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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

REPLY BRIEF

Liberty under the Fourteenth Amendment

Twining v. New Jersey Distinguished. In Light of History It Should in Any Event Be Overruled

The State of California has failed to answer our contentions in this case, either in its brief or its oral argument, which were ably presented by Mr. Walter L. Bowers, Esq., Assistant Attorney-General of the State of California.

It relies principally, if not solely, upon the holding of this Court rendered in 1908 in *Twining* v. *New Jersey,* 211 U. S. 78.

But that holding was based upon an *assumption* of a non-existent situation in the case and differs from the case at bar.[1] Nor did the *Twining* case involve a state statute which allows silence in the courtroom to supply the failure of proof. Furthermore that case was a direct evidence case

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as contra-distinguished from the present case which is based entirely on circumstantial evidence.

Nor did that case (1) shift the burden of proof, nor (2) give the right to the jury to consider an arbitrary and false presumption to flow from the failure of the accused to testify in the courtroom and to presume the defendant guilty from his testimonial silence.

That case was rendered shortly after *Davidson* v. *New Orleans,* 96 U. S. 97, where at page 104, the Court pointed out that what constitutes due process of law under the 14th Amendment is not clearly defined and the Court itself is uncertain as to its exact scope; that what is and what is not due process of law as then understood involves a "process of inclusion and exclusion."[2] Since then the inclusions and exclusions have expanded and changed.

Nearly forty years of history and suffering, including two wars, have given us a new concept of ordered liberty, a concept based upon a clear examination of those things which should be included and excluded in a living world under a Constitution that was meant to protect all the human rights for which this republic stands.

We are coming back to the Blessings of Liberty for which the Preamble and the Constitution says our country was formed.

And so we have asked this Court to overrule *Twining* v. *New Jersey, supra,* and to include in the fundamental con-

[1] "The prevailing opinion of the court added: 'We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption.'" In view of this language the point should unquestionably be regarded as still an open one under the United States Constitution.

[2] Professor Roscoe Pound says that "due process" is a standard. As a standard, he says it is a standard and not a principle and that a great part of the difficulty of lawyers is that they seek to treat this standard as if it were a principle susceptible of definition. Justice Frankfurter in his opinion in *State of Louisiana* v. *Resweber,* No. 142, October Term, 1946, treats due process as a standard.

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cepts of liberty as guaranteed by the due process clause of that Amendment, the safeguard against self-incrimination and compulsory testimony in a criminal case. This has been guaranteed by our history and by the history of common law, in fact, it is basic and fundamental in the history of mankind. It was well recognized in Roman law and in the trial of Jesus. It was the defense tactic selected by Him on that historic occasion.[3]

In *Boyd* v. *U. S.,* 116 U. S. 616, this Court said:

> * * * **Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. Boyd v. United States, 116 U. S. 616, 631-632.**

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[3] In St. Matthew, 26:60 it is said: "60 . . . yea, though many false witnesses came, yet found they none. At the last came two false witnesses,

61 And said, this fellow said, I am able to destroy the temple of God, and to build it in three days.

62 And the high priest arose, and said unto Him, answerest Thou nothing? What is it which these witness against Thee?

63 But Jesus held his peace."

Again in St. Mark, 14:57 it is said:

"57 And there arose certain, and bare false witness against Him, saying,

58 We heard him say, I will destroy this temple that is made with hands, and within three days I will build another made without hands.

59 But neither so did their witness agree together.

60 And the high priest stood up in the midst, and asked Jesus, saying, Answerest Thou nothing. What is it which these witness against Thee?

61 But He held His peace, and answered nothing."

In St. John, 19:8 it is said: "When Pilate therefore heard that saying, he was the more afraid;

9 And went again into the judgment hall, and saith unto Jesus, Whence art Thou? But Jesus gave him no answer."

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"What, let me inquire, must then have been regarded as principles that were fundamental in the liberty of the citizen? Every student of English history will agree that long before the adoption of the Constitution of the United States certain principles affecting the life and liberty of the subject had become firmly established in the jurisprudence of England and were deemed vital to the safety of freemen, and that among those principles was the one that no person accused of crime could be compelled to be a witness against himself. It is true that at one time in England the practice of 'questioning the prisoner' was enforced in Star Chamber proceedings. But we have the authority of Sir James Fitzjames Stephen, in his History of the Criminal Law of England, for saying that soon after the Revolution of 1688 the practice of questioning the prisoner died out. Vol. 1, p. 440. The liberties of the English people had then been placed on a firmer foundation. Personal liberty was thenceforward jealously guarded. Certain it is, that when the present Government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to *compel* persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law." *Twining* v. *New Jersey,* 211 U. S. 78, 117, 118.

Compulsory confessions, in or out of a courtroom, have consistently been held by this Court to be offensive to America's concept of ordered liberty.

Chambers v. *Florida,* 309 U. S. 235.

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Liberty Is a Guarantee under the Fourteenth Amendment Right Against Compulsory Testimony Is Such a Liberty

Professor Charles Warren in 39 Harvard Law Review 431, 460, in discussing "The New Liberty Under the Fourteenth Amendment" says:

"Why is not a right against self-incrimination contained in the Fifth Amendment as much a part of a person's 'liberty' as his right of freedom of speech? The Court might so hold, without overruling *Twining* v. *New Jersey,* for that case only considered the question whether a state law removing provisions against compulsory self-incrimination was a failure of 'due process'; it did not consider whether the right in question was a 'liberty' which the state could not deprive Twining of 'without due process of law.' Certainly the right to be free from unreasonable search and seizure, contained in the Fourth Amendment, is as much a part of a person's 'liberty' as his right of freedom of speech."

Justice Harlan's able and analytical dissenting opinion in *Twining* v. *New Jersey* should be the standard of due process of today.

Justices Brandeis and Holmes lived to see their dissenting opinions become the majority opinions. See Brandeis "A Free Man's Life" pages 632 *et seq.* We think Justice Harlan's reasoning is now justified in the light of experience and time.

Professor Pound in his admirable book "Social Control through Law" points out that standards of conduct—of fairness must govern (Pg. 48). The standards of the horse and buggy days must give way to the automobile, the train, the airplane.

We have asked this Court in its determination of this case to overrule *Twining* v. *New Jersey.* Factually, our

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case differs from *Twining* v. *New Jersey* wherein the case was based upon direct evidence and no statute inherently or as construed or applied in the case was involved but there was only the short statement of the trial judge in his charge to the jury, which we will quote in full hereafter. There the case was not one of circumstantial evidence, as here, but direct evidence.

In the present case we have a statute which the Supreme Court of California admits results in a measure of compulsion to take the witness stand to testify or incriminate oneself.

Nowhere in our States at present may a defendant now be called to the witness stand by the prosecution and compelled to testify. The California statute is next door to it, however, compelling by indirection what cannot be done by direction. Does this offend due process of law or take away one of the liberties protected against State action by the 14th Amendment to the Constitution of the United States as represented and defined by the 5th Amendment to the Constitution? If so, then this decision must settle the question.

As Justice Frankfurter pointed out in the *Willie Francis* case, No. 142, Oct. Term, 1946, throughout the decisions of this Court run the phrases: "Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Lisenba* v. *California,* 314 U. S. 219. "No higher duty, no more solemn responsibility rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately brilliant and unsullied for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." *Chambers* v. *Florida,* 309 U. S. 241; *Lisenba* v. *California,* 314 U. S. 219. "A fair and enlightened system of justice"—etc. These are standards of

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liberty, which every State must maintain. This Court in its 1908 decision admits in *Twining* v. *New Jersey* that "The exemption from testimonial compulsion, that is from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law though there may be differences as to its exact scope and limits." 211 U. S. 91. "At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty and a safeguard against heedless, unfounded or tyrannical prosecutions."

Testimonial Compulsion

California's Art. I, Sec. 13, as amended in 1934, is a form of testimonial compulsion. The opinion of the Court itself in *Adamson* v. *People of the State of California* so admits it (R. 385). **The Court says: "The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. Such a coercive effect, however, is sanctioned by the amendment, which, being later in time, controls provisions adopted earlier."**

We respectfully submit that examination of California's statutes under common law principles requires this Court to consider testimonial compulsion all forbidden by any state.

But independent of a review under those principles we respectfully assert that the fundamental concepts of justice embodied in the 5th Amendment to the Constitution of the

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United States forbidding self-incrimination are equally applicable to the 14th Amendment.

Justice Harlan in *Twining* v. *New Jersey* said in 1908:

"I am of the opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging—as much so, for instance, as the right of free speech (Amdt. II), or the exemption from cruel or unusual punishments (Amdt. VIII), or the exemption from being put twice in jeopardy of life or limb for the same offense (Amdt. V), or the exemption from unreasonable searches and seizures of one's person, house, papers or effects (Amdt. IV)." Even if I were anxious or willing to cripple the operation of the Fourteenth Amendment by strained or narrow interpretations, I should feel obliged to hold that when that Amendment was adopted all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the Fourteenth Amendment, no State could impair or destroy. But, as I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.

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"It is my opinion also that the right to immunity from self-incrimination cannot be taken away by any State consistently with the clause of the Fourteenth Amendment that relates to the deprivation by the State of life or liberty without due process of law." *Twining* v. *New Jersey,* 211 U. S. 78, 124, 125.

Since Justice Harlan's dissent, this Court has held freedom of speech and freedom of the press safeguarded by the 1st Amendment are protected by the 14th Amendment. *Dejonge* v. *Oregon,* 299 U. S. 353, 364; *Herndon* v. *Lowry,* 301 U. S. 242, 259. Freedom of the press: *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707; or the free exercise of religion: *Hamilton* v. *Regents,* 293 U. S. 245, 262; are safeguarded by the 14th Amendment. It has repeatedly protected one accused of crime and guaranteed his right to the benefit of counsel. *Powell* v. *Alabama,* 287 U. S. 45. It has protected one against perjured testimony in the trial of a case. *Mooney* v. *Holohan,* 294 U. S. 103. It has expressed rebellion against double jeopardy guaranteed by the 5th Amendment as equally applicable to the 14th Amendment as held in the recent case of *Willie Francis,* No. 142, Oct. Term, 1946. It has expressed rebellion against the use of confessions obtained by third degree methods. *Chambers* v. *Florida,* 309 U. S. 227.

But equally on a parity with double jeopardy in the 5th Amendment is the provision against self-incrimination and we respectfully submit that a statute which inherently results in testimonial compulsion is abhorrent to liberty-loving people. **"It is contrary to the principles of a free government. It is abhorrent to the ancestors of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power but it cannot abide the pure atmosphere of political liberty and personal freedom."**

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If then, as expressed in this Court's great opinion in *Chambers* v. *Florida,* 309 U. S. 227, confessions or statements taken as result of testimonial compulsion "would make of the constitutional requirement of due process of law a meaningless symbol because the same liberty has torn away from the courtroom a statute which permits the same to take place within a courtroom is equally offensive to due process of law and is proscribed by the 14th Amendment. As stated in the opinion of this Court the due process clause tf the 14th Amendment—just as that in the 5th Amendment—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate then and thereafter to protect at all times people charged with or suspected of crime by those holding positions of power and authority."

A Statute Which Permits Comment by the District Attorney upon the Failure of Accused to Testify and Statutory Permission for the Jury to Consider Such Failure to Testify as a Fact Against Him Is a Denial to the Petitioner of Liberty Guaranteed by Due Process of Law and of His Privileges and Immunities as a Citizen of the United States Guaranteed by the Fourteenth Amendment in That He Was Thus Compelled to Be a Witness Against Himself (by His Very Silence in the Courtroom) in Violation of the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

This is one of the Liberties guaranteed by the Fourteenth Amendment.

As this Court has said only recently that the construction of the Constitution must be a gradual process of judicial

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inclusion and exclusion as time goes on (see also *Davidson* v. *New Orleans,* 96 U. S. 104; *State of Louisiana ex rel. Willie Francis* v. *Resweber,* No. 142, October 1946 Term), it is respectfully submitted that the process of inclusion must include the fundamental right expressed by the framers of our Constitution in the Fifth Amendment. In *Bram* v. *United States,* 168 U. S. 543, the Court quoting at length from *Brown* v. *Walker,* 161 U. S. 596, said:

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities

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of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

"There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguished attributes.

"In Burrows *v.* High Commission Court (1616) Bulst., 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev., Section 886), certain it is that without a statute so commanding, in Felton's case (1628), 3 How. St. Tr., 371, the Judges unanimously resolved, on the question being submitted to them by the King, that 'no such punishment as torture by the rack was known or allowed by our law.' "

Story on the Constitution, 5th Ed., 1782, at 1788 said:

"This is but an affirmance of a common law privilege. But it is of inestimable value. It is well known that in some countries not only are criminals compelled to give evidence against themselves but are subjected to the rack of torture in order to procure a confession of guilt. And, what is worse, it has been (as if in mocking or scorn) attempted to excuse or justify it, upon the score of mercy and humanity to the

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accused. It has been contrived, it is pretended, that innocence should manifest itself by a stout resistance, or guilt by plain confession; as if a man's innocence were to be tried by the hardiness of his constitution, and his guilt by the sensibility of his nerves. Cicero, many ages ago, though he lived in a state wherein it was usual to put slaves to the torture in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking as they are brief (see 4 Black Comm. 326). They are conceived in the spirit of Tacitus and breathe all his pregnant and indignant sarcasm. Ulpian, also at a still later period in Roman jurisprudence, stamped the practice with severe reproof." (1 Gilb., Hist., 249.)

2 Story's Commentaries on the Constitution, p. 697 (5th Ed.).

"The humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."

Cooley's Const. Lim., 6th Ed., p. 375.

" 'A far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. * * *

" 'A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the states, the operation of which is believed to have been generally satisfactory.

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These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance. * * * Otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.' "

Cooley's Const. Lim., 379, 384, 386.

In *Counselman* v. *Hitchcock,* 142 U. S. 563, the Court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

In *People* v. *Courtney,* 94 N. Y. 492, the Court said:

"A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the legislature and the courts."

In *Quinn* v. *People,* 123 Ill., at page 345, the Court said:

"It is claimed by the prisoner, that in the conduct of the trial, his rights, under the constitution and laws of the

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State, were violated and disregarded. It is clear that whenever a trial is so conducted as to deprive the accused of any substantial right, he has not had a fair trial, within the meaning of the constitution, and a trial which is not fair is not only violative of common right, but is contrary to the spirit and genius of our free institutions. It is also a reproach to the courts that permit it, and a blot upon the jurisprudence of the State.''

In *McKnight* v. *U. S.,* 115 Fed. Rept. 982, 983, the Court says:

''The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the statute which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt.'' * * *

''* * * After allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.''

In *U. S.* v. *Three Tons of Coal,* 6 Biss. 386, the Court said:

''The common law rule upon this subject was thus established in England, and thus it existed and was the law of that realm, when the American colonies were organized, and when this government was formed. Under the shelter of judicial decision, the subject became secure * * * and could not be compelled to accuse himself * * * and with the adoption of the fourth and fifth amendments, principles established at common law became reaffirmed in the Constitution.''

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In *O'Neil* v. *Vermont,* 144 U. S. 323, 370:

"I fully concur with Mr. Justice Field that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction."

"These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States."

In *Twining* v. *New Jersey:*

". . . The court says: 'The exemption from testimonial compulsion, that is, from disclosure as *a witness of evidence against one's self, forced by any form of legal process, is universal in American law,* though there may be a difference as to its exact scope and limits.' "

Twining v. *New Jersey,* 211 U. S. 78, 121.

And Justice Harlan says and we agree:

". . . The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself" Twining v. **New Jersey, 211 U. S. 78, 123.**

Could the Fourteenth Amendment be adopted today with an exemption of California's Article I Section 13 or Section 1323 in it, applied to all States? We think not. If not, they violate the Fourteenth Amendment.

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Professor Charles Warren in 39 Harvard Law, 431, 460, in discussing the new liberty under the 14th Amendment points out that even without overruling *Twining* v. *New Jersey,* it would be proper to decide that the provisions of the 5th Amendment against self-incrimination are a part of a person's liberty equally with his right of free speech.

The 14th Amendment furnishes an additional guarantee against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. Among those rights are the right not to accuse oneself of crime nor to have one's silence in not accusing oneself considered as evidence or a basis for presumption or inference of guilt.

California's Article I, Section 13, of Its Constitution and Section 1323 Penal Code Compel Self-Incrimination, or Permit the Jury to Draw Arbitrary or Untrue Inferences and Result in Unfair Trials and Unfair Results of Trial.

The unanswered position of petitioner is:

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California's laws (Article I Section 13 California Constitution and Section 1323 California Penal Code) inherently and as construed and applied in this case:

> (a) violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States as that amendment is viewed in the light of the clause forbidding self-incrimination in the Fifth Amendment and in the light of a present day conception of ordered liberty and justice under the constitution. We further assert that the Fifth Amendment is a part and parcel of ordered liberty of all citizens, including California, and must be applied to the states along with or as part and parcel of the Fourteenth Amendment.

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(b) violate the privileges and immunities of citizens of the United States and of the State of California. That one of the great privileges of an American is to be free from star chamber or other questioning by anyone in the United States.

(c) violate the right not to have the burden of proof shifted and an arbitrary presumption or inference of guilt to flow from testimonial silence in the courtroom.

The California laws under attack remove the blessings of liberty guaranteed by the preamble of the Constitution of the United States to all liberty-loving peoples within our borders.

In America immunity from testimonial compulsion is a principle and standard inherent in orderly and due process of law in a free republic. The right to remain silent in a courtroom without having that silence considered as evidence of guilt or as a fact from which the jury may infer or presume guilt is a fundamental principle basically accepted by the common law and by liberty loving people everywhere.

II

Our second great proposition left unanswered is that the California law as construed and applied in this case has denied to the accused under sentence of death that *fundamental fairness* to which he is entitled under due process of law guaranteed by the 14th Amendment. This fundamental unfairness results from comment permitted by the California Statutes under attack which must be viewed not as mere error in the course of the trial but as that fundamental violation of due process which has always required of this court a re-examination of all the facts of the case regardless of any particular state rulings. *Lisenba* v. *California,* 314 U. S. 219; *Mooney* v. *Holohan,* 294 U. S. 103; *Chambers* v. *Florida,* 309 U. S. 235. This has been the

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holding of this Court where the issues involved have been questions of the use of involuntary confessions and whether a state court has ruled favorably or unfavorably this Court has examined the entire record to determine for itself whether there existed that fundamental unfairness which fatally infected the fairness of the trial. *Lisenba* v. *California,* 314 U. S. 219.

III

Our third great proposition is that the California laws (Article I, Section 13, California Constitution and Section 1323 California Penal Code) inherently and as construed and applied in this case have shifted the burden of proof unconstitutionally to the accused and have permitted arbitrary and false presumptions or inferences to flow from the mere *failure* of the accused to take the witness stand in the courtroom.

None of these great tenets which we presented in our opening brief and which we argued in oral argument have been answered in the State's brief in this case, nor in oral argument. *Twining* v. *New Jersey,* 211 U. S. 78, was a direct evidence case and not a case of circumstantial evidence and even the law of New Jersey does not permit comment on the failure of defendant to explain or deny by his own testimony personally in a case which involved purely circumstantial evidence, Judge Richard Hartshorn of New Jersey pointed out in the *American Bar Ass. Journal,* Vol. 56, p. 153. In *State* v. *Wines,* 65 N. J. Law 31, the comment was held error in the case.

Even New Jersey would not permit such comment or inference in a case such as the one at bar. Judge Richard Hartshorn of New Jersey said: "It is only where the prosecutor has proven direct evidence of the commission of the crime which the defendant has had

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personal knowledge of, that then his refusal to testify may be taken against him. If, on the other hand, mere circumstantial evidence has been produced which he cannot *directly* personally deny then his failure to testify cannot be taken against him. That is the state rule in New Jersey." 56 A. B. A. Jour. p. 143.

Can the State of California in justice say that a man's life shall be taken from him on such an inference of guilt based on the testimonial silence of the accused? If perjury in the production of evidence is a denial of due process, is not the use of an arbitrary presumption of guilt from silence and the likelihood that a false reason may ensue equally a denial of due process?

Silence as testimony for the jury to consider is shocking to the sense of justice. It is arbitrary and unwarranted. It is an unfair result obtained in an unfair way. See *Snyder* v. *Massachusetts,* 291 U. S. 97, opinion of Justice Roberts on procedural due process.

California, in its brief and oral argument holds to the contrary.

What the Jury Considers by Reason of the Defendant's Silence in the Courtroom

This case demonstrates the additional evidence which the jury considers by reason of the testimonial silence of the accused in the courtroom in this very case and the additional evidence which the jury is asked to consider because of the testimonial silence of the accused.

Thus the jury is asked to conclude: (1) that because the accused has not testified it follows that the fingerprints on the garbage disposal door with both similarities and dissimilarities are nevertheless his fingerprints because he has not taken the witness stand; that without one shred of

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evidence as to when or how they got on the garbage disposal door that it follows that they were put there on the date and time when Mrs. Blauvelt was killed. This arbitrary inference follows, says the State, because he has not taken the stand. The jury may thus consider and conclude arbitrarily, of course, that because of such fingerprints on a garbage disposal door it follows that—because of his silence—he is the man who killed her although there is no evidence whatsoever of the fact that he did or that he was ever there or ever saw her; (2) that by his testimonial silence and the fact of such silence in the courtroom the jury is permitted to conclude that the defendant took a ring or rings of the deceased; (3) that by reason of his testimonial silence in the courtroom and failure to take the witness stand the jury is authorized to conclude that the defendant in a cocktail bar had a conversation with some unknown man about selling him a diamond ring and that the diamond ring which he referred to was none other than the diamond ring which it is claimed was missing from the deceased's body when she was found even though there is no proof that the defendant ever took such a ring or that the deceased was actually wearing it just before her death or that the landlady who had talked to her had seen such a ring; (4) that by his testimonial silence and the fact of such silence in the courtroom the jury is permitted to conclude the additional fact that the defendant removed stockings from the deceased and was interested in the stocking tops from such stockings and that because the defendant failed to explain the presence in his room of the stockings by personally taking the stand that this fact of testimonial silence may be considered by the jury as proof that the defendant had drawn the deceased's dress up around her waist and had torn the panties at the crotch and that this torn part was laid up over the top of the dress (R. 304).

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While the theory of the State was that the person who entered the apartment entered it for the purpose of committing burglary yet the testimony shows that whoever was in the apartment had remained from approximately 3:30 in the afternoon until approximately between 6 and 8 p. m. (R. 287, 290, 233) although it is very strange that a person who might have gone into the apartment to commit burglary would remain from between three and five hours when the only thing allegedly taken was a couple of rings off a finger, with three rings on it, and one was left behind. Nevertheless, the jury was permitted to draw the false conclusion that whoever may have committed burglary had also committed the murder.

The State, acting through its officials, was thus able to impinge upon the jury the conclusions of guilt of *murder* and *burglary* with no evidence that the defendant had murdered the deceased but with great reliance upon the testimonial silence of the accused to support what was lacking in the proof. This is a denial of due process of law guaranteed by the 14th Amendment and is as equally shocking to the conscience of humanity of English liberty-loving people, equal with the use of a confession in which guilt is extorted by threats or promises which have been repeatedly condemned by this Court.

When the Congress of the United States authorized an accused to take the witness stand it included in the statute a specific provision that no presumption of guilt should flow from the failure of accused to take the stand. *Bruno* v. *U. S.,* 308 U. S. 287.

This was but the common law view and the American view of decency for if the failure of the accused to take the witness stand could constitute testimonial evidence of his guilt then the privilege of testifying has become a club instead to force the accused to the stand. We have presented this argument on the basis that the guarantee of the

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5th Amendment against self-incrimination should be incorporated into the 14th Amendment and that *Twining* v. *New Jersey, supra,* insofar as it holds in direct evidence case and without statute to the contrary should be overruled by this Court. We are not here concerned merely with a trial as in the *Twining* case where the judge in the charge to the jury tells the jury it may consider such a situation. We are here concerned with a statute which goes much farther and authorizes false and arbitrary inferences of guilt because of the failure of the accused to testify. The reformers have reformed too much and have invaded valid constitutional guarantees to protect life and liberty and have removed them from the pale of fair trial.

It is not sufficient to examine merely judicial interpretations of the constitutions as legislatures as well as the judiciary are charged with the duty of providing due process and protecting fundamental rights. *Mooney* v. *Holohan,* 294 U. S. 103. The Constitution of the United States protects witnesses in the federal courts from compulsory self-incrimination, and the constitution of most every state gives similar protection in the state courts.[4] The accused was nowhere a competent witness before the eighteen-sixties,[5] but was presumed innnocent and the legislation which made him competent nearly always provided that his failure to testify should not create any presumption against him. In view of such statutes it has seldom been necessary for the courts to determine how far the constitutions protect the accused.[6] We should, therefore, consider legislative as well as judicial interpretations of the constitutions; we should see how the laws have developed as well as the way they have been applied in the

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[4] *See Bruno* v. *U. S.,* 308 U. S. 287.

[5] 1 Wigmore, Evidence, 2d Ed., 1008 (1920).

[6] See, e. g., *People* v. *Tyler,* 36 Cal. 522 (1869).

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courts, in their generally expressed and almost universal view as being a safeguard to fair trial.

The first legislation upon the subject was in 1864. In that year Maine enacted a statute [7] which simply provided that the accused might testify at his own request but not otherwise. This law was followed word for word by California in April, 1866,[8] and in substance by South Carolina in September, 1866.[9] In May, 1866, Massachusetts enacted a statute [10] similar to that of Maine but with the added proviso, "nor shall the neglect or refusal to testify create any presumption against the defendant." In November, 1866, Vermont [11] provided that "the refusal of such person to testify shall not beconsidered by the jury as evidence against him." In February, 1867, Nevada [12] made the accused a competent witness but provided that "in all cases wherein the defendant to a criminal action declines to testify the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause." In July, 1867, Connecticut [13] followed the example of Massachusetts but added, "nor shall such neglect be alluded to, or commented upon by the prosecuting attorney or by the court." The Connecticut law was followed in substance by Minnesota in March, 1868,[14] and by Ohio in May, 1869.[15] In

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[7] Act of March 25, 1864; Laws of Me. (1864), c. 280, p. 214.

[8] Act of April 2, 1866; Statutes of Cal. (1865-6), c. 644, p. 865.

[9] Act of September 19, 1866; Statutes of S. C. (1866), Act No. *4780, Sec. 2; 13 S. C. Stats., p. 366(9).

[10] Act of May 26, 1866; Mass. Acts and Resolves (1866), c. 260, p. 245. See also Act of June 22, 1870; Mass. Acts and Resolves (1870), c. 393, Sec. 1, p. 302.

[11] Act of November 19, 1866; Vt. Laws (1866-7), No. 40, p. 52.

[12] Act of February 18, 1867; Statutes of Nev. (1867), c. 18, p. 58. Passed over veto by votes of 17 to 0 in Senate and 37 to 1 in House.

[13] Act of July 19, 1867; Conn. Laws (1867), c. 96, p. 101.

[14] Act of March 6, 1868; Minn. Gen. Laws (1867-8), c. 70, p. 110.

[15] Act of May 6, 1869; 66 Laws of Ohio, p. 308.

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1869 Wisconsin [16] and New York [17] enacted laws similar in substance to that of Massachusetts. In the same year a New Hampshire law [18] declared that "nothing herein contained shall be construed as compelling and such person to testify, nor shall any inference of guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify." After legislation in several territories and in several other States,[19] Congress in 1878 [20] provided for the federal courts that the accused

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[16] Act of March 4, 1869; Laws of Wis. (1869), c. 72, p. 70.

[17] Act of May 7, 1869; Laws of N. Y. (1869), c. 678, p. 1597.

[18] Act of July 7, 1869; Sess. Laws of N. H. (1867-71), c. 23, p. 282.

[19] Colorado: Act of February 5, 1872, Sess. Laws (1872), p. 95; Idaho: Act of January 14, 1875; Rev. Laws of Idaho (1874-5), Sec. 12, p. 321; Illinois: Act of March 27, 1874; Rev. Stats. (1874), c. 38, Sec. 426; Kansas: Act of February 21, 1871; Laws of Kan. (1871), c. 118, p. 280; Maryland: Act of April 7, 1876; Laws of Md. (1876), c. 357, p. 601; Missouri: Act of April 18, 1877; Laws of Mo. (1877), p. 356; Montana: Laws of Mont. (1872), pp. 271, 272; Nebraska: Act of March 4, 1873; Laws of Neb. (1873), Sec. 473, Gen. Stats. 1873, p. 827; Pennsylvania: Act of April 3, 1872; Laws of Pa. (1872), p. 34; Act of March 24, 1877; Laws of Pa. (1877), p. 45; see also Act of May 21, 1885; Laws of Pa. (1885), p. 23; Rhode Island: Act of March 15, 1871; R. I. Laws (1871), c. 907, p. 134; R. I. Gen. Stats. (1872), c. 203, Sec. 39; Utah: Act of February 22, 1878; Laws of Utah (1878), p. 151; see also Utah Comp. Laws (1876), p. 505; Washington: Act of November 29, 1871; Laws of Wash. (1871), p. 105; Wyoming: Act of December 6, 1877; Laws of Wyo. (1877), p. 25; and see Wyo. Comp. Laws (1876), c. 14, Sec. 129. In Florida the accused might make a statement under oath before the jury: Act of January 16, 1866; Laws of Fla. (1866), c. 1472, Sec. 4, p. 36; Act of June 1, 1870; Laws of Fla. (1870), c. 1816, p. 13.

[20] Act of March 16, 1878, 20 Stat. 30; U. S. C., Tit. 28, Sec. 632 (1926). The act was based upon the Massachusetts law: 7 Cong. Rec., pt. 1, p. 385. Prior to the act of 1878 the accused was not a competent witness. The revised edition of the Revised Statutes was published in the same year. It showed that the only section then in force which apparently established a general rule as to testimony in criminal trials was Sec. 858, and that section did not apply: *Logan* v. *United States,* 144 U. S. 263 at 299-303, 12 Sup. Ct. 617 (1897). 1 Wigmore, Evidence, 2d Ed., p. 81 (1920). As explained in Wigmore, the act of 1789 established for the federal courts the common law rules as to the competency of witnesses which were in force in 1789 or when the states were admitted to the Union.

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"shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." That limitation prevents any unfavorable comments by federal courts upon the failure of accused persons to testify.[21] In 1879, after decisions which will be referred to hereafter, the Maine law was amended [22] by providing that "The fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be taken as evidence of his guilt." And so on through the states. At the present time the laws of forty-two states provide that the failure of the accused to testify shall not create any presumption against him [23]

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[21] *Wilson* v. *United States,* 149 U. S. 60, 13 Sup. Ct. 765 (1892); *Reagan* v. *United States,* 157 U. S. 301, 305, 15 Sup. Ct. 610 (1894); *Bruno* v. *U. S.*, 308 U. S. 287.

[22] Act of February 14, 1879; Laws of Me. (1879), c. 92, Sec. 1, p. 112.

[23] Arkansas: Ark. Dig. Stat. (Crawford & Moses, 1921), Sec. 3123; Colorado: Colo. Am. Stat. (Mills, 1930), Sec. 2111; Louisiana: Act of 1916; Laws of La. (1916), p. 379 (see La. Code of Crim. Proc. (Dart., 1932), p. 226); Maine: Me. Rev. Stat. (1930), c. 146, Sec. 19; Maryland: 1 Md. Ann. Code (Bagby, 1924), Art. 35, Sec. 4; Massachusetts: Mass. Gen. Laws (1921), c. 233, Sec. 20; New Mexico: N. M. Stat. (Courtright, 1929), Sec. 45-504; New York: N. Y. Code Crim. Proc. (Bender, 1932), Sec. 393; North Carolina: N. C. Code Ann. (Michie, 1931), Sec. 1799; Oregon: Ore. Code Ann. (1930), Sec. 13-929; South Carolina: S. C. Crim. Code (1922), Sec. 97 (as interpreted in *State* v. *Howard,* 35 S. C. 197, 203 (1891)); Tennessee: Code of Tenn. (Thannan, 1932), Sec. 9783; Vermont: Vt. Gen. Laws (1917), Sec. 2554; Washington: Wash. Comp. Stats. (Remington, 1922), Sec. 2148; Wisconsin: Wis. Stat. (1929), Sec. 325-13.—The provision in the Louisiana act cited above was not repealed by its omission from Art. 461 of the 1928 Code of Criminal Procedure. Only provisions in conflict with the code were repealed by it: Art. 582. Those who drafted the code had proposed to authorize comment on the failure of the accused to testify, and consequently had omitted from Art. 461 the provision of existing law as to presumption. The Senate, by a vote of 39 to 0, and the House, by a vote of 76 to 3, struck out the proposed authorization of comment: Louisiana S. J. for June 13, 1928, pp. 295, 297, 310; H. J. for June 19, 1928, pp. 544, 545.

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or that it shall not be subject to comment,[24] or contain both such provisions.[25]

The states which do not conform to the general rule are: Georgia, where the accused is not a competent witness;[26] Iowa,[27] New Jersey,[28] and Ohio,[29] where the constitutions

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[24] Connecticut: Conn. Gen. Stat. (1920), Sec. 6480; Florida: Fla. Comp. Laws (1927), Sec. 8385; Indiana: Ind. Ann. Stat. (Burns, 1926), Sec. 2267.

[25] Alabama: Ala. Code (Michie, 1928), Sec. 5632; Arizona: Ariz. Code (Struckmeyer, 1928), Sec. 5179; California: Cal. Pen. Code (Deering, 1923), Sec. 1323; Delaware: Del. Rev. Code (1915), c. 129, Sec. 4215; Idaho: Idaho Comp. Stat. (1919), Sec. 9131; Illinois: Ill. Rev. Stat. (Smith-Hurd, 1930), c. 38, Sec. 734; Kansas: Kan. Rev. Stat. Ann. (1923), c. 62, Sec. 1420-1; Kentucky: Ky. Stat. (Carroll, 1930), Sec. 1645; Michigan: Mich. Comp. Laws (1929), Sec. 14218; Minnesota: Minn. Stat. (Mason, 1927), Sec. 9815; Mississippi: Miss. Code Ann. (1930), Sec. 1530; Missouri: Mo. Rev. Stat. (1929), Sec. 3693; Montana: Mont. Rev. Code (Choate, 1921), Sec. 12177; Nebraska: Neb. Comp. Stat. (1929), c. 29, Sec. 2011; New Hampshire: N. H. Pub. Laws (1926), c. 336, Sec. 36; North Dakota: N. D. Comp. Laws Ann. (1931), Sec. 10837; Oklahoma: Okla. Comp. Stat. Ann. (Bunn, 1921), Sec. 2698; Pennsylvania: Pa. Stat. Ann. (Purdon, 1930), Tit. Crim. Proc., Sec. 631; Rhode Island: R. I. Gen. Laws (1923), c. 342, Sec. 5028; Texas: Tex. Rev. Code Crim. Proc. (Vernon, 1928), Art. 710; Utah: Utah Comp. Laws (1917), Sec. 9279; Virginia: Va. Code Ann. (Michie, 1930), Sec. 4778; West Virginia: W. Va. Code (1931), c. 57, Art. 3, Sec. 6; Wyoming: Wyo. Rev. Stat. (1931), c. 33, Sec. 801.

[26] Ga. Ann. Code (Park, 1914), Sec. 1037. See also Act of December 15, 1866, Ga. Laws, 1866, p. 138. The fact that a witness claimed privilege against complsory self-incrimination in one proceeding could not be shown against him in another proceeding: *Loewenherz* v. *Merchants Bank,* 144 Ga. 556, 560, 87 S. E. 778 (1915). The court quoted from *State* v. *Bailey,* 54 Iowa 414, 416, 6 N. W. 589 (1880). "'It would indeed be strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it.'"

[27] Iowa Code (1927), Sec. 13891, provided not only that the failure of the defendant to testify should have no weight against him at the trial but that if the attorney for the state should refer to such failure he would be guilty of a misdemeanor and the defendant would for that cause alone be entitled to a new trial. The Act of March 28, 1929, 43 Gen. Acts. c. 269, p. 311, referred to that section by number and repealed it.

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clearly do not prevent comment upon the silence of the accused; Nevada,[30] where the court may not comment upon his silence unless he requests it to instruct the jury upon his right to refrain from testifying; and South Dakota, where a rule which had prevailed since 1879 [31] was changed in 1927 [32] to provide that the failure of the accused to testify in his own behalf was a proper subject of comment by the prosecuting attorney.[33]

The statutes and presumptions have always been with due regard to the fact that many reasons other than guilt motivate a defendant not to take the witness stand, as said in *Wilson* v. *U. S.*, 149 U. S. 60, 66.

"But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed

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[28] Common law forbids compulsory self-incrimination though the Constitution does not: *State* v. *Zdanowicz*, 69 N. J. L. 619 at 622), 55 Atl. 743 (1903). Defendant may testify if he so desires: Act of June 14, 1898, N. J. Laws, 1898, c. 237, Sec. 57, p. 886. Comment on failure to testify is permitted in direct evidence cases. *Parker* v. *State*, 61 N. J. L. 308, 39 Atl. 651 (1898); *Twining* v. *New Jersey*, 211 U. S. 78 at 90, 29 Sup. Ct. 14 (1908); *State* v. *Kisik*, 99 N. J. L. 385, 125 Atl. 239 (1924).

[29] See note 4.

[30] Act of March 17, 1915, Stats. of Nev. (1915), c. 157, Sec. 2, p. 192; Nev. Comp. Laws (Hillyer, 1929), Sec. 10960.

[31] Act of February 10, 1879, S. Dakota Sess. Laws (1879), c. 16, p. 49.

[32] S. D. Sess. Laws (1927), c. 93, p. 116.

[33] This South Dakota statute was held unconstitutional. *State* v. *Wolfe*, 266 N. W. 116, 104 A. L. R. 464, commented upon in 104 A. L. R. 478.

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on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.

"In this case this provision of the statute was plainly disregarded. When the District Attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness." *Wilson* v. *United States,* 149 U. S. 60, 66.[34]

Justice Jackson said in *Hickman* v. *Taylor,* No. 47 October Term 1946.

"Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness."

What about the witness without a legal education? Sometimes he may crucify a brilliant prosecutor. Most often the prosecutor would crucify him.

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[34] This statement of the prosecutor is similar to one in the instant case.

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A California case, based upon the law in existence prior to the Amendment under attack, expresses the general views on the subject:

"At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the People the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically *be deprived of the option which the law gives him,* and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. *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 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.*

"Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are

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satisfied that the defendant, *with respect to exercising his privilege under the provisions of the Act in question,* is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question." *People* v. *Tyler,* 36 Cal. 522, 529-530.

In *Petite* v. *People,* 8 Colo. 518 at 519; 9 Pac. 622, the court said:

"For if silence is to be taken as evidence of guilt, defendant's option is of but little avail; he is practically forced to testify, and once upon the stand may be required to give the very testimony upon which his conviction shall rest."

In *Price* v. *Commonwealth,* 77 Va. 393, 395 the court said: "It can never be made a means for depriving the prisoner of this presumption of innocence, as it inevitably will be if the courts and their officers are permitted to comment upon the failure of the accused to testify."

In *Powell* v. *Virginia,* 189 SE 433; 110 ALR. 90 the court held asking the production of original papers, which compelled the defendant to take the witness stand to repel an unfavorable reference from his refusal to do so invaded the defendant's constitutional rights and includes and compares the Fifth Amendment in its opinion.

In *Ruloff* v. *People,* 45 N. Y. 213, 221, 222 the Court said:

"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

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be treated as of but little value, will be subject 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 pretence 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-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. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.

"The Legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect of refusal of the accused to testify should not create a presumption against him." Ruloff v. People, 45 N. Y. 213, 221, 222.

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In *Bruno* v. *U. S.,* 308 U. S. 287, 293, this Court said:

"But congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him."

And on page 294—"and when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of the jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary presumption and not without support in experience."

The dissenting opinion in *Twining* v. *New Jersey* says:

"Can there be any doubt that at the opening of the War of Independence the people of the colonies claimed as one of their birthrights the privilege of immunity from self-incrimination? This question can be answered in but one way. If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its Convention of May, 1776—in advance, be it observed, of the Declaration of Independence—made a Declaration (drawn entirely by the celebrated George Mason) which set forth certain rights as pertaining to the people of that State and to their posterity 'as the basis and foundation of government.' Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself." *Twining* v. *New Jersey,* 211 U. S. 78, 119, 120.

Lack of Fair Trial

In addition to the statute, however, under the considerations of our questions as a violation of due process of

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law guaranteed by the 14th Amendment to the Constitution of the United States, we have another consideration of whether the accused has been accorded a fair trial. For a fair trial has always been held to be an essential requirement under the due process clause of the 14th Amendment to the Constitution of the United States. *Lisenba* v. *California,* 314 U. S. 219. This Court has said that a fair trial is denied to an accused when a confession obtained by third degree methods is introduced in evidence against him. *Chambers* v. *Florida, supra; Lisenba* v. *California, supra.* How much more unfair is it to convict an accused where the evidence as in this case is extremely weak and where the defendant's silence is testimonial evidence that he could not explain or deny (1) fingerprints; (2) alleged conversation regarding a purported offer of sale of a diamond ring; (3) the condition under which the deceased was found with stockings removed and three stockings tops found in his room. Thus silence is permitted to supplant the need for evidence and such proceeding is unfair.

Furthermore, when viewed in the light of the facts in the case the constitutional provision and statute permitting the prosecutor to comment as he did resulted in unfair trial and an unfair result.

Comments of Prosecutor

The prosecutor told the jury that he stood before them "in the capacity of a sworn officer of the law, a part of the district attorney's office, for the purpose of presenting the facts available to you intending to see that a proper verdict is arrived at" (R. 336).

Thus speaking in the name of the authority of the State, the prosecutor went on to tell the jury that there were 441 pages of testimony (R. 338) and later on that none of it was denied by the accused. The prosecutor told the jury that

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Frances Jean Turner overheard the defendant say to another colored man in substance and ask this man "if he would be interested in buying a diamond ring." "No, he was not interested" (R. 333). Prosecutor said in reference to this: "The defendant has not taken the stand; he has not denied that; it is uncontradicted in the testimony. There he sits, not getting on the stand, not giving you what his version of the situation is. You have got the right, members of this jury, to consider the fact and consider that four hundred and some odd pages of testimony are uncontradicted from the lips of this defendant. Why? For example, during the time that Frances Turner was on the stand—it happened here in the courtroom—the defendant and his counsel went into a huddle, and then came up with some questions about a juke box. You remember that. He was there. That conversation happened. He has not denied it; it is uncontradicted" (R. 343-344).

Again we have comment about two pillows that were on top of the deceased when she was found. The pillows had the appearance of blood underneath. The prosecutor argues: "That in itself, with reference to the condition of those pillows there, appearing to be blood, indicate that the defendant had remained in that apartment for some considerable period of time; a considerable period of time; unquestionably those pillows were changed. Why, I don't know. The man over here knows, but he does not tell.[35] We have, in addition to the situation on the pillows—when I say a long period of time, that statement is corroborated by the

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[35] What evidence is there he knows and does not tell? None. It is left to be proved by the defendant's silence. It resembles trial by ordeal, which supplanted lack of proof. See Wigmore's Kaleidoscope of Justice, page 5. The theory is that a Divine or supernatural power can manifest to mankind the truth in controversy, and that it will do so when properly sought. Here the State supplants silence for the ordeal. Or should we call it the ordeal of Silence?

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testimony of Mrs. May, the lady across the hall. Now, she is, you will recall, that afternoon seated on the divan, and then later on, I believe she said around 5:30 or 6 o'clock, she went to bed. She is not definite as to the time. Counsel read it from the transcript of the preliminary hearing, and I think her time was some place between 6:30 and 8:30; somewhere in that vicinity'' (R. 348).

With reference to the stockings being taken off the body and the exposure of Mrs. Blauvelt's body, the prosecutor argued: ''Mr. Brennan testified that that photograph was taken for the purpose of showing that the under garments or pants that Mrs. Blauvelt had on were torn across the crotch. Now, by looking at People's Exhibit 34 you can see in that exhibit what appears to be a portion of a woman's garment used for the purpose of holding up the stockings. We know from the testimony that the stockings are taken off. We know that the shoes are off when the body is found. We know that the lower portion of her body, when the brown coat is removed, is entirely exposed up to the position that Mr. Brennan said. Now, the defendant has not explained that. He has not told you why. I would have liked to find out, if he had gotten on the stand, and I think you would have liked to have known why'' (R. 350).

Again the prosecutor commented as follows: ''Again he says, 'I will have my attorney and all my alibi witnesses there when the time comes.' Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? If he had alibi witnesses that would testify, they would be up here testifying'' (R. 367). A false inference was also permitted to be drawn by the jury regarding the defendant's failure to testify which involved the tops of three women's stockings identified as having been taken from the defendant's room and admitted over objections into evidence (R. 314-

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315) (People's Exh. 35). One of the stocking tops was found on his dresser, the other two in the drawer of the dresser among other articles of apparel. The stocking tops were not all of the same color and at the end of each part away from what was formerly the top of the stocking a knot or knots were tied. None of the stocking tops from defendant's room matched with the bottom parts of the stockings found under the body of the deceased (R. 382). There was evidence that on the day of the alleged murder the deceased had been wearing stockings.

To allow the jury to draw a false and unwarranted inference that merely because the defendant had not testified that he had something to do with removing the stocking from the deceased is to permit false evidence in a trial to convict an accused.

The prosecutor argued regarding the stockings: "And when the body was removed underneath the body he found the foot portion of the stocking and that was introduced here in evidence. We placed in evidence three stockings found in the room of the defendant. From the appearance I think it is readily determined that they are women's stockings. They are tied at the top. We have the top part of the stocking Mrs Blauvelt had, missing, and the whole stocking she had on the other leg missing." Yet the evidence showed that none of these stockings were alike, nor were the same stockings. Yet the prosecutor continued:

"Going to some of the other testimony in this case, Mr. Pinker testified to making certain observations there and finding certain things at the scene. He is the witness that testified that he was there when the Coroner deputies removed the body, and when the body was removed, underneath the body he found the foot portion of this stocking, and that was introduced herein to evidence. We placed in evidence the tops of three stockings found in the room of

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the defendant. From the appearance, I think it is readily determinable that they are women's stockings. They are tied at the top. We have the top part of the stocking that Mrs. Blauvelt had on, missing, and the whole stocking she also had on the other leg missing. Counsel on cross-examination of one of the witnesses—I believe it was Miss Massey, one of the women that saw her on that date, last saw her alive, and asked her if she was wearing stockings, and she said she was. The defendant has not seen fit to explain what these stockings are doing in his room. It is rather an unusual situation where we find stockings gone and three women's stockings in the room of the defendant. * * * At least, we have those in the possession of this defendant. No explanation; nothing said or testified by him as to what they are doing in his room. The record is silent'' (R. 346).

Again the prosecutor commented as follows:

''Counsel asked this question: 'The defendant may or may not take the stand'—you remember that—'In the event he does not take the stand, will you view that in the light of the presumption of innocence?' You were asked this question by myself: If the court instructs you that you can consider the fact of the failure of the defendant to take the stand, his failure to explain or deny anything, if you would do that, and you said you would. Now, the defendant does not have to take the stand in any case. He didn't take it here. He did not call, however, any witnesses. He tells the officers, 'I will have my alibi witnesses.' Where are they? Where are they? You know what stopped him. Those fingerprints; those fingerprints. Not one single witness did they call to the stand. You heard yesterday, 'The People rest,' and the defendant said, 'The defense rests.' I say, why didn't they have them? The reason is, finger-

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prints; powerful evidence. So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid. He does not tell you.''

The district attorney also made the following comment on the law:

''Counsel, in starting out, tells you about the presumption of innocence and the doctrines of reasonable doubt. He says that the defendant is clothed with the presumption of innocence. . . . And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case. . . . If there is any mystery that has occurred in this case, it is a mystery from the defense side of this case. Did the defense clear up any mystery? The answer to that is 'No' '' (R. 369-370).

Another argument on the defendant's failure to take the stand follows:

''Then counsel says, if the defendant wasn't there, what has he got to tell you? He says, 'If he wasn't there, what has he got to tell you?' Well, there are a lot of things he could tell us. If he wasn't there, where was he? Where was he? Was he by himself or was he with somebody? Where are these alibi witnesses he talked about? He could explain how his prints got on there, and he could explain what he was trying to do when he was selling or attempting

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to sell a diamond ring. He could have done that. Neither he nor witnesses did it. Those are matters which all have been testified to and are here in this case" (R. 372).

Again the prosecutor commented: "Now, the defendant does not say, from the witness stand here, 'I put my prints on the door there at the preliminary'; and he does not say, 'I put my prints on there at the police station' " (R. 376).

And in conclusion the prosecutor said: "Well, I again repeat the statement I made this morning: that this defendant had the right to take the witness stand; it is a privilege afforded to him, and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it.

"In conclusion, I am going to just make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness. I leave the case in your hands" (R. 379).

The above comments were made in a case of circumstantial evidence.

Compare the comments of the California prosecutor, permitted by the California laws under attack and approved by the California courts with the following comments in the *Twining* v. *New Jersey* case by the court:

Page 98 *et seq.*, Original Record No. 10, October Term, 1908.

The Court:

"Now that meeting was held or not.

"That paper says that at this meeting were present among others, Patterson, Twining and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that

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he was not present at any such meeting, and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

"Now Twining and Cornell, this paper says were present. They are here in Court and have seen this paper offered in evidence and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present, or to show that the meeting was held.

"Now it is not necessary for them to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

"Now, of course in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any obligation. It is simply a right they have to go upon the stand, and consequently the fact that they do not go upon the stand to contradict this statement in the minutes they both denying through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

On page 102-103 the court further charged the jury:

"Now gentlemen, if you believe that this is so; if you believe this testimony that Cornell did direct this man's attention to it—Cornell has sat here and heard that testi-

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mony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt Cornell is guilty. And yet he has sat here and has not gone on the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

"Now, Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg in this respect. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So consequently the fact that Twining did not go upon the stand can have no significance at all.

"You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

We are not concerned here with mere error of the California prosecutor but with a series of comments which the Constitution and statute of the State of California apparently authorized the prosecutor to make and which are the

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application by him of the statutory authority and which were made pursuant to that constitutional and statutory provision but which shock the conscience of justice, and deprive one of liberty without due process.

Prior to 1934 such comment would have been reversible error. *People* v. *Tyler,* 36 Cal. 522. It was only pursuant to the authority of the Constitution and statute that the prosecutor was thereafter able to make the comments that he did.

The California Supreme Court considered the claim that this statute inherently and as applied in this case violated the 14th Amendment of the Constitution of the United States and held against that claim. The California Court said:

> **"The practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment. Such a coercive effect, however, is sanctioned by the amendment, which, being later in time, controls provisions adopted earlier" (R. 385).**

Defendant's Failure to Testify replaces Essential But Missing Evidence

"It apepars from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings

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or rings that had no connection with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 389).

Thus the defendant's silence supplants the lack of proof by the State.[a]

The State based its denial of petitioner's claim upon authority of *Twining* v. *New Jersey,* 211 U. S. 78 (R. 386), but this decision overlooks three phases of the *Twining* case. First, that in the *Twining* case the decision was unnecessary to the facts of that case, and second, that the case was one of direct testimony and not of circumstantial evidence and did not involve a statute, such as here, which permits the court and prosecutor to comment on the failure of the defendant to explain or deny personally by his testimony any facts against him. In the *Twining* case the comment was by the court and there, too, the court, so far as Twining was concerned, stated that he did not personally need to go on the stand and deny the charges against him. Nor would the

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[a] There have been several practical objections to the proposal to substitute comment of the prosecutor for substantial evidence. One of these objections is akin to the objections by the Wickersham Commission in 1936 to the use of "third degree" evidence out of helpless prisoners. That method, said the Wickersham Commission, made police officers lazy in their quest of competent evidence. The same objection has been voiced to the statutes. It is said that prosecutors will rely either upon their ability to extort a confession on the witness stand or in the absence or failure to take the stand they can effectively argue the fact of testimonial silence to the jury as proof of defendant's guilt. Thus, it will not be necessary for prosecutors to get competent or sufficient evidence at all. They can rely upon shifting the burden to the defendant to defend himself or upon the failure of defendant to testify to buttress their case against the insufficient or incompetent or irrelevant evidence.

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fact that he did not take the stand personally be considered against him. The court's instructions were very limited and did not compel the defendant to take the witness stand. Neither did the court's comment result in an inference in that case which might have been false because of a situation, such as here, where Adamson could not take the witness stand because of a prior conviction of felony. Here the statute admittedly amounts to testimonial compulsion. While there has been some comment in the brief of the respondent, State of California, that other decisions support the *Twining* case in their comment, none of the other decisions or cases involve, as here, a question of a statute which amounts to testimonial compulsion nor do any of those cases involve compulsory self-incrimination. The case of *Snyder* v. *Massachusetts,* 291 U. S. 97, involved merely the right of showing place of an offense when the defendant does not accompany the jurors to the scene of the crime. *Palko* v. *Connecticut,* 302 U. S. 319, involved merely the right of a state to retry an accused a second time and convict him of murder after the State had appealed the decision. No other case since *Twining* v. *New Jersey, supra,* in this Court has involved the great immutable principle of justice that an accused should not be compelled to testify and no case has involved a statute, such as here involved which says that the jury may consider the defendant's failure to take the stand as a fact against him.

We respectfully submit that "The due process clause of the 14th Amendment withdrew the freedom of a state to enforce its own notions of fairness in the administration of criminal justice" where "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that the right against testimonial compulsion in a free republic whether it consists in the seizure of a person or of a document or the extorting of testimony "has been offensive

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to the free spirit of an American, to the free spirit of an Englishman and objectionable except where despotic power reigns."

These matters offend principles of justice inherent in our American Government and violate standards of decency universally accepted in this country, and so far always thought to be an inalienable right of an American

Through "the gradual process of judicial inclusion and exclusion" this Court has given accused defendants the right and protection of counsel of his own choice, adequate time to prepare for a defense, freedom from the use of extorted confessions and safeguards against double jeopardy and cruel or unusual punishment. But of what avail is the protection of counsel if counsel is put to the difficult task of advising an accused who has suffered a previous conviction of a felony? To take the witness stand would mean to expose his past and result in conviction but not to take the witness stand would mean that the prosecutor could use the very fact of silence in the courtroom as a fact of guilt.

Of what avail is it that able counsel should appear in the courtroom in behalf of an accused and yet be unable to explain away the silence of the defendant and the state statutory and constitutional provision of having the jury consider the defendant's silence as proof of facts otherwise left unproved in the case? His most brilliant oratory, his most convincing arguments, his most subtle reference, his most careful pulls at the heartstring or appeals to reason, all go for naught when the prosecutor says, as in the present case, "Counsel asked you to find this defendant not guilty, but does the defendant get on the stand and say under oath 'I am not guilty,'" or where the prosecutor says "Counsel asks you to do for the defendant what he does not do for himself, tell you he is not guilty."

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The Prosecutor's Argument: The Defendant's Requested Instructions to Cure the Error Refused. Cases Cited

During oral argument Mr. Chief Justice Vinson asked counsel for authorities to the effect that a requested instruction to the jury under California practice would cure any error or misconduct committed by the district attorney in his comments or was sufficient under California practice. See *People* v. *Tyler,* 36 Cal. 522. Further authorities in response to this request are as follows: *People* v. *Mayen,* 188 Cal. 237, 259. The court said (188 Cal. 257): "The specifications of misconduct of the counsel for the prosecution representing the district attorney's office had some foundation. There were repeated comments of the prosecuting officer which were open to censure. For the most part the court corrected them *by instructions to the jury. . . .*"[36] Again on p. 259 the court said: "Neither was there anything in the instructions to indicate to the jurors that they should not consider to his prejudice the failure of the defendant to testify." In *People* v. *Tedesco,* 1 Cal. 2d 211, 221, where the prosecutor commented on the failure of the defendant to take the witness stand, the court said: "The jury was advised in the charge that if the defendant in a criminal case does not testify, failure to do so shall not be taken as a circumstance against him. We, therefore, find no error." In *People* v. *McCarthy,* 115 Cal. 255, 262, the court said: "It is found suggested in People *v.* Schmitt, supra, that the instruction was evidently given to correct an erroneous suggestion made in the argument of counsel and for that purpose was proper." In *People* v. *Schmitt,* 106 Cal. 51, the court gave an instruction in the charge to the jury to correct a mistake of the district attorney. He held that the proper time to do so was in his charge to the jury.

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[36] The petitioner's requested instructions were refused.

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In *People* v. *Kynette,* 15 Cal. 2d 731, the defense counsel asked the trial court to instruct the jury as to the effect, if any, of the refusal of witnesses to testify. The court instructed the jury, which instruction the appellate court held cured the error.

See also *People* v. *Glass,* 158 Cal. 650. In *People* v. *Williams,* 32 Cal. 280, 287, the court said: "It will rarely fail to happen that subjects for instruction, not previously thought of, will be suggested or occur to counsel pending the argument or after its close; and as one of the objects of giving instructions is to present the law of the case fully, and not partially, it would hardly be consistent with that object to refuse matters of perhaps vital importance merely because they did not occur to counsel at or before a given stage in the proceedings, and if such was the case here we should feel inclined to hold an error, as being an abuse of discretion." Independent of rules a party would have a right to submit his instructions at any time before the jury left the box. In *People* v. *Sears,* 18 Cal. 635, the court said: "It is true that injustice may be done a defendant in some cases by refusing to consider instructions because not offered before the argument, since such instructions may be necessary in consequence of the propositions or argument of the prosecuting attorney. In such cases the court should either give the instructions of defendant or make such explanations of his own as would put the law correctly before the jury." In *People* v. *Dukes,* 16 Cal. App. 2d 105, 110, the defendant has in the case at bar offered an instruction to the jury regarding defendant's failure to take the witness stand and told the jury that not the slightest presumption of guilt is raised against the defendant by reason of the fact that he has not taken the witness stand. The California court held that: "The instruction, if given, would have in effect told the jury not to consider that which the con-

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stitutional amendment authorized it to take into consideration (referring to Art. I, Sec. 13 of the Constitution, as amended in 1934, and Sec. 1323 of the California Penal Code)."

In California Penal Code, Sec. 1127, it is stated that ". . . Either party may present to the court any written charge on the law but not with respect to matters of fact and request that it be given if the court thinks it correct and pertinent; if not, it must be refused. Upon each charge presented and given or refused the court must endorse and sign its decision." * * * Sec. 1259 of the Penal Code provides: ". . . 1259. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court if the substantial rights of the defendant were affected thereby."

Even without any instructions being offered, it is the rule in California that "Where an examination of the entire record fairly shows that the acts complained of are of such a character as to produce an effect which as a reasonable probability could not have been obviated by any instruction to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court." In *People* v. *Podwys,* 6 Cal. App. 2d 71, the court there held that the district attorney was guilty of serious misconduct in the argument to the jury which was persistent, amounting to a course of conduct throughout the trial and that a fair and impartial trial was not had for that reason. See also *People* v. *Adams,* 14 Cal. (2) 154, 162; *People* v. *Tyler,* 36 Cal. 522; *People* v. *Wells,* 100 Cal. 459, 465; *People* v. *Stafford,* 108 Cal. 26; *People* v. *Simon,* 80 Cal. 675, 679; *People* v. *Edgar,* 34 Cal. 459, 469; *People* v. *Shears,* 133 Cal. 154.

The defendant offered a series of instructions designed to cure the prosecutor's comments on this failure personally

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to testify or explain by his testimony the evidence against him (R. 390). Thus, the defendant offered an instruction that "You are instructed that it is the policy of the law to zealously protect the innocent. In a criminal case the law clothes the defendant with a presumption of innocence and casts upon the people the burden of proving guilt beyond a reasonable doubt. The defendant is not obliged to prove his innocence or offer any proof thereon, and if the defendant elects not to take the witness stand but to rest upon what he believes to be the weakness or insufficiency of the People's case, he has a right to so do and no inference or presumption of guilt arises from his failure to take the witness stand."

"You are instructed that the burden of proof rests on the prosecution and the failure of the defendant to take the stand raises no presumption or inference of guilt." These instructions, if given, would have cured the mere error of the prosecutor insofar as one or more of his comments were concerned and under California practice the request for an instruction was a proper method to cure any misconduct on the part of the prosecutor. There were many other instructions offered and refused which are contained in the opinion and in the record (R. 390, 391).[37] Many others were offered and refused.

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[37] In the case of *Greenberg* v. *The People of the State of California*, No. 466, October Term, 1946, now pending in this Court, the defendant, Greenberg, was tried on the identical statute and constitutional provisions as in the present case before the same Court and judge with the same instructions offered and with repeated objections to the prosecutor's comments on the failure of the defendant to explain or deny personally by his testimony any of the evidence against him. Greenberg did not take the stand. He, too, has suffered a prior conviction. The Trial Court overruled the objections and denied the claims under the 14th Amendment, including the claim of the prosecutor's misconduct because of his comments on the failure of the defendant personally to explain or deny the testimony against him. The California District Court of Appeals, based upon the Adamson decision, affirmed that judgment also and an appeal was allowed to this Court.

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We are not dealing here alone, however, with mere error in the prosecutor's comments to a jury but with a state constitutional provision and a statute of the state which give the prosecutor the right to comment on the failure of the defendant personally to explain or deny by his testimony any evidence against him inherently and as construed and applied in the instant case, and the fact of the defendant's silence, as thus commented on, may be considered by the jury.

In *Mooney* v. *Holohan,* 294 U. S. 103, the Court said: regarding claimed misconduct by the use of perjured evidence by the prosecutor: "Reviewing decisions relating to due process, the Attorney General insists that the petitioner's argument is vitiated by the fallacy 'that the acts or omissions of a prosecuting attorney can ever, *in and by themselves,* amount either to due process of law or to a denial of due process of law.' The Attorney General states that if the acts of omissions of a prosecuting attorney 'have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusation against him, then such acts or omissions of the prosecuting attorney may be regarded as *resulting* in a denial of due process of law.' And, 'conversely,' the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied.'

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation

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through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State 'whether through its legislature, through its courts, or through its executive or administrative officers.' " *Mooney* v. *Holohan,* 294 U. S. 103, 111, 112, 113.

What difference is there in deceiving a jury by perjured evidence and deceiving it by claiming that the defendant is guilty because he does not take the witness stand when the real reason is that the defendant has been convicted of a prior felony and cannot expose his past?

The statute permits the prosecutor to argue on a false premise that the defendant is guilty because he did not take the witness stand and permits the jury to consider that false premise as the reason for the defendant's silence in the courtroom. Such a statute which permits a false argument or false conclusion to be reached offends standards embodied in the fundamental conception of justice which lie at the base of our civil and political institutions. Hebert v. Louisiana, 272 U. S. 312, 316, 317; Mooney v. Holohan, 294 U. S. 103.

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Such a statute inherently "violates standards of decency more or less universally accepted" or offends " immunities implicit in the concept of ordered liberty" or offends a principle of justice "practiced in the traditions and conscience of our people" or repugnant "to the conscience of mankind," phrases used by Mr. Justice Frankfurter in *State of Louisiana* v. *Resweber,* No. 142, Oct. Term, 1946. In other words "due process of law" is a standard, and without defining it, we know that it must not be repugnant to standards of ordered liberty or offend principles of justice practiced in the traditions and conscience of our people or repugnant to the conscience of mankind.

Does a statute which amounts to a backdoor compulsion of a defendant to testify and which the State of California recognizes in its practical effect compels the accused "to do so to avoid the adverse effects of the comments and consideration authorized by the amendment" (R. 385) violate the *standards* of decency more or less universally accepted in the United States of America?

Even before our nation was formed, the star chamber method of inquisition was abolished. The provision against compulsory testimony of any character was forbidden in England and became deeply enrooted in the common law. *Boyd* v. *United States,* 116 U. S. 616, which has been repeatedly reaffirmed by this Court, re-enunciated this sound principle at length. 42 of the 48 states wrote into the state constitutions the provision of the 5th Amendment to the Constitution of the United States, thus expressing an almost universal standard of decency in regard to criminal trials throughout the United States. For equally with the resonsibility of safeguarding the fundamental principles of justice and liberty that inhere in our institutions with the courts are those of the state legislatures of the various states of the Union. This expression by each of them of the

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principle which the Federal Government had incorporated in its 5th Amendment is but a universal expression of common decency. Furthermore, it has been one of the immutable principles of justice which inhere in the very idea of free government, *Holden* v. *Hardy*, 169 U. S. 366, 389, that no accused should be forced to testify and in no state at the present time do we know of such a case where the accused can be called to the witness stand by the prosecution. The California constitutional provision and the statute, though, compel him to testify or suffer inferences of guilt for failure to do so. This offends the principle of justice 'rooted in the traditions and conscience of our people' that no accused shall be compelled to testify or that if he fails to do so a presumption or inference of guilt arises against him.''

This Court has said that it is ''repugnant to the conscience of mankind'' to permit officers of the state to take an accused and extort a confession from him in a jail, *Chambers* v. *Florida,* 309 U. S. 235, or in some private place, *White* v. *Texas,* 310 U. S. 530, 533; *Lomax* v. *Texas*, 313 U. S. 544; *Canty* v. *Alabama,* 309 U. S. 629; *Vernon* v. *Alabama*, 313 U. S. 547, or under a host of other circumstances and situations which this Court has had occasion to condemn as violative of the 14th Amendment. The California statutes substitute the place of compulsion *as that of the courtroom.* The opinion of the Supreme Court of California admits that the statute has a form of compulsion. Justice Jackson in oral argument used the expression that it puts ''the heat'' on the defendant to testify. This might be characterized as ''statutory heat'' replacing the club, the fist, the bludgeon, the rubber hose.

The only difference is that instead of being wielded in the seclusion of a cell by a furtive minion of the law it is administered in open court with the defendant and his counsel sitting helplessly by, while the heat is legally applied by the state's District Attorney aided and abetted

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by the judge in his stately black and somber robe. I say legally, if this constitutional provision is permitted to stand. It says you get on the witness stand and subject yourself to questioning of a clever prosecutor who is prepared to shrivel you to pieces, very much like the star chamber methods which were disapproved in England and the earlier ecclesiastical courts. The statute says, in effect, if you don't do so there is a presumption or inference of guilt which the jury has a right to consider from the mere fact of silence in the courtroom.

Thus, you are damned if you do and you are damned if you don't.

But if this Court's "minds rebel against permitting the same sovereignty to punish an accused twice for the same *offense,*" *State of Louisiana ex rel. Willie Francis* v. *Resweber,* No. 142, Oct. Term, 1946, then this Court's mind should equally rebel against removal of an equivalent constitutional guarantee equally sacred and expressed in the same Constitution.

Construction of the Statute by the State

We come then next to the question of *construction* of the California statutes in this case.

The California Court considered the statute inherently and as construed and applied in this case upon our challenge in that court. Upon motion for a new trial (R. 32) in the trial court and in the Supreme Court of the State of California, both in its hearing and on rehearing (R. 394), the California Court held that pursuant to the constitutional provision and the statute the defendant "in any criminal case whether the defendant testifies or not his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the jury.

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The construction and application, therefore, of the statute permits a jury to consider as evidence in the case testimonial silence in the courtroom as a fact for it to consider in reaching its verdict and was permitted to do so in this case.

When does the silence of the accused become proper for consideration?

The prosecution puts in all its evidence at which time the accused asks for an advised verdict. If the prosecution has failed to make out a *prima facie* case the defense is entitled to an advised verdict. The silence of the accused in the courtroom is no part of the people's case up to this point.

If it becomes proper for consideration thereafter it is testimony extorted from the defendant in the courtroom, and if there are two reasonable theories that can be given to the evidence, one of innocence, and one of guilt, the rule of law that the jury must accept that one of innocence and reject the one of guilt is outweighed and tilted to say that the jury shall accept that of guilt if the defendant fails to testify.

Mr. Justice Reed asked the question in the course of oral argument as to just what additional fact is proved or established by the silence of the accused or what additional fact or inference might the jury consider by reason of the silence of the accused. The answer is that several things are considered by the jury by the reason of the mere silence of the accused.

The California Court says:

"It appears from the evidence that defendant could reasonably be expected to explain or deny all evidence presented. Thus the jury could infer from the evidence concerning the fingerprints either that defendant handled the garbage compartment door in the perpetration of the burglary and murder or that they were placed there at some other time. The defendant could reasonably be expected

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to know whether or not he had handled the garbage door and if so, on what occasion. The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings or rings that had no connection with the crime. The defendant could reasonably be expected to know whether or not he had done such soliciting and, if so, with regard to what rings. His failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 389).

Thus the failure of the prosecutor to prove when or how any fingerprints got on the door was supplanted by the argument to the jury and in the inferences which the jury were permitted to draw and approved by the court's opinion by the mere failure of the defendant to take the witness stand. There was not one scintilla of evidence to show that accused had *murdered* Mrs. Blauvelt or that he had ever laid a hand on her or injured her or taken any jewelry from her or been in the apartment three to five hours after the alleged attack. As a matter of fact, it is hard to believe any such thing occurred. Yet the California court permits the jury to infer from the mere failure of the defendant to take the stand what the prosecutor failed to be able to prove.

Thus the presumption of innocence is overcome by testimonial silence in the courtroom.

The California Court says "defendant could reasonably be expected to know whether or not he had handled the garbage door and if so, on what occasion." The prosecutor never proved time, place, or circumstances of the defendant having handled the door and the testimony of the police and sheriff's experts showed marked dissimilarities in the defendant's actual fingerprints with those allegedly found

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on the door by the sprinkling of a powder. Yet the jury was given the authority to presume the defendant's guilt of murder beyond a reasonable doubt on this slim evidence.

The California Court further says: "The evidence that he solicited someone to buy a diamond ring is susceptible of an inference either that he was attempting to sell the victim's rings or rings that had no connection with the crime." Of course, the evidence relating to the question of the ring is merely a purported statement which it is alleged the accused made to someone in the Colony Club about a ring with no showing that it had any relationship whatsoever to any ring of the deceased or that there ever was such a ring. Nevertheless, the California court construes the statute to authorize the jury to presume the guilt of the defendant and that this was the ring in question because the defendant's "failure to explain or deny this evidence by his testimony could have been considered by the jury as indicating that the evidence was true and that the inferences unfavorable to the defendant were the more probable" (R. 390). Yet the court recognizes that the defendant's failure to take the witness stand could have been logically and properly explained because of his prior convictions of felony which would have been exposed to the jury had he taken the witness stand. The court admits that "Since fear of this result is a plausible explanation of his failure to take the stand to deny or explain evidence against him, the inference of the credibility and unfavorable tenor of such evidence that arises from this failure is definitely weakened by this rule of impeachment." This weakness, however, could not be revealed to the jury by counsel or court without prejudicing the defendant through the revelation of past crimes. Court and prosecutor are left no alternative but to comment on defendant's failure to deny or explain evidence against him as though the sole reason for

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his silence was that he had no favorable explanation. Any change in the law in this respect, however, must be made by the Legislature" (R. 393).

We respectfully differ. We think that it is a violation of due process of law for a statute to permit a false inference of guilt to arise and to permit argument to go to a jury that a defendant is guilty because he fails to take the witness stand where the *real reason* for his failure to take the witness stand may be the fact that he has suffered *previous conviction or convictions* of felony.[38] Such a presumption or inference is arbitrary and since it is possible to lead a jury to a false presumption or inference or conclusion and did in this case such a proceeding should not be permitted any more than the use of a false confession, or perjured testimony forbidden by this Court in its illustrious decicions of *Chambers* v. *Florida,* 309 U. S. 227 or *Mooney* v. *Holohan,* 294 U. S. 103.

Is it not fraudulent concealment authorized by statute to permit comment on the failure of the defendant to take the witness stand as proof of guilt when the judge and prosecutor both know the defendant has suffered a prior conviction of felony and that is most likely the true reason for the defendant's failure to take the stand?

Further Evidence of Unfair Trial

The further elements of *unfair trial* in this case unanswered by the State are shown by the paucity of evidence that the defendant murdered the deceased. Stella Blauvelt, aged 64, was found dead in her apartment on July 25, 1944. She had apparently been dead a day and a half when she was found with her face upward covered with two bloodstained pillows. She still wore her wristwatch and a box

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[38] The defendant in this case suffered from prior felonies twenty-four years and seventeen years before.

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containing jewelry was still in the apartment. It was claimed that various people had seen her within a day or two prior to the date of her death wearing two diamond rings on her left ring finger and a gold band thereon. The gold band was still on the finger but those searching the apartment said they did not find the diamond rings. The last witness that saw her the day she was found did not observe the rings. Mrs. Blauvelt, when found, had her dress up around her waist with her panties showing. The panties were torn at the crotch "that is, the crotch was torn out and laid up over the top of the dress" (R. 304). There were a number of rings, costume jewelry, cheap rings, light green settings, etc. but no diamond or white stone rings about the place (R. 306). The pocketbook was opened and it had a small coin purse right at the entrance of it which appeared to be empty. The articles from the pocketbook were strewn on the chair (R. 308). There was a garbage disposal door in the kitchen (R. 6). This door, it was claimed, had some fingerprints on the inside of it. The fingerprints were not visible but latent and powder was spread over the door and photographs taken of the prints. The police officer fingerprint man testified that the prints on the inside of the door represented prints of the right ring and the little finger of the right hand and the left index, middle, and ring fingers of the left hand and one finger print on the back side of the door as the middle finger. The police experts admitted that there were many points of dissimilarity (R. 223-224) that the fingerprints actually taken of the defendant were "almost twice as wide" and the cores of the fingerprints appear different (R. 224). On the left print there is a little white section with a dot in the middle which does not exist on the door and the witness testified that he had explanations for the differences; one of these explanations was that the time difference between the time

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that the fingerprint was left on the door and the time it was photographed "why anything could have happened" (R. 225). And he admitted that his explanations for the differences and similarities was based upon "guess and speculations as to the reasons therefor" (R. 225). There was no evidence as to the time or manner in which the fingerprints got on the door. There was not one scintilla of evidence that the defendant had murdered the deceased. Nothing whatsoever connected him with the actual murder. When Mrs. Blauvelt's body was found, her stockings were off and she had no shoes on. After the defendant was arrested a month later officers went to his room and found the tops of three women's stockings but these stocking tops, it was admitted, were not the same color or type as those found in Mrs. Blauvelt's room. Nevertheless, the prosecutor argued about these stocking tops as though that was evidence that connected the defendant with the crime of murder of the deceased. This constitutes the evidence of guilt from which no logical conclusion can be drawn that the accused was guilty beyond a reasonable doubt and to a moral certainty. Testimonial silence was therefore the basis of the jury's illogical and unwarranted verdicts of guilt arrived at in this way. This violated procedural due process.

Article I, Section 13, California Constitution and Section 1323 California Penal Code Unconstitutionally Shift the Burden of Proof and Create an Arbitrary Presumption of Guilt and Therefore Violate the Fourteenth Amendment to the United States Constitution.

The statute is further unconstitutional and in violation of due process of law because it shifts the burden of proof to the defendant and permits an arbitrary presumption of guilt to flow from the failure of the defendant to explain

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or deny by his testimony any of the evidence against him. The statute shifts the burden of proof once the state has introduced evidence of the offense and even though the possible connection is slight or none at all and proof is unsatisfactory or entirely lacking as in the instant case it then shifts the burden to the defendant to explain or deny personally the testimony whcih has been introduced. This has been held to be unconstitutional. *Morrison* v. *California,* 291 U. S. 290; *Tot* v. *United States,* 219 U. S. 463, 467.

Furthermore the presumption of guilt which flows from the failure of the accused to take the witness stand is an *arbitrary presumption.* The rational connection between the failure of the accused to deny or explain alleged incriminating evidence and inference and unfavorable tenor that these provisions permit the jury to draw are arbitrary and not rational. Many reasons other than lack of power to explain favorably or to deny such evidence, for example, fear of disclosure to the jury of prior crimes such as impeachment, (Cal. Code of Civil Procedure, Sec. 2051 [37a] or fear of creating a bad impression by being a "poor witness" even lawyers suffer from this fear. *Hickman* v. *Taylor,* No. 47, Oct. Term, 1946, or lack of knowledge of anything that may be able to clear up the case may prevent an accused from taking the witness stand as said in *Wilson* v. *United States,* 149 U. S. 60. There are many reasons why an accused may fail to take the witness stand. The California Court con-

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[37a] If a person who has suffered a prior conviction of crime takes the witness stand, evidence of the prior conviction comes before the jury, but if the defendant does not take the stand that fact cannot be brought out if the defendant prior to trial admits his prior conviction of felony outside the presence of the jury. Section 1025 California Penal Code. Thus the statute (1025 P. C.) offers an attractive reason to keep off the stand if one has suffered a prior conviction of felony while Article I Section 13 then permits the State to argue from that fact that the jury should consider it as evidence of guilt.

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cedes that "It is true that defendants convicted of prior crimes often do not take the stand because of fear that upon cross-examination their criminal record will be given to the jury." (R. 293). Yet it permits an arbitrary presumption of guilt to flow that the reasons the defendant has not taken the witness stand upon cross-examination his past record will be exposed to the jury. Such an arbitrary presumption for any reason offends the due process clause of the 14th Amendment of the Constitution of the United States.

Thus in the present case inherently and as construed and applied the jury was permitted to presume the guilt of the defendant to first-degree murder though no evidence arising above the dignity of suspicion connected him with the murder itself.

In addition to the lack of fair trial which we have shown as flowing from the silence of the defendant resulting in testimony we have also urged as unfair and in violation of due process of law the introduction of evidence and the argument thereon of the irrelevant stocking tops found in the defendant's room but in no wise connected with the stockings of the accused. This evidence was introduced against this poor Negro with the idea of inflaming the passions and prejudices of the jury. As the California Court points out, "None of the stocking tops from defendant's room matched with the bottom part of the stocking found under the body." Yet the prosecutor telling the jury that he stood before them in the capacity of a sworn officer of the law, as a representative of the State, urged upon the jury that the possession by the defendant of stocking tops not the same as those found underneath Mrs. Blauvelt coupled with the defendant's silence and the fact that "Defendant has not seen fit to explain what these stockings are doing in his room," inflamed the passions and prejudices

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of the jury. Irrelevant evidence of this character like the fatal drop of poison in a whole barrel of water so taints and affects the water as to make it unfit to stand or use and so the fatal drop has infected the fairness of this trial. While we have urged that the procedure and proceedings offended due process of law which requires not that the results be right but that the proceedings be fair and just to an accused, we have also urged that this statute inherently and as construed and applied in this case violate the privileges and immunities clause of the 14th Amendment.

We are not unmindful of the decisions of this Court which have defined privileges and immunities of national citizenship, such as the right to go freely from one state to another, the right to vote, the right to carry on business, and other rights and privileges which have been held to be incidents of and characteristics of our national citizenship.

The Constitution does not name them specifically, nor exclude any particular one.

Nevertheless, we assert that if our right to travel freely from state to state is one of the fair incidents of national citizenship equally with it should be the right when one gets there to be free from testimonial compulsion in the criminal court and free from having one's oath and one's testimony extorted. In other words, we think this is the right of an American citizen everywhere and that coupled with his right to travel freely and to vote freely, is the right of a free citizen not to be seized and compelled to testify against himself.

This is so explained in the Preamble of our great American Constitution that "We, the People of the United States, in Order to form a more perfect Union" and "secure the Blessings of Liberty to ourselves and our Posterity,"—these words are but empty shibboleths if we may be compelled to accuse ourselves even though we are American citizens. The right to be protected in our personal liberty

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in the courtroom is as equally as great as the right to be protected in our travel or in our business.

In *Boyd* v. *U. S.*, 116 U. S. 616, 635 this court said:

". . . but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

"It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

This Court has further said in lasting words:

"Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaiden of tyranny. Under our system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are nonconforming victims of prejudice and public excitement. **Due process of law preserved by all for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death" Chambers v. Florida, 309 U. S. 235, 236.**

We therefore pray for reversal of the judgments.

Respectfully submitted,

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