February 1929

The Right of the Accused in a Criminal Case Not to Be Compelled to Be a Witness against Himself

Mose E. Boiarksy

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, Criminal Law Commons, and the Evidence Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol35/iss2/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
THE RIGHT OF THE ACCUSED IN A CRIMINAL CASE NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF.*

Mose E. Boiarsky**

Closely connected to the question just considered is that of the right to compel the accused to exhibit himself for identification. In People v. Gardner122 the court acting within its discretion, compelled the accused to stand up for the purpose of identification, and this was held not to be in violation of the constitutional provision against compelling one to be a witness against himself. It has been held that for this purpose a defendant can be compelled to disclose only those parts of her person which are not usually covered.122 The decisions on the question of compelling the defendant to exhibit himself for comparison with evidence introduced at the trial are in direct conflict. The identification of a prisoner raises the question whether or not the court may order any inspection of the bodily features of the accused? In State v. Jacobs,123 the court said: "A judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury, for the purpose of enabling them to determine his status as a free negro." In State v. Garrett124 the same court permitted evidence as to the condition of the accused's hands, the court distinguishing this case from the Jacob's Case thus: "In this case, not the prisoner, but the witnesses, were called upon to prove what they saw upon inspecting the prisoner's hands," so that the court permits circumstances tending to show the guilt of the accused to be proved, although they were brought to light by testimony.

*This is the second installment of a thesis on "The Right of the Accused in a Criminal Case". The first installment appeared in the December, 1928, number of the West Virginia Law Quarterly.

**L.L.B., West Virginia University, 1928, Charleston, West Virginia.

121 144 N. Y. 119, 38 N. E. 1003 (1894); accord, People v. Ferns, 27 Cal. App. 285, 149 Pac. 802 (1915).

122 State v. Height, 117 Ia. 650, 91 N. W. 935 (1902); Thornton v. State, 117 Wis. 338, 93 N. W. 1107 (1903); State v. Nordstrom, 7 Wash. 506, 510, 35 Pac. 382 (1893); but see State v. Ah Chuey, 14 Nev. 79 (1879).

123 5 Jones (N. C.) 259 (1857).

124 71 N. C. 85, 87 (1874).
inadmissible per se; but in Blackwell v. State\textsuperscript{125} it was held that, the place where a prisoner's leg was amputated being a material point, it was erroneous to require him to stand up and show his leg, so that a witness could see and describe it to the jury. But in Ah Chuey's Case\textsuperscript{126} the court compelled Ah Chuey, against his protest, to roll up his sleeve, and show tattoo marks on his arm. Even this case, however, limited the exposure to situations short of offensive or indecent exhibits.

Is a prisoner compelled to testify against himself when he is made to take his shoes and place them in tracks? There is a conflict of authority on this point.\textsuperscript{127} It is improper to force the accused to make foot tracks for comparison,\textsuperscript{128} but an examination of defendant's foot to see if they fitted tracks, is held permissible.\textsuperscript{129}

It should be observed that in the Ah Chuey Case, the court stated concerning the Jacobs Case: "It is a noticeable fact that in none of the subsequent cases in that state (North Carolina), where the Jacobs Case was cited, have the Courts sanctioned * * * or in any manner approved of the first reasoning upon which the decision was based." However the cases have been compared,\textsuperscript{130} and it is pointed out that in none of the later cases decided by the North Carolina court\textsuperscript{131} was the Jacobs Case overruled, and some of the cases distinguished it.\textsuperscript{132}

The rule, in England, compels a person whose handwriting is in dispute to write in the presence of the judge so that the writing may be compared with that in litigation.\textsuperscript{133} Statutes to reach the same result have been adopted in the United States, and the accused in criminal

\textsuperscript{125} 67 Ga. 76 (1881).
\textsuperscript{126} 14 Nev. 79 (1879).
\textsuperscript{127} People v. Wormer, 175 N. Y. 188, 67 N. E. 299 (1903); State v. Griffin, 124 S. E. 81 (S. C. 1924).
\textsuperscript{128} Cooper v. State, 86 Ala. 610, 6 So. 110 (1888).
\textsuperscript{129} Lipes v. State, 15 Lea 125, 128 (1885); accord, Magee v. State, 92 Miss. 865, 46 So. 529 (1909).
\textsuperscript{130} 28 L. R. A. 703.
\textsuperscript{131} State v. Woodruff, 67 N. C. 89 (1872); State v. Johnson, 67 N. C. 55 (1872); State v. Garrett, supra, n. 124.
\textsuperscript{132} See the forcible dissenting opinion of Leonard, J., in State v. Ah Chuey, supra, n. 126.
cases has been compelled by the court to prepare specimens of his handwriting for submission to the jury.  

Another line of cases deals with the compulsory speaking or repetition of certain words to enable the defendant's voice to be identified. This has been permitted where the accused has waived his privilege, but a recent Pennsylvania case prohibited this practice. This would seem to be correct, since here words are used for assertions of evidentiary facts.

In conclusion it is pertinent to justify the courts' rulings which admit evidence of identification against the accused. Wigmore contends that "What is obtained from the accused by such action is not testimony about his body, but his body itself." The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.

A New York Statute made it incumbent upon the operator of a motor vehicle, knowing that injury had resulted from the operation of such vehicle, to report his name and license number to the injured person or to the police. A case arising under the statute held that the legislative action was violative of the constitutional provision providing that no person shall be compelled in any criminal case to be a witness against himself. The dissenting opinion in the appellate decision, stated: "The statute does not relate to a criminal prosecution. * * * Whether a person causing an injury is guilty of crime depends upon other provisions of law. * * * If no crime was committed when the accident occurred the constitutional provision could have no application, and the defendant's

136 Wigmore, §2265.
138 Laws 1910, ch. 374, §290 (3).
140 By Ingraham, P. J.
RIGHT OF THE ACCUSED IN A CRIMINAL CASE 129

constitutional provision was not infringed.” The same question arose in another jurisdiction141 under a similar statute142 which gave a result contra to that reached in the New York cases. The court justified its conclusion thus:

“Common observations and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the Legislature, a person enjoying such privilege must take it subject to all proper restrictions.”137a

While it appears that the statute is permitted to override the constitutional provision, the conclusion of the Missouri case is justifiable. As one writer has put it, the report is required, by law, to be made for an administrative purpose, and the duty to make the report applies to a generic class of acts irrespective of the criminality of any particular act. The duty thus exists anterior to the whole series of acts and is independent of the criminality involved in the act.

The testimonial privilege on account of the tendency toward incrimination is purely personal and can be claimed only by the accused himself,144 and the party’s counsel may not, as such, give public warning of the privilege to the accused,145 but it is highly proper in such a case that the accused be appraised of his constitutional rights.146 Nor is the judge required to warn the accused of his privilege147 though he may, in his discretion, be permitted to give an

---

141 Ex Parte Kneedler, 243 Mo. 632, 147 S. E. 983 (1912); State v. Sterrin, 78 N. H. 220, 98 Atl. 482 (1918).
142 Laws of 1911 (Mo.), §12, p. 328.
137a A question somewhat similar is that of compulsory physical examination. This, however, is a different one from the question of self-incrimination.
144 State v. Lloyd, 152 Wis. 24, 139 N. W. 514 (1913); Wigmore, §2270; Ham v. State, 165 Ala. 645, 47 So. 126 (1908); People v. Danziger, 238 Mich. 39, 231 N. W. 448 (1927).
146 State v. Pancoast, supra, n. 145.
147 WHARTON, CRIMINAL EVIDENCE, 10th ed., p. 974.
intimation to this effect, or the court may, upon request by counsel, advise the accused of his privilege.

Whether or not such a warning from the judge is necessary is questionable. There may have been a time when the warning was needed; but that was before the days when the masses became generally informed as to the privilege. Today the accused is well coached by counsel before his trial begins. Furthermore, as an eminent writer on the subject has said: “It is not called for by principle, since until the witness refuses, it can hardly be said that he is compelled to answer; nor is it material that he believes himself compelled, for the court’s action, and not the witness’ state of mind, must be the test of compulsion. If the accused desires to decline, he should be permitted to apply to counsel for advice. The accused, however, has no control over the right of one jointly charged with him to refuse to testify the accused’s trial on the ground of self-incrimination.

The accused is not the sole judge of the possibility that he is being compelled to testify against himself. In an early case Marshall, C. J., said that the accused is not “compellable to disclose a single link in the chain of proof against him”. However, it must appear to the court, from all the circumstances, that “the danger to be apprehended must be (is) real and appreciable * * * not a danger of an imaginary and unsubstantial character * * * so improbable that no reasonable man would suffer it to influence his conduct.

In a recent case the Federal Court said, as to a witness not the accused, that a “witness claiming the privilege be-

---

150 Wigmore, §2260; Atty. Gen’l v. Radloff, 10 Exch. 84 (1864).
151 Taylor v. Wood, 2 Edw. Ch. 94 (1883).
154 Burn’s Trial, 424.
155 Cockburn, J., in R. v. Boyes, 1 B. & S., 311, 321; See Mitchell, J., in State v. Thaden, 43 Minn. 253, 255, 45 N. W. 447 (1890); also Wigmore, §2271 (for citations of American cases on point); People v. Mather, 4 Wend. (Mass.) 229, 21 Am. Dec. 122 (1830).
cause of a tendency of evidence to incriminate him is not required to show how such incrimination might occur, and that the action of the trial court in permitting the witness' refusal to testify was within the permissible exercise of sound discretion."

At common law, parties to actions and parties in interest were not permitted to testify. This rule, however, would seem to have been based on the question of competency rather than privilege, the evidence of the party being excluded because he was not regarded competent as a witness, and not as a protection against self-accusation. It was thought advisable to remove this disqualification by statute, and accordingly, in practically all the states, a party to a criminal proceeding may give evidence in his own behalf. The statutory provisions merely give the accused a right to testify and do not make it obligatory, for to do so would be to contravene the constitutional immunity of self-crimination. Generally, it is provided, as legislation of a second class, that the omission of the accused to testify shall not operate against him or be in any way considered by the jury. In Iowa, a statute provided it was a misdemeanor for the prosecuting attorney to make mention of the defendant's failure to testify. In Ohio, however, the failure of the accused to testify may be taken into account and may be made the subject of comment by counsel.

Under statutes which prevent such comment, the court should interrupt any counsel who, in his argument, attempts

---

156a Wharton's CRIM. EVIDENCE, 902.
157 W. Va. Code, Ch. 152, §19: "In any trial or examination * * * for a felony or misdemeanor, the accused shall, at his or her own request (but not otherwise) be a competent witness * * *. See also, COMPIL. STATUTES OF U. S., §1465.
158 Tate v. State, 76 Oh. St., 537, 10 Ann. Cas. 949 (1906); Also Ohio Rev. St. 1906, 7286.
159 "But nothing in this section shall be construed as being compulsory * * *, and a failure to make such request shall not create any presumption against him or her, nor shall any reference be made to nor comment upon such failure by anyone * * * in the hearing of the jury. W. Va. Code, supra, n. 157; Price v. Commonwealth, 77 Va. 393 (1883); State v. Galford, 87 W. Va. 358, 105 S. E. 237 (1920); State v. Chisnell, 36 W. Va. 659, 15 S. E. 412 (1892).
160 COMP. CODE OF IOWA, 1919, §9464.
161 CONSTITUTIONS, 1851 and 1914, I, 10; PAGE'S ANN. OHIO GEN. CODE, III, p. 6401.
to make use of the fact that the witness had not taken the
witness stand; and should clearly state to the jury that
there is no presumption of guilt from the prisoner's claim
of privilege. Generally not all references to law is pro-
hibited. As one text-writer has put it:

"The true test is, was the reference calculated or in-
tended to direct the attention of the jury to the defend-
ant's neglect to avail himself of his right?"

It should be noted that the West Virginia statute pro-
hibits not only comment, but it forbids any reference to the
accused's failure to testify by anyone during the progress of
the trial in the hearing of the jury. The validity of this
legislation has been vigorously attacked:

"But it is argued that the accused cannot suffer by
deciding to take the stand, because the court does not
permit the prosecution to comment on the fact, and
instructs the jury that they must not allow it to operate
against him, while in some states the law provides, ex-
pressly, that the failure of the accused to become a wit-
ess shall not prejudice him in any way.

"It may be asked, in reply, whether it is in the courts
or legislatures to prevent the accused's failure to tes-
tify from prejudicing him in the minds of the jury. It
is a fact in the case which the jury have derived from
the infallible evidence of their own senses, and which
must needs force itself on their minds. The failure of
an accused to make an explanation in reply to an extra-
judicial imputation of crime is not only relevant but
strong evidence against him, but how tremendous must
be the effect of his silence on that supreme occasion
which is to decide forever the question of his guilt or
innocence. *

"You might as well try to 'bind the sweet influence
of the Pleiades or loose the bands of Orion' as try to
erase from the minds of the jury a material relevant

162 Underhill, p. 140.
164 Underhill, p. 141; Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R.
A. 403 (1888).
164a Supra, n. 157.
165 Wm. A. Maury, "Validity of Statutes Authorizing the Accused to
Testify," 14 Am. L. Rev. 763, 764 (1880).
fact which has become a part of their consciousness through the evidence of their own senses * * * . No legislative command, no direction from the bench, can ever shake the intuitive conviction of men that the operations of the mind are beyond the control of human law, and, as a consequence, so long as statutes allowing the accused to testify exist, so long will innocent men be coerced to take the stand by the dread of being compromised by their silence.”

But another writer, urging the enactment of an enabling statute\(^{167}\) gives us an example of the other method:

“A judge of New York—no less an historical personage than he whom Irving has immortalized as the ‘great Congressman’—was once called on, in the discharge of his official duties, to sentence a negro slave, owned by one of his neighbors and whom his honor had known from boyhood, for some trifling offense. ‘Stand up, Zingo,’ said his honor; ‘what have you to say why the sentence of the law should not be pronounced upon you?’ The criminal, frightened out of what little wit nature had given him, commenced stammering in a painfully confused manner, ‘Why—massa—massa—Knickerbocker—’ ‘Not a word, Zingo!’ interrupted his honor, ‘not a word!’ and sentence was pronounced.”

The rule forbids an inference from the accused’s prior failure to testify at a preliminary examination\(^{168}\) except where there is a waiver.\(^{169}\)

A different conclusion has been reached in some jurisdictions where the accused has not produced evidence. Shaw, C. J., in *Commonwealth v. Wester*,\(^{170}\) said:

“When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all * * * circumstances * * * and show, if such was the truth, that the suspicious cir-

---

\(^{166}\) See State v. Laurence, 57 Me. 581 (1870).

\(^{167}\) Article, “Testimony of Parties in Criminal Prosecution,” 5 Am. L. Reg. (N. S.) 129, 133.

\(^{168}\) State v. Bailey, 54 Ia. 414, 415, 6 N. W. 589 (1880).

\(^{169}\) Clarke v. State, 87 Ala. 71, 6 So. 638 (1888).

\(^{170}\) 5 Cush. (Mass.) 205, 316 (1849).
cumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, * * * would tend to sustain the charge. But this is to be cautiously applied, and only in cases when it is manifest that proofs are in the power of the accused not accessible to the production."\textsuperscript{171}

In \textit{People v. Cline}\textsuperscript{172} the accused failed to call an alleged vendor, and the court held that such a failure was open to inference. If there is a presumption of innocence, so that the burden of proof is on the prosecuting party, the inference seems somewhat paradoxical, since he runs the risk of inference from non-production.\textsuperscript{173} The inference is prohibited as to the non-production of papers of the accused's own authorship but is permitted for all other documents which happen to be within his control but not produced.\textsuperscript{174} Where evidence that an incriminating document is in the possession of the accused, the Federal court uniquely held that no notice of production can be given by the prosecution, because the claiming of the privilege would permit inferences to be drawn against him.\textsuperscript{175}

There is a conflict of decision upon the question whether a new trial should be granted for a comment upon the failure of the accused to testify when the prosecuting counsel withdraws his remarks, or the courts exclude them or instruct the jury that the accused's silence is not a presumption against him. One court\textsuperscript{176} held that so long as "the state * * * does not directly or covertly comment upon the failure of the accused to voluntarily become a witness, the law is not violated."\textsuperscript{177} A contrary result is reached in other jurisdictions.\textsuperscript{178} It would seem that there is no call for a stringent rule that a new trial be granted \textit{ipso facto} where comment has been improperly made, for "the judge

\textsuperscript{171} The italics are those of the writer.
\textsuperscript{172} 83 Cal. 374, 23 Pac. 391 (1890).
\textsuperscript{173} Wigmore, §§2485, 2273.
\textsuperscript{174} See cases cited by Wigmore, §2273, n. 3.
\textsuperscript{175} McKnight v. U. S., 54 C. C. A. 358, 115 Fed. 972 (1902). Wigmore criticizes this holding in §2273.
\textsuperscript{176} Clinton v. State, 56 Fla. 57, 47 So. 389, 390 (1908).
\textsuperscript{177} Frasier v. State, 135 Ind. 38, 34 N. E. 817 (1893); State v. Seely, 92 Iowa 488, 61 N. W. 184 (1894).
\textsuperscript{178} Anglo v. People, 96 Ill. 209, 36 Am. Rep. 132 (1880).
must be trusted, not only to control counsel, but also to remedy the effect of his impropriety." 170 The general American view, contrary to the English decisions, is that comment may not be made even by the judge.

In view of the statutory privilege granted to the accused to testify should he so desire, the questions arise, first, may he waive his privilege, and, second, if he has waived his constitutional right, to what extent is it allowable to cross-examine the accused. 186 Generally speaking, the limitations have been judge-made. 183 However, a few states at least have passed statutes on the limits to which the cross-examination may go. The California statute, for example, provided that when the accused offers

"Himself as a witness, he may be cross-examined by the counsel for the People as to all matters about which he was examined in chief."

The Supreme Court of California has interpreted the statute to mean that the accused cannot be cross-examined generally as a witness. 182 However, he cannot escape answering a further question, asked for the purpose of clearing up what he has already said, because it is foreign to his direct examination. 183 In a California Case, the defendant denied that he had ever seen the prosecuting witness. The prosecuting witness testified that the accused had exhibited to him a scar from an appendectomy operation; and on cross-examination the court permitted the accused to be questioned as to the scar. 184 Statutes similar to that of California have been enacted in Missouri and Oregon. 185 In states where there are no statutory regulations on the subject, the prevailing view is that the defendant may be cross-

170 WIGMORE, §§2272; Robert W. Millair, "The Modernization of Criminal Procedure," 11 JOUR. AM. INST. OF CRIM. LAW AND CRIMINOLOGY, 344, 351 et seq.
181 JOHN D. CARROLL, supra, n. 30.
182 People v. O'Brien, 66 Cal. 602, 6 Pac. 695 (1885).
183 People v. Sutton, 73 Cal. 243, 15 Pac. 86 (1887).
184 People v. Ryan, 250 Pac. 104 (Cal. 1926).
185 15 L. R. A. 669.
examined to the same extent as any other witness. Judge Cooley in his work\textsuperscript{186} said:

"These statutes (giving the accused the right to testify) cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses. If he does so, he is at liberty to stop at any point he chooses * * * otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself and the statutory privilege becomes a snare and a danger."

A note in a later edition of Judge Cooley's work\textsuperscript{187} states:

"Though the foregoing statement * * * is based upon sound reason, the greater weight of authority, since it was written, seems to support the rule that where the accused voluntarily takes the witness stand, he thereby waives his privilege and becomes subject to the rules that govern other witnesses * * *.\textsuperscript{188}

This same view has been held by the federal courts.\textsuperscript{189} An earlier case\textsuperscript{190} held that "whether a cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is a question of state law, as administered in the courts of the state, and not of federal law. This right to cross-examine the accused does not extend beyond a legal cross-examination.\textsuperscript{191}

It seems to be the general rule that when the defendant in a criminal case testifies in his own behalf, he may be discredited on cross-examination by inquiries as to his previous prosecution for or conviction of crime,\textsuperscript{192} in the same man-

\textsuperscript{186} Const. Limitations, 6th ed., 384.
\textsuperscript{187} Cooley's Const. Limitations, 8th ed., I, 661.
\textsuperscript{189} Fitzpatrick v. U. S., 178 U. S. 394, 44 L. ed. 1078 (1900).
\textsuperscript{190} Ex parte Spies, 123 U. S. 131, 31 L. ed. 80 (1887).
\textsuperscript{191} Harold v. Territory, 18 Okla. 395, 89 Pac. 202, 169 Fed. 47 (1907).
\textsuperscript{192} State v. Brownlow, 89 Wash. 582; 154 Pac. 1009 (1916).
ner as any other witness, and this is true even in the absence of statutory regulations. Thus, in *Denny v. State*, which was a prosecution for stealing automobile tires, it was held proper to ask the defendant on cross-examination whether he was under indictment in the Federal court for a violation of the liquor law. The court said:

“The control of the cross-examination of witnesses rests largely in the sound discretion of the trial court.”

In Texas a defendant cannot be cross-examined as a witness with reference to a previous conviction of crime unless the state is in possession of the evidence with which to sustain the impeaching facts.

When may the accused, after he has taken the stand, claim his privilege? Apparently the rule differs in the case of the accused than that which prevails for the ordinary witness. The English view and that which prevails in some American jurisdictions seems to permit the ordinary witness to claim his privilege at any time during the cross-examination, but other cases hold that if the privilege is not promptly claimed, it is waived and lost. In the case of the accused, merely taking the stand as a witness operates as a waiver. In the case of *State v. Lloyd*, the Wisconsin court permitted the accused after he had testified without asserting his privilege, to take advantage of the immunity as against a further disclosure.

How far does the accused waive his privilege by taking the stand? There are at least three views: (1) That he waives it as to all facts, including those facts which affect his credibility; (2) that he may nullify the waiver at any time; (3) that he waives it as to all matters relevant to the

---

193 Denker *v.* State, 106 Neb. 779, 184 N. W. 945 (1921).
195 190 Ind. 78, 129 N. E. 308 (1921).
196 See also *State v.* Bowers, *supra*, n. 194.
198 *Chesapeake Club v.* State, 83 Md. 446 (1885).
199 *State v.* Weisengoff, 89 W. Va. 279, 109 S. E. 707 (1921).
200a 152 Wis. 24, 139 N. W. 514 (1913).
200b *Wisconsin*, §2276.
issue, thereby including collateral matters, such as matters which merely affect his credibility. It should be kept in mind that when the defendant offers himself as a witness, he may be examined as to crimes other than the one under investigation, if the other crimes committed are so related to, or connected with, the one for which he is on trial that they may be treated as relevant to it. A reason for the distinction is this: when the accused takes the stand, he knows he will be asked questions involving him in crime. The ordinary witness does not know that he will necessarily be called upon to criminate himself; and it is, therefore, not until the ordinary witness begins to criminate himself that the necessity for claim or waiver arises. It seems justifiable to require the defendant, when he has testified to such facts as tend to his establishing his innocence to continue to answer pertinent and relevant questions relating to the charge against him, or connected with the testimony he has given. The constitutional safeguard was designed to protect the defendant, so long as he desired to remain silent; he must keep all or lose all; he cannot waive such of his privilege as suits his interests.

Does a waiver of the privilege at one stage of the proceeding operate at every other stage thereof? This question is affirmatively answered by the Kansas Court, but a contrary view which seems to be generally followed, was reached by the Georgia court, which considered the second trial as de novo investigation. The view of the Kansas Court is justifiable since it will, in the generality of cases, tend to promote greater justice. The Massachusetts Court has considered the waiver at one trial to become retractive upon the privilege claimed before the grand jury.

Is a proceeding to punish for a contempt of court a "criminal case" within the meaning of the constitutional guaranty, against self-crimination? In the case of In re Nickel the defendant had been ordered to show cause why

201 John D. Carroll, cited supra, n. 30.
he should not be punished for contempt of court. Nickell objected to the answering of questions, and he was committed to jail for contempt of court. The Supreme Court of Kansas discharged him on the ground that the offense with which he was charged was, in addition to a contempt of court, a statutory crime. However, the California court in the case of *Ex parte Gould* reached a decision that a proceeding for contempt for the violation of an injunction in a civil cause is in the nature of a criminal prosecution, and that the court is not authorized to compel the defendant to be sworn as a witness in such proceeding, or to punish him for contempt because of his refusal to testify, for to do so would be in violation of the constitutional guaranty against self-accusation. While the penal code of California contains a provision which declares contempt of court to be a misdemeanor, the court does not rely upon the statute, except as declaratory of the common law.

In *O'Neil v. People*, counsel for the defendant contended that as the action against him was based upon his alleged solicitation of a bribe, the proceeding was in itself criminal and so a rule requiring him to answer interrogatories was in violation of the constitutional provision that no person shall be compelled in a criminal case to give evidence against himself. The court held that this was not true and that such an element did not enter into the case. In *Kanter v. Circuit Court*, the Illinois court was of the opinion that "the constitutional exemption from compulsion extends to all proceedings sanctioned by law". This same court in another case has said: "The constitutional provision that 'no person shall be compelled in any criminal case to give evidence against himself,' has no application to a contempt proceeding, even though it be of that class which is considered as criminal in its nature." The United States

---

206 47 Kans. 734, 28 Pac. 1076 (1892).
207 99 Cal. 360, 33 Pac. 112 (1893).
209 113 Ill. App. 195 (1903).
210 108 Ill. App. 287 (1903).
Supreme Court has said:212 "In criminal contempts, as in criminal cases, presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself."

In an early Louisiana case, an attorney was charged with contempt of court, and he refused to answer the questions propounded. The court said:

"The interrogatories in this case were not propounded for the purpose of compelling the defendant to give evidence against himself; but to enable him, if he could, to exculpate himself from the alleged contempt."212a

It is necessary to determine the policy of the privilege. Those who favor the privilege are extremely careful in the safeguarding of this procedural right, and probably the time is too far distant to hope for an abrogation of the privilege. We Americans are meticulous of our constitutional rights and are especially demandant of them when our backs are to the wall. Individual interests are then placed above the interests of society. Since our courts are not in harmony on the interpretation to be given to constitutional and statutory enactments on the privilege, it is, therefore, an expectancy that there should be a variance of opinion as to the soundness of the privilege.

Those who favor it are loud in their commendation of it. "It confers upon the criminal trial an aspect of dignity, humanity, and impartiality, which the contrasted inquisitorial process is too apt to lack."213 Another defender says:214

"When we see, as we often do, honest disinterested witnesses betrayed by timidity and embarrassment into inconsistencies which bring discredit on their testimony, is it going too far to say that the principle that a man shall not be compelled to testify against himself is not a dangerous indulgence to crime, but a barrier wisely erected for the protection of innocence?"

212a State v. Soule, 8 Rob. 500, 506 (La. 1844).
213 Sir John Salmond, Jurisprudence, §175 (1924).
214 Mauby, Wm. A., n. 165.
The real objection 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. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture.216

The privilege was attacked almost a century ago by Bentham in what he called "pretences for exclusion":216 "(2) The old woman's reason. The essence of this reason is contained in the word 'hard'; 'tis 'hard' upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. But did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? From his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple; so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection—a confirmed and most extensive predilection, for bad evidence * * *. "(3) The fox-hunter's reason. This consists in introducing upon the carpet of legal procedure the idea of 'fairness', in the sense in which the word is used by sportsmen. The fox is to have fair chance for his life: he must have (so close is the analogy) what is called 'law',—leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as 'unfair' as convicting him of burglary on a hen-roost in five minutes' time, in a court of conscience * * *.

In recent years, consistent with the changing social con-

215 See Commissioners, Criminal Law in the Channel Islands, Second Report, 8 St. Tr. (N. S.) 1127 (1848).
ditions, comes an insistent demand for a change in criminal procedure. There are those in the legal profession who believe that it is the faulty administration of criminal law which is causing a growing disrespect for the law. The technicalities of the criminal law are chiefly responsible for the public disapproval. "If the law is a mere game, neither the players who take part in it nor the public who witness it, can be expected to yield to its spirit when their interests are served by evading it." When society loses faith in the ability of the law to punish the guilty, it resorts to lynch law and to vigilance committees, with all attendant evils connected therewith.

"We pride ourselves that great progress has been made since the abolition of the trial by battle. But do we not reproduce most of the essential elements of the wager of battle in the modern criminal trial? The state and the defendant are represented by their hired champions while the accused sits with the truth securely locked in his breast. The outcome of the trial often depends more largely upon the intellectual strength and skill of these hired champions than upon the guilt or innocence of the accused, just as the result of the old wager of battle was determined by the physical strength of the contestants rather than the truth of the charge against the defendant."  

Laws exist for the protection of society at large against crimes. The law attempts to make crime unprofitable, and its methods are prevention and punishment. The criminal is an enemy to society. He is to be restrained or reformed, and our laws and procedure must be adapted to accomplish the extirpation of the criminal classes. Improved procedure enables the law to grapple with complex facts, and thus the aspirations of citizens and lawyers are aimed at an ideal maximum of certainty to ensure public acquiescence in the justice of the state.

219 Moorefield Storey, Stone Practical Suggestions as to the Reform of Criminal Procedure, 4 Id, 495.
220 Pollock, A., First Book of Jurisprudence, 44, 45.
Does the reason for the privilege exist today?

"In ages past, when the crown or the ruling class had a tendency to oppress, the care and solicitude for the individual charged with crime indicated a leaning toward the popular welfare that won for the courts the approval of the people and the commendation of all history. But in these times, when the state is not a crowned head, nor a favored class, but when the state is the people and all the people, to make a fetish of the rights of a criminal as against the rights of society is a perversion of law and an encouragement to the tyranny of the lawless and vicious. * * * All that was intended by the constitutional provision was that an accused shall be subjected to no form of compulsion. It was never intended as an absolute bar or even as an impediment to the detection and punishment of crime." Substantiating the theory that the policy never required the interpretation of the privilege as has been given it, one eminent jurist said: "I am inclined to think that the expression, 'no person shall be compelled to testify against himself,' if traced back to its original source, had reference to a system of torture which did prevail in the time of the early English Kings, and which was intended to denounce * * * the actual compulsion of evidence by physical means * * *.

The privilege today has ceased to be a protection for the innocent. For an innocent man, the sooner his defense is raised the better. The privilege has developed into a means of escape for the guilty. As has been expressed, "if all the criminals of every class had assembled and formed a system after their own wishes, is not this rule the very first which they would have established for their security?" We have thus given an artificial protection to the accused. We clothe him with a presumption of innocence; we permit him silently to watch the legal combat; and we thus turn what should be a prompt and effectual proceeding to free society.

223 Italics are those of the writer.
224 Dumont, Treatise on Judicial Evidence, VII, Ch. 11.
from one who is presumptively dangerous into a race in which the accused has a long start which the state must overcome.\(^\text{225}\) The enforcement of the privilege exposes the prisoner to the inquisition of detectives and to the attendant evils of the infamous third degree.

There have been suggestions that we in America should revert to the English practice and give judges more power in the conduct of trials. Those who argue for this reform contend that the jury and the judge are the only impartial men in court, and the judge’s training should make him more absolutely impartial, and that to prohibit the judge’s full weight in the decision of the case is to deprive the tribunal of its most valuable element, thus making it less efficient in the administration of justice.

Even today the privilege against self-incrimination is not totally granted in Great Britain, for a statute enacted in 1883 expressly provided that in bankruptcy the examination of the debtor may be taken and may thereafter be used in evidence in criminal proceedings against him.\(^\text{226}\)

It is interesting to note what a French student on criminal procedure thinks of the Anglo-American system:

"Plainly this inquisitional system is the preferable one. The principal purpose of the examination is to give the accused an opportunity to explain himself on the circumstances which seem to inculpate him * * *. The accused is nowadays fully informed of all incriminating circumstances and is assisted by counsel; so that his examination * * * is now mainly a means of meeting the charges and exonerating himself if he can. * * * The scruples of Anglo-American law, which for the sake of preventing possible abuses forbid questions to be put to the accused on the trial, are surely exaggerated.

"* * * the judge (in the inquisitional system) assumes the active part of an inquirer * * * and seeks to extract a confession * * *. But * * * the mere confession alone is not treated as enough to call for a judgment of guilty; the object not being to pass upon

\(^{225}\) MOOREFIELD STOBER, n. 219.
the parties' conduct of their case, but to get at the facts, the trustworthiness of the admissions must be established by further inquiry.\textsuperscript{227}

There is now little danger of convicting and of holding in confinement an innocent man. With the publicity given to criminal trials, the rule that a defendant shall be represented by counsel, the facilities for appeal after verdict, the scrutiny applied to the record by the appellate courts, the liberality with which the pardoning power is exercised, the conviction of innocent men is practically unheard of.

The history of compulsory self-incrimination clearly shows that the abuse depends upon the conditions under which it may be invoked against the accused. If we do not permit the accused to be examined until there has been presented at least a \textit{prima facie} proof of his guilt by the authorities after indictment, and if such examination is required to be held before an impartial judge, with the accused represented by counsel, it would seem that the prosecution would thus be compelled to resort in the first instance to other avenues of evidence, and abuse would be prevented.

The object of every trial is to ascertain the truth. If rules of procedure tend toward suppressing the truth or toward rendering a correct determination of the issue more uncertain, they are inherently unsound. No injustice will be done to the defendant in a criminal case by compelling him to submit to an examination, unless it be unjust to compel the defendant to tell the truth when the truth shows him to be guilty. Society and the criminal are at war; and we must choose between procedural reform to bring out the truth, and a silent acquiescence in the motto, Long Live the Criminal.

\textsuperscript{227} R. Garraud, \textit{Traite Theorique et Pratique d'Instruction Criminelle}

\textit{et de Procedure Penale, 1 Jour. of the Am. Inst. of Crim. Law and Criminology, 998.}