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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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No. 102

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ADMIRAL DEWEY ADAMSON,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent*

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**PETITION FOR REHEARING**

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*To the Honorable Chief Justice Fred M. Vinson and to the  
Honorable Associate Justices of the Supreme Court of  
the United States:*

Your petitioner respectfully petitions for rehearing upon  
the following grounds, to-wit:

I

The majority of the court erred in matters of law in its  
majority opinion.

II

The majority opinion erred in matters of fact or over-  
looked factual situations in the case which necessitate a  
reversal of the judgment and a new and different opinion.

### III

The majority of the court did not envision the setting by which the stocking tops falsely inflamed the passions and prejudices of the jury. Such procedural unfairness denied the defendant due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

### IV

The court overlooked the fact that the Constitution commands that reviews from State Courts must be "re-examined in the light of common law principles."

**Seventh Amendment U. S. Constitution.**

Reviewed under this Constitutional Command, the judgment must be reversed, since, the rules of common law forbid self-incrimination or testimonial compulsion.

\* \* \* \* \*

We approach this case with great concern, as it does not merely involve the life of a poor, friendless and helpless negro, but concerns principles of criminal law which seriously change the whole scope of fair procedure as has always been envisioned in America.<sup>1</sup>

Heretofore, it has always been assumed that a fair criminal trial in America required in proof of the crime the following fair and general practices in American courts:

**(1) That the burden of proof actually is upon the prosecution and that it must prove its case beyond a reasonable**

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<sup>1</sup> See Justice Burton "The Supreme Court, Mr. Justice Burton gives Interesting Comparisons." Case must be examined in the light of its effect on the nation. 33 American Bar Assn. Journal 645, 648. The "Constitution with its Bill of Rights, is, in turn, just as strong as it is interpreted to be by the Supreme Court of the United States." This connotes that it is just as weak as it is "watered down" by the Supreme Court.

doubt; a defendant cannot be compelled to prove or disprove anything.

(2) That when a defendant is accused of a crime and is brought before a trial court and enters a plea of not guilty that plea is a general and specific denial of all of the charges against him for all purposes;

(3) That the accused is clothed with a presumption of innocence which follows him at every stage of the proceedings, even into the jury room, and remains with him as evidence unless or until overcome with the evidence of facts and circumstances which occurred at the time of the commission of the offense, which would overcome this presumption.

In the light of the facts of this case, and as now construed and applied in the present case, these basic fundamentals, believed always to be necessary before a conviction could be obtained or sustained, have been brushed aside and in their place there now exists as evidence *the silence of the accused in the courtroom* as a sufficient basis to overcome the necessity of proof of guilt beyond a reasonable doubt by competent evidence and the fundamental presumption of innocence.<sup>2</sup>

We believe we can demonstrate not only that this occurred in this case but without it a conviction could not have legally sustained the charge of murder as alleged in the indictment.

Murder is defined by the California Penal Code as: "Murder is the unlawful killing of a human being, with malice aforethought." (California Penal Code, Sec. 187.)

Let us see what the actual evidence produced is as to the defendant:

Justice Reed sets it out in his opinion: "The guilty person was not seen at the place and time of the crime." This

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<sup>2</sup> The California Court so construed the laws of California and this Court affirmed this holding. *Peo. v. Adamson*, 27 Cal. (2d) 478.

certainly definitely eliminates the petitioner as far as any proof in this case was concerned that he was seen at the place at the time of the crime.

Justice Reed also says: "There was evidence, however, that entrance to the place or room where the crime was committed might have been obtained through a small door. (This, however, is highly conjectural. There is no proof that the murderer did go through this door.) It was freshly broken. (When or how long is not established.) Evidence showed that six fingerprints on the door were petitioner's. (The fingerprint men nevertheless admitted there were differences between the 'latent' fingerprints on the door and the actual prints of defendant.) The 'latent' fingerprints were developed by policemen. The door from which they were alleged developed was not brought into court. Certain diamond rings were missing from the deceased's possession. There was evidence that appellant, sometime after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring."

Taking all of these facts individually and in combination they still do not prove by any competent substantial evidence that the defendant "on or about the 24th day of July, 1944 at and in the County of Los Angeles, State of California did willfully, unlawfully and feloniously, and with malice aforethought, murder one Stella Blauvelt, a human being (R. 1), as charged in the information.

Where in all of these facts and statements of the court setting up the evidence is there one scintilla of proof, competent or satisfactory, that the defendant *killed* Stella Blauvelt?

Where is the evidence of his having possessed any of the instrumentalities of the crime?

Where is there any evidence that he was at the place at the time of the crime?

Where is there any evidence that he was the one who administered the instrumentalities of the crime, or that he caused the death of Stella Blauvelt?

Where are there any admissions that he did any of the things? See *Peo. v. Lamson*, v *Cal.* (2d) 648;<sup>3</sup> *Peo. v. Staples*, 149 Cal. 405.

The record is devoid of all of them. Not only are there no admissions, but there are denials—emphatic denials to the arresting officers and a general denial covering everything at the time of plea before the court (R. 4). Such a general denial is in ordinary general practice stated to the jury and constitutes a general denial of everything of which the appellant is charged.

There is nothing in the facts or circumstances which the court has in its opinion related which could possibly justify legally and fairly a conviction of first degree murder with a death penalty. “Entrance to the place or room where the crime was committed might have been obtained through a small door” does not establish that it was made at the time of the murder, or that the murderer actually entered through this small door. It rests on probabilities or conjecture.

The absence of diamond rings from the deceased’s possession was not shown to have been caused by the defendant. None were ever found on him or in his possession. The statement of another woman in a bar surely proves nothing. This was just a fragment of a conversation and was meaningless. *People v. Rabalete*, 28 Cal. App. (2) 480. Where a scrap or fragmentary of a conversation is heard,

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<sup>3</sup> In *People v. Lamson*, a typical circumstantial evidence case, 1 Cal. (2d) 648, the court said :

“Where in the case before us is there evidence of a preparation for commission of a crime? Where is the plan by which the death was to become known? Where is the effort to prevent detection or for concealment? Where are the bloody or missing clothes? Where is evidence of a seizure in order to inflict the blows?”

it is inadmissible. It is unsubstantial. *People v. Rabalete*, 28 Cal. App. (2d) 480, 487.

The alleged conversation referred to by the court that “there was evidence that appellant, sometime after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring”<sup>3a</sup> certainly is too remote and unconnected to show it was any ring that the deceased might have had, whether it was a gentleman’s or ladies’ ring, or as to its size, kind or character, or that it was one that was possessed by the defendant. Certainly with the millions of diamond rings in the country, it would be very conjectural testimony to hold that this was sufficient to connect the defendant with a specific kind, or character, of ring as involved in this case. Besides, the proof that the deceased possessed diamond rings rested on circumstantial testimony of other persons who had seen her with the rings at a previous time; but there was no satisfactory or conclusive evidence that she had any rings on at the time of the homicide.

Evidence that “six fingerprints on the door were petitioner’s” would not establish when or how they got there or how long they had been there; nor was the door on which the fingerprints were alleged to have been found ever produced in court, only unsubstantial evidence of police officers seeking to convict the defendant that they had taken pictures of the finger prints. Furthermore, the testimony regarding the finger prints was given by officers in the de-

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<sup>3a</sup> It is a rule of law that “oral declarations are to be viewed with caution and distrust.” Section 2061 California Code of Civil Procedure. Had Mrs. Blauvelt’s ring been found in the possession of the defendant it might have been a circumstance connecting the defendant with the taking of the ring, but this was not established. Even if it had been, it would not prove murder. In *People v. Covington*, 1 Cal. (2d) 316, three sailors entered an apartment. One of them killed the occupant. After that the other two took several articles and fled. The court made the offense as to them petty theft. Neither their presence nor subsequent taking established murder. (See also, *People v. Braun*, 31 Cal. App. (2d) 593.)

partment seeking the defendant's conviction and not satisfactory or conclusive evidence, and in any event all that they established was that such prints were on the apartment door. It did not establish in any way that the defendant committed the *murder* for which he is now under sentence of death.

No one saw the defendant in or around this premises although he is a colored man and this is a four-story apartment building. No one saw him in or about the building.

Hypothetically speaking, if the defendant took the witness stand and testified that he went into the apartment to commit a burglary, found Mrs. Blauvelt dead and fled from the premises (even with her jewelry), such a defense would have been consistent with every other fact produced by the prosecution and could certainly not have established the murder by him.

Therefore, in looking to all of the evidence in the case, examined in the light of every strong fact and inference presented by this record, legally possible to be fairly drawn from the evidence, there is no proof beyond a reasonable doubt or to a moral certainty that the defendant killed Stella Blauvelt. Circumstances equally consistant with several hypotheses prove neither; and the party having the burden must fail. *Pennsylvania Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819; *Mutual Life Ins. Co. v. Hess*, 161 F. (2d) 1, 4.

Again we say that direct or indirect comment permitted by the statutes must necessarily be an argument that the defendant's silence is proof of guilt; that he did not dare to testify because being guilty he could not do so truthfully and he dare not risk the falsehoods he would be obliged to tell, being exposed; but by his silence he had attested to the truthfulness of the witnesses against him,

no matter how incredible their testimony might seem, how unsatisfactory their demeanor on the stand may have been, how clearly their animus may have been shown, how effectually their credibility may have been undermined. It is argued that notwithstanding the inherent weakness of the evidence for the prosecution is such that the unbiased mind must linger unconvinced that the failure of the defendant to deny that which should require no denial overcomes its inherent weaknesses and makes of a fabric composed of contradictions and improbabilities “confirmation strong as proof of holy writ.”

Where the case for the prosecution consists entirely of *circumstances* from which conflicting inferences may reasonably be drawn, one, an inference of guilt and again one of innocence, and where the accused cannot deny the truth of any of the facts, he may no longer have the benefit of a reasonable doubt, for in such case, the comment of the prosecutor that an innocent man would have denied the *truth* of the circumstantial facts, being a comment he is privileged to make, is an argument that the jury may properly convict although all of the facts are consistent with innocence *because the accused has not by his personal sworn testimony denied the truth* of any of the circumstances.

The two classes of cases either circumstantial or where the defendant has suffered prior convictions. In a circumstantial evidence case if he knows none of the circumstances there is nothing to deny. If he has suffered a prior conviction his past rises up to discredit and slay him if he takes the stand constitute practically all of those in which a defendant fails to take the stand. In all other cases either he does take the stand or he refrains from doing so in the hope that the case of the prosecution may break down. The argument of the prosecutor on the silence of the accused then is one that is essentially false. So in this case, the prosecutor knew that Adamson had been charged with a prior conviction; that he had admitted the fact to

be true; and that if he testified in his own behalf that fact would rise up to damn him. It was an inference the prosecutor could scarcely escape, that Adamson's counsel kept him off the stand to avoid the prejudice such disclosure would arouse. So we have in such cases what we should never have in criminal prosecutions, namely, arguments in favor of a conviction that are essentially misleading and insincere.

#### **OTHER FACTORS IN THE CASE**

We must then look to the other factors in the case, and examine the trial in the setting most closely had in which it was held, in order to determine:

- (1) Upon what factors conviction rests.
- (2) If he had a fair trial.

In order to decide against the defendant on the charge of *murder*, it was necessary for the court and jury, and it is necessary for this Court, to determine that issue on one fact alone. It means looking to the *silence* of the defendant in the court room as testimonial evidence and regard that silence alone as sufficient to uphold his conviction of murder in the first degree.<sup>4</sup> Where else is there any evidence that he *killed* Stella Blauvelt? There is none, so the court and jury relied upon California Constitutional provision given in the instruction to the jury that "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*" (Constitution of California, Article I, Section 13).

How considered by the court and the jury? There is only one way in which it can be considered and that is as a fact

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<sup>4</sup> The California court and this Court state that silence alone is not sufficient. Yet, in appraising the evidence, the courts have accepted it as sufficient under the state of the evidence.

upon which the jury may return a verdict of guilty. It is certainly not offered as a fact upon which the jury is being urged by the prosecution to return a verdict of not guilty. How can it be considered by the jury at all, unless it becomes evidence? And how can the jury consider it because the jury is sworn to decide a case only on the evidence and the law. Only if it is in effect deemed a *presumption* of the truth of the charge. It is true it is not called a presumption—but whatever may be the use of terminology or the nicety of word, its effect is, or only could be, that it is deemed a presumption, since it is not evidence in and of itself of the offense. Otherwise, the jury would have no right to consider it at all except as an arbitrary statutory fiat, and as such it surely must be condemned as violative of the Fourteenth Amendment to the Constitution of the United States. *Tot. v. United States*, 319 U. S. 467-8.

A presumption or an inference are themselves conclusions which can only be drawn from facts proved or presumed to be facts because they are such in common experience.

The silence of a defendant in the court room and the inference or consideration thereof is a fact proved. Certainly it is much stronger than a presumption, rebuttable or irrebuttable.

Certainly, by itself, it does not either confirm or deny guilt or innocence. Does it? If it is not a fact from which a conclusion can be drawn of guilt, it is not evidence, and as such is irrelevant and is something that should not be taken into consideration in arriving at a verdict or judgment of guilt. However, the Statute says that it should be taken into consideration and thus it overcomes all the well-known rules of evidence as to what facts should determine the guilt or innocence of an accused. Thus the statute overcomes not only the defendant's presumption of innocence but his general denial of guilt which he made by his plea of not guilty.

Justice Reed's opinion states erroneously, we think, that California's Constitutional provision "does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence." We respectfully assert that in the setting of criminal trials that this statute does exactly do that for in the setting of a trial where a defendant has not taken the witness stand and the prosecutor argues this fact to the jury, or even does not argue this fact to the jury, but the judge tells the jury, in the language of the California Constitutional provision that this fact of "silence may be *considered* by the court or the jury" results in an instruction to the jury to *consider this silence*. How? As evidence of the truth of the charge against the defendant because he has not testified.

We do not need to debate the niceties of the word "presumption" as used by Justice Reed and the language of the constitutional provision, "and may be *considered* by the court or the jury." The word presumption is defined by Webster as something that one has "ground for believing is probable."

There must be a rational connection between the fact proved and the ultimate fact presumed. *Tot v. U. S.*, 319 U. S. 467-8. If the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience the "presumption" cannot be sustained. *Tot v. U. S., supra*.

The California Statute says the jury may *consider* the fact of silence in the courtroom during trial as proof of the ultimate fact of guilt. Surely this is arbitrary "because of the lack of connection between the two in common experience." *Tot v. U. S., supra*.

The consideration which the jury is asked to give to the failure of a defendant to take the witness stand is more than a probability—they are asked to believe, then, as a

fact, because the defendant does not take the witness stand he is guilty of the offense charged. The prosecutor so argued. The trial court told the jury, in effect, such argument was proper and the jury could consider such argument and such failure to testify. The Constitution and Statute do not limit the inference to be drawn "from proven facts." They permit the inference to be drawn from "any evidence in the case against him." The jury is told they may consider the silence of the accused. Whatever the jury may "consider" must be deemed evidence. Thus the fact that the accused remains silent in the courtroom becomes an evidentiary fact for the jury to consider as proof of the guilt of the accused of the commission of the offense at some previous time. It does not follow that because one is silent on that occasion he is guilty of murder on another date. Thus, the mere fact that one is accused and is placed on trial with any slight amount of evidence, whether they are "proven facts or otherwise," permits the jury to draw conclusions unwarranted by the true facts of the case.

No limitations are put upon the jury that they may draw inferences from *proven facts alone*. On the contrary, in this particular case the jury was allowed to draw the inference of *murder* from nothing more than the silence of the accused in the courtroom. None of the other facts which he was called to explain or deny, if this was constitutionally permissible, could have established the murder charge.

The court refers to *Caminetti v. United States*, 242 U. S. 470, 492-495, but in that case the defendant took the witness stand. It was not a case where the accused failed to take the witness stand, nor was it a case of murder where the inference of the murder was drawn from the silence of the accused.

Justice Reed states: "California has prescribed a method for advising the jury in the search for truth." We respectfully disagree that the statute was, or is, a method to advise the jury in the search for truth. There has never been any less power in the Federal Court in its search for truth because of the constitutional provision contained in the Fifth Amendment forbidding self incrimination and supported by statutory provisions and upheld by court decision, 28 U. S. C. A. 632; *Bruno v. United States*, 308 U. S. 287; *Wilson v. U. S.*, 149 U. S. 60, 66; *Johnson v. United States*, 318 U. S. 189.<sup>a</sup> This Court says California's method could not be sustained in the Federal Courts. Indeed, historically this right against compulsion to testify has always been regarded as one of the great fundamental "rights of citizens" in the United States—at least in the Federal Courts.

Actually, the California statute was designed to effectuate compulsion of an accused to take the witness stand and heretofore we have always thought that any form of compulsion or coercion of a person to testify in a criminal case has been forbidden in this liberty loving United States of America. *Boyd v. U. S.*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 563. Historically, the Constitution itself would never have been adopted but for the promise to adopt the Bill of Rights of which the guarantee against self-incrimination is a part.

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<sup>a</sup> Two hundred years or more of experience at common law have shown that truth can best be secured by forbidding use of testimony obtained by self incrimination.

### Testimonial Compulsion<sup>5</sup>

California's Art. I, Sec. 13, as amended in 1934, is a form of testimonial compulsion. The opinion of the Court itself in *People v. Adamson*, 27 Cal. (2) 478, so admits it (R. 385). The California 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."

**THE SEVENTH AMENDMENT STANDS IN THE WAY: IT REQUIRES RE-EXAMINATION OF ANY FACT TRIED BY A JURY ACCORDING TO THE RULES OF COMMON LAW.**

The Fifth Amendment, forbidding self-incrimination, is an embodiment of the common law rule. The Seventh

<sup>5</sup> In California arguments are submitted to the voters upon measures to be voted as constitutional amendments. The following is an excerpt from the argument presented to the voters. Such arguments under the construction of California Law may be considered by the court as grounds for the enactment of the law. *Holland v. Byram*, 28 Cal. (2d) 567, 568.

"Argument in Favor of Initiative Proposition No. 5

"This measure is designed and will have the effect of making more certain the conviction of the guilty.

"As the law now stands, neither the judge nor the district attorney has the right to comment to the jury on the failure of the accused to testify denying the offense charged. An ex-convict will seldom take the stand, since there is no way in which the jury can learn that he is an ex-convict, unless he voluntarily offers himself as a witness. Many mistrials occur where the evidence of guilt is clear because some sympathetic juror, not knowing that the defendant is an ex-convict will persist in voting not guilty, thinking it is the accused's first offense."

Thus it appears that the law was designed to compel an accused to testify and that if he is an ex-convict this might thus be disclosed to the jury. The California court recognizes that this "practical effect" has been accomplished by the Amendment to the law.

Amendment requires re-examination according to that rule.

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

In *Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166, page 180, the court said:

“The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better, if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence. As we have said, ‘due process of law’ . . . commands that no such practice . . . shall send any accused to his death.”

Certainly, nothing could be more compulsory to an accused, in the very presence of court and jury to take the witness stand than this statute. We have always assumed that such compulsion, from whatever source, was abhorrent to the spirit of an American and to anyone where the abiding atmosphere of liberty is thought to reign. *Boyd v. U. S.*, 116 U. S. 616.

**It is forbidden by the common law which controls the reexamination in this Court.**

But, if truth is the object of a trial, and if a jury is falsely misled by a fact or circumstance presented by the State, the trial does not end in a truthful verdict but in a possible false verdict. Therefore, when the prosecutor argues to the jury, as in this case, that the defendant is guilty of murder because he did not take the witness stand, both court and jury are deceived and any procedure which may be deceptive or may lead to a false verdict of death should not be allowed to stand.

If a conviction based upon perjured testimony produced by the prosecutor is void because it shocks our fundamental principles of justice, *Mooney v. Holohan*, 294 U. S. 103-113, surely the leading of a jury to a false conclusion or to an unwarranted conclusion because of the silence of the accused in the court room should be offensive to those standards embodied in the fundamental concept of justice which are inherent in due process of law. *Hebert v. Louisiana*, 272 U. S. 312-317, *Mooney v. Holohan*, 294 U. S. 103.

In the present case, the prosecutor backed by the State, with all the solemnity and dignity of the court and with judicial dignity argued to the jury that the defendant was guilty of murder, because of his failure to take the witness stand. It was a false inference because the defendant had a motive and reason for not taking the witness stand, which was known to the State, to the prosecutor and the court as well that the defendant had suffered prior conviction of felony and to do so would expose his past, not otherwise exposable to the jury. It was not a mere election on the part of the defendant, or his counsel, or both, but a fact well known to the prosecutor; and the prosecutor also knew all of the evidence which he intended to present. The court also knew that most likely this was the real reason that the accused would not take the witness stand yet he joined with the prosecutor and permitted this argument to be made to the jury, concealing a fact which the jury had no knowledge of, and could have no knowledge of under other sections of the California Code.

The court in seeking to preserve the purity of its own temple, should prevent such procedure. *Sorrells v. U. S.*, 287 U. S. 435, 77 L. Ed. 415.<sup>5a</sup>

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<sup>5a</sup> "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from the prostitution of the criminal law." *Sorrells v. U. S.*, 287 U. S. 435.

In *Olmstead v. United States*, 277 U. S. 438, 484, Judge Brandeis said:

“Our government is the potent, the omnipresent, teacher, for good or for ill, it teaches the whole people by its example.”

Judge Brandeis also said, further in the case (p. 476), that the provision against self-incrimination in the 5th Amendment has been given an equally broad construction to the provision of the Fourth Amendment and that the provision is as broad as the mischief against which it seeks to guard.

Therefore, in this case which is before the court, the jury, by Statute, was kept in the dark as to why the defendant actually did not take the witness stand.

The prosecutor argued to the jury that his failure to take the witness stand meant he was guilty of murder and the court, clothed in the dignity of its judicial ermine, solemnly instructed the jury in the language of California Constitutional provision that the defendant’s “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.*” Thus, in California’s eyes it is proper to present a possible false ground to a jury “why the defendant did not take the witness stand” and let a jury draw a false consideration and this court sustain such procedure as a proper method of giving a fair trial and a proper method of “*advising the jury in the search for truth.*”

The question is thus presented whether a fair trial can be had in a case in which it is known to the prosecutor that the defendant dared not take the witness stand by reason of the ability of the prosecutor to impeach him by proof of his conviction of a felony. This, of course, would render his testimony of very little value to him and probably

would cause his testimony to be disregarded no matter how strong otherwise it might be. For the District Attorney, under such circumstances, to argue that the defendant did not take the stand because he could not testify to facts inconsistent with his guilt is a perversion of the truth, and if a fair trial means the placing before the jury only that which it must necessarily imply as truthful that he may not have placed before the jury a false inference and seek to take the life of a defendant upon such inference or to have such inference overcome a reasonable doubt which otherwise might exist.

It must at all times be remembered that the defendant has not actually remained silent. He has entered a plea of not guilty and has denied every part and particle of the charges. He has also denied the charge to the police officers grilling him. He has only failed to take the witness stand after the state has rested its case.

What more could Adamson have said by his testimony than by his plea of not guilty or his denial to the officers? He denied that he had killed Mrs. Blauvelt. There never were any admissions to the contrary. There was nothing that he knew about the murder that he could have explained. Why, then, was he required to take the witness stand to explain or deny any facts relating to the murder?

The majority opinion held: "Rights as were embraced in the concept of ordered liberty became secure from state interference by the Fourteenth Amendment". One can conceive of no greater right in the concept of ordered liberty than the right not to be compelled, directly or indirectly, to incriminate one's self. *Boyd v. United States*, 116 U. S. 616. It was adopted in our Federal Bill of Rights without which the statutes would never have been adopted and made a part of our federal system. 20 Stat. 20; *Bruno v. U. S.*, 308 U. S. 287. 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.<sup>5b</sup>

*Raffel v. United States*, 271 U. S. 494-497, also involves the question regarding the right to ask an accused on the witness stand to be cross-examined and there it was held that if a defendant takes the witness stand, he may be cross-examined as to his failure to contradict the government's testimony at a previous trial. As bearing on the question of his credibility, the court there, however, says: "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do."

*Twining v. New Jersey*, 211 U. S. 78, was a case decided many years ago in a case where the issues were quite different than those presented here, nor was the appeal in that case based upon issues similar to those presented here.

*Palko v. Connecticut*, 302 U. S. 319, must be viewed in the

<sup>5b</sup> 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."

setting in which it also was decided and would not involve the questions involved in the present case.

Justice Frankfurter, in his concurring opinion says: "A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent". This overlooks another section of the California law, which provides as follows:

"In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction *must not be read to the jury, nor alluded to on the trial*". (Ital. ours.)

Penal Code of California, Section 1025.

In *Twining v. New Jersey*, *supra*, the court itself pointed out that the Supreme Court had never passed on the precise questions involved in the *Twining* case, and it is a view of test rights such as Professor Charles Warren's that the question which we have raised here could well be decided without overruling *Twining v. New Jersey*.

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 Burton spoke<sup>6</sup> of the trusteeship of the court to preserve freedom of the press and of speech. Our Bill of Rights does not limit "freedom" to the press and to speech. Freedom from self-incrimination is contained in the Bill of Rights too. It is backed by two centuries of common law history and a struggle for freedom which is entwined with other freedoms.

Justice Frankfurter's great dissenting opinions in *Davis v. U. S.*, 160 U. S. 469; *Zap v. U. S.*, 328 U. S. 624 and *Harris v. U. S.* 91 L Ed. 1020 are classic and history making in their upholding of "liberty" under the Fourth Amendment. Why is not the same "liberty" under the Fifth Amendment a part of America under the Fourteenth Amendment? Justice Frankfurter has said in a footnote to *Harris v. U. S.* that this Court will reexamine its opinion on constitutional questions of recent vintage.

**The Seventh Amendment controls the review of this case.  
It must be re-examined in the light of common-law principles.**

The court has overlooked the fact that even on appeals from State Court decisions that it is governed by and must re-examine the case "according to the rules of common law." Seventh Amendment to the Constitution of the United States.

This amendment governing the re-examination of state cases by the Supreme Court of the United States is equally applicable and binding on the Supreme Court of the United States. *Justices v. Murray*, 9 Wallis 278, 19 L. Ed. 658; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 242, 41 L. Ed. 979.

If, then, this Court is charged with the legal duty of looking at the case under the eyes of the common law, this case falls squarely within the common law principles which pre-

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<sup>6</sup> 33 A. B. A. 648.

serve and protect against self-accusation or self-incrimination. See *Brown v. Walker*, 161 U. S. 596, 40 L. Ed. 819; *Counselman v. Hitchcock*, 142 U. S. 563, 35 L. Ed. 1110; *United States v. Wetmore*, 218 Fed. 227; *Interstate Commerce Commission v. Baird*, 194 U. S. 23-25, 48 L. Ed. 860.

In *Dimick v. Schiedt*, 293 U. S. 474, 79 L. Ed. 603, this court said:

“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson v. Utah*, 170 U. S. 343, 350, 42 L. Ed. 1061, 1066, 18 S. Ct. 620; *Patton v. United States*, 281 U. S. 276, 288, 74 L. Ed. 854, 858, 50 S. Ct. 253, 70 A. L. R. 263.” (95 A. L. R. p. 1152) . . . .

“It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply the principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions, *Funk v. United States*, 290 U. S. 371, 78 L. Ed. 369, 54 S. Ct. 212, 93 A. L. R. 1136. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Constitutional Limitations, 8th ed. 124.” (95 A. L. R. p. 1157)

This clause against self-incrimination of the Fifth Amendment reaffirms the common law principals. *U. S. v. Three Tons of Coal*, 28 Fed. Case No. 16515.

The clause against self-incrimination "has been regarded as one of the safeguards of civil liberty" and "should be applied in a broad spirit, to secure to the citizen immunity from every kind of self-accusation."

*In re Nachman*, 114 Fed. 995.

Forty-five of the forty-eight States in the Union regarded this principle as basic by their adoption of it in their constitutions. Has it suddenly ceased to be a basic principle of mankind because California has chosen to change it in favor of one of the more European methods of approach? We submit that it does not. In the light of the mandate of the Seventh Amendment, we think this Court is under duty in re-examining California constitutional provisions to rehear the case and reverse it.

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

"This is but an affirmation 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 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 years 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. 696  
(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 the 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.

In *Brown v. Walker*, 161 U. S. 596, the court says:

"The maxim *Nemo Tenetur seipsum accussare* 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 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.<sup>6a</sup> But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities 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 Barrow *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.' "

The majority opinion has not considered the common-law rule in reaching its decision. Nor has it considered the

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<sup>6a</sup> This would seem to answer Justice Reed's statement that there is no difference between an accused as a witness and another witness who has suffered a prior conviction who might be called on to testify.

Seventh Amendment's mandate that the case must be re-examined according to the rules of common law. Seventh Amendment U. S. Constitution.

The majority opinion further says "failure of the accused to testify is not an admission of the truth of the adverse evidence." But the instruction to the jury says that "such failure to testify may be considered by the court or the jury," and if the prosecutor argues that the failure to testify is an admission of the truth of the evidence against the defendant, under the decision that has been rendered there can be no reversal.

The court overlooks the fact that the statute says that the fact that the accused fails to take the witness stand "may be considered by the court or the jury." What consideration does that mean? Proof that the accused has committed the offense. Proof of the guilt of the accused. That is the only consideration that they could give to it, that the failure to testify means that he is guilty of the offense charged.

The court further says: "Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt."

This statement fails to take into consideration the trial setting in this case. The District Attorney commented on failure of the defendant to take the witness stand, as proof of *murder*. He only intended them to accept it as proof of murder. Did not this supply the missing element of *murder in the first degree?* Did this not supply what was lacking in any evidence, namely, that the defendant had *killed Mrs. Blauvelt*.

In a murder case, facts or circumstances must be proved beyond a reasonable doubt. *Potter v. U. S.*, 155 U. S. 438; *Lilienthal v. U. S.*, 97 U. S. 237; *Davis v. U. S.*, 160 U. S. 469;

*Breen & Co. v. U. S.*, 74 F (2) 6<sup>7</sup> from which the conclusion is established that John Doe struck a decisive blow, fired a fatal shot, used an instrumentality to bring about death. Proof must be produced that the instrumentalities of the crime belonged to the accused and that he used them; proof that he was at the premises and had in his possession some of the instrumentalities of the offense, or the fruits of the crime. Here none of them are present. Every fact and circumstance leading to the guilt of the defendant for murder is equally compatible with innocence of murder. This proves nothing. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333; 77 L. Ed. 819.

A rule is laid down in California courts regarding the sufficiency of corroborative evidence of the testimony of an accomplice. This corroborative evidence, under the California law, needs to be only slight, as against a universal rule of criminal law that proof of guilt must be beyond a reasonable doubt. This rule is laid down in *People v. Braun*, 31 Cal. App. (2d) 600, quoting from *Weldon v. State*, 10 Tex. App. 400:

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<sup>7</sup> In *Lilienthal v. United States*, 97 U. S. 237-272, 24 L. Ed. 904, the court said:

"In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that, the defendant is guilty in the manner and form as charged in the indictment. *Comm. v. McKie*, 1 Gray 64; *Com. v. York*, 9 Metc., 125; *Com. v. Webster*, 5 Cush., 305; *Com. v. Eddy*, 7 Gray 584; *Com. v. Wright*, Ben. & H. L. Cr. Cas. 399.

"Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree of quantum of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which in doubtful cases, is always sufficient to turn the scale in his favor. 3 *Greenl. Ev.*, 8th ed., sec. 29; 1 *Taylor, Ev.*, 6th ed., 372."

" . . . eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be *any inculpatory evidence*—evidence tending to connect the defendant with the offense . . . the evidence must tend *directly* and *immediately* to connect the defendant with the commission of the offense."

If we take this rule regarding corroboration, which only requires slight evidence, and not evidence beyond a reasonable doubt as generally required to prove guilt itself in criminal cases, and still examine the evidence in our case, we must turn to the silence of the defendant in the court room for direction. Without it there is absolutely no possible ground of inference of *murder* in the first degree. This silence does not even "directly and immediately" tend to connect the defendant with the commission of the offense. This falls far short of due process requiring *proof of guilt beyond a reasonable doubt*.

We say that in the Federal Court and under the rule of common law, that the evidence must be convincing beyond a reasonable doubt. That it must not only be consistent with the absolute facts, but inconsistent with any other reasonable hypothesis than that of guilt.

This is the universal rule in American courts. *Bram & Co. v. U. S.* 74 F. (2) 6.

Where the prosecution depends entirely on circumstantial evidence for a conviction, it must not only be consistent with the guilt of the defendant, but it must be inconsistent with his innocence.

- C. C. A. Ala. 1924. *De Luca v. U. S.*, 298 F. 412;
- C. C. A. Ariz. 1936. *Paddock v. U. S.*, 79 F. 2d 872;
- C. C. A. Fla. 1931. *Stutz v. U. S.*, 47 F. 2d 1029;
- C. C. A. Mo. 1906. *Vernon v. U. S.*, 146 F. 121, 76 C. C. A. 547;

C. C. A. Mo. 1930. *Spalitto v. U. S.*, 39 F. 2d 782;  
 C. C. A. Mo. 1938. *Carello v. U. S.*, 93 F. 2d 412, reversing *U. S. v. Shannabarger*, 19 F. Supp. 975;  
 D. C. Ga. 1906. *U. S. v. Greene*, 146 F. 803, affirmed; *Greene v. U. S.*, 154 F. 401; 85 C. C. A. 251, certiorari denied, 1907, 28 S. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Crime may be proven by circumstantial evidence, but facts and circumstances shown should be consistent with each other and defendant's guilt and inconsistent with any reasonable theory of innocence.

C. C. A. Cal. 1930. *Ferris v. U. S.*, 40 F. 2d 837;  
 C. C. A. Mont. 1930. *Kennedy v. U. S.*, 44 F. 2d 131;  
 C. C. A. Puerto Rico 1932. *Enrique Rivera v. U. S.*, 57 F. 2d 816.

Where government's evidence on any particular count is as consistent with innocence as it is with guilt, evidence is insufficient to sustain verdict of guilty.

C. C. A. Kan. 1933. *Patterson v. U. S.*, 62 F. 2d 968;  
 C. C. A. Mo. 1933. *Cravens v. U. S.*, 62 F. 2d 261, certiorari denied 53 S. Ct. 594, 289 U. S. 733, 77 L. Ed. 1481.

To support conviction, circumstantial evidence must exclude every reasonable hypothesis except that of accused's guilt.

C. C. A. La. 1930. *Tomplain v. U. S.*, 42 F. 2d 205;  
 C. C. A. Minn. 1930. *Cochran v. U. S.*, 41 F. 2d 193;  
 C. C. A. Mo. 1927. *Van Gorder v. U. S.*, 21 F. 2d 939;  
 C. C. A. Mo. 1929. *Beck v. U. S.*, 33 F. 2d 107;  
 C. C. A. Mo. 1930. *Ribaste v. U. S.*, 44 F. 2d 21;  
 C. C. A. N. J. 1919. *Chass v. U. S.*, 258 F. 911, 169;

C. C. A. 631 Certiorari denied, 40 S. Ct. 12, 250 U. S. 65, 63 L. Ed. 1196;  
 C. C. A. Okla. 1925. *Ezzard v. U. S.*, 7 F. 2d 808;  
 C. C. A. Tex. 1920. *Sherman v. U. S.*, 268 F. 516.

If evidence is as consistent with innocence of defendants as with their guilt, conviction cannot properly be had.

C. C. A. Minn. 1939. *Neal v. U. S.*, 102 F. 2d 643;  
 C. C. A. Mo. 1931. *Peightel v. U. S.*, 49 F. 2d 235;  
 C. C. A. Mo. 1936. *Galatas v. U. S.*, 80 F. 2d 15, Certiorari denied, 56 S. Ct. 574, 297 U. S. 711, 80 L. Ed. 998, *Farmer v. U. S.*, 56 S. Ct. 574, 297 U. S. 711, 80 L. Ed. 998, and *Mulloy v. U. S.*, 56 S. Ct. 575, 297 U. S. 711, 80 L. Ed. 998;

Evidence which is consistent with two conflicting hypotheses tends to prove neither.

C. C. A. Minn. 1939. *Neal v. U. S.*, 102 F. 2d 643;  
 C. C. A. Mo. 1938. *Cox v. U. S.*, 96 F. 2d 41.

Where then is there any proof in this case that meets this test? The judgment must rest entirely upon inference from the silence of the defendant, which supplies *the missing element of proof* of guilt.

#### **This Is a Circumstantial Evidence Case.**

The court has entirely overlooked, in its opinion, that this was a circumstantial evidence case. It has also either overlooked, or chosen not to comment on the fact that in New Jersey, from which *Twining v. New Jersey* stems, that the rule is that comment may be made in the direct evidence case but not in a circumstantial evidence case. See *Parker v. State*, 61 N. J. L. 309, 39 Atl. 651; *State v. Kisik*, 99 N. J. L. 385, 135 Atl. 239.

Let us get the setting of this trial involving a circum-

stantial evidence case. We have the prosecutor in a circumstantial evidence case arguing circumstances from which he tells the jury that another interpretation is possible, then reverts back to the fact that the accused has not taken the witness stand. Take, for instance, the argument in this case regarding the stocking tops:

“Now, I do not say that the type of stocking found in the room of the defendant are from the same stocking that was found underneath her. The evidence does not indicate that. I will say to you, frankly, they are not. But we do have this circumstance of finding those stocking tops there in the room of the defendant. When I was a kid, long before I started to get bald-headed—maybe that is one of the reasons I am bald-headed, coupled with several other factors,—I can remember of getting some old stockings, taking the tops off and making a stocking cap. Now, once in a while older people do it. 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” (Rec. pp. 346-347).

Thus, the prosecutor gets back to the same argument and thus the jury draws an inference of guilty from this kind of argument, which has heretofore been forbidden in common law and in our country since the beginning of time.

The majority opinion of Justice Reed concedes that the prosecutor's comment approached the border line in a statement that might have been construed as asserting “that the jury should infer guilt solely from defendant's silence.”

The court further says, referring to the California Supreme Court, “that court felt that it was improbable the jury was misled into such an understanding of their power.” Who can say what led or misled the jury? We cannot under California procedure bring forth the affidavits of the jurors since they are not allowed to impeach their verdict. *People*

v. *Gidney*, 10 Cal. (2) 134, 146; *People v. Reid*, 195 Cal. 249.

In *Bram v. United States*, 168 U. S. 532 at 541, 42 L. Ed. 568 at 572, the court said:

“Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt.”

So here, the prosecutor having argued the silence of the accused as a fact to establish guilt of murder, one should not now be heard to say that it did not have the effect which the prosecutor sought to place before the jury.

We are helpless to show just what did *mislead* the jury to decide, without evidence, that the accused committed the murder. Surely, any one of the statements of the prosecutor could have brought about the fatal results.

This Court says, “we shall not interfere with such a conclusion” but this Court is charged with the duty, under the Fourteenth Amendment, to reexamine the case and make its own determination as to whether a fair trial has been had and whether that amendment has been violated. *Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166; *Faye v. People of the State of New York*, Nos. 377 and 452, October Term 1946, 15 L. W. 4700; *Ashcraft v. Tennessee*, 322 U. S. 143; *Norris v. Alabama*, 294 U. S. 587, 590; Justice Frankfurter’s comments in the present case, page 9, Court’s printed Opinion.

This Court said, in *Faye & Bove v. New York*, Nos. 377

and 452, 15 L. W. 4700: "We would in any case be obliged on a constitutional question to *reach our own conclusion*, after full allowance of weight to findings of the State Court, and in this case must examine the evidence."

Upon a reexamination of the evidence in the present case, we respectfully submit that this statement of the prosecutor, like a drop of poison, polluted the whole barrel, and ended in fatal results.

#### **The Conjectural Nature of the Fingerprint Evidence.**

It must not be forgotten that the door upon which the fingerprints were found was off the hinges and leaning upon a chair when the police officer arrived who first saw it. Where was it? Why was it taken off the hinges or what was done with it while it was off the hinges? When was it taken off the hinges? How long did it remain off? These are matters undisclosed by the evidence. It is merely conjectural that the door was in the building when the defendant's fingerprints were placed upon it. Officer Brennan testified as follows:

"Now, the door to the garbage compartment, was that unhinged from the compartment? A. Yes it was. Q. When you first saw it? A. Yes it was" R. 321.

This conjectural testimony is supplanted by the silence of the accused in the courtroom. Is this fair trial?

#### **With Reference to the Stocking Tops**

Again we ask the court to examine the case in the light of the jury setting. Here was the jury of all white women, trying the accused negro. It is well known among the negro population that stocking-tops are used for caps by negroes; that they use them to fasten down the hair. This man was a married man and might well have stockings in his apartment. Certainly, placing women's stocking tops

before a white woman jury could have no other purpose than to inflame the jury. The stocking tops were utterly without evidentiary value; admittedly not the same stocking tops that came from the deceased.

Relevant and cogent circumstances may constitute evidence of accused's guilt, but must have legal, as well as logical, relevancy and point to guilt with compelling force; circumstances merely raising suspicion or giving room for conjecture being insufficient. *Kassin v. U. S.*, 87 F. (2d) 183.

Certainly a colored person has a constitutional right to a fair trial, uninfluenced by inflammatory matters. It is just as serious to place this kind of evidence before a woman jury as it is to place a coerced confession before the jury.

The prosecutor knew that these stockings had no relevance. This trial court knew they had no relevance. Yet, their introduction was a subject of comment to the jury and must have been a subject of discussion within the jury room itself. They were offered to prejudice the jury to a conviction.

We submit that this violates the defendant's rights to a fair trial.

#### **Europe's Dark History of Self-Incrimination**

The whole history of Medieval Europe is blackened by the expedients through which self-incrimination was induced. In no other way has so much untrustworthy evidence been adduced, so much injustice been worked, so much innocent blood been shed. It is not necessary here to catalogue the means that were used to such ends. The wrack and the thumb screw were not always the most efficient nor always the most cruel. The psychological torture sometimes exceeded the agony of physical pain. Knowing that every statement he made would be warped and twisted

into the semblance of a meaning he never intended and that silence would be regarded as a confession of guilt; that his word would be taken as evidence only when it militated against himself, the innocent accused had no means, in a vast number of cases, of escaping a conviction even though physical torture was not applied.

The common sense of mankind, revolting against the injustice everywhere rampant, slowly evolved certain rules for the just treatment of him who was accused of crime. Evidence must be confined to the charge; he might not be called upon to meet proof of which he had no notice; he must be brought face to face with his accusers and be permitted to cross-examine him; he might have witnesses brought into court under its process to give testimony in his behalf; the burden might not be cast upon him to prove his innocence but upon his accusers to prove his guilt; he might stand mute and demand his acquittal unless guilt was established beyond a mere probability; he might have the benefit of skilled counsel and give testimony in his own behalf—all of these are included in the comprehensive term of “due process of law” and none of these rights may be infringed or abridged by any state under the pretense of procedural change.

By the provision of the California law under discussion, we have just such a pretense. It is said that the prosecution may comment upon the failure of the defendant to take the witness stand and deny the evidence against him. But **what comment can there be other than that if he were innocent he would testify to his innocence? However it may be disguised, such comment always and of necessity must infringe upon one of those fundamental rights which are embraced within due process.**

By his plea of not guilty, the defendant denies the truth of the charge preferred against him. An innocent man often

can do no more by his testimony than he has done by his plea. Being innocent, he has no knowledge of the crime and can do no more than to deny his guilt. If, as will probably be the case in such instances, there should be a reasonable doubt in the unprejudiced mind the defendant has two courses he can pursue: He can attempt to strengthen the presumption of innocence by his own testimony, or he can refrain from testifying. If he pursues the former course, there will be no more when he is through than the reasonable doubt to which he was entitled without testifying. His denial viewed in the light of his interest will not receive much weight; and he will expose himself to those admissions that the astute lawyer can always obtain from the most innocent and to those insinuations which the zealous prosecutor knows how to use.

On the other hand, if he refrains from testifying, the argument will be made that there *is no reasonable doubt because he has not taken the witness stand personally to explain or deny the testimony.*

It frequently occurs, as is well known to every lawyer experienced in trials, that because of psychological processes over which he has not control a defendant becomes so terrified by the seriousness of his predicament that no matter how innocent he may be it is impossible for him to take the stand without his appearance there creating the impression that he is testifying under a "consciousness of guilt." See record of *Sacco & Vanzetti* case—Frankfurter, Page 40.

"Certain actions which we recognize as expressive of certain states of mind are the direct result of the constitution of the nervous system, and have been from the first independent of the will and to a large extent of habit" (Darwin's Expression of the Emotions, p. 66).

Undoubtedly it is true that "the demeanor of the witness will frequently give the preponderance to one side or the

other" (*Dickenson v. Steamboat Gore*, 7 Fed. Cas. No. 3,893) and that "the confusion, the hesitation and trembling of another will contradict to the eye what his faltering tongue has uttered to the ear" (*Carter v. Bennett*, 4 Fla. 284, 357).

And yet, such a demeanor may arise as well from the trepidation of the innocent as from the consciousness of guilt on part of the guilty accused. He may be a good shoemaker and a poor fish peddler, as were Sacco and Vanzetti. The unfamiliar atmosphere of the courtroom; the dignity of the court; the cold formality of the proceeding; the surprise occasioned by evidence an innocent man could not have anticipated, all may tend to confuse a defendant, while the unknown but serious consequences of every answer he gives upon cross-examination may cause his mind to hesitate and his tongue to falter.

When the defendant is one of the very great numbers who are thus subject to the emotion of fear, his counsel is confronted with the certainty that to expose him with his very great interest in the outcome, even to a mild cross-examination while under the influence of an emotion which thus betrays him would be fatal. And, it is revolting to our sense of justice (that has been handed down to us together with devoting to the law that seeks justice) that the natural timidity of such a man should be the basis for an argument that a guilty consciousness has sealed his lips.

Under the law of California, a witness may be impeached by proof of his previous conviction of a felony (C. C. P. 2051). The effect of such proof is not only to destroy his credibility but to portray him as a bad character and therefore one who probably committed any crime of which he is accused; and unfortunately when a major crime has been committed, ex-convicts are the ones toward whom suspicion is first directed.

The injurious effect of such proof upon the minds of jurors is recognized and although prior convictions may be pleaded as was done in this case, in aggravation of punishment, if the defendant admits the prior conviction and pleads not guilty, the fact of such prior conviction is kept from the jury unless he takes the stand in which case only it can be used to his prejudice (Pen. Code 1025, C. C. P. 2051).

We have therefore a legislative recognition that such fact is opposed to the ends of justice on the one hand and a legislative device whereby it is sought to coerce such a defendant into putting himself into a position where the fact of such prior conviction may be brought to the attention of the jury ostensibly to show that he is unworthy of credence but actually to impress the idea upon the mind of the jury that he is a bad and dangerous character who therefore is probably guilty and who in any event ought not be permitted to be at large.

The penalty for his failing to submit himself to the highly prejudicial effect of such proof is the right of the prosecutor "to comment upon his failure to take the stand and the jury to draw the conclusion of guilt therefrom."

#### **Justice Frankfurter's Concurring Opinion.**

Justice Frankfurter says in his opinion that he would affirm this judgment on the authority of *Twining v. New Jersey*. He further mistakenly states that the circumstances of this case present a "minor variant" from that in *Twining v. United States*. He then points out that this minor variant is the dilemma in which the defendant finds himself in as to whether to subject himself to unfavorable inferences from a prior conviction or to testify. This is not the real difference as we view it between the *Adamson* case and the *Twining* case.

The court has inadvertently overlooked the real difference between them. The *Twining* case was a *direct evidence* case. The *Adamson* case is one entirely of *circumstantial evidence*.

The *Twining* case involved a situation where two defendants were directly accused by a witness in the courtroom. There, people were supposed to be present at a meeting. Patterson, one of those present, accused Twining and Cornell, the other defendants, in the courtroom in the presence of the court and jury. It was under this type of setting that the trial judge said Twining and Cornell would not testify and the court said:

“Now, it is not necessary for these men 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. . .”

The court further pointed out that it might not have been necessary for them to have taken the stand.

The court’s charge was full and fair in a direct evidence case, given by a judge and not by a one-sided advocate.

But here we have a *circumstantial evidence* case. Many people do not believe in circumstantial evidence. Many juries will not convict upon circumstantial evidence alone. They require something more than circumstantial evidence. Silence in the courtroom is thus used to supplant the circumstantial evidence. It is frequent in circumstantial evidence cases for the court in the impanelling of the jury to ask jurors if they believe in circumstantial evidence, and many a juror has disqualified himself stating he did not believe in circumstantial evidence alone.

New Jersey, where *Twining v. New Jersey* gave birth recognized this principle when it provided that the comment of the court might be made in a direct evidence case. See *Park v. State*, 61 N. J. L. 308; also the comments of New Jersey Judge Richard Hartshorn's comments in American Bar Association Journal, Vol. 56, Page 153; *State v. Wines*, 65 N. J. L. 31. 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 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.

There is a very great difference between the situation in which the defendant is directly accused by strangers who have confronted him and submit their testimony as to his conduct, giving under or to the privilege of cross-examination, and the case in which no such witness appears but the prosecution depends entirely upon the evidence of circumstances.

It is a rule of criminal evidence recognized everywhere that in such cases the circumstance must not only be such as is consistent with the guilt of the defendant but entirely inconsistent with any other rational hypothesis. *U. S. v. Vanrause*, Fed. Case No. 16,608. It might very well have occurred in this case that at the time all of the evidence had been produced there was in the minds of the jurors a reasonable doubt arising from the unsatisfactory character

of the circumstances relied upon, but, if such was the case, when the prosecutor was permitted to argue as the result of an *additional circumstance* that the defendant's failure to take the witness stand became one of the incriminating circumstances, he was thus made a witness against himself.

"Inferences arising from circumstances cannot be substituted for circumstances to prove guilt." *Gerson v. U. S.*, 25 F. (2) 49.

Justice Frankfurter's opinion also overlooks the fact that in the *Twining* case the trial judge gave a very full and fair expression to the jury in the state court; that it was an unbiased explanation in which the judge told the jury as follows:

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

#### **The Twining Case—Direct Evidence**

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 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 testimony 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.” (Caps and italics ours).

#### **The Adamson Case—Circumstantial Evidence**

But in the present case, based upon circumstantial evidence, it was the comment made by the District Attorney—not as an impartial judge giving the jury both sides of the issue from which they might find significance—but as an advocate giving solely the prosecution’s inferences and deductions. He preceded his argument with the statement as follows:

“I do not stand here, members of the jury, in the capacity (fol. 581) of representing any private client. I stand here 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. My obligation is to the People of the State of California and to the defendant in this case. I do not owe any obligation to a private client.” One of those “facts” was the silence of the defendant.

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 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.<sup>35</sup>

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<sup>35</sup> 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?

We have, in addition to the situation on the pillows—when I say a long period of time, that statement is corroborated by the 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. 314-315) (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 tops 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 of murder and send him to his death.**

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 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 when 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, fingerprints; 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 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.

A prosecutor has a duty, it is true, to all of the People. But his argument was one sided—as an advocate. He has a duty to present his case with all the vigor of an advocate and partisan, *Berger v. United States*, 259 U. S. 78. This accentuates the unfairness of California's statutes. Certainly this is different than in the *Twining* case where the comment was by an unbiased judge giving an impartial charge.

Perhaps the prosecutor thought it was his duty to make this argument in view of the constitutional provision in the Statute. If he had not believed it to be his duty, he would not have made it. What we do say is that any law which imposes, or permits, such a claimed duty is an innovation—is contrary to the spirit of justice and fair play which lies at the roots of due process of law—is an avoidance of the limitation which the Fourteenth Amendment placed upon the States. Until this Court has finally decided otherwise,

we cannot fail to believe that this law of California is contrary to the spirit of American Jurisprudence.

It may be easy to gloss over the effect of this law. It ought not be difficult to see that however artfully its real purpose may be concealed that in reality it is the beginning of an assault upon the presumption of innocence and of a process of undermining the right to be free from self incrimination. Such a process is always insidious.

“Vice is a monster of such horrid mein,  
“As to be hated needs but to be seen  
“Yet seen too oft the old familiar face  
“We first endure, then pity, then embrace.”

The viciousness of such a law may not be easily apparent. Certainly its object is to make convictions more surely obtainable in criminal cases. It seeks to do this by striking down one of the protections that the law hitherto has afforded a defendant. To make convictions more easy to obtain, it makes it more easy to convict the innocent. See Borchard “Convicting the Innocent.” The loyalty of those who have suffered unjustly under such law and of those to whom such unjust suffering is known will not easily be held. It is therefore a step toward the overthrow of the state and the nation.

Unfortunately experience has shown that such legislation is only a step in a certain direction. In 1927 radical changes were made in the criminal procedure of California for the avowed purpose of making convictions more easy to obtain in criminal cases. There were those of us who knew that where intelligent and efficient investigations were obtainable —were being obtained as were desirable if the innocent were to be given adequate protection. In the last analysis all such laws are enacted to obtain by an indolent and inefficient enforcement, that which could more certainly and safely be obtained by an effective enforcement of laws that were less stringent and more fair.

From this law it is only a step and not a great one to a law which will provide that the silence of a man when arrested shall be presumptive evidence of the falsity of any testimony he may give in his own behalf; and to a law which will permit a judge to charge the jury that it is the duty of every citizen to aid in the enforcement of law and therefore it was the duty of the defendant, if he was innocent, to place before the arresting officers full and convincing proof of his innocence. In short this is a long step backward towards those dark ages when it was presumed that an accused was guilty and when it was deemed proper to extort by physical torture, a confession to support the presumption.

It is a duty of the Courts to be ever vigilant for slight encroachments upon constitutional guarantees. The motto is to be ever vigilant against it. See *Boyd v. United States*, 116 U. S. 616, *Brown v. Walker*, *Counselman v. Hitchcock*, *supra*.

In *People v. Fishgold*, decided June 19, 1947, 16 L. W. 207, the court reversed the case wherein the prosecuting attorney, under mistaken belief of the fact asked the accused if he had previously been convicted, committed serious error whose prejudicial effect was not mitigated by the accused's denial. The court pointed out that the prosecuting attorney does represent the public and as such jurors look upon him with great consideration. He is a public official and his argumentative, one sided, expression, as was the case in this instance, as against a fair and impartial comment of the trial judge in the *Twining* case, causes an entirely different situation than was considered or passed upon by this Court in *Twining v. New Jersey*.

This is a fundamental distinction which surely escaped the learned Justice Frankfurter and other members of the court. Surely in the setting in which a trial is had, for the

prosecutor to be able to give a one-sided comment, which comment he gave either at the beginning or end of his argument, with no possibility of reply, and from which the jury, by reason of his public capacity, draws the conclusion which he urges, is certainly not a fair trial.

We say most respectfully that Justices Cardozo, Hughes, McReynolds, Brandeis, Sutherland, Stone, Roberts and Black were never called upon to pass upon a question precisely like this. Justice Black has spoken adversely in this case.

Each case must always be examined in the light of its own facts and its own setting and we respectfully say that none has ever come up which was entirely based on circumstantial evidence, with a one-sided argument like the present one given by a public official charged with a duty to the public and carrying with it great weight and solemnity of the court. Such procedure, we respectfully submit, denies fair trial. *Snyder v. Massachusetts*, 291 U. S. 97, wherein it is said that not the result but the procedure must be fair.

Mr. Justice Frankfurter also says that "only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem." We have no quarrel with this principle provided that which is *relevant* is secured in a manner which is *fair* and under the procedure authorized by the Constitution in its Fifth, Seventh and Fourteenth Amendments. *Brown v. Walker*, 161 U. S. 596; *Counselman v. Hitchcock*, 142 U. S. 563. This has been the holding of this Court in all of the third degree cases. For surely nothing can be more relevant in the prosecution of crime than a confession. *Braun v. U. S.*, 168 U. S. 532. Yet, this Court has held that a confession obtained by third degree methods and its use before court and jury violates due process. *Chambers v. Florida*,

309 U. S. 227; *Brown v. Mississippi*, 297 U. S. 278; *Lisenba v. California*, 314 U. S. 219.

Mr. Justice Frankfurter also says: "Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict." This would not encompass the situation of a jail nor of a court where heretofore the circumstances under which the men remained silent has always been deemed to be ample justification for their remaining silent. After all a man is not remaining silent when he pleads NOT GUILTY in open court and denies fully and generally the charge against him and that denial is placed before the jury. Must he deny it twice, three times, or ten times, in order to satisfy everyone?

The learned Justice further says: "The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'."

The great justices from Lord Coke on did not regard self-incriminating evidence as trivial. It became a rule of common law. Under the Seventh Amendment it became a rule under which every case must be re-examined. The framers of the Bill of Rights did not regard safeguarding against self-incrimination as "trivial." They required it in the Fifth Amendment. Congress passed a Statute to protect against it and decisions of this Court have held statutes unconstitutional which did not give immunity as broad as the guarantee of the Fifth Amendment to the Constitution. *Counselman v. Hitchcock*, 142 U. S. 563. But men in everyday life act upon probabilities. Jurors may not do so. They may act only on a moral certainty produced by

evidence—and the silence of the accused is not evidence. To permit jurors to act upon probabilities is to undermine the security which the Government affords the citizen, and destroy the safeguards which have existed from time immemorial.

Furthermore, Justice Frankfurter, who is a great lover of history, has overlooked the historical background of the right which has been granted to men from Biblical times and all through common law, the *right and privilege of remaining silent*. This is an outgrowth of that struggle for freedom on the part of the masses from the tyranny imposed upon them by those who had seized the power of government. It is one of the most important fruits of the struggle for liberty in England, and one of the most brilliant gems in the concept of due process of law. See 2 Story, Commentaries on the Constitution 6th Edition 697; One Gilberts History 249; Story Commentaries on Constitution 5th Edition 1782 at page 1788; Cooley's Const. Lim. 6th Ed. p. 375; *Brown v. Walker*, 161 U. S. 596; *Counselman v. Hitchcock*, 142 U. S. 563.

Justice Frankfurter further says: "A man who has done one wrong may prove his innocence of a totally different charge. To deny that the jury can be trusted to make such discrimination is to show little confidence in the jury system".

On the contrary, it is because we believe in the jury system and because we believe that the jury does what ordinary people do, and think as ordinary people think, that the situation is different than viewed by Justice Frankfurter.

The Statutes of California, Section 2061, California Code of Civil Procedure, and the rule generally is that a witness may be impeached by a prior conviction of felony. (*People v. Braun*, 14 Cal. (2d) 1.) This means that he

may be discredited and the jury is so told because that is the effect of *impeachment* of a witness. Now, if the jury therefore is told that a prior conviction of crime *impeaches* or discredits a man, they are supposed to and do follow it and believe it, and thereby they give to such a person's testimony little or no weight because the law so states the situation.

Therefore, it is because Jurors do follow the law and do view a person who has committed a crime as being thoroughly discredited or impeached that an unfair trial arises.<sup>7a</sup> The fact that in criminal trials where other persons are witnesses may thus be impeached does not place them in the category of a defendant, for although they may be discredited by reason of another crime, it is within the bounds of other witnesses to testify; it is not made mandatory, as in the present case, nor is the jury told they may draw their own conclusions from the failure to call such a witness. The comparison of a defendant to a witness is entirely a different situation.

Justice Frankfurter's opinion further refers to forty-three judges who have construed the Fourteenth Amendment, speaking of both the living and the dead. Justice Harlan's opinion was regarded as an eccentric exception. Yet since that time freedom of speech, freedom of religion, freedom of the press, and many other freedoms have been added to a concept of a "fair and enlightened system of justice",—at least to our "*liberty*" under the Constitution.

In James M. Beck's work on the Constitution of the United States, page 212, he says that one of the great

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<sup>7a</sup> So devastating is the effect of an admission of prior conviction of felony that the California Legislature gave such persons the right to admit the prior conviction outside the presence of the jury and thus bar and reference to it in the trial if the defendant does not testify. Section 1025 California penal Code.

achievements of our constitution “was a guarantee of individual liberty through constitutional limitations”.

*“The third principle was the guaranty of individual liberty through constitutional limitations.*

“This marked another great contribution of America to the science of government. In all previous government building, the State was regarded as a sovereign, which could grant to individuals or classes out of its plenary power certain privileges or exemptions, which were called ‘liberties’. Thus the liberties which the barons wrung from King John at Runnymede were virtually exemptions from the power of government. The Fathers did not believe in the sovereignty of the State in the sense of absolute power, nor did they believe in the sovereignty of the people in that sense. The word ‘sovereignty’ will not be found in the Constitution or the Declaration of Independence. They believed that each individual, as a responsible moral being, had certain ‘inalienable rights’ which neither the State nor the people could rightfully take from him.

“This conception of individualism, enforced in courts of law against executives and legislatures, was wholly new and is the distinguishing characteristic of American constitutionalism. As to such reserved rights, guaranteed by Constitutional limitations, and largely by the first ten Amendments to the Constitution, a man, by virtue of his inherent and God-given dignity as a human soul, has rights, and religious freedom, which even one hundred millions of people cannot rightfully take from him, without amending the Constitution. The framers did not believe that the oil of anointing that was supposed to sanctify the monarch and give him infallibility had fallen upon the ‘multitudinous tongue’ of the people to give it either infallibility or omnipotence. They believed in individualism. They were animated by a sleepless jealousy of governmental power. They believed that the greater such power, the greater the danger of its abuse. They felt that the individual could generally best work out

his own salvation, and that his constant prayer to government was that of Diogenes to Alexander: 'Keep out of my sunlight'. The worth and dignity of the human soul, the free competition of man and man, the nobility of labor, the right to work, free from the tyranny of state or class, this was their gospel. Socialism was to them abhorrent.

"This theory of government gave a new dignity to manhood. It said to the State: 'There is a limit to your power. Thus far and no farther, and here shall thy proud waves be stayed'."

The court, in the *Adamson* case, has reversed and negatived this basic principle.

Justice Frankfurter's opinion nowhere points out that this accused has been given a fair trial; that the evidence was sufficient, nor that this case does not show violation of fundamental rights in the ordered concept of justice.

The *Money* case in California was one of circumstantial evidence. *People v. Mooney*, 177 Cal. 642; *People v. Billings*, 35 Cal. App. 549; *People v. Mooney*, 178 Cal. 525; *In re Mooney*, 10 Cal. (2d) 1; *Holohan*, 244 U. S., 103.

The *Sacco and Vanzetti* case in Massachusetts was a direct evidence case wherein the identity of defendant, Vanzetti, as the occupant of the murder car was directly testified to.

Justice Frankfurter stated in *Adamson v. California*: "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

It is respectfully requested that the evidence in this case, or rather the lack of it, be analyzed with as painstaking

consideration as was given to Sacco and Vanzetti in the cogent analysis by Justice Frankfurter.<sup>8</sup>

In his book Justice Frankfurter says:

“Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism. Grave is the mark of a civilized legal mechanism. Grave injustices, as a matter of fact, do arise even under the most civilized systems of law and despite adherence to the forms of procedure intended to safeguard against them.

By way of illustration let us recall three striking instances in which the machinery of the criminal law worked injustice which was later corrected. The effectiveness of English criminal justice is properly held up to us for our imitation. Yet it was that system which, in a case turning on identification, sent Adolf Beck to prison for five years, although it was subsequently established that Beck was as innocent of the crime as the judge who sentenced him.<sup>9</sup> It was this grave miscarriage of justice which led, in 1907, to the establishment of the English Court of Criminal Appeal, with its very wide power of revision of criminal cases. In 1922 a Chinese student named Wan was convicted of murder in the courts of the city of Washington. The Court of Appeals of the District of Columbia (ordinarily the final court of appeal in such cases) affirmed the conviction. Luckily the Supreme Court of the United States, doubtless influenced by the intervention of Mr. John W. Davis, exercised its prerogative of grace and allowed an appeal. The court then unanimously found both the trial court and the Court of Appeals in error, reversed the conviction, and ordered a new trial because of a singularly abhorrent resort by the police to ‘third degree’ methods in extorting confes-

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<sup>8</sup> “See the case of Sacco and Vanzetti, by Felix Frankfurter, Little Brown, and Company, 1927, a critical analysis for lawyer and layman.”

<sup>9</sup> Watson, Trial of Adolf Beck.

sions from the Chinaman.<sup>10</sup> Wan was twice put on trial, twice thereafter the juries refused to convict, and the Government thereupon quashed the indictments; and Wan—after seven years in jail under harrowing circumstances—was given his liberty.<sup>11</sup> It should be noted that the review exercised by the Supreme Court in this case is seldom assumed by that Court. But for this unusual intervention Wan would have been executed, despite all the formal observances of the criminal procedure of the District of Columbia; and high-minded men and women, without opportunity or time to exercise independent judgment on the case, would have assumed that the trial court and the Court of Appeals of the District of Columbia had served as ample safeguards against an unwarranted hanging carried out under the forms of law. Finally, last year the Governor of New Jersey pardoned an Italian named Morello convicted of murdering his wife because later investigation showed that a fatally wrong meaning was given to his testimony through misunderstandings of the interpreter.”<sup>12</sup>

We respectfully submit that the present case rests on nothing but a faltering set of fingerprints and the silence of the accused in the courtroom and that a conviction based upon that unsubstantial evidence should not send any accused to his death.

We again call important attention of this Court to the fact that this is the first *circumstantial evidence* case where this court has approved comment by a prosecutor on the defendant's failure to testify, or that the comment was fair and full, like that of an impartial judge or that such comment could be fairly appraised.

We say respectfully that sitting as we do in a trial court from day to day that the unfairness of the prosecutor's

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<sup>10</sup> *Wan v. United States*, 266 U. S. 1 (1924).

<sup>11</sup> See *New York Times*, June 17, 1926.

<sup>12</sup> See *New York Times*, May 20, 21, 23 and June 5, 1926.

comment in these types of cases is devastating to any defendant. Problems arise and will arise where one defendant could take the stand, as his record is clear, and another could not. (See *People v. Lanigan*, 22 Cal. (2d) 569) because of a prior conviction.

#### **AN APPEAL TO THE JUSTICES IN THE MAJORITY OPINION**

Mr. Justice Frankfurter said with reference to the adoption of the first eight Amendments as a part of the Fourteenth Amendment:

“Of all these judges, only one, who may respectfully be called an *eccentric exception*, ever indicated the belief that the Fourteenth Amendment was a short-hand summary of the first eight amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.” (Italics ours.)

By the opinion rendered June 23, 1947, four more justices of the present Court joined with this eccentric exception.

#### **WHO WILL BE THE FIFTH, OR SIXTH, OR SEVENTH, OR EIGHTH, OR PERHAPS NINTH ON THIS COURT TO JOIN NOW IN THE PARADE TOWARD ONE MORE LIBERTY PRESERVED AND PROTECTED FOR ALL PEOPLES UNDER THE CONSTITUTION?**

Mr. Justice Burton: To you, the junior and last member of the Court to be appointed, we now appeal to join in this view which we believe represents protection of ultimate decency in a civilized society. In your address published in 33 American Bar Association Journal, you espouse the “freedoms” under the Constitution and proclaim your trusteeship of those freedoms. Surely protection against self-incrimination is within these trusteeships.

In your first liberal opinion since you were on the bench, in *Louisiana v. Resweber*, 91 L. Ed. page 359, at page 366, you stated that due process of law protected an accused from cruel and unusual punishment guaranteed by the Eighth Amendment to the Constitution of the United States, but not specifically named in the due process clause of the Fourteenth Amendment to the Constitution of the United States. You stated that:

“Pre-constitutional American history reeked with cruel punishment to such an extent that, in 1791, the Eighth Amendment to the Constitution of the United States expressly imposed upon federal agencies a mandate that ‘Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ . . . The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man.”

But, the same historical and common law basis which exists for the condemnation of cruel and unusual punishment, exists against self-incrimination.

The Seventh Amendment commands that this case be re-examined according to the rules of common law wherein self-incrimination and the use of testimony which is self-incriminating is forbidden. This being the rule of common law since 1637.<sup>13</sup>

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<sup>13</sup> In Lilburn's trial, 3 How. St. Tr. 1315 ff., the facts are these:

John Lilburn was committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; (freedom of the press and of speech) on examination, while under arrest, by the Attorney-General, having denied these charges, he was further asked as to other like charges, but refused, saying: 'I am not willing to answer you to any more of these questions, because I see

In *Brown v. Walker*, 161 U. S. 596, some of the 78 past justices of this court pointed out that:

"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 brow-beat him if he be timid or reluctant, to push him into a corner, and to entrap

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you go about the examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of the examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories.' Afterwards, 'some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do.' Then, when examined before the Chamber itself, he again refused, saying, 'I had fully answered all things that belonged to me to answer unto,' but as to things 'concerning other men, to insnare me, and get further matter against me,' he was not bound 'to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry,' i. e. *ex officio*, 'and of the same nature as the High Commission oath,' which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, 'if I had been proceeded against by a bill, I would have answered.' Then the Council condemned him to be whipped and pilloried, for his 'boldness in refusing to take a legal oath,' without which many offences might go 'undiscovered and unpunished'; and in April, 1638, 13 Car. I., the sentence was executed. On Nov. 3, 1640, he preferred a complaint to Parliament, and on May 4, 1641, the Com-

him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably 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 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."

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mons (having not yet abolished the Star Chamber Court) voted that the sentence was 'illegal and against the liberty of the subject,' and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13, 1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality, 'the ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser;' and Mr. Cook arguing that, without an information, 'to administer an oath was all one with the High Commission,' whereon the Lords ordered that the said sentence 'be totally vacated . . . as illegal, and most unjust, against the liberty of the subject, and law of the land and Magna Charta;' and on Dec. 21, 1648, he was finally granted 3000 pounds in reparation." (15 Harvard Law Review, p. 624, 625.) Thus freedom from self-incrimination is wrapped up in freedom of speech and of the press. "1649, King Charles Trial, 4 How. St. Tr. 993, 1101 (one Holden objected to answering, and the court, 'perceiving that the questions intended to be asked him tended to accuse himself, thought fit to waive his examination'); 1649 Lilburn's Trial, ib. 1269, 1280, 1292, 1342 (Lilburn, on a trial under the Commonwealth for treason, claimed that his former counsel, Bradshaw, now Lord President of the Council, had tried to make him criminate himself just as the Star Chamber Court had formerly done; he here refused on his trial to do so; Lord Keble: 'You shall not be compelled; 'Liliburn: 'I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, 'Thou sayest it.'"

We believe this liberty against self-incrimination is one of your trusteeships.

Will you not then join with four of your colleagues in condemning what historically and at common law has been condemned as something that is fundamentally un-American or British and exists only in Continental Europe?

This case, *Brown v. Walker*, is historical in respect to the rights which it seeks to protect.

Mr. Justice Jackson: Will you join in the march toward upholding the safeguards to liberty which historically have always existed in this country and as part of common law. When you returned from Nuremberg you joined with other justices in the upholding of liberal principles that safeguard against unreasonable searches and seizures and unreasonable inspections.

In *Harris v. United States*, 91 L. Ed. 1035, you stated:

“In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open any easy way to circumvent the protection it extended to the privacy of individual life. . . . Of course, this, like each of our constitutional guarantees, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for the decent privacy of home, papers and effects which is indispensable to individual dignity and self respect.”

Historically this “has always been held to be fundamental in America’s concept of freedom.” *Boyd v. U. S.*, 116 U. S. 616; *Brown v. Walker*, 161 U. S. 596. The Fourth Amendment is the counterpart of the Fifth Amendment.

Even in your rules of “Fair Trial for Defendants” in the Nuremberg War Trials, Article 24, as to the proceedings at the trial, you did not compel any defendant to take the witness stand. You provide in Article 24 only that the prosecution and defense may cross-examine any defendant

who gives testimony and you provided that “each defendant may make a statement to the tribunal.” No right was given even to compel the defendant to take the witness stand under the rules set out in Chapter 2, Charter of the International Military Tribunal.<sup>14</sup> Contained in Nazi Conspiracy and Aggression, Volume 1, Page 10, published by U. S. Printing Office.

Will you not uphold in this case America’s conception of ultimate decency in civilized society? Surely what was considered by the framers of the Fifth Amendment to be a requirement and what was considered as essential to a fair Bill of Rights is certainly equally a part of America’s conception of Ordered Liberty. We appeal to you to join the other four members of the Court who have already expressed themselves.

Mr. Justice Frankfurter:

You stated in *Harris v. United States*, in a footnote, that: “A constitutional adjudication of recent vintage and by a divided Court may always be re-considered.” Contained in Footnote 2, Page 91 L. Ed., page 1019.

You refer to the decision of Justice Cardozo’s opinion in *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288 which involves language that was pure dictum. No case like the Adamson case or even one remotely connected with it was involved in *Palko v. Connecticut*. That case involved questions of double jeopardy on the right of a state to appeal from a judgment with which it was satisfied and thereafter to retry the defendant on the reversal of that judgment.

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<sup>14</sup> “Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra*, p. 824; Garner, *Criminal Procedure in France*, 25 Yale L. J. 255, 260; Sherman, *Roman Law in the Modern World*, vol. 2, pp. 493, 494; Stumberg, *Guide to the Law and Legal Literature of France*, p. 184.” (Footnote *Palko v. Connecticut*, 302 U. S. 324, 82 L. Ed. 292.)

Actually this is the first case in which the principles enunciated in *Twining v. New Jersey* and the issues of self-incrimination have been considered on a direct problem involved in the present case.

But, we cannot find any case where the issue has been considered under the command of the Seventh Amendment to this Court to re-examine the facts under the rules of common law.

We now appeal to you to reconsider your holding in this case on an issue "of such far reaching importance to Constitutional liberties" which you sought to preserve in *Davis v. United States*, 328 U. S. 590, 90 L. Ed. 1458; *Zap v. United States*, 328 U. S. 624, 90 L. Ed. 1477, and in *Harris v. United States*, 91 L. Ed. p. 1019.

In *Harris v. United States*, you said:

"A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights (speaking of the Fourth Amendment) or consider it on the whole a kind of nuisance, a serious impediment in the war against crime."

"The provenance of the Fourth Amendment bears on its scope. It will be recalled that James Otis made his Epochal argument against general warrants in 1761." (p. 1020)

In this case, you repeatedly upheld the broad historic policy underlying the Fourth Amendment and you quoted the Boyd opinion as follows:

"The Boyd opinion has been the guide to the interpretation of the Fourth Amendment to which the Court has most frequently recurred."

But the Boyd opinion says that the Fourth Amendment, which you have so vigorously fought for in such a marvelous manner, is the counterpart of the Fifth Amendment against self-incrimination, and the Boyd opinion points out his-

torically “That the compulsory production of books and papers is really compelling a man to be a witness against himself within the meaning of the Fifth Amendment to the Constitution of the United States.” In the *Boyd* case the failure to produce books and records permitted the court to consider the facts alleged as true. This case permits the jury to *consider* the failure of the defendant to testify in support of the truth of the accusation.

The Court, in the *Boyd* case, points out that:

“. . . 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.”

**Mr. Justice Frankfurter:**

You have firmly and vigorously upheld the *Boyd* case. As a great part in the “momentous chapter in the history of Anglo-American freedom,” surely its counterpart is equally one of the important chapters in American freedom. Won't you re-examine your expressions on this question of far-reaching importance to constitutional liberties to protect and preserve those rights which you have so strongly upheld in other phases of the same matter.

The common law makes it a rule of evidence, which the Constitution commands and the Seventh Amendment is the rule which must govern this court.

Mr. Justice Reed: As the author of the majority opinion you have stated that due process forbids “compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process.” Does this not beg the question? California

itself says that the statute is coercive. *People v. Adamson*, 27 Cal. (2d) 478. It leaves no choice to the defendant but to take the witness stand or else suffer the inevitable result, conviction. Does your statement in the opinion not beg the question, when at one breath you state that due process forbids compulsion to testify by "any other type of coercion that falls within the scope of due process." One is either compelled to testify or one is not compelled to testify. It matters little whether that compulsion comes from a policeman's club in a dark or empty room next to a jail, *Chambers v. Florida*, 309 U. S. 227; *Brown v. Mississippi*, 297 U. S. 278, or in a secluded woods some miles away from a police station, *White v. Texas*, 310 U. S. 530, or whether it is done under the maestro baton of a prosecutor sitting in a Court in the corner of which there is an American flag and on the bench of which sits a judge with judicial ermine, who says: "You either take the witness stand or else the prosecutor will argue vigorously your guilt from your failure to do so and I will tell the jury to consider your failure to do so against you." Compulsion exists in many forms and has always been condemned wherever it has been used in this country. Your opinion has now sanctioned it if it is used in the dignity of a courtroom. The common law forbids self-incrimination anywhere and the Seventh Amendment commands this court to be guided by the rules of common law. Will you not join in a rehearing of this question of far reaching importance?

You stated in your Opinion that a statute might violate due process which "might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence." Is that not exactly what California's Constitutional provision does in actual practice? There is a permitted refusal to testify, yet the jury is told by the Court that it may consider such failure to testify. While it does not compel the jury as a matter

of statute to accept the truth of the prosecution's evidence, it tells them that they may consider that evidence and of course there is only one consideration which they can therefore give to the evidence, and that is an acceptance of the truth of the prosecution's evidence by the result of the failure of the defendant to take the witness stand. While the statute leaves a hiatus in theory, in actual practice it leaves nothing for the jury to do but to accept the truth of the prosecution's evidence, based upon the defendant's permitted refusal to testify.

That is exactly what happened in the present case. A review of the evidence so shows. The jury accepted as true not merely the prosecution's evidence but its charge that the defendant was guilty of murder because of a permitted refusal of the defendant to testify.

You also stated that "A state may control such a situation in accordance with its own ideas of the most efficient administration of criminal juries." Is that not exactly what the Fourteenth Amendment says a state may not do, that it may only control criminal trials in accordance with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

You have also stated that due process clause is not to protect an accused against a proper conviction but against an unfair conviction. Is it not the fact that due process clause goes further? It protects not only against an unfair conviction but also a conviction by unfair means. *Snyder v. Massachusetts*, 291 U. S. 97. (Justice Roberts comments.)

A compelled confession is unfair and properly excluded. *Chambers v. Florida*, 309 U. S. 227. A compelled silence or comment on the silence as evidence is likewise unfair procedure.

In a circumstantial evidence case, what can a defendant deny except circumstances of which under his plea of not guilty he has no knowledge. Failure on his part to deny

therefore supplies the missing element of proof of guilt where otherwise the circumstances would be insufficient. It is different in a case of direct evidence, which was the situation in the *Twining* case.

Mr. Chief Justice Vinson:

In your Opinion in *Harris v. United States*, while you affirm the judgment, you enumerated fundamental principles of *Liberty*. You stated:

“The danger to fundamental personal rights and interests resulting from excesses of law enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect against such abuses.”

There could be no greater danger to fundamental personal rights and interests than excess law enforcement in the very courtroom itself. *Lisenba v. California*, 314 U. S. 219. What could be more invasive of fundamental personal rights than to compel an accused in the very presence of the Judge and Jury either to take the witness stand or to have his silence in the courtroom used as evidence against him?

The fundamental personal rights which led to the adoption of the Fifth Amendment were not illusory. The instrument of free government was born when James Oate made his epochal argument against general warrants in 1761, *Harris v. United States*, 91 L. Ed. 1020, but it was only adopted when its framers were assured that a Bill of Rights would subsequently be approved which contained fundamental rights, including not merely freedom of speech and freedom of the press and guarantees against double jeopardy and cruel and unusual punishment, *but also against self-incrimination*.

Fifth Amendment U. S. Constitution.

Like the claims of persons under the Fourth Amendment,

the rights under the Fifth Amendment must be asserted by those accused of crime and, usually, actually on trial for a criminal offense, and those in this unfortunate position have few friends. But the rights thus guaranteed call for alert and strenuous protection the same as the rights of freedom of speech, of the press, and of religion.

No step has been heretofore taken by this High Court which could be called a step backward toward the European System of law enforcement and law court,<sup>15</sup> where self-incrimination is the usual mode of hustling off a prisoner to his doom. *Brown v. Walker*, 161 U. S. 596. The *Adamson* case decision as it now stands does precisely that. As the Trustee of all American Liberties, do you wish it to do that?

We respectfully appeal to you, as our present Chief Justice, heading a Court which must be looked to for the preservation of all personal freedoms, for all peoples, rich or poor, high or low, accuser and accused, to join with those who have already asserted that these fundamental rights contained in the Bill of Rights are part of the Fourteenth Amendment, and to grant a re-hearing in this matter and order the judgment reversed.

We think that the procedure and the proceedings is totally unfair and violates every concept of due process.

We cannot let this petition for re-hearing go by without commenting upon the brilliant dissenting opinions which present our case in other phases far more learnedly and eloquently than we could possibly do, and whether this Court grants or denies a re-hearing, those opinions will be history for future views in this matter.

We respectfully submit that if this Court re-examines the evidence in this case, it is shocking in its paucity to prove murder. To all lovers of justice the slight and unsatis-

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<sup>15</sup> See footnote regarding European systems, *supra*.

factory character of the evidence in this case is such that without the testimonial silence there is nothing to warrant putting the accused to his death. We can only attribute it to a statute whose procedural fairness does not comport with historic and general views that in this "liberty loving America" men should not be compelled to testify, by their person or silence, and condemn themselves to death in either manner. If we are trying to set an example of liberty to the world we have failed. We have turned the wheels of progress backward and used those methods so despicably used in Continental Europe and heretofore condemned by us.

Wherefore, we pray for rehearing and reexamination of the decision of recent vintage of this court on a constitutional question of great importance by a closely divided court. We ask for reversal of the judgment below.

Respectfully submitted,

MORRIS LAVINE,  
*Attorney for Petitioner.*

**Certificate of Counsel.**

MORRIS LAVINE, counsel for the above entitled petitioner, hereby certifies that the above entitled petition for rehearing is filed in good faith, that he believes the grounds thereof to be meritorious, and not for the purposes of delay.

MORRIS LAVINE.

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