Marquette Law Review

Volume 5
Issue 2 *Volume 5, Issue 2 (1921)*

Article 5

Making the Accused Testify Against Himself

Ernest Bruncken

MAKING THE ACCUSED TESTIFY AGAINST HIMSELF

ERNEST BRUNCKEN,
Member of the Milwaukee Bar.

Among the changes which a committee of the Wisconsin State Bar Association recently proposed for recommendation to the Legislature was an amendment to Section 8, Art. I, of the State Constitution, inserting therein, after the words "jeopardy of punishment, nor" the clause: "until the Legislature shall otherwise provide," the effect being that the Legislature may at any time and to any extent take away the privilege of "not being compelled in any criminal case to be a witness against himself." The report was rejected by the members of the Bar Association present, but it is reasonably certain that efforts for such a change will continue.

The arguments in favor of the proposed change are mainly drawn from two practical inconveniences of the law as it stands. It is argued that the privilege results in the escape of the persons really guilty, where, in a number of offenses committed by juridical persons, or by several persons jointly, the proof is difficult without the testimony of individuals accessory to the act, and these persons promptly plead the benefits of the various immunity acts.[1] The other reason is that under present conditions the legal impossibility of examining the accused, unless he consents, results in improper and often scandalous attempts on the part of police officers and other unauthorized individuals to extort confessions, sometimes by physical or mental cruelty.

The successful opposition, at the meeting of the State Bar Association, seems to have been inspired more by conservative feeling and a reluctance to curtail in any manner the rights of individuals as laid down in our historic bills of rights, than in a thoroughly reasoned attitude. It may as well be admitted that the privilege is hard to defend by arguments purely rationalistic and taking the law as if it were an independent and isolated rule having no connection with the rest of our legal system. It is true that the natural way of finding out whether a person has committed a certain act is to ask him about it, and if he denies, to make him explain any circumstances pointing to him as the person who did it. It

[1] These acts and provisions, in Wisconsin, are: Wisconsin Statutes 1791m, 4534, 1955o, 4078d, 4575n, 4078a, 4078b, 4077 and possibly a few others.

is also true that the rule sprang up during the time when political persecution frequently took the form of criminal prosecution, during the struggle against Stuart absolutism; and that it was elaborated while the recollection of that struggle was still fresh. It may be said—a few years ago it was easier to maintain this argument than it is just now—that the necessity of guarding against governmental ferocity has ceased, and that the rule is now simply a convenient loophole for guilty parties to escape punishment. Formerly, when the accused could not testify at all, there might have been cases of conviction by circumstantial evidence which the defendant might easily have explained; but the law has been changed in that respect, and besides, juries are notoriously reluctant to convict on circumstantial evidence, unjustified as that attitude of mind may be. That the really guilty persons in prosecutions against corporations are given to taking "immunity baths" cannot be denied; and that the police, or even the district attorney sometimes, resort to the "third degree" is certainly deplorable and might not be done so often if it were possible to question the suspect openly before a magistrate.[2]

Nevertheless, I believe that there are very important grounds on which the proposed constitutional amendment ought to be defeated. These are (1) That the form in which the constitutional amendment is drawn is vague and inexpedient; (2) that the rule cannot be excised from the body of our law without making other changes necessary, many of which cannot be foreseen; (3) that the inconveniences arising from the rule can be measurably abated by less radical measures.

I

The proposed amendment leaves it to the Legislature whether the rule is to remain, or whether it is to be modified, curtailed, or entirely abolished. In effect, the Legislature is to decide whether the Constitution is to be changed in this particular or not. No doubt, the voters, with whom will lie the ultimate decision if the amendment should twice pass through the Legislature, have a perfect right to entrust the latter body with the power of changing the fundamental law of the State, not only in this instance but if the people choose in every instance. This would seem, however, a startling retrogression from what we have heretofore considered a fundamental principle of American policy, namely that the whole

[2] See Wigmore on Evidence, Chap. LXXVIII, for a full account of the history and the ordinary reasons against the rule.

people, represented by the electors, have alone the power of determining the frame of government. It would be a long backward step towards the English principle of Parliamentary omnipotence, a step proposed at the very moment when the general tendency of our political development is to take some of the legislative functions away from elective bodies and give them to the electorate itself.

The case is not analogous to those instances where the Constitution expressly empowers the Legislature to frame exceptions to a general constitutional rule; as where the Constitution provides for certain courts, but lets the Legislature "establish inferior courts in the several counties, with limited civil and criminal jurisdiction." There the general rule is fixed by the people, but recognizing that there may be special circumstances requiring a different or additional court, they permit the Legislature to attend to that detail. The present amendment proposes to leave it to the Legislature to determine, not a mere subordinate detail, but whether one of the fundamental rules of jurisprudence, long established, and heretofore considered important enough to be embodied in the Constitution itself, shall remain or not. Certainly an extraordinary proposition.

The probable reasons why the framers of the proposed amendment drew it as they did are not hard to find. The rule, although expressed in few words, is not as simple as it looks. In fact a considerable body of case law has grown around it. One who should read the constitutional provision by itself and not look at the interpretations given to it in a long series of successive precedents would hardly conclude that the privilege may be claimed not only by the accused in the particular case on trial, but also by mere witnesses; not only with regard to the issue then at the bar, but with respect to any matter that might possibly become the subject of a subsequent criminal action; and strangest of all, even in a civil action, although the Constitution expressly says: "in any criminal case." Now the objects the proponents have mainly in view—the prevention of immunity claims by corporate agents, and of temptation to extort confessions—do not necessarily require the entire abolition of the rule. Any number of limitations, especially of those interpretative rules laid down by the courts, may be imagined which would accomplish that purpose and leave much of the general rule intact; but to select one of these and set it out in the Constitution would be inconvenient. It might not be

possible to do it in less space than several sections. The length, and the incomprehensibility of such an amendment to the average voter, would probably doom it to defeat. So, in order to avoid this danger the proponents are willing to tamper with one of the most important principles of American constitutional practice. Surely a bad case of expediency before principle!

II

The proponents of the amendment are aware, of course, how great the difference is between that which a mere reading of the text of the constitutional provision conveys to the mind, and the large body of complicated rules regarding self-crimination which make up the real law on the subject. Yet they seem to have no scruples about precipitating one or more statutory rocks into the sea of law, on which new crops of sea weed may gather. They are quite willing to unsettle a matter which in the course of time has become fairly certain, by statutes which must necessarily become the starting points of new developments of legal doctrine, the end of which no man can foresee. It would seem that many American lawyers have no realization of the difficulties inherent in statutory alterations of legal principles under our system. The flood of statutes biennially ground out by our Legislatures is so enormous that the feeling seems to prevail: Go ahead, one more or less will make no difference. The fact, however, is that by far the greater portion of the acts found in each successive volume of session laws do not affect legal principles at all. They are mere regulations of detail, administrative rules, often nothing but orders that some single thing be done. They are concerned with matters which, in countries working under the parliamentary system, are attended to by the Ministries or Departments. They should, of course, be drawn and considered carefully; but if a poorly drawn or ill advised statute of this class is adopted, the mischief is easily noticed and remedied. It remains on the outside of the body politic, so to speak, does not change its internal character, and is, if need be, easily lopped off again by repeal.

A statutory change of one of the principles of private or criminal law is a more serious matter. It is seldom limited in its effects to the particular subject with which primarily it deals. It may be likened to the food taken into the human body, which is indeed first of all deposited in the digestive organs, but may finally become the material of tissue-building in any part of the anatomy, and

no person can foresee where it will finally show its effects. Thus the statute may in words refer to a definite and circumscribed subject; but from the moment it goes into effect it no longer stands by itself but becomes an integral part of the entire legal organism, and every part of the latter must be brought into harmony with it. Until that process is completed, uncertainty must prevail as to what the law is, affording countless opportunities for more rash reformers making the malady worse by still more statutes.

The normal way for legal principles to change is by the cautious building up of precedents. The principle of "stare decisis" may or may not be the ideal way of adapting the law of a community to its needs, but it is our way. There is not the slightest prospect of our abandoning it for the methods of Continental Europe, or any other system. Moreover, great as have been the statutory changes during the last hundred years, the core of American law is still customary, still the old Common Law brought from England. Every statute is nothing but an amendment of the Common Law, the principles of which immediately run through the veins of the new act so that it is henceforth organically connected with every immemorial custom. This fundamentally customary character of our law, and the principle of "stare decisis," historically and logically inseparable from the former, make the statutory change of a legal principle a far more difficult undertaking than in countries where the Roman methods of interpretation prevail. If American courts were at liberty to disregard prior decisions; if it were the duty of every judge, as it is in France and Germany, to be guided by nothing, in construing the text of a written law, except his own trained understanding of the words, the privilege of refusing to incriminate one's self would never have been extended to mere witnesses, nor to civil cases, when the text expressly limits it to criminal ones. Under the rule of precedent, every new decision becomes a new starting point of interpretative reasoning. What lies behind the last well-established precedent is settled law; the court accepts it as it finds it; while the Continental judge is expected to go back to the bare text in every case calling for its application. The first case may go beyond the actual "intention of the legislator" by ever so little, the least deviation is enough for being the beginning of the development in a direction never dreamt of by the originators of the text. This, I have no doubt, happened in the rule against self-

crimination. Personally, I believe that the individual who first formulated the text as a part of an American Constitution, never meant to do more than prohibit the questioning of the accused regarding the facts of the offense for which he was then being prosecuted. In other words, he wished to prohibit the introduction of the inquisitorial process in criminal cases. That was a rather lively subject of debate in France, at the time of the American Revolution, and continued to be so, throughout Continental Europe, till about the middle of the nineteenth century.[3] So much for the insertion of the clause in American bills of rights. All extensions of the rule are subsequent legal growth; they may have been within the intention of the legislator in juridical contemplation, but certainly not in his actual consciousness.

Now let us assume that the amendment is adopted and the Legislature passes some statute under it. We cannot foresee what the scope of the statute may be. Perhaps it will be nothing more than authority given for a sort of discovery proceeding against corporations without consequent immunity of the testifying officers. Perhaps it may, in broad terms, take away the privilege altogether. Whatever its text and apparent purpose, it will become the starting point for a vigorous growth of new law by adjudication, and there is no possibility of telling whether or not, after fifty years, the result may not be as surprising as the present scope of the rule would be to the authors of the clause in the Fifth Amendment to the Constitution of the United States, which is practically identical with the Wisconsin rule. One can easily imagine that zealous district attorneys, with the help of complacent magistrates, may use such a statute to convert our criminal procedure into a very fair imitation of a seventeenth century criminal trial in France, with the grosser forms of physical torture supplanted by refined mental anguish, but relieved of the humane restriction that a prima facie case must be made against the accused before he is stretched on the rack. All that would be necessary is to have an indefinite series of continuances of the preliminary hearing before the magistrate, to give the district attorney a chance to verify each of the statements of the defendant. No doubt he would discover that some of the collateral facts were different from what the accused represented them to be. Then the poor devil, whether guilty or innocent, could be threatened

[3] Comp. Francis Lieber, *Civil Liberty and Self-Government*, Chap. VII. Also: id., Appendix III.

with prosecution for perjury. At once he would try to correct his previous testimony, get himself completely tangled in contradictions, and, if on the subsequent trial he had cleared his mind and told a straight story, he would be confronted with his altogether different testimony in the preliminary hearing, until every juror would be ready to call him the most brazon liar that ever lived.

Such a proceeding would be the essence of the inquisitorial process in its unadulterated form, except that there is a final jury trial added. The present method on the Continent also has the final jury trial; but in a trial such as we might have under the amendment, the situation would be much worse for the accused than before a European court. True, he would be examined by the district attorney and not by the court itself; he might even find occasional protection against too atrocious bullying from the supposedly impartial gentleman on the bench. Yet, in the French or German court, he would be allowed to tell his own story, while here he would be constantly stopped by objections that what he says is "irrelevant," "hearsay," "not the best evidence," and so forth. Or do the proponents expect that together with the statute permitting the questioning of the accused the Legislature will also undertake a radical reform of the law of evidence? The modern principle on the Continent is that the parties may submit whatever evidence they deem, in good faith, calculated to help their case. It is for the court afterwards to reject what is improper. Especially is there no arbitrary rule excluding hearsay. Obviously, this works to the advantage of the accused, especially in showing the bias or malice of adverse witnesses.

III

All of this, and much more that might be said, shows how a single change, such as is here proposed, may not only be much greater in its consequences than the proponents can foresee or desire, but also that the change of one principle requires changes in others, unless our whole system is to be thrown into confusion. That does not mean, of course, that statutory changes of legal principles are to be avoided under all circumstances. Sometimes, a time-honored principle is no longer in accord with changed economic or social conditions, and yet it is so entrenched in precedents, that there is no prospect of reform by judicial adjudication. Then the surgical operation of statutory change may

properly be resorted to. Such was the case with the distribution of personal risk growing out of modern industrial life. There the change from the principle of negligence as basis of liability, to the recognition of the social character of industrial employment was demanded by every consideration of logic, good policy and humanity, but it could not be effected except by legislation. In the present case we are asked to favor a fundamental change in criminal procedure on no better ground than the convenience of prosecuting officers. We are told that district attorneys and police authorities sometimes have trouble in securing sufficient evidence, although we see that criminals are duly convicted every day. It is said that incompetent and brutal police officers are exposed to the temptation of adopting illegal and sometimes inhuman methods of extorting confessions. The obvious answer is: "Punish the perpetrators of 'third degree' crimes, and protect their victims against revenge." While that is obvious and right as far as it goes, a surer remedy will be found in the better organization of our police service. As matters are, most of the evils complained of, both as regards failure to find evidence, and ill treatment of prisoners, comes from the smaller towns, where the police authorities are untrained, poorly disciplined, and often mere petty politicians, not always of the best character. In Milwaukee, it is very doubtful whether the grosser form of this abuse, at least, is fairly chargeable. It should be said, moreover, that there is great need for systematic training of police officials in methods of detecting crime, such as have been elaborated in Europe. No question that a few men in the Milwaukee police force, by long experience and intelligent private effort, have acquired exceptional skill in their profession. That, however, can by no means be said of the ordinary "fly-cop."

The case of the corporate officer committing statutory offenses and promptly taking his immunity bath stands on a different basis. The statutes here in question are attempts to regulate business methods, perfectly permissible, in many cases, at common law, but conceived to be incompatible with the public welfare under modern economic conditions. They are what I should like to call "nominal" or "inchoate" law, that is, law which is in force because it is on the statute books, but not "essential" law, meaning law which is upheld by the practically unanimous consciousness of the community.[4] It may, in the course of time, develop into

[4] Comp. Bruncken, Some Neglected Factors in Law-making, 8 *Political Science Review, 222.*

"essential" law, when the moral consciousness of every good citizen will condemn offences against them as it now condemns larceny and murder. For the present, however, nobody at heart believes that the men committing such offenses are criminals, much as one may reprehend their conduct from a social or economic point of view. Still less do they themselves have qualms of conscience about their acts, although they deem it unfortunate to be caught in them. Trials of this kind are apt to be simply matches of skill between rival attorneys. When such statutes shall have become "essential" law, it will be no harder to convict the occasional offender than it is to convict a robber. For the present, what we should learn from them is that it is as bad policy to try the immediate transformation of society by penal statutes, as it is to attempt making men temperate by the same means. Under no condition, however, should we tamper with settled principles of our Constitution to gain small and temporary ends. That also would teach men to be "anarchists," that is contemners of all law as a trifling thing.