COMMENT

COMMENT AND INFERENCE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

In the United States when the prosecution says, "The state rests," the accused has an option to testify in his own defense or to exercise his privilege against self-incrimination. In several of the states when the accused adopts the latter alternative, comment on his silence by the court or prosecutor or both and an inference of guilt are permitted. The subject of this comment is the constitutionality and desirability of comment or of inference.

The question of the constitutionality of comment or inference arises under the fifth and fourteenth amendments. The fifth amendment issue is whether the exertion of pressure to testify by the use of comment or inference violates the accused's privilege against self-incrimination. The fourteenth amendment issue is whether an inference of guilt which is used as evidence for the prosecution violates the accused's right to due process.

Inference and comment do not violate the accused's privilege against self-incrimination if they are compatible with the purposes of the privilege. After culling, two significant purposes of the privilege remain. They are the protection of the accused from the probing of an over-zealous questioner and the promotion of a fair state-individual balance. A prohibition against comment and inference is unnecessary to maintain either purpose. First, probing by the prosecutor easily can be controlled by the court. Second, the multiple safeguards now accorded the accused at the trial stage in a criminal proceeding make it both unnecessary and undesirable to tip the scales further in favor of an accused and hold comment or inference impermissible.

Inference violates the accused's right to due process if it results in shifting the burden of proof. This is not the case. Permitting the prosecution to use the accused's silence as an item of evidence connoting guilt does not enable the prosecution to secure a conviction without showing the accused's guilt beyond a reasonable doubt. It merely secures to the prosecution a piece of evidence with which to prove its case—a piece of evidence which is not destructive of a fair state-individual balance.

Although comment or inference should not be prohibited on constitutional grounds, it should be discarded if it lessens the accuracy of the guilt determining process. As comment or inference now exist, there is no guarantee that the accused's silence is relevant

to the probability of his guilt. For example, a record of prior conviction or a poor demeanor may account for the silence of the accused. Thus comment or inference should be banned until the formulation of some test which prevents comment or inference from benefiting the prosecution when the accused's silence is explicable by something other than guilt. A test for so circumscribing comment or inference is suggested in this article.

COMMENT OR INFERENCE IN THE SUPREME COURT

In *Twining v. New Jersey*[1] the jury was instructed that it might draw an unfavorable inference from the failure of the accused to testify in denial of evidence which tended to incriminate him. The law of New Jersey permitted such an inference to be drawn. In upholding the constitutionality of the instruction the United States Supreme Court found that the privilege against self-incrimination as guaranteed by the fifth amendment did not apply to the states. A headnote states, "Exemption from compulsory self-incrimination did not form part of the law of the land prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto."[2] Therefore the court found it unnecessary to decide whether or not the drawing of an unfavorable inference from the silence of an accused violated the fifth amendment.[3]

Thirty-nine years later, in *Adamson v. California*,[4] the Supreme Court reiterated its decision in *Twining*. In *Adamson* the prosecution acting under the authority of California Constitution, article I, section 13 and California Penal Code Section 1323 commented on the accused's failure to take the stand. The defendant contended 1) that the fifth amendment was applicable to the states and 2) that comment as permitted by the California Constitution violated the privilege against self-incrimination. The Supreme Court assumed without deciding that permission extended to the court, counsel and jury to comment on and consider the accused's failure by his testimony to deny or explain facts in the case against him would violate the accused's privilege against self-incrimination under the fifth amendment. However, the Court held that because the fifth amendment was not made effective in the states by the fourteenth

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[1] 211 U.S. 78 (1908).
[2] *Id.* at 78-79.
[3] *Id.* at 79.
[4] 332 U.S. 46 (1947).

amendment, the defendant's rights were not violated.[5] Justice Frankfurter, who agreed with the majority that the fifth amendment was not applicable to the states, wrote a concurring opinion in which he specifically addressed himself to the question of comment. He stated, "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions." [6] Justice Black, in a dissenting opinion, concluded that the majority of the Court did not consider comment violative of the privilege: "the Court's opinion, as I read it, strongly implies that the Fifth Amendment does not, of itself, bar comment upon failure to testify in federal courts. . . ." [7] Thus, although the question of whether the drawing of an inference from the accused's failure to take the stand violates the privilege is discussed in *Adamson,* taken as a whole, the opinion of the Court is no more enlightening than the opinion of the Court in *Twining.*

On June 1, 1964, the Supreme Court overruled *Twining* and *Adamson* and held that the privilege against self-incrimination as guaranteed by the fifth amendment applied to the states. The issue was presented to the Court in *Malloy v. Hogan.*[8] Malloy had been arrested in a gambling raid in 1959 in Hartford, Connecticut. He pleaded guilty to the misdemeanor of poolselling and was sentenced to a year in jail and a $500 fine. After serving ninety days, he was released on probation for two years. Sixteen months after his guilty plea, Malloy was ordered to testify before a referee appointed by the Superior Court of Hartford County to investigate gambling and other criminal activities in the county. When asked a series of questions [9] concerning his 1959 arrest and conviction, he refused to answer on the grounds of self-incrimination.

The Superior Court found him in contempt and ordered him incarcerated until he answered the questions. Malloy applied to the Superior Court for a writ of habeas corpus. It denied the writ and the Connecticut Supreme Court of Errors upheld the denial.[10]

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[5] *Id.* at 50-54.

[6] *Id.* at 61 (concurring opinion).

[7] *Id.* at 69 (dissenting opinion).

[8] 378 U.S. 1 (1964).

[9] The questions asked Malloy were:

(1) for whom did he work on September 11, 1959; (2) who selected and paid his counsel in connection with his arrest on that date and subsequent conviction; (3) who selected and paid his bondsman; (4) who paid his fine; (5) what was the name of the tenant in the apartment in which he was arrested; (6) did he know John Bergoti. *Id.* at 12.

[10] Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963).

In so doing it found that the fifth amendment privilege against self-incrimination did not apply to the states, that the fourteenth amendment granted Malloy no privilege, and that he had not correctly invoked the privilege against self-incrimination available under the Connecticut Constitution. Having granted certiorari the Supreme Court found 1) the fifth amendment privilege against self-incrimination was applicable to the states, 2) it applied with full federal constitutional content, and 3) Malloy's privilege had been violated.[11] However, the Supreme Court's reversal of the Connecticut Supreme Court of Errors did not resolve the question of the constitutionality of comment or an inference under the federal constitution because the factual pattern in *Malloy* did not include comment or an inference. The question is important because at present six states—Iowa, New Jersey, Connecticut, New Mexico, California and Ohio—permit comment or an inference or both.

Comment or Inference in the States Which Permit Them

While the six enumerated states all permit recognition of the accused's silence, the significance accorded to such silence varies. A discussion of the weight attached to the accused's silence in the various states is pertinent because it is arguable that the Supreme Court should reject en bloc immunity to the accused, and hold comment or inference impermissible only when it is likely to result in undue prejudice.[12] The scope of comment or inference as it developed in Iowa, New Jersey, Connecticut, New Mexico, California and Ohio follows.

The Iowa Supreme Court held in *State v. Ferguson*[13] that comment by the prosecutor did not violate "due process of law" as secured by the Iowa Constitution,[14] or the Iowa competency statute.[15] In reaching the conclusion that comment did not violate due process under the state constitution, the court relied on the rejection by the Supreme Court of the United States of the due process argument made in *Twining*. However, in *Twining* due process was argued as a ground for carrying through the fifth amendment privilege against self-incrimination to the states, while in

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[11] *Supra* note 8, at 14 (dissenting opinion).

[12] See section entitled Test for Determining Violation of the Privilege *infra* at 588, for a suggested test for ascertaining when the accused is unduly prejudiced.

[13] 226 Iowa 361, 283 N.W. 917 (1939).

[14] Iowa Const. art. I, § 9.

[15] Iowa Code § 781.12 (1946):

Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state.

Ferguson it was argued as a basis for finding that in a state which recognized a privilege against self-incrimination due process would prevent comment.[16] While the Iowa Constitution did not guarantee a privilege against self-incrimination, the court in interpreting the due process clause of the Iowa Constitution found that it encompassed the privilege against self-incrimination. Thus the court did not really answer the accused's challenge that comment violated due process as guaranteed by the Iowa Constitution. The probable explanation for the court's willingness to permit comment is that the Iowa legislature had indicated its approval of comment by repealing a statute which disallowed comment.[17] The court said:

> Were we to sustain appellant's contention herein, the result would be that, under the guise of construing the due process clause, we would, in effect, re-enact Section 13891 of the Code of 1927, which the 43rd Gen. Assem. . . . chose to repeal.[18]

New Jersey, like Iowa, has no specific constitutional privilege against self-incrimination. However, the New Jersey courts recognize the common law privilege against self-incrimination as being in full force in the state.[19] Notwithstanding this the New Jersey courts have permitted comment by the court[20] and by the prosecuting attorney,[21] and have permitted the drawing of an adverse inference by the jury.[22]

Connecticut recognizes the privilege against self-incrimination in its constitution.[23] However, the Connecticut courts have held

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[16] *Supra* note 13.

[17] Section 13891 Codes of 1924 and 1927, formerly § 5484 Code of 1897, repealed by Chapter 269 of the Acts of the Forty-third General Assembly in 1929, said in effect that should a defendant not elect to become a witness, that fact should create no weight against him, nor should it be the subject of comment by the prosecutor.

[18] State v. Ferguson, *supra* note 13, at 373, 283 N.W. at 923; see also State v. Stennett, 220 Iowa 388, 260 N.W. 732 (1935), in which repeal of Iowa Code § 13891 (1927), was the basis of a decision that prosecutorial comment on the accused's failure to testify was permissible.

[19] Zdanowicz v. State, 69 N.J.L. 619, 55 Atl. 743 (Ct. Err. & App. 1903).

[20] Parker v. State, 61 N.J.L. 308, 39 Atl. 651 (Sup. Ct. 1898), *aff'd per curiam*, 62 N.J.L. 801, 45 Atl. 1092 (Ct. Err. & App. 1899), held that the Act of 1871, § 8 of the Evidence Act, (Rev. 1877, at 379), repealed, [now N.J. Rev. Stat. § 2A: 81-8 (1951)], which permitted an accused to become a witness in his own behalf, did not prohibit comment or the drawing of an inference; and that when facts which were introduced by the prosecution might be disproved by the accused if they were not true, the accused's failure to take the stand might be considered.

[21] State v. Lisena, 129 N.J.L. 569, 30 A.2d 593 (Sup. Ct.), *aff'd per curiam*, 131 N.J.L. 39, 34 A.2d 407 (Ct. Err. & App. 1943).

[22] State v. Bright, 123 N.J.L. 435, 8 A.2d 904 (Sup. Ct. 1939), *aff'd per curiam*, 124 N.J.L. 451, 12 A.2d 677 (Ct. Err. & App. 1940).

[23] Conn. Const. art. I, § 9 provides:

> He shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law.

that the fact that the accused did not take the stand may be considered by the jury and an adverse inference drawn therefrom.[24] This is apparently limited to those instances in which the state has made a prima facie case,[25] but the evidence of the state which establishes the prima facie case may be circumstantial.[26] Comment upon the accused's failure to take the stand is permitted only to the court;[27] comment by the prosecutor is prohibited by statute.[28]

New Mexico's constitution provides that "no person shall be compelled to testify against himself in a criminal proceeding." [29] However, when faced with a statute [30] which permitted comment but no inference, the court upheld the statute's constitutionality, saying that the statute was a procedural rule promulgated by the court and did not affect the substantive rights of the accused.[31]

In 1934, California amended its constitution to permit comment by court and counsel and consideration by the court or jury when the defendant fails to explain or deny by his testimony any evidence or facts in the case against him.[32] The comment and consideration which are now allowed pertain not to the accused's failure to take the stand, but to his failure to explain away incriminating evidence.[33] His refusal to testify does not supply any missing element of proof for the prosecution.[34] And it is proper for the trial judge to instruct the jury that no inference is to be drawn from the accused's refusal to testify.[35]

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[24] State v. Ford, 109 Conn. 490, 146 Atl. 828 (1929).

[25] State v. DelVecchio, 145 Conn. 549, 145 A.2d 199 (1958); State v. Nelson, 139 Conn. 124, 90 A.2d 157 (1952).

[26] State v. Grosso, 139 Conn. 229, 93 A.2d 146 (1952).

[27] State v. Heno, 119 Conn. 29, 174 Atl. 181 (1934).

[28] Conn. Gen. Stat. Ann. § 54-84 (1960) provides:

> Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. . . . The neglect or refusal of an accused party to testify shall not be commented upon to the court or jury.

As interpreted in State v. Heno, *supra* note 27, only comment by the prosecutor is prohibited.

[29] N.M. Const. art II, § 15.

[30] N.M. Stat. Ann. § 41-12-19 (1964), formerly, N.M. Trial Ct. Rules 45-504, provides:

> His failure to testify shall create no presumption against him, but may be the subject of comment or argument. In trials in the district court such comment or argument shall be within the discretionary control of the court, and shall entitle the accused to an instruction that the jury shall indulge no presumption against the accused because of his failure to testify.

[31] State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955).

[32] Calif. Const. art. I, § 13.

[33] People v. Adamson, 27 Cal. 2d 478, 165 P.2d 3 (1946); see also Caminetti v. United States, 242 U.S. 470, 495 (1917).

[34] People v. Casillas, 60 Cal. App. 2d 785, 141 P.2d 768 (Ct. App. 1943).

[35] People v. Kynette, 15 Cal. 2d 731, 104 P.2d 794 (1940).

The Ohio Constitution as amended in 1912 provides that no person in any criminal case shall be compelled to be a witness against himself, but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel.[36] As originally enacted the constitution made no reference to what was permissible when the accused failed to take the stand.[37] This is understandable since the accused was not a competent witness in Ohio until 1867.

The statute which granted competency as a witness to the accused further provided: "nor shall the neglect or refusal to testify create any presumption against him nor shall any reference be made to, nor any comment upon, such neglect or refusal." [38] Instead of repealing the statute, Ohio amended its constitution when it desired to permit notice to be taken of the defendant's refusal to testify. Subsequent to the amendment of the constitution, the legislature amended the competency statute to accord with the constitution.[39] Thus, in Ohio, comment by counsel [40] and consideration by court and jury is specifically permitted both by the constitution and by statute. It has been held that court and jury may consider the defendant's refusal to testify: 1) when the evidence offered against the defendant calls for an explanation,[41] 2) as an inference [42] though not a presumption [43] of guilt, 3) as a makeweight in finding guilt beyond a reasonable doubt when the state has made out a prima facie case and no evidence has been offered by the defendant,[44] 4) as a makeweight in finding guilt beyond a reasonable doubt though the state's case is based solely on circumstantial evidence,[45] and 5) as substantial evidence of his guilt.[46]

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[36] Ohio Const. art. I, § 10.

[37] Ohio Const. art. I, § 10 (1803).

[38] 64 Laws of Ohio 260 (1867), codified, 66 Laws of Ohio 287, § 140 (1869). See Ohio Gen. Code § 13661 (1910).

[39] Ohio Rev. Code Ann. § 2945.43 (Page 1953) provides:

> On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.

[40] Vecchio v. State, 32 Ohio L. Rep. 553 (Ct. App. 1930).

[41] Halsey v. State, 42 Ohio App. 291, 182 N.E. 127 (1932).

[42] Long v. State, 109 Ohio St. 77, 141 N.E. 691 (1923); Leonard v. State, 100 Ohio St. 456, 127 N.E. 464 (1919); City of Cincinnati v. Hawkins, 48 Ohio L. Abs. 604, 75 N.E. 2d 218 (Ct. App. 1947); City of Cincinnati v. Hyams, 77 Ohio App. 403, 67 N.E. 2d 39 (1945).

[43] Hinz v. State, 15 Ohio C.C.R. (n.s.) 88 (Ct. App. 1911), *aff'd*, 86 Ohio St. 348, 99 N.E. 1127 (1912).

[44] City of Cleveland v. McNea, 158 Ohio St. 138, 107 N.E.2d 201 (1952).

[45] State v. Butler, 43 Ohio Op. 321, 94 N.E.2d 457 (Ct. App. 1949); Leslie v. State, 7 Ohio L. Abs. 299 (Ct. App. 1929).

[46] Bair v. Cleveland, 9 Ohio L. Abs. 618 (Ct. App. 1931).

In summary, the present forms of comment or inference may be assigned to four broad categories. The first category represents the situation as it exists in New Mexico. There the defendant's failure to testify is accorded the least significance, because the jury is not permitted to draw an adverse inference from the failure even though it may be pointed out to them by the prosecutor.[47] This obviates consideration of a fourteenth amendment due process argument based on a shifting of the burden of proof by using the silence of the accused as evidence. However, the New Mexico statute is not immune from attack as violative of the privilege. An accused must feel more compulsion to testify when he is aware that his silence will be commented upon than when he knows it will pass unremarked by the prosecution. Lack of knowledge of the events which occur in the jury room makes it difficult to postulate the effect which comment has upon a jury. However, it is more probable than not that the subtle adverse influence which the silence of an accused produces is augmented when it is specifically pointed out to a jury by an authoritative figure.[48]

The second category includes comment and inference as they exist in California. Both fourteenth and fifth amendment issues are instant. The fourteenth amendment due process argument is applicable because an inference of the truth of the prosecution's case based on the accused's silence concerning a matter about which he reasonably could be expected to have knowledge is allowed. Hypothetical number one is illustrative of this situation.[49]

> XYZ constitutes the quantum of evidence which must be proved to find the defendant guilty beyond a reasonable doubt. XYZ could be found proved by the jury. The defendant does not take the stand. X is something about which the defendant could reasonably be expected to have knowledge. The fact that the defendant does not take the stand may be used to find the truth of X by a jury which does not believe X proved on the strength of the prosecution's evidence alone.

Absent fifth amendment considerations such inference is apparently permissible. The Supreme Court in *Adamson* held the

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[47] N. M. Stat. Ann. § 41-12-19 (1964).

[48] For an analysis of the constitutionality of such pressure see section entitled Purposes of the Privilege *infra* at 591.

[49] People v. Adamson, *supra* note 33, at 490-91, 165 P. 2d at 10.

> The jury . . . should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny . . . the jury may consider his failure to do so—as . . . indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.

above described use of the accused's silence constitutional because 1) California's constitution, which at that time provided the only applicable privilege against self-incrimination, specifically permitted it, and 2) the defendant's silence was not considered as evidence of his guilt, but only as evidence of the strength of the prosecution's case.[50] In reaching its decision the Court cited *Caminetti v. United States*.[51] In that case the accused took the stand, but omitted to explain or deny incriminating circumstances or events already in evidence in which he participated and concerning which he was fully informed.[52] The Court upheld the constitutionality of inference on the facts as presented.

While *Caminetti* and *Adamson* may be considered dispositive of the fourteenth amendment argument concerning the permissibility of the use of the silence of an accused as evidence, they do not resolve the fifth amendment question. The pressure on an accused to testify is substantially greater if he knows his silence will be used to give credence to the prosecution's case.[53]

The third category encompasses comment and inference as it exists in Connecticut, New Jersey, and Iowa. There the weight to be given to the accused's silence is left to the jurors who are instructed that they may draw reasonable inferences or may determine themselves what inferences should be drawn. As in California both fourteenth and fifth amendment issues are involved. Hypothetical number two exemplifies the advantage which results to the prosecution in the aforementioned states.[54]

> XYZ is the quantum of evidence which must be proved to find the defendant guilty beyond a reasonable doubt. XYZ could be considered proved by the jury. The defendant does not take the stand. The fact that the defendant does not take the stand may be used as a substitute for X, call it X^1. Thus a jury which disbelieves the truth of X can find the accused guilty beyond a reasonable doubt by substituting X^1 for X.

The result is that the jury may find the prosecution's case proved by substituting the defendant's silence for a portion of the prosecution's evidence which is both disbelieved and necessary to find guilt beyond a reasonable doubt. It is arguable that under *Caminetti* this use of the accused's silence is permissible, because

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50 Adamson v. California, *supra* note 4, at 55-56.

51 242 U.S. 470 (1917).

52 *Id.* at 495.

53 The constitutionality of such pressure is discussed in section entitled Purposes of the Privilege *infra* at 591.

54 State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941); State v. Ferguson, *supra* note 13; State v. Bright, *supra* note 22.

there is no practical difference in using the defendant's silence to prove the prosecution's case by showing the truth of what the prosecution has presented and in using it to prove the prosecution's case by supplying a substitutional item of evidence for the prosecution. This argument is not meritorious, however, because the inference permitted in California arises only when the accused reasonably could be expected to have knowledge about the particular evidence to which it applies, while in Iowa, New Jersey, and Connecticut there is no assurance of the relevancy of the accused's silence to the particular evidence for which it is substituted. Thus to uphold the constitutionality of the above described use of the silence of an accused, the Court will have to go beyond *Caminetti* and *Adamson* in which the inference was supported as an admission of a particular fact. In substance, the Court will have to find that the accused's silence is an admission of guilt and that the fourteenth amendment permits the state to take advantage of the accused's silence in proving its case against him. These prerequisites to finding that the above described inference is permissible under the fourteenth amendment and the fifth amendment and the constitutionality of comment in this situation are both discussed later in this article.

The fourth category comprises comment and inference in Ohio. In this state the jury may be instructed that silence is substantial evidence of the defendant's guilt.[55] Hypothetical number three depicts the probative force accorded to the accused's failure to testify in Ohio.[56]

> XYZ is the quantum of evidence which must be proved to find the defendant guilty beyond a reasonable doubt. X could

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[55] Bair v. Cleveland, *supra* note 46.

[56] It has been held that the jury can use the inference to supply the quantum of evidence necessary to find the accused guilty beyond a reasonable doubt. City of Cleveland v. McNea, *supra* note 44; State v. Butler, *supra* note 45. The decisions of the above cited Ohio cases, do not permit the use of the silence of the defendant to supply proof for any of the essential elements of the prosecution's case. This is harmonious with the recommended instructions for Ohio juries, 3 Fess, Ohio Instructions To Juries § 87.18:

> The defendant did not see fit to take the witness stand in his own behalf. There is no law whereby a defendant can be compelled to take the witness stand or to testify in a case against him, but you are charged that you may consider the failure of the defendant to take the witness stand in his own behalf. This failure, however, cannot cure the failure upon the part of the state, if any, to prove any of the essential elements required to convict; but, otherwise, you may consider the circumstances attending the failure of the defendant to take the witness stand and attach thereto such significance and weight, if any, as you believe to be justified.

> not be considered proved by the prosecution. The defendant moves for a directed verdict. The judge overrules his motion. The defendant does not take the stand. The jury finds against the defendant. On appeal the court finds that the defendant's failure to take the stand could have been used by the jury in finding guilt beyond a reasonable doubt.

In effect the fact that the defendant does not take the stand is the very piece of evidence which convicts him, for the probative force of the defendant's non-appearance, an event which occurs after the directed verdict motion, is weighed with the evidence adduced before the directed verdict motion, giving the prosecution's evidence a specious weight, *i.e.*, a weight which it did not and could not have had at the time of the motion. Thus in addition to the aforementioned prerequisites to finding that the form of inference sanctioned in Iowa, New Jersey, and Connecticut is permissible under the fourteenth amendment—that silence of the accused is an admission of guilt and that an inference which may replace an item of the prosecution's case is tolerable—the Court will also have to justify the use of the accused's silence to prove guilt in instances where it cannot be considered proved otherwise, if inference in Ohio is to be decreed constitutional under the fourteenth amendment.[57]

It is sufficient to say at this point that the argument for holding inference or comment violative of the fifth amendment is strongest in the context of the Ohio situation. The accused in fact has no choice. The presumption which must be allowed is that if he testifies he will incriminate himself. Otherwise the presumption of guilt based on his silence is erroneous. If he does not testify, he in fact incriminates himself, for his silence is of necessity used to convict him.

A Test for Determining Violation of the Privilege

The question becomes whether the Constitution as construed in *Malloy* should be used to invalidate comment or inference as it is used in the states or whether a judicially inhabitable half-way house can be constructed in the form of a test which will rob comment or inference of their prejudicial impact on the accused without depriving the state of relevant evidence. The commentary of history—particularly legislative intimations—indicates that comment and inference have not been thought to violate the privilege. Any test to determine whether comment or inference are violative of the privilege may touch this history to draw support from it, but must also go beyond history to the root purposes of the privilege.

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[57] See section entitled Fourteenth Amendment Constitutionality *infra* at 595.

Comment or Inference in the Legislatures

In *Malloy* it was held that the fifth amendment applies to the states with full federal constitutional content.[58] Thus if it can be found that the fifth amendment is a bar to comment or inference in the federal courts, that finding is determinative of the constitutionality of comment or inference in the state courts. In *Bruno v. United States*[59] several of Bruno's co-defendants took the stand, but Bruno did not testify. Counsel for Bruno requested the following instruction:

> The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.[60]

Counsel urged that the instruction was compelled by the fifth amendment. The Court ignored the fifth amendment argument and based its decision on the federal competency statute of 1878.[61] The statute which afforded competency as a witness to the accused simultaneously provided that his failure to take the stand "shall not create any presumption against him."[62] Inherent in the Court's opinion was the implication that the statute was not based on the fifth amendment: in discussing the accused's immunity from comment the Court termed it "a privilege which Congress has given him."[63]

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[58] Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

[59] 308 U.S. 287 (1939).

[60] *Id.* at 292.

[61] 18 U.S.C. § 3481 (1948).

[62] 20 Stat. 30 (1878), now 18 U.S.C. § 3481 (1948).

[63] 308 U.S. at 294. Because of the competency statute the Supreme Court has never been forced to decide whether the privilege against self-incrimination prohibits comment or an inference. However, a few lower federal courts have indicated that the Constitution as well as the competency statute bars comment or inference. The best of these cases is DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), in which the Fifth Circuit reversed the conviction of a defendant whose trial was irretrievably prejudiced by commentary on his refusal to testify made by a co-defendant's attorney in closing argument. Judge Wisdom's scholarly majority opinion asserts a fifth amendment violation, *id.* at 141, but rests as well upon a fair construction of the competency statute, *id.* at 150-55. Bell, C.J., concurring, reaches the unexceptionable result by means of the sixth amendment guarantee of fair trial. *Id.* at 155 (concurring opinion).

In United States *ex rel.* Shott v. Tehan, 337 F.2d 990 (6th Cir. 1964), the Sixth Circuit recently granted habeas corpus to a state prisoner by finding that an Ohio trial in which the prosecutor had commented upon the accused's refusal to testify was by that fact infected with unconstitutionality. The court noted that *Malloy* had made the privilege applicable to the states with full federal impact, *id.* at 992, and asserted that

It is significant that forty-two of the states have enacted statutes prohibiting inference[64] or comment[65] or both.[66] The federal statute, which was enacted after passage of similar legislation in several of the states,[67] was patterned upon Massachusetts law.[68] The import is that both a substantial majority of the state legislatures and Congress felt that the privilege against self-incrimination does not of itself prevent comment. However, two notable legislative enactments indicating a different opinion are the legislative amendments to the Ohio[69] and California[70] constitutions passed in 1912 and 1934 respectively. The amendments, which are

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"the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution." *Ibid.*

[64] Ark. Stat. Ann. § 43-2016 (1964); Colo. Rev. Stat. Ann. § 39-7-15 (1953); Me. Rev. Stat. Ann. ch. 148, § 22 (1954); Md. Ann. Code art. 35, § 4 (1957); Mass. Gen. Laws Ann. ch. 233 § 20 (1959); Nev. Rev. Stat. § 175.175 (1955); N. Y. Code Crim. Proc. § 393; N. C. Gen. Stat. § 8-54 (1953); Ore. Rev. Stat. § 139.310 (1963); S. D. Code § 34.3633 (Supp. 1960); Tenn. Code Ann. § 40-2403 (1955); Wis. Stat. Ann. § 325.13 (1958).

[65] Fla. Stat. Ann. § 918.09 (1944).

[66] Ala. Code tit. 15, § 305 (1958); Ariz. Rev. Stat. Ann. § 13-163 (1956); Del. Code Ann. tit. 11, § 3501 (1953); Hawaii Rev. Laws § 222-15 (1955); Idaho Code Ann. § 19-3003 (1948); Ill. Ann. Stat. ch. 38, § 155-1 (Smith-Hurd 1961); Ind. Ann. Stat. § 9-1603 (1956); Kan. Gen. Stat. Ann. § 62-1420 (1949); Ky. Rev. Stat. § 421.225 (1963); Minn. Stat. Ann. § 611.11 (1947); Miss. Code Ann. § 1691 (1942); Mo. Ann. Stat. § 546.270 (1953); Mont. Rev. Codes Ann. § 94-8803 (1947); Neb. Rev. Stat. § 29-2011 (1956); N. H. Rev. Stat. Ann. § 516:32 (1955); N. D. Rev. Code § 29-21-11 (1943); Pa. Stat. Ann. tit. 19, § 631 (1964); R. I. Gen. Laws Ann. § 12-17-9 (1956); Tex. Code Crim. Proc. Ann. art. 710 (1941); Utah Code Ann. § 77-44-5 (1953); Vt. Stat. Ann. tit. 13, § 6601 (1959); Va. Code Ann. § 19.1-264 (1960); W. Va. Code Ann. § 5731 (1955); Wyo. Stat. Ann. § 7-244 (1957).

[67] Colorado: Act of Feb. 5, 1872, Sess. Laws (1872) at 95; Idaho: Act of Jan. 14, 1875; Rev. Laws of Idaho (1874-5) § 12, at 321; Illinois: Act of March 27, 1874, Rev. Stat. (1874) c. 38, §426; Kansas: Act of Feb. 21, 1871; Laws of Kan. (1871) c. 118, at 280; Maryland: Act of April 7, 1876; Laws of Md. (1876) c. 357, at 601; Missouri: Act of April 18, 1877; Laws of Mo. (1877) at 356; Montana: Laws of Mont. (1872) at 271-72; Nebraska: Act of March 4, 1873; Laws of Neb. (1873) § 473, Gen. Stats. 1873, at 827; Pennsylvania: Act of April 3, 1872; Laws of Pa. (1872) at 34; Act of March 24, 1877; Laws of Pa. (1877) at 45; see also Act of May 21, 1885; Laws of Pa. (1885) at 23; Rhode Island: Act of March 15, 1871; R. I. Laws (1871) c. 907, at 134; R. I. Gen. Stat. (1872) c. 203, § 39; Utah: Act of Feb. 22, 1878; Laws of Utah (1878) at 151; see also Utah Comp. Laws (1876) at 505; Washington: Act of Nov. 29, 1871; Laws of Wash. (1871) at 105; Wyoming: Act of Dec. 6, 1877; Laws of Wyo. (1877) at 25; and see Wyo. Comp. Laws (1876) c. 14, § 129.

[68] 7 Cong. Rec. 385 (1878).

[69] Ohio Const. art. I, § 10.

[70] Calif. Const. art. I, § 13.

substantially identical and which specifically permit the drawing of an inference and comment, were felt necessary by the respective states if comment was not to violate the privilege against self-incrimination as guaranteed by each state constitution.[71]

The Purposes of the Privilege

The evolution of the various theories about the purpose of the privilege against self-incrimination is not within the scope of this article. Their moment on comment is that comment is unconstitutional if it is incompatible with the purposes of the privilege. Wigmore has winnowed from the suggested purposes behind the privilege two of genuine significance.

> The significant purposes of the privilege . . . are two: The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. . . . The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself. . . . [72]

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[71] See People v. Tyler, 36 Cal. 522, 530 (1869), where the court said:

> *If the inference in question could be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the* [*competency*] *statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

(Emphasis in original). The court held that comment was barred by Calif. Const. art. I, § 8 (1849).

See also 2 Ohio Constitutional Convention Proceedings and Debates 1595 (1912):

> A Delegate: What is the object of putting in line 25 there, "but his failure to testify may be considered by the court and jury and the same may be made the subject of comment by counsel?" Is there anything in the present constitution that prevents that?
>
> Mr. Fitzsimmons: Yes.
>
> Mr. Mauck: Has not the clause, "no person shall be compelled, in any criminal case, to be a witness against himself" been construed so as not to permit any comment on the fact that he fails to testify?
>
> Mr. Riley: That is where it comes in.

See also Tate v. State, 76 Ohio St. 537, 540-41, 81 N.E. 973 (1907), where the court said of the significance of the statute granting competency to an accused:

> The obvious purpose of the statute was to confer upon an accused person the right, previously denied him, to testify in his own behalf, and to so confer it as to preserve unimpaired his constitutional immunity from being compelled to testify against himelf. . . . To accomplish that it was distinctly provided 'but his neglect or refusal to testify shall not create any presumption against him.'

[72] 8 Wigmore, Evidence § 2251, at 318 (McNaughton rev. 1961). For other articles dealing with the first purpose of the privilege see American Bar Association

The value accorded to the first purpose by the Supreme Court is titanic—no less is demonstrated by its rejection of confessions induced by mental compulsion.[73] If the Court incorporates into the self-incrimination area the prohibition against mental compulsion expressed in the coerced confessions cases, comment or inference would violate the privilege. With its analysis in *Malloy* that the prohibition against the use of coerced confessions had as a basis the privilege against self-incrimination,[74] the Court established grounds for adoption of coerced confession law in the self-incrimination area. The likelihood that the prohibition against mental compulsion is a part of confessions law which will be found applicable to the privilege area is substantial, for in *Malloy* the Court noted:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own

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Committee on the Improvements in the Law of Evidence, in 63 A.B.A. Rep. 570, 591 (1938); Chafee, The Blessings of Liberty 186, 188 (1956). For other articles dealing with the second purpose of the privilege see Clapp, "Privilege Against Self-Incrimination," 10 Rutgers L. Rev. 541, 548 (1956); Fortas, "The Fifth Amendment: Nemo Tenetur Prodere Seipsum," 25 Cleve. B.A.J. 91, 98-99 (1954). See Griswold, The Fifth Amendment Today 7-9 (1955). My thesis, underlying the test suggested *infra* at 594, is that the fifth amendment privilege is "a limited immunity from the common duty to testify" evoked by "historical reasons" which Wigmore adequately limns, *id* § 2250, and that it both is not and ought not be made a vast prohibition of governmental power. The collateral predicate is that the individual at trial deserves no more than a guarantee that the guilt-determining process will not be polluted by evidence which is either irrelevant or touched with relevance, but pregnant with prejudice.

[73] See Spano v. New York, 360 U.S. 315 (1959). The Court said, "We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused. . . ." *Id.* at 323. In Lynumn v. Illinois, 372 U.S. 528 (1963), a confession was held coerced when induced by threats that state financial aid for accused and her infant children would be cut off and her children taken from her if she did not cooperate; in Haynes v. Washington, 373 U.S. 503 (1963), a confession was held inadmissible when secured by refusing to allow the suspect to call his wife until he confessed. See also Herman, "The Supreme Court and Restrictions on Police Interrogation," 25 Ohio St. L.J. 449 (1964).

[74] 378 U.S. 1, 7 (1964):

> Today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram v. United States*, 168 U.S. 532, the Court held that 'In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled, in any criminal case to be a witness against himself."'

will, and to suffer no penalty, as held in *Twining*, for such silence.[75]

Notwithstanding portents that the Supreme Court may decide otherwise, it is submitted that the evils sought to be prevented by the prohibition against mental compulsion of an accused at the police station are not necessarily attendant at a trial. If the accused is not coerced to testify by comment or inference, the first purpose of the privilege has not been violated, because he has not been subjected to cross-examination. If the accused does testify because of fear of comment or inference, abridgement of the first purpose of the privilege is easily prevented by regulation of the prosecutor's cross-examination.[76] In other words, means of controlling the examiner exist at the trial stage of a criminal proceeding which do not exist at the police station where the interrogation is often conducted under clandestine circumstances.

It is more difficult to find comment compatible with the second purpose of the privilege—protection of the sovereignity of the individual against the state. The Supreme Court, speaking in general of this ideal, has asserted that in its contest with the individual the government should be required to shoulder the entire load.[77] The Court has effectuated this sentiment by its holdings in the areas of search and seizure, right to counsel, and coerced confessions.[78]

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[75] *Id.* at 8.

[76] See Maquire, Evidence of Guilt 13 (1959) for a discussion of the contention that the privilege is unnecessary to prevent brutality when the questioning of an accused takes place under well supervised circumstances; see also Note, "Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 Harv. L. Rev. 426, 445-46 (1964) in which the author proposes an accused be immediately brought before a magistrate after arrest, informed of his privilege against self-incrimination, be afforded the right not to testify as at a trial; but, if he chooses to remain silent, be subjected to comment upon such silence when he is formally tried.

[77] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[78] Fahy v. Connecticut, 375 U.S. 85 (1963), held introduction of evidence of paint and brush procured by an illegal search and seizure reversible error. The significance of this case to the use of comment or an inference is that the Court said that the question to be decided was not whether the erroneous admission of the evidence could have changed the outcome of the trial but whether there was a reasonable possibility that it might have. By analogy the fact that the use of an inference in California, Iowa, Connecticut, and New Jersey might change the outcome of a trial would be reversible error, assuming that an inference is found unconstitutional by the Court. The Ohio situation as discussed in hypothetical number three clearly changes the outcome of the trial; thus there is no question that the use of such an inference would be reversible error if an inference is found to be unconstitutional.

Massiah v. United States, 377 U.S. 201 (1964), held the use in evidence of incriminating statements made after indictment in the absence of counsel, which statements were recorded by police with the assistance of co-defendant, reversible error.

The fallacy in applying the apotheosis of the accusatorial system demonstrated in those areas to comment and inference at a trial is this: at the trial stage in a criminal proceeding there are multiple safeguards for the individual which are either non-existent or exist only in part during a search and seizure or police interrogation.[79] Most importantly, having secured an indictment or prosecutor's information the state has demonstrated that there is good reason for it to disturb the accused. Therefore, it is submitted that the privilege alone should not bar the state's use of evidence elicited during the trial—the testimony of the accused or the inference of guilt resultant from his silence.

A Test for Determining Violation of the Privilege

While the purposes of the privilege already mentioned do not warrant prohibition of the use of comment or inference, protection of an accused from a conviction based on factors irrelevant to the likelihood of guilt—poor demeanor, prior convictions—necessitates a more limited use of comment or inference than is now permitted. It is significant that such protection is a result of the privilege when it is unaccompanied by comment or inference. And although such protection could more properly be afforded by revising the evidentiary rules governing relevancy, it has been provided to date by finding comment or inference violative of the privilege. Thus to prevent undue prejudice to the accused the suggested essential is that the privilege at the trial stage protect the innocent and guilty from a conviction based upon factors irrelevant to the likelihood of guilt. If the reason the accused does not wish to testify is that he committed the crime and he takes the stand because of fear of comment and is convicted, the essential of the privilege has not been violated. If the accused does not wish to testify because he fears disclosure of prior convictions[80] and he takes the stand because

In Escobedo v. Illinois, 378 U.S. 478 (1964), use in evidence of a confession obtained by police interrogation prior to indictment and absent requested counsel was held reversible error. See generally Herman, *supra* note 73.

[79] Meltzer, "Required Records, the McCarran Act, and the Privilege Against Self-Incrimination," 18 U. Chi. L. Rev. 687, 691-92 (1951):

> Wigmore's principal argument for the privilege at the trial stage . . . slights some important considerations, such as the necessity for a showing of probable cause before the trial is initiated; the reluctance of prosecutors, intent on their record of convictions, to rely on the possibility that the defendant will convict himself. . . . Moreover, it plays down the protection provided for the defendant by the court and counsel. Indeed, Wigmore seems strangely to ignore his own warning against confusing a public judicial inquiry with a torture chamber.

[80] See quote in Ohio Constitutional Convention, *supra* note 71, at 1597, of pamphlet by Edward S. Wilson of the Ohio Bar.

of fear of comment, whereupon the prior convictions are shown by the prosecution and he is convicted, the essential of the privilege has been violated and the conviction should be reversed upon appeal. However, if the prior convictions are not disclosed by the prosecution, then the essential of the privilege has not been violated and the conviction should be upheld. If the dissuasion against testifying for the accused is fear that his demeanor on the stand will create an unfavorable impression on the jury[81] and he takes the stand because of fear of comment and is convicted, then the question on appeal should be whether his demeanor created an impression on the jury which might have changed the outcome of the trial. If the question is answered in the affirmative, then the essential of the privilege has been violated and his conviction should be reversed upon appeal.

In the above examples it has been assumed that the accused takes the stand because of fear of comment. If fear of comment is not a primary cause of his testifying, his privilege against self-incrimination has not been violated. On appeal the burden of showing that the accused voluntarily waived the privilege should be on the prosecution. This would entail showing the absence of recognized motivation—prior convictions, poor demeanor,[82] other factors demonstrably irrelevant to the probability of his guilt or innocence but likely to prejudice a jury against him—for remaining silent.

Fourteenth Amendment Constitutionalty

The question of fourteenth amendment constitutionality of comment or inference as allowed in Iowa, New Jersey, Connecticut and Ohio arises when the accused remains silent. As discussed with reference to the privilege, protection of the individual from the state does not compel a prohibition against an inference of guilt based on the accused's silence. Such an inference does not change the burden of proof, because the state still must prove its case beyond a reasonable doubt. Therefore an inference is no more than an item of evidence which the state may utilize to prove its case. Moreover, it is suggested that the essential here is the same as the

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81 See Wilson v. United States, 149 U.S. 60, 66 (1893):

> Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against [defendant], will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.

82 Some method will have to be devised for insuring that the poor demeanor of the accused will be disclosed in the transcript. A suitable procedure might be to limit the types of poor demeanor, for example, overt homosexuality, which will be recognized as a suitable reason for the accused to wish not to take the stand, in conjunction with providing that such poor demeanor will be noted in the transcript by the judge.

essential in the self-incrimination area—protection of both innocent and guilty from a conviction based upon factors irrelevant to the likelihood of guilt.[83] Certainly a prior record or a poor demeanor presently provide reasons other than guilt which may account for the muteness of an accused. And as demonstrated in hypothetical number two, in Iowa, New Jersey and Connecticut the accused, silent because of a prior record or poor demanor, may find his silence, in fact his prior record or poor demeanor, used by the jury to convict him. In Ohio, as illustrated in hypothetical number three, given a situation in which the prosecution's evidence is not sufficient to convict the accused, he will find his silence, in fact his prior record or poor demeanor, so used.

The suggested test for determining whether comment or an inference violates the privilege against self-incrimination removes the possibility that an accused did not testify because of his poor demeanor or record of prior convictions. Assume that the accused takes the stand and either his record of prior convictions is shown by the prosecution or his poor demeanor results in a prejudiced jury. In such instances the test provides for a reversal. Thus an accused should not be afraid to testify because of his prior convictions or poor demeanor. Therefore when he chooses to remain silent, an inference of guilt is warranted. While this prevents the prosecution from proving its case by using prior convictions or poor demeanor of the accused, it is not unreasonable, because it provides the prosecution with something more relevant to the guilt-determining process—the testimony of the accused.[84] It is noteworthy that the Uniform Rules of Evidence permit comment and an inference if the accused does not testify,[85] but if he does testify he may not be impeached by proof of prior convictions unless he first puts his character in issue.[86] The suggested test grants more

[83] See section entitled Comment or Inference in the States Which Permit Them *supra* at 581 for a discussion of the importance of relevancy of the accused's silence to the inference in light of *Adamson* and *Caminetti*.

[84] See Storey, "Some Practical Suggestions As To The Reform Of Criminal Procedure," 4 J. Crim. L. & C. 495, 501 (1913), "The accused of all persons in the world knows best whether he is guilty or innocent." See also Reynolds, "Proposed Reforms of American Criminal Law," 32 Yale L.J. 368, 371 (1923):

> Once a criminal trial ceases to be a game or a contest or a legal proceeding governed by rules of a hoary tradition and becomes a search for the truth without fear and without favor, what evidence is likely to be so informing as that of the party alleged by the state to have committed the act under investigation?

[85] Uniform Rule of Evidence 23 (4):

> If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify and the trier of fact may draw all reasonable inferences therefrom.

[86] Uniform Rule of Evidence 21.

protection to the accused than the Uniform Rules because it also removes from the prosecution the use of the demeanor of the accused.

With the relevancy of the silence of the accused to the probability of his guilt thus insured, the constitutionality of the use of his silence as evidence is resolved. As discussed above, apotheosis of the accusatorial system is unwarranted when such apotheosis is not only unnecessary for the protection of the innocent but also deleterious to the guilt-determining process.

The Desirability of Comment

In the past the proponents of comment have received the support of such established groups as the American Law Institute[87] and the American Bar Association.[88] In 1935 a crime conference sponsored by the Attorney General of the United States and composed of representatives of the federal, state, territorial and local governments, as well as more than seventy-five interested organizations, recommended a rule permitting comment by court and counsel on the failure of the defendant in a criminal case to take the stand.[89] Wigmore noted the constitutional amendment in Ohio with approval in a lecture delivered before the attorneys of Cincinnati.[90]

The objective which the proponents of comment are trying to attain is a more effective system for the administration of criminal justice.[91] To many this connotes only the conviction of more de-

87 9 A.L.I. Proceedings 202, 218 (1931), "The judge, the prosecuting attorney and counsel for the defense may comment upon the fact that the defendant did not testify."

88 56 A.B.A. Rep. 137 (1931), "That by law it should be permitted to the prosecution to comment to the jury on the fact the defendant did not take the stand as a witness; and to the jury to draw the reasonable inferences."

89 See "Resolutions Adopted By The Crime Conference," 21 A.B.A.J. 9, 10 (1935).

90 See Heintz, "Criminal Justice in Ohio," 26 J. Crim. L. & C. 180 (1935).

91 The Conference on Crime explained its sponsorship of comment and other measures:

> That the Attorney General's Conference on Crime believes that the time is ripe for securing a substantial improvement in criminal procedure, and it therefore recommends to all legislatures which are meeting in 1935, a careful consideration of procedural recommendations, and particularly of the Model Code of Criminal Procedure prepared by the American Law Institute and approved by the American Bar Association and the Association of American Law Schools.

"Resolutions Adopted by the Crime Conference," *supra* note 89, at 10. That such improvement was the objective of the Ohio legislature in passing the 1912 amendment permitting comment is very apparent from the debates preceding the passage. Proceedings and Debates, *supra* note 71, at 1604:

> Mr. Peck: Look at the thousands of crimes that are committed here. The statistics are dreadful against this country on crime. Why, we have more

fendants,[92] and the effectiveness of comment is evaluated as a means to this end.

> If the defendant does not take the stand the prosecuting attorney . . . can . . . point his finger at accused and ask "Why did you not take the stand and tell the jury the thing it wants to know, to wit: whether or not thus and so is a fact?" He may thus run the whole gamut of the case and ask the jury to draw its conclusions as to why the defendant did not testify. It is a withering ordeal for the defense.
> On the other hand, if counsel for the defense, in order to escape the running fire of the prosecuting attorney in the argument, puts the accused on the witness stand, it furnishes the prosecuting attorney the opportunity to tear into shreds the testimony of the accused . . . . When the prosecuting attorney says "we rest," the attorney for the accused looks at the vacant witness chair and finds himself like the Greek sailors with Scylla on the one hand and Charybdis on the other.[93]

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in proportion to our population than any country in the world! And why have we so many lynchings? What brings greater disrepute than a lynching? I want to tell you, if you go across the water and read the newspapers, you will find that there is nothing they gloat over over there as much as the details on an American lynching. Every one of them is published in full, with all the details, in the London papers.

Mr. Halfhill: Are you not in error in stating that there are more homicides in this country to the population than any country on earth?

Mr. Peck: No, sir; this country very greatly exceeds any civilized country. There might be some in Africa that would exceed it.

[92] 2 Ohio Constitutional Convention, *supra* note 71, at 1604:

Mr. Peck: I tell you, this is an important proposition. There has not been a more important one before this body. We must do our duty, and we must not let our professional notions keep us from passing this proposal. The trouble with lawyers is that they have heard all these old legal maxims and legal saws until they have come to look upon them as a sort of ten commandments. We represent a state, the people and a law-abiding state, and we are not here to represent lawbreakers, or to facilitate the escape of lawbreakers, or to make specious pleas for the poor, weak, miserable criminal. . . . What we want is to convict that poor, weak criminal, and not let him do it again. It is to the interest of society that punishment should be prompt.

[93] Heintz, *supra* note 90, at 181; see also 2 Ohio Constitutional Convention, *supra* note 71, at 1595:

> Mr. Bowdle: We can not compel the accused to take the witness stand but we can at least smoke him out, by a process of allowing the court and counsel to do that which the court and counsel can not now do—by allowing them to draw conclusions from his failure to testify and comment upon these conclusions.

See also Dunmore, "Comment on Failure of Accused to Testify," 26 Yale L.J. 464, 465-66 (1917), in which the author reports the results of a questionnaire submitted to all the county prosecutors in Ohio. Of the fifty-two prosecutors who answered all favored comment; fifteen favored the defendant's being forced to take the stand, and the defendant took the stand in 1507 out of the 1658 criminal trials in their re-

The justification offered for the use of comment or inference is that if the accused were innocent he would be glad to testify.[94] Buttressing this argument is an analogy to the use as an admission of the extra-judicial silence of the accused when he is confronted with incriminating facts.[95] The fallacy in the reasoning of those in favor of comment as it now exists lies in the invalid assumption that the only possible explanation for his silence is guilt.[96] As dis-

spective counties. Dunmore, while admitting that there were no available statistics on how many defendants took the stand prior to the 1912 amendment permitting comment, concluded that when comment was allowed the accused usually took the stand.

[94] 2 Ohio Constitutional Convention, *supra* note 71, at 1598:

> Mr. Bowdle: Has it not been your uniform observation that innocent men charged with crime uniformly do not fail to take the stand and uniformly do not seek the protection of the bill of rights?

In State v. Cleaves, 59 Me. 298, 301 (1871), the court said: "If innocent, he will regard the privilege of testifying as a boon justly conceded." Those in favor of comment not only believe that if an accused were innocent he would testify, but they also are convinced that a jury will reach the same conclusion regardless of whether comment is permitted or not. Thus they urge that prohibition is pointless. Storey, *supra* note 84, at 506: "The inference is inevitable, and in saying that it shall not be drawn, the law is forbidding men to use their reason." Taft, "The Administration of Criminal Law," 15 Yale L.J. 1, 9-10 (1905):

> [A] jury may be charged as explicitly as possible to disregard the fact that the defendant does not go on the stand, but it is impossible to eradicate in the minds of sensible men the impression that, if one who is charged with the crime, refuses to explain by his own evidence that he was not guilty, that the reason for his so doing is because he is afraid he cannot so explain.

See also State v. Ford, 109 Conn. 490, 498, 146 Atl. 828, 830 (1929); Parker v. State, 61 N.J.L. 308, 314, 39 Atl. 651, 654 (Sup. Ct. 1898); Halsey v. State, 42 Ohio App. 291, 295, 182 N.E. 127, 128 (1932).

[95] Thus in State v. Bartlett, 55 Me. 200, 217 (1867), the court said:

> If a person accused remains silent when he may speak, he does so from choice, and the choice he makes upon such occasions has always been regarded competent evidence. . . . From time immemorial the reply or the silence of the accused person, when charged, has been regarded as legitimate evidence on this trial for the consideration of the jury.

This opinion was reiterated in State v. Cleaves, *supra* note 94, at 301, where the court said:

> When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality. Is his silence of any the less probative force, when thus in court called upon to contradict or explain, by the pressure of criminative facts, fully proved, than his extrajudicial silence when a charge is made to him or in his presence?

See also State v. Baker, 115 Vt. 94, 110, 53 A.2d 53, 62 (1947); State v. Wolfe, 64 S.D. 178, 196, 266 N.W. 116, 125 (1936) (Bakewell, C.J., dissenting).

[96] See Wilson v. United States, 149 U.S. 60, 66 (1893), ("It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him."); State v. Chisnell, 36 W. Va. 659, 671, 15 S.E. 412, 416 (1892), ("Often, indeed generally, it is best policy for him to remain silent, even if innocent. . .");

cussed above, fear of disclosure of prior convictions or a poor demeanor are possible alternatives which are applicable when an accused refuses to testify although irrelevant in the instance of extra-judicial silence.[97] The potential for abuse of the individual within such an assumption is apparent throughout the debates preceding the Ohio Constitutional amendment permitting comment:

> [I]t would be a good deal better that ninety-nine criminals be convicted, and occasionally an innocent man sent up too, for it might be a good thing for a penitentiary to have a really innocent man once in a while. I want to see a system of justice that will get the ninety-nine even though in the process it occasionally convicts an innocent man. Why, his reward in heaven will be immeasurably greater.[98]

Although comment or inference in its present form is undesirable, as circumscribed by the suggested test its contribution to the guilt-determining process is significant. It provides a means for presenting the jury with the testimony of an accused or its equivalent—an inference of guilt—when there is no apparent reason other than guilt for his silence. As Justice Bakewell said in *State v. Wolfe*, "[W]e must not overlook the fact that a criminal trial is a proceeding to determine the guilt or innocence of the defendant." [99]

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State v. Cameron, 40 Vt. 555, 565-66 (1868), ("In the great body of cases no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge."). See also, State v. Holister, 157 Wash. 4, 288 Pac. 249 (1930); State v. Steele, 150 Wash. 466, 273 Pac. 742 (1929); State v. Hopkins, 147 Wash. 198, 265 Pac. 481 (1928); Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928).

[97] In addition to fear of disclosure of prior convictions and a poor demeanor the accused's desire to test the state's case has been suggested as a reason for his silence. State v. Browning, 154 S.C. 97, 102, 151 S.E. 233, 235 (1929):

> Defendant's able counsel may have been so certain of their position as to error in the introduction of the indictment, and, for that reason, so sure of a reversal of an adverse judgment against their client, that they deemed it unnecessary and unwise to offer testimony in his behalf.

Consideration of this reason is not necessary in devising a test which will protect an accused from a conviction based upon irrelevant factors.

[98] 2 Ohio Constitutional Convention, *supra* note 71, at 1699.

[99] State v. Wolfe, *supra* note 95, at 196, 266 N.W. at 125.