

HISTORY AND DEVELOPMENT OF THE ACCUSED'S RIGHT TO TESTIFY

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Issues dealing with the individual's right to remain silent despite interrogation and accusation by governmental authorities have raised topical and provocative questions and discussions in this country over the last decade. However, the subject can be best appreciated when it is realized that its roots are entwined in the history of the common law and that its present structure is but a stage in a development spanning the centuries.

Recently an English barrister, described as "one of Britain's most brilliant legal minds," suggested that the accused in a criminal trial should be forced to submit to questioning by the prosecutor after the government has proved a *prima facie* case, and, although he might refuse to answer, he would then suffer inferences of guilt by his silence. It was argued that "any system of criminal justice must strive for the truth, and who better to assist in arriving at the truth than the chief suspect?"¹

Although lawyers trained in the common law might be quick to charge that such a departure from the acquisitorial to the inquisitorial system should not be tolerated, it is significant that the reason given for the yet unaccepted procedure is similar to part of the rationale which led to allowing the accused to testify at his own trial—a practice which is of relatively recent vintage. In fact, for at least three hundred years, between the sixteenth and nineteenth centuries, the defendant in a criminal case was not permitted to testify in his own behalf even if he desired to. It is this inflexible rule of incompetency for the purpose of giving evidence which will be examined in its historical perspective.

I. THE ENGLISH BACKGROUND

Prior to the sixteenth century in England, the accused himself, like the parties in civil cases, had always been allowed to plead his cause orally. But unlike civil procedure the criminal practice did not develop the use of counsel, and the accused was prohibited from being

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1. *Time*, Dec. 19, 1960, p. 31. The barrister was John Foster, fifty-six years of age, a Conservative M. P., former first secretary of the British Embassy in Washington and wartime head of the legal section of SHAEF in Europe. His statements were made in a dissent from the majority report of the British Section of the International Commission of Jurists.

represented in court by an attorney. A statute passed in 1695² marked the first time the defendant was permitted a lawyer to aid him in his defense against charges of treason. For other felonies he waited until 1836.³

Nor in this period was the accused allowed to call witnesses on his own behalf.⁴ This was perhaps not unnatural when (1) the jurors had knowledge of their own concerning the factual issues in the case, and (2) the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law, were taking place.⁵ However, during the fifteenth century when witnesses were common in civil actions, they were still not allowed in criminal cases.⁶

The reason given was the same as the rationale for not allowing counsel—they simply were not needed:

The fouler the crime is, the clearer and the plainer ought the proof of it to be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it.⁷

Perhaps also there was fear of undermining the effectiveness of the prosecution and further complicating the trial process.⁸ Not that the criminal trial of this period was a study in perfection. Quite the contrary; it has been described as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning."⁹

Gradually, however, the defendant was given the opportunity to produce witnesses. Finally, at the end of the seventeenth century,

2. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 434-36 (5th ed. 1956); 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 350, 440 (1883); THAYER, *EVIDENCE AT THE COMMON LAW* 161 (1898); 1 WIGMORE, *EVIDENCE* § 575, at 995 (2d ed. 1923) [hereinafter cited as WIGMORE].

3. An act for regulating of trials in cases of treason and misprison of treason, 1695, 7 & 8 Will. 3, c. 3 (treason); An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney, 1836, 6 & 7 Will. 4, c. 114 (other felonies).

4. Authorities cited note 2 *supra*.

5. 1 WIGMORE § 575, at 992-93, 995.

6. Authorities cited note 2 *supra*.

7. L. H. Steward Finch, in Lord Cornwallis' Trial, 7 How. St. Tr. 143, 149 (1678) as quoted in 1 WIGMORE 995.

8. 1 STEPHEN, *op. cit. supra* note 2, at 354; 1 WIGMORE § 575, at 995-96.

9. 1 STEPHEN, *op. cit. supra* note 2, at 326.

statutes provided for compulsory process of sworn witnesses for the defense.¹⁰

Once the accused was allowed witnesses, however, rules disqualifying them because of interest were applied. These rules were enforced in both civil and criminal litigation and served as precedent to extend the policy of incompetency to parties in civil suits and to defendants in criminal cases. The underlying fear was, of course, that such testimony would be perjurious.¹¹ In any event, the incompetency of parties in civil cases seems to have been settled by the end of the sixteenth century and was extended in the seventeenth century to interested non-party witnesses. In the criminal law, the same practice developed but at a slower pace. The accused was not even permitted to call witnesses until the seventeenth century, and so it was not until the end of that period that the rules of interest reached the point of excluding him as incompetent to testify.¹²

II. THE ACCUSED'S INCOMPETENCY IN THE UNITED STATES

Incompetency of a party or of a witness because of interest was, therefore, the common law rule in this country. Blackstone stated that:

All witness, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous* or such as are *interested* in the event of the cause.¹³

It was considered certain that the defendant's fear of punishment, whether he was guilty or innocent, would cause him to perjure himself, and to avoid this, he was not allowed to testify.¹⁴ When the prosecution wished to call one of two or more jointly indicted defendants as a witness against the others, it was forced to discharge such witness in some way, as by the entry of a *nolle prosequi* or dismissal of the indictment as to him alone.¹⁵

This resulted in the paradoxical situation of a defendant becoming more reliable after having been induced to testify by a promise of

10. Case and statutory development can be found in 1 WIGMORE § 575, at 996 and in THAYER, *op. cit. supra* note 2, at 157 n.4.

11. APPLETON, EVIDENCE chs. 5-7 (1860); 1 STEPHEN, *op. cit. supra* note 2, at 350-54. At first this evidently barred even the prosecutor—the person injured—from testifying; BEST, EVIDENCE 154-55 (3d Am. ed. Chamberlayne 1908); 1 GREENLEAF, EVIDENCE 875-76 (16th ed. 1899); RAPALJE, WITNESSES 47-48 (1887); 2 TAYLOR, EVIDENCE 1137-58 (8th ed. 1885).

12. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 194-96 (1926).

13. 3 BLACKSTONE, COMMENTARIES 369.

14. 1 WHARTON, CRIMINAL EVIDENCE 903 (10th ed. 1912).

15. BEST, *op. cit. supra* note 11, at 154; DuBois, *The Accused as Witnesses*, 4 CRIM. L. MAG. 323 (1883); PHILLIPPS & AMOS, EVIDENCE 62-63 (1839); RAPALJE, *op. cit. supra* note 11, at 47-48.

immunity. Although such testimony must certainly have been considered suspect, it was competent nevertheless. By ceasing to be a party, a defendant would suddenly become purged of any incompetency, and only then, could he be a witness for or against a co-defendant.¹⁶

On the other hand, if two or more persons were separately indicted for an offense in which all were implicated, any of them could be a defense witness for the others providing there were separate trials.¹⁷ If they were jointly indicted and tried separately, the authorities were split as to whether any could testify.¹⁸ This rather irrational and intricate area caused difficulties, as will be seen, even after enabling statutes recognized the competency of the accused.¹⁹

III. THE BEGINNING OF REFORM

It was not until the nineteenth century that changes in this aspect of the law appear. As in so many other areas of legal reform, the impetus came from Jeremy Bentham. The publication of his treatises, in 1827, furnished English lawyers with diverse and powerful arguments for abolishing the rules of interest in civil cases.²⁰ Arguing that the interest does not always result in false testimony, Bentham wrote:

Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed: but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty: but will he obey the impulse? That will depend upon the forces tending to confine him to that path: upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth: yet all bodies are not there. All mountains have a tendency to fall into a level with the plains: yet, notwithstanding, there are mountains. All waters seek a level: yet, notwithstanding, there are waves. . . .

Upon the proportion between the impelling and the restraining forces it depends, whether the waggon moves or no, and at what rate it moves: upon the proportion between the mendacity-pro-

16. 1 WIGMORE § 580, at 1012.

17. *United States v. Hanway*, 26 Fed. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851); *McKenzie v. State*, 24 Ark. 636 (1867); *Lucre v. State*, 66 Tenn. 148 (1874); *cf. United States v. Hunter*, 26 Fed. Cas. 436 (No. 15425) (C.C.D.C. 1807).

18. RAPALJE, *op. cit. supra* note 11, at 48-49.

19. See text accompanying notes 46-49 *infra*; for a discussion on needed reforms in this area, see APPLETON, *op. cit. supra* note 11, at 135-43.

20. 5 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 34, 350 (1827); see Thayer, *A Chapter of Legal History in Massachusetts*, 9 HARV. L. REV. 1-2 (1895).

moting and the mendacity-restraining forces it depends, whether any mendacity be produced or no, and in what degree and quantity. Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say, any horse, or dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a running at the pace of a mail coach.²¹

The struggle for reform had started. Led by Denman and Brougham, it continued until 1843 when Lord Denman's Act abolished the incompetency of interested witnesses in civil litigation.²² A similar result was achieved for civil parties in 1851,²³ and for the spouses of such parties in 1853.²⁴

In the United States the English statute of 1843 served as an example, and it was soon followed.²⁵ In 1846 Michigan became the first state to abolish interest as grounds for disqualifying a witness in civil litigation, although parties were still incompetent.²⁶ But the broad movement of reform in New York brought results which attracted even more general attention. The legislation of that jurisdiction was the direct means by which the reform of testimonial rules in civil cases spread, within the decade after 1848, to most of the other states.²⁷

However, it was long after the disqualification of parties was abolished in civil law suits in England and the United States that American criminal defendants were permitted to testify.²⁸ Reforms in the civil procedure were not accepted as being applicable to the criminal law. To protect the criminal process from perjury, it was necessary to keep the accused silent; this reasoning proved so persuasive that opposition to any change became impressive.

Writing in 1863, Sir James Stephen stated:

The proposal to make the prisoner a competent witness has an appearance of system about it, which at first sight is extremely plausible. It would no doubt harmonize well with what I have called the litigious theory of criminal trials, but there are strong objections to it. In the first place the prisoner could never be a

21. 5 BENTHAM, *op. cit. supra* note 20, at 39-41.

22. An Act for improving the Law of Evidence, 1843, 6 & 7 Vict. c. 85; Thayer, *supra* note 20, at 12; 1 WIGMORE § 576, at 1002.

23. An Act to amend the Law of Evidence, 1851, 14 & 15 Vict. c. 99.

24. An Act to amend an Act of the Fourteenth and Fifteenth Victoria, Chapter Ninety-nine, 1853, 16 & 17 Vict. c. 83.

25. 1 WIGMORE § 576, at 1002, 1004 n.4; and see references to the English law in N.Y. COMMISSIONERS ON PRACTICE AND PLEADING, FIRST REPORT 247-49 (1848).

26. MICH. REV. STAT. ch. 102, § 99 (1846); GREENLEAF, *op. cit. supra* note 11, at § 328b.

27. See text accompanying notes 66-81 *infra*; N.Y. Sess. Laws 1848, ch. 379, §§ 351-52; 1 WIGMORE § 576, at 1002.

28. There have been several statutes in England before 1893 qualifying parties in particular types of cases. The history is recounted in part in BEST, *op. cit. supra* note 11, at 128-29, 153, 158-66, 571-74.

real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it. . . .

To leave the discretion of calling the prisoner or not in the hands of his counsel would be carrying the litigious view of a criminal trial to an unwise extent. . . . He would call or decline to call the prisoner, not with an eye to the interests of truth, but with an eye to the verdict only, under the special circumstances of the case.²⁹

Other arguments in opposition to any change in the rules included:

(a) because of the inference the jury will draw, the defendant will be forced to testify, and if guilty, either incriminate himself or commit perjury;³⁰ (b) the presumption of innocence will become meaningless; (c) the criminal trial will be degraded into a battle between the defendant and the prosecutor; (d) there will be so much false and worthless testimony from defendants as a group that the individual de-

29. STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 201-02 (1863). Even after competency statutes had come into existence, Bishop commented in his treatise:

This legislation is exactly adapted to the wants of old and practiced dissemblers, to whose faces the thought of their crimes brings no blushes, and the capacity of whose stomachs for perjury has no bounds. Such a man, when tried for crime, sits in court and watches the testimony on both sides to the end. Then he takes the stand, and, with an invented story which will harmonize all with some theory of innocence, he beguiles a credulous jury and outside public with what is perhaps in its nature impossible to be true, till he secures, at least, a disagreement.

He then went on to describe the innocent man who, on the witness stand, presents a very different spectacle:

[H]is mind is overwhelmed. He says what he would not, and what he would say he omits. . . . The fate of this sort of legislation remains to be seen. . . . But as a means to acquittal through perjury of those guilty persons who, for the public good, most need punishment, it has no rival. BISHOP, *CRIMINAL PROCEDURE* § 1187, at 705-06 (1880).

See also *Wilson v. United States*, 149 U.S. 60, 66 (1893); *State v. Cameron*, 40 Vt. 555, 565 (1868); STEPHEN, *op. cit. supra* at 202-03; Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM. L. REV. 753 (1880); Cox, *The Admission of Defendants as Witnesses in Criminal Cases*, 57 L.T. 425 (1874).

30. As one judge argued:

The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been waged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offense may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony. *People v. Tyler*, 36 Cal. 522, 528 (1869) (Sawyer, C.J.).

defendant will never be believed.³¹ One writer summed up his arguments in a sentence, which, in part, epitomizes the standard reaction to legal change:

It is an experiment entered upon without necessity, not called for by the profession, not petitioned for by anybody, demoralizing from its encouragement of perjury, and useless for the purpose of accomplishing any substantial good result.³²

Other commentators asserted that the proposed and enacted statutes violated the federal and state constitutional privilege against self-incrimination, despite the fact that they contained many provisions to the effect that the failure to testify cannot operate to create any presumption against the defendant. This argument was fostered by liberals who, fearing the enactment of a procedural innovation now regarded as a basic right of the accused, were reluctant to jeopardize the established privilege of the defendant to remain silent. These doubts were not without foundation. Neither Bentham nor Appleton—arch proponents for extending the rules of competency—favored the privilege against self-incrimination.³³

IV. JOHN APPLETON AND THE OTHER REFORMERS

Chief Justice John Appleton, of the Supreme Court of Maine, became the leading voice in the movement for reform. A self-acknowledged disciple of Jeremy Bentham,³⁴ Appleton was the first American of any influence or prestige to advocate the competency of parties, both civil and criminal, to testify.³⁵ In 1833 he began writing upon this subject for the *American Jurist*.³⁶ By 1860 these articles, gathering together the arguments which eventually led to reform legislation,³⁷ were substantial enough to be collected and published in book form. In his preface Appleton wrote:

The conclusions to which I have arrived are these:

All persons, without exception, who having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

31. See, e.g., *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443 (1867).

32. *Id.*, at 450.

33. APPLETON, *op. cit. supra* note 11, at 126-34; 5 BENTHAM *op. cit. supra* note 20, at pt. IV, ch. III.

34. APPLETON, *op. cit. supra* note 11, at iii; Thayer, *supra* note 20, at 12.

35. Hamlin, *John Appleton*, in 5 GREAT AMERICAN LAWYERS 41, 45, 55-56 (1909); see In Memoriam, 83 Me. 587, 605 (1891); 1 DICTIONARY OF AMERICAN BIOGRAPHY 328, 329 (1928).

36. APPLETON, *op. cit. supra* note 11.

37. 7 THE GREEN BAG 510, 514 (1895).

Objections may be made to the credit, but never to the competency of witnesses.³⁸

Employing principles enunciated by Bentham for civil parties and extending them to the criminal defendant, he argued in great detail that the defendant's testimony is crucial in order to ascertain the whole truth; that the defendant is most apt to be familiar with the true facts; that he is no more interested than the complainant; that since he is presumed innocent, a perjurious motive should not be attributed to him; and that the law should not aid the guilty and harm the innocent.³⁹

The zeal and fluency with which Appleton argued his position is best illustrated by the following excerpt. It stresses the benefit not to the innocent but to society because of the increased efficiency with which the guilty could be convicted:

Now the evils of exclusion are obvious. Were all testimony excluded, the detection of the criminal would be impossible. To the extent of exclusion—so far as from that cause crime escapes detection—to that extent it is encouraged and rewarded—by receiving and retaining in safety and without molestation its fruits. Impunity is the necessary and inevitable result of insufficient proof. Partial exclusion is partial impunity. When this deficiency of evidence is the result of exclusionary rules, the law aids and abets the criminal. It does on a grand, what the perjured withholder of facts does, on a small scale.⁴⁰

He continued his argument by opposing one common law tradition with another:

Innocence of the accused, then, being a presumption of law—the accusation in the outset being *presumed* untrue, the accuser's statements false, whether intentionally so or not is immaterial—the question would naturally arise, whether both, and if not both, which of the two, should be heard as a witness.

The principle of impartial neutrality—blind justice, holding in her hands the *even balanced* scales, without prejudice for or against the accuser or accused, would require, that each should be heard. With equal means of knowledge, with equal power to instruct, with motives to truth dependent on their relative situations—motives, whose existence and tendency being seen in advance will be little likely to deceive—both should be heard and *believed*, . . . *until* from comparison of their several statements, reasons for belief or disbelief shall be found. A selection of either, would be an infringement of the proposed neutrality of the judge.

But the common law selects. Whom? The accuser, presumed a perjurer, alone is heard. The accused, for whose benefit such favorable presumptions are nominally made; the accused-innocent, is rejected.⁴¹

38. APPLETON, *op. cit. supra* note 11, at iii.

39. *Id.* at 119-34; see 6 AM. JURIST 18 (1831); 8 AM. JURIST 5 (1832).

40. APPLETON, *op. cit. supra* note 11, at 120.

41. *Id.* at 123-24.

Others were no doubt influenced by Appleton and objected vigorously to the old rule. They too ridiculed the notion that a prisoner is so interested in the outcome of the prosecution, and his temptation to commit perjury therefore so great, that his testimony if admitted would be of no value in elucidating the truth.⁴² As a result, a new idea arose in America which challenged the traditional common law. Dissatisfaction with the intellectual basis for incompetency gave rise to an increasing intolerance of old rules and a growing clamor for reform.

In England a similar trend was manifested. Sir James Stephen abandoned his earlier opinions⁴³ and expressed ideas more in keeping with the democratic ideals of the age:

I am convinced by such experience that questioning [the accused], or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most persons accused of crime are poor, stupid, and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee, so that even when prisoners are defended by counsel the defence is often extremely imperfect, and consists rather of what occurs at the moment to the solicitor and counsel than of what the man himself would say if he knew how to say it.⁴⁴

In an ingenious reversal of their opponents' arguments, the champions of reform pointed out that, far from harming the innocent, the proposed changes would actually hurt the guilty. With telling success, they persuaded the legislators that it was those who were guilty and who did not want to take the stand who benefited from the old law. As Sir Edward Clarke put it, the traditional law "often operated cruelly against an innocent person; but in nine out of ten it was of advantage to the guilty."⁴⁵ This was the kind of stuff to give even con-

42. Thus it was written in regard to the tardy reform of the federal rule:

We constantly receive and act upon the testimony of interested witnesses in all the most momentous affairs of life; and what reason can be adduced for holding that a mode of enquiry which is approved of as advantageous for the ascertainment of truth everywhere else, should be dangerous when applied to investigations in a court of justice?

Again, the existing rule of the common law produces the most absurd inequalities, not to say the grossest and most palpable injustice. Thus, the defendant is prohibited from testifying on account of his *interest* in the result of the prosecution, while at the same time the public prosecutor, who is likewise interested, and sometimes in an equal degree with the defendant, is heard without objection. 1 CENT. L.J. 147 (1874).

43. STEPHEN, *op. cit. supra* note 29, at 201-02.

44. 1 STEPHEN, *op. cit. supra* note 2, at 442.

45. CLARKE, *THE STORY OF MY LIFE* 144 (1919):

It would, indeed, in my opinion have been practically impossible to obtain an acquittal if at that time the law had permitted accused persons to be

servatives pause, and such arguments eventually turned the tide in favor of Appleton and his reforms.

V. THE CHANGE IN THE LAW

As might be expected, Appleton's influence was initially felt most strongly in his own state. As a direct result of his leadership,⁴⁶ in 1864 Maine enacted the first general legislative measure reflecting the ideas of the reformers. It provided:

Sec. 1. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury under instructions of the court.

Sec. 2. Nothing herein contained shall be construed as compelling any such person to testify.⁴⁷

Maine was followed by Massachusetts in 1866, Connecticut in 1867, New York, New Hampshire⁴⁸ in 1869 and New Jersey in 1871. Within

called as witnesses. The strange rule which then prevailed by which neither a prisoner nor his wife was a competent witness (a rule which was the worst example of judge-made law which I have ever known) often operated cruelly against an innocent person; but in nine out of ten it was of advantage to the guilty.

See APPLETON, *op. cit. supra* note 11, at 125-34; *Evidence of Parties in Criminal Cases*, 21 MONTHLY L. REP. 193 (1858).

46. Hamlin, *op. cit. supra* note 35, at 50.

47. Me. Pub. Laws 1864, ch. 280; see *State v. Bartlett*, 55 Me. 200 (1867); Thayer, *supra* note 20, at 12. An earlier statute, enacted in 1859, granted competency to the accused in a limited number of prosecutions. It provided:

No respondent in a criminal prosecution or proceeding at law, for libel, nuisance, simple assault, simple assault and battery, or for the violation of any municipal or police ordinance offering himself as a witness, shall be excluded from testifying, and all laws inconsistent herewith are repealed. Me. Pub. Laws 1859, ch. 104.

48. The situation in New Hampshire differed, somewhat colorfully, because of the personality of Judge Charles Doe and his penchant for ignoring rules and precedents.

Before the passage of the Statute of 1869, making respondents competent to testify in their own behalf, it was very common for counsel representing the accused to complain bitterly of the fact that their clients' lips were sealed; and to assert that, if they could only have the privilege of testifying, they could satisfactorily explain all incriminating circumstances. Judge Doe had probably got very tired of hearing this sort of talk in cases where there was no reasonable doubt of guilt. One day, when a lawyer opening for the defense was making these stereotyped assertions, he was suddenly interrupted from the Bench. "Mr. ———, you may put your clients on the stand." "What, your Honor?" "You will be permitted to call your clients as witnesses in your own behalf." The learned counsel, gradually recovering from his astonishment, turned, and whispered to his junior: "Well, John, we shall have to put the rascals on, and the result will be conviction." JEREMIAH SMITH, MEMOIR OF HON. CHARLES DOE 15-16 (1897); Smith, *Memoir of Charles Doe*, 2 PUB. SO. N.H.B. ASS'N 125, 137-38 (1899). Quoted in: Reid *The Reformer and the Precisian: A Study in Judicial Attitudes*, 12 J. LEGAL ED. 157, 162 n.21 (1959).

See Reid, *A Speculative Novelty*, 39 B.U.L. REV. 321, 334 n.55 (1959).

twenty years, most states had followed Maine's lead,⁴⁹ and, before the end of the century, all but Georgia had abolished the disqualification.

Ironically, in Bentham's own country progress was delayed. Opposition to the enlargement of the competency rules in Great Britain can be explained, in part, by the "extreme caution and tardiness" of English lawyers to adopt an innovation in their legal system.⁵⁰ But the American experience proved an impetus to English jurists. Parliament was told, for example, in a dramatic speech by Arthur Balfour, that:

precisely the same doubts and difficulties which beset the legal profession in this country on the suggestion of this change were felt in the United States, but the result of the experiment, which has been extended gradually from State to State, is that all fears have proved illusory, that the legal profession, divided as they were before the change, have now become unanimous in favor of it, and that no section of the community, not even the prisoners at the bar, desire to see any alteration made in the system.⁵¹

Finally, Alverstone introduced a bill into the House of Commons which, after several years and with the help of Lord Halsbury, became law in 1898.⁵²

VI. THE STATEMENT—AN HISTORICAL CARRYOVER

There were those in the United States who remained unconvinced by the "radical" arguments of Appleton and refused to adopt the proposed innovations. Yet, recognizing the injustice of the old rule, which left the accused's tale untold, they compromised by using a procedure which avoided perjury but which allowed the jury to hear all of the available evidence.

This cautious solution allowed the defendant to make a "statement" to the jury, and so to tell his story, not under oath and not as a witness, but in the guise of an address or argument on the law and on the

49. The dates, on which the general competency statutes of the states were enacted are: Ala. 1885, Alaska 1899, Ariz. 1871, Ark. 1885, Cal. 1866, Colo. 1872, Conn. 1867, Del. 1893, Fla. 1895, Hawaii 1876, Idaho 1875, Ill. 1874, Ind. 1873, Iowa 1878, Kan. 1871, Ky. 1886, La. 1886, Me. 1864, Md. 1876, Mass. 1866, Miss. 1882, Mo. 1877, Mont. 1872, Neb. 1873, Nev. 1867, N.H. 1869, N.J. 1871, N.M. 1880, N.Y. 1869, N.C. 1881, N.D. 1879, Ohio 1867, Okla. 1890, Ore. 1880, Pa. 1885, R.I. 1871, S.C. 1866, S.D. 1879, Tenn. 1887, Tex. 1889, Utah 1878, Vt. 1866, Va. 1886, Wash. 1871, W. Va. 1881, Wis. 1869, Wyo. 1877. *Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1961).

50. 99 L.T. 103 (1895).

51. 60 PARL. DEB. (4th ser.) 679 (1898), as quoted in *Ferguson v. Georgia*, 365 U.S. 570, 581 (1961).

52. An Act to Amend the Law of Evidence, 1898, 61 & 62 Vict. c. 36; see also ALVERSTONE, *RECOLLECTIONS OF BAR AND BENCH* 179 (1915).

evidence. He remained unsworn and, technically, furnished no evidence, but by his statement he attempted to persuade the jury.⁵³

This procedure was adopted in England and was practiced in some jurisdictions of the United States. The first state to pass such a statute was Michigan in 1861. This act allowed the defendant to be cross-examined on his statement.⁵⁴ Other states recognized the "statement" but limited the defendant still further by permitting him merely to argue the law and comment upon the evidence as given by other witnesses; he could not relate facts.⁵⁵

Although it has been assumed that the procedure was developed as a device to mitigate the hardship resulting to the accused from the exclusion of his testimony, its actual effect is not, as a practical matter, too clear. Some states allowed the prosecutor to introduce evidence to contradict any facts mentioned by the prisoner in his statement to the jury,⁵⁶ but in an early Florida case, the court said that:

The making of such a statement under oath does not necessarily constitute the accused a witness, nor does it subject him to the rules applicable to witnesses, making him liable to cross-examination. It is simply a presentation verbally, in his own language and manner, of the matters pertaining to his defense, of such facts and circumstances surrounding the case as will go to excuse the offense and negative the idea of wilful and corrupt intent.⁵⁷

As for the significance of such a statement to the jury, it has been noted:

Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief.⁵⁸

Although now largely an historical fixture, this practice is, in some degree, still in existence. An example may be the rule in New York which permits the accused on a preliminary hearing before a magis-

53. *Boston v. State*, 94 Ga. 590 (1894); *People v. Thomas*, 9 Mich. 314 (1861); *PLUCKNETT*, *op. cit. supra* note 2, at 432, 437; *STEPHEN*, *op. cit. supra* note 29 at 191-94; 1 *WIGMORE* § 575, at 995, § 579, at 1008-09; *Kellog*, *Accused Persons as Witnesses in their Own Behalf*, 7 So. L. Rev. N.S. 683 (1881).

54. See *Ferguson v. Georgia*, 365 U.S. 570, 584-86 (1961); *People v. Thomas*, *supra* note 53; 1 *WIGMORE* § 579, at 1008.

55. See *Ford v. State*, 34 Ark. 649 (1879); *cf. People v. Lopez*, 2 Edm. Sel. Cas. 262 (New York Oyer and Terminer, 1851). See also *Ferguson v. Georgia*, 365 U.S. 570, 584 n.15.

56. *Holsenbake v. State*, 45 Ga. 43 (1872); *Burden v. People*, 26 Mich. 162 (1872).

57. *Miller v. State*, 15 Fla. 577, 583 (1876).

58. *Bird v. State*, 50 Ga. 585, 589 (1874); see *Underwood v. State*, 88 Ga. 47, 51 (1891).

trate to either remain silent, testify under oath, or make an unsworn statement without fear of being cross-examined.⁵⁹

More to the point, the Georgia codification of these rules is presently in effect. In 1866 Georgia abolished by statute the common law rules of incompetency for most persons but expressly retained the incompetency of persons "charged in any criminal proceeding with the commission of any indictable offense or any offense on summary conviction . . ."⁶⁰ Two years later all criminal defendants were authorized to make an unsworn statement.⁶¹ This statute was never changed and, as a result, Georgia is the only state in the United States, and apparently the sole jurisdiction in the common law world, to retain the rule of the accused's incompetency to testify under oath in his own defense.⁶²

Georgia's procedure further hindered the accused by denying him the aid of his lawyer while making his statement unless the trial judge in his discretion ruled otherwise.⁶³ Remarkable as it may appear, the constitutionality of this practice remained unadjudicated in the United States Supreme Court until 1961. In *Ferguson v. Georgia*,⁶⁴ Mr. Justice Brennan, writing for the majority of the court, examined the history of the entire problem. The decision brought about the first major change made by the courts rather than the legislature in the area of the accused's incompetency.

In *Ferguson* the defendant, a Negro, had been convicted of murder and sentenced to death. At the trial, he had, in line with time-honored practice, been allowed to make an unsworn statement on his own behalf, but, while doing so, he was not permitted to be questioned by his attorney. This, the Supreme Court ruled, deprived him of "the guiding hand of counsel at every step in the proceedings"⁶⁵ and therefore violated the requirements of due process as imposed on the states by the fourteenth amendment.

The question of the constitutionality of the underlying incompetency

59. N.Y. CODE CRIM. PROC. §§ 196-200.

60. GA. CODE § 38-416 (1953).

61. GA. CODE § 38-415 (1953). This 1868 statute, as amended, now provides:

In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.

62. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

63. *Ibid.*; *Ferguson v. Georgia*, 215 Ga. 117, 109 S.E.2d 44 (1959).

64. 365 U.S. 570, 593 (1961). This opinion (Brennan, J.) gives an admirable historical account of the accused's incompetency in general and especially in Georgia.

65. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

was not ruled upon, although in concurring opinions Justices Frankfurter and Clark reasoned that the statute should have been considered and declared unconstitutional. This issue will undoubtedly be settled in the near future. Of course, since the fourteenth amendment was ratified in 1868, approximately the same time as the Georgia statutes, the Court's historical survey serves only as an interesting backdrop. The constitutional decision, and the proposed solution of the concurring justices, could not have been reached as a logical deduction from knowledge of legal history. The amendment was obviously construed in terms of current due process concepts.

VII. COMPETENCY OF THE ACCUSED IN NEW YORK

David Dudley Field played the leading part in procedural reform in New York. Because New York's reform affected the law in other jurisdictions, that state's experience is significant. Moreover, a slightly detailed account indicates some of the difficulties met and overcome by a bar faced with the new rule.

Turning first to the civil side, it is observed that the 1848 Code of Procedure enacted that: "No person offered as a witness, shall be excluded, by reason of his interest in the event of the action."⁶⁶ But the 1848 law still left parties incompetent to be witnesses in their own favor, despite the report of the New York Commissioners on Practice and Pleadings which recommended, in the same year, that parties in civil cases be deemed competent to testify for their cause.⁶⁷

66. N.Y. Sess. Laws 1848, ch. 379, § 351.

67. An excerpt from the N.Y. COMMISSIONERS ON PRACTICE AND PLEADINGS, FIRST REPORT 246 (1848), is informative:

The abrogation of the rule, which excludes a witness, who has an interest in the event of the action, has been frequently proposed and discussed in this state. We think the time has come for effecting it.

The rule appears to us to rest upon a principle altogether unsound; that is, that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just enquiry is this; whether the chances of obtaining the truth, are greater from the admission or the exclusion of the witness. Who that has any respect for the society, in which he lives, can doubt, that, upon this principle, the witness should be admitted?

The contrary rule implies, that, in the majority of instances men, are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none.

Absolutely to exclude an interested witness, is therefore, as unsound in theory, as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biased in favor of the party, than he who has merely a pecuniary interest. . . .

There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that, we are considering. Not a circuit is held,

Field, who was influenced by John Appleton,⁶⁸ favored reform of these rules, and his efforts resulted in an 1857 statute declaring parties competent to testify in their own behalf.⁶⁹ But in 1865, it was held that this statute did not apply to the defendant in a criminal case.⁷⁰ It was not until 1869 that New York permitted the accused to testify for himself at his trial.⁷¹

The new statute changed the entire status of the defendant. The fact that a witness was the defendant may have affected his credibility, but it no longer altered his competency. It was held, moreover, that the competency statute overrode a previous enactment that "no person sentenced upon a conviction for a felony shall be competent to testify in any case, . . . unless he be pardoned by the governor. . . ."⁷² A defendant in a criminal case who had been previously convicted of a felony was thereafter a competent witness for himself.⁷³

The advent of this liberalization of criminal procedure resulted in new questions of law and evidence and raised issues such as the proper scope of cross-examination of the defendant when he took the stand.⁷⁴ Supplementary criminal practice developed from case to case, but the larger rule enabling the accused to testify was in New York, as in all other states, a product of legislation rather than of judicial decision.

but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. . . .

England has outstripped us in this most necessary reform. Five years ago, an act of parliament obliterated the rule from the laws of that country. . . . [Lord Denman's Act (1843) is then quoted in full.]

68. Hamlin, *op. cit. supra* note 35, at 49.

69. N.Y. Sess. Laws 1857, ch. 353.

70. See *Williams v. People*, 33 N.Y. 688, 691 (1865); *Patterson v. People*, 46 Barb. 625 (N.Y. Sup. Ct. 1866). See also *Deloohery v. State*, 27 Ind. 521 (1867); *Hoagland v. State*, 17 Ind. 488 (1861).

71. N.Y. Sess. Laws 1869, ch. 678. This statute is fairly typical of the laws in the other states which abolished the common law rule and for that reason will be set forth in full:

An act in relation to evidence in criminal prosecutions, and in all proceedings in the nature of criminal proceedings.

§ 1. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, and in all proceedings in the nature of criminal proceedings in any and all courts, and before any and all officers and persons acting judicially, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him.

The modern version of this 1869 statute has been shortened to read: "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him." N.Y. CODE CRIM. PROC. § 393.

72. *Delameter v. People*, 5 Lans. 332, 333 (N.Y. Sup. Ct. 1871).

73. *Delameter v. People*, *supra* note 72; see N.Y. PEN. LAW § 2444.

74. *People v. Trybus*, 219 N.Y. 18 (1916); *People v. Hinksman*, 192 N.Y. 421 (1908); *People v. Tice*, 131 N.Y. 651 (1892).

It is to be noted that although the statute of 1869 made the accused competent to testify "in his own behalf," he was, paradoxically, still held incompetent to testify for his co-indictee or co-defendant.⁷⁵ This was true in most other states as well.⁷⁶ Prior to any governing legislation, the New York rule was that co-indictees could not testify for each other, even if tried separately,⁷⁷ unless the one to be a witness was first discharged, acquitted or convicted.⁷⁸ However, they were allowed to testify against each other and for the prosecution when they were tried separately.⁷⁹

In 1876 a statute was passed which remedied this situation. It read in part: "All persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the same indictment."⁸⁰ Thus the competency of the defendant was finally and fully established in New York.

Before concluding, it is interesting to note that this change from the common law was not unanimously approved either by the bench or bar. This is clear from some of the early opinions in the Court of Appeals commenting upon the new legislation.⁸¹ In 1871 that court made this impassioned comment:

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 pretense 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-

75. *People v. Bill*, 10 Johns. R. 95 (N.Y. Sup. Ct. 1813).

76. *RAPALJE, op. cit. supra* note 11, at §§ 42-43; *WIGMORE, op. cit. supra* note 2, at § 580.

77. *McIntyre v. People*, 9 N.Y. 38 (1853); *Patterson v. People*, 46 Barb. 625 (N.Y. Sup. Ct. 1866); *Wixson v. People*, 5 Parker 119 (N.Y. Sup. Ct. 1860); *People v. Williams*, 19 Wend. 377 (N.Y. Sup. Ct. 1838); *People v. Bill*, 10 Johns. R. 95 (N.Y. Sup. Ct. 1813); see *Taylor v. People*, 12 Hun 212 (N.Y. Sup. Ct. 1877) (as to whether such a defendant could testify for the People and against a co-defendant).

78. *People v. Bill*, 10 Johns. R. 95 (N.Y. Sup. Ct. 1813).

79. *People v. Van Wormer*, 175 N.Y. 188 (1903); *Wixson v. People*, 5 Parker 119 (N.Y. Sup. Ct. 1860); see *Lindsay v. People*, 63 N.Y. 143 (1875).

80. N.Y. Sess. Laws 1876, ch. 182; see present version: N.Y. CODE CRIM. PROC. § 393-a; and see N.Y. PEN. LAW § 2444.

81. *Connors v. People*, 50 N.Y. 240, 243 (1872); "The act is not regarded with much favor by the bench, bar or the people"

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 embarrassments 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.⁸²

CONCLUSION

It has been seen that the rules of incompetency which developed by the sixteenth century lasted three hundred years. The incompetency of the criminally accused was the last stronghold of these rules. Yet when they too were finally changed, the change was, to many members of the bench and bar, an unwarranted and radical innovation. Nevertheless, once the new procedure began to operate opinions changed and the rules gained favor. Just five years after the New York statute of 1869 permitted the accused to testify for himself, it was remarked in a legal periodical of the day:

that these changes have been most beneficial; that the wonder is that we ever did without them and that not five percent of the judges and lawyers of the State would return to the old system of abomination if return were possible. The denial of a man's right to testify on his own behalf in all legal proceedings, criminal as well as civil, has gone out with slavery, and can no more come in again than human bondage. Thus the law has obliterated this monstrous absurdity, wrong and disgrace.⁸³

The distrust that the common law displayed for this type of evidence was first manifested in a rule of law precluding such testimony. Only later did the bar, with the self-confidence developed perhaps by a more mature legal procedural system, allow this evidence to be heard in court, leaving to the trier of the fact the weight to be given it in the light of the many factors affecting credibility. In other words, once the defendant was allowed to testify, a type of graded pragmatism⁸⁴ prevailed whereby his testimony was judged by weighing it in the light of his status, rather than by allowing his status, per se, to preclude the reception into evidence of his side of the story.

The new rule brought about many practical changes, one being the

82. *Ruloff v. People*, 45 N.Y. 213, 221-22 (1871).

83. 9 ALBANY L.J. 317 (1874). Shortly after the Connecticut statute granting competency to the accused became effective, the Lieutenant Governor of that state wrote to one of the members of the New York Commissioners on Practice and Pleadings, that "after conversing with eminent gentlemen of the bar, in different parts of the state, and from my own observation, professional and judicial, that the result is highly satisfactory." N.Y. COMMISSIONERS ON PRACTICE AND PLEADINGS, FINAL REPORT 716 (1860).

84. See Cahn, *The Consumers of Injustice*, 34 N.Y.U.L. REV. 1166, 1176-78 (1959).

inevitably unfavorable inference that the jury draws from the defendant's failure to take the stand. That this is true, regardless of how much the jury is instructed to the contrary, is known to most trial attorneys and acts as a weighty factor to induce the defendant to testify.⁸⁵ On the other hand, prior to the competency statutes the guiltiest of criminals could, almost with impunity, shield himself behind his lawyer's eloquence—"My client, if he were permitted, would relate his defense, but the law has sealed his lips."

Today the defendant with a history of previous conviction finds himself in a special quandary. If he does not testify the jury may draw an inference of guilt; if he testifies he will be prejudiced when his past criminal record is elicited from him on cross-examination by the prosecution. For the innocent, however, the slightest word of explanation may suffice to create a reasonable doubt in the minds of the jurors. They may even sympathize with a defendant who suffers through withering cross-examination, but, more important, they want to size him up and hear him deny his guilt.⁸⁶

When an objective appraisal of the new law is made, one should consider that although the element of intent in criminal law is crucial, the only person who definitely knew its content was formerly prohibited from explaining it. It was not until after incompetency disappeared that the defendant's own version of his state of mind replaced, if he so desired, his conduct, as the main source for the decision on this ingredient of the crime.

Finally, it is significant that the preclusion of the defendant's sworn testimony, once regarded as a vital necessity for the protection of the accused, has now been intimated by a minority of the Supreme Court to be a violation of due process of law.⁸⁷ This is a vivid reminder that the outmoded notion of the accused's incompetency is not yet a dead issue.

85. TRAIN, *THE PRISONER AT THE BAR* 207 (1924). Concerning the specific use of the privilege against incrimination and the inferences to be drawn from it, see Hook, *COMMON SENSE AND THE FIFTH AMENDMENT* (1957); cf. GRISWOLD, *THE 5TH AMENDMENT TODAY* (1955).

86. TRAIN, *op. cit. supra* note 85, at 207-10. Nott, *In the District Attorney's Office*, *Atlantic Monthly* 476, 481-84 (1905).

87. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

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