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## SILENCE—AN ADMISSION OF GUILT

## I. INTRODUCTION

One popular misconception of the law is that one who is arrested cannot legally be forced to make a statement. The fact is that one can be so forced; at least the Illinois Supreme Court has so held, as have the Supreme courts of several other states. The means of coercion, however, is not a rubber hose; it is simply an accusation. For a well established rule of evidence is that where an accusation is made in the presence and hearing of the accused and is not denied, testimony relating to the accusation and defendant's failure to deny can be admissible in a criminal proceeding as evidence of his acquiescence in its truth.<sup>1</sup> This rule is based on the questionable presumption that ordinarily when an innocent person is accused of a crime, he will naturally deny the charge.<sup>2</sup> The accusation and the failure of the accused to deny, however, must have been made under such circumstances as would naturally call for a denial and afford an opportunity for reply.<sup>3</sup>

Where the accused is not under arrest, all courts recognize the rule that when an accusation is made under circumstances which would naturally call for a contradiction or reply, evidence of the accusation and of the silence of the person accused is admissible because it gives rise to an inference of truth of the accusation. There is, however, a great divergence of opinion as to the admissibility of testimony as to such silence as evidence where the accused is under arrest at the time the incriminating statement is made. Some courts hold that the fact that the accused is under arrest makes the fact of defendant's silence as to the accusation inadmissible.<sup>4</sup> Other courts feel that arrest is merely one factor to be considered in determining whether the accused was called upon to make a denial and whether he had an opportunity to do so.<sup>5</sup> A third view taken by some courts is that when the accused is under arrest, he is under no obligation to affirm or to deny but may plead his right against self-in-

<sup>1</sup> *People v. Bennett*, 3 Ill.2d 357, 121 N.E.2d 595 (1954).

<sup>2</sup> *People v. Bennett*, 413 Ill. 601, 110 N.E.2d 175 (1953).

<sup>3</sup> *People v. Hanley*, 317 Ill. 39, 147 N.E. 400 (1925).

<sup>4</sup> *People v. Taylor*, 284 App. Div. 1017, 134 N.Y.S.2d 740 (1954); *Cardell v. State*, 156 Tex. Crim. 457, 243 S.W.2d 702 (1951); *United States v. Lo Biondo*, 135 F.2d 130 (2d Cir. 1943); *People v. Pignataro*, 263 N.Y. 229, 188 N.E. 720 (1934).

<sup>5</sup> *People v. Lee*, 23 Ill.2d 80, 177 N.E.2d 199 (1961); *State v. Case*, 253 N.C. 130, 116 S.E.2d 429 (1960); *Goldsby v. State*, 123 S.2d 429 (Miss. 1960). *Moore v. State*, 229 Ark. 335, 315 S.W.2d 907 (1958).

crimination. This plea will render both the accusation and the failure to deny inadmissible.<sup>6</sup>

The purpose of this article is to discuss (1) the requirements that must be met before this rule of tacit admission may be applied, (2) the effect of the rule when applied and (3) the writer's valuation of the rule.

## II. REQUIREMENTS THAT MUST BE MET FOR THE RULE OF TACIT ADMISSIONS TO APPLY

The courts recognize that "nothing can be more dangerous than this kind of evidence"<sup>7</sup> and often state that caution must be exercised in receiving it. A review of the decisions of various jurisdictions indicate that there are six requirements that must be met before such evidence is admissible.

a) *The accusation must be oral.* The first requirement is that the accusation must be oral and not written. "Oral declarations made to one sought to be charged thereby may in cases be considered as admitted by silence but the rule is otherwise as to letters. The recipient is not called on to reply or to be considered as to admitting what is written."<sup>8</sup> Thus where the defendant was charged with deduction, a letter from the prosecutrix to defendant implying his breach of promise and testimony as to defendant's failure to deny was held inadmissible<sup>9</sup> in that the accusation was not oral.

b) *One making accusation must be competent to testify.* Another requirement demanded by a minority of courts, including Illinois' is that the person making the inculpatory statement be competent to testify. Thus in one case<sup>10</sup> it was held error to admit as evidence testimony that the defendant was silent in the face of his wife's statement that she had caught him in the act of rape. The statement was inadmissible because of the then well established rule that a wife is incompetent to testify against her husband. However, the majority of courts will admit such evidence on the theory that the competency of the person making the statement of accusation is irrelevant since the fact of the statement is not offered in evidence as proof of the truth of the incriminating fact asserted, but rather

<sup>6</sup> Commonwealth v. Ford, 193 Pa. Super. 588, 165 A.2d 113 (1960); People v. Abbott, 47 Cal.2d 362, 303 P.2d 730 (1956); United States v. Kelly, 119 F. Supp. 217 (D.D.C. 1954).

<sup>7</sup> Moore v. Smith, 14 Serg & R. 388, 393 (Pa. 1829).

<sup>8</sup> State v. Howell, 61 N.J.L. 142, 38 Atl. 748, 749 (1897).

<sup>9</sup> Snead v. Commonwealth, 138 Va. 787, 121 S.E. 82 (1924).

<sup>10</sup> People v. Jordan, 292 Ill. 514, 127 N.E. 117 (1920).

it is admitted to show the reaction of the accused in failing to deny a statement under circumstances normally calling for such a denial.<sup>11</sup>

c) *The inculpatory statement must not be denied.* It is almost<sup>12</sup> uniformly agreed that an inculpatory statement is inadmissible if it is denied in toto. The courts, however, have been inconsistent in determining what constitutes a denial as opposed to a mere evasive answer. The response of "I don't remember" has been held by one court<sup>13</sup> to render both the accusation and the response inadmissible. Yet, another court<sup>14</sup> has held these exact words to be a mere evasive answer and therefore within the rule of tacit admissions. Nor is the inconsistency found only in comparing various jurisdictions, for the same court may render decisions on this subject which cannot be reconciled with one another. The Illinois Court, for example, has held the answer, "It will take twelve men to try me"<sup>15</sup> to constitute a denial. The same court has held that the responses, "I don't know anything about it; give me a break";<sup>16</sup> "What can I say"<sup>17</sup> and "I am a working man. I work for a living"<sup>18</sup> were only evasive answers and therefore warranted the admission into evidence of both the defendant's reply and the inculpatory statement. In a recent Illinois case,<sup>19</sup> the defendant, while under arrest, was accused of rape by the prosecutrix. He refused to say anything until he had a lawyer. The Court not only allowed the admission into evidence of the accusation and defendant's failure to deny, but the Court also held that such evidence further justified the conviction.

As stated in the introduction, several courts have held that the exercise of the privilege against self-incrimination will prevent the admission

<sup>11</sup> *Robinson v. State*, 253 Miss. 100, 108 So.2d 583 (1959); *State v. Lavdisi*, 86 N.J.L. 230, 90 Atl. 1098 (1914).

<sup>12</sup> It has been held that where the accused in his denial asserts facts which are later proved to be untrue, evidence of both the inculpatory statement and of the defendant's reply is admissible in spite of the denial. *Commonwealth v. Westwood*, 324 Pa. 289, 188 Atl. 304 (1936); *People v. McCoy*, 127 Cal. App. 195, 15 P.2d 543 (1932).

<sup>13</sup> *Dykeman v. Commonwealth*, 201 Va. 807, 173 S.E. 867 (1960).

<sup>14</sup> *Jones v. State*, 228 Miss. 296, 87 So.2d 573 (1956).

<sup>15</sup> *People v. Hanley*, 317 Ill. 39, 43, 147 N.E. 400, 401 (1925). (In reply to an accusation of robbery).

<sup>16</sup> *People v. Popilsky*, 366 Ill. 268, 271, 8 N.E.2d 640, 641 (1937). (In reply to an accusation of robbery).

<sup>17</sup> *People v. Andrae*, 305 Ill. 530, 533, 137 N.E. 496, 498 (1922). (In reply to an accusation of burglary).

<sup>18</sup> *People v. O'Donnell*, 315 Ill. 568, 572, 146 N.E. 490, 492 (1925). (In reply to an accusation of robbery).

<sup>19</sup> *People v. Lee*, 23 Ill.2d 80, 177 N.E.2d 199 (1961).

of the incriminating statements into evidence.<sup>20</sup> However, if the accused refuses to speak, evidence of both the incriminating statement and his silence is admitted.<sup>21</sup> It would seem that the distinction between silence and a plea of the right against self-incrimination would favor the experienced criminal, as opposed to the innocent layman who is not versed in the intricacies of rules of evidence.<sup>22</sup>

d) *The statement must be made in the presence of the accused and he must hear and understand it.* For the testimony pertaining to the accusation and silence to be admitted into evidence so that an inference may be drawn from defendant's silence, the statement must be made in his presence and it must be reasonably inferable that he heard and understood it. Thus the fact of the accusation was inadmissible where the accused was unconscious,<sup>23</sup> intoxicated,<sup>24</sup> or where the accusation was made in a foreign language.<sup>25</sup>

e) *Statement and circumstances must call for a denial.* It is necessary, of course, that both the accusation and the circumstances under which the accusation was made be such that a denial would normally have been expressed. In *Davis v. State*<sup>26</sup> the Court held inadmissible a statement, "If you had listened to me, you would not have gone down there, and the man would not have been killed,"<sup>27</sup> on the ground that the statement was not an accusation and therefore required no denial.

Although the statement itself may call for an answer, the circumstances may be such that an answer would be inappropriate and therefore the one accused would feel no obligation to speak up. In an Illinois case, defendant asked her three year old son why he had shot his father, and the son answered: "I didn't shoot daddy. You shot daddy and I am going to

<sup>20</sup> *People v. Abbott*, 47 Cal.2d 362, 303 P.2d 730 (1956); *United States v. Kelly*, 119 F. Supp. 217 (D.D.C. 1954).

<sup>21</sup> *People v. Chavez*, 50 Cal.2d 778, 329 P.2d 907 (1958); *United States v. Peckham*, 105 F. Supp. 775 (D.D.C. 1952), rev'd on other grounds, 210 F. 2d 693 (D.C. Cir. 1953).

<sup>22</sup> Thus in one case the defendant repeatedly answered the accusation of police with the response "I have told you all I am going to tell you." The Court concluded from this that he was attempting to exercise his constitutional privilege and therefore the statement was held to be inadmissible. *People v. Simmons*, 28 Cal.2d 699, 712, 172 P.2d 18, 27 (1946). However, in another case it was held that evidence of a statement by the defendant's captor that the defendant had committed the crime, and the defendant's silence following such a statement was admissible as an implied admission of guilt. *People v. Gotham*, 185 Cal. App.2d 47, 8 Cal. 135 (1960).

<sup>23</sup> *People v. Koerner*, 154 N.Y. 355, 48 N.E. 730 (1897).

<sup>24</sup> *People v. Allen*, 300 N.Y. 222, 90 N.E.2d 48 (1949).

<sup>25</sup> *State v. Kysilka*, 84 N.J.L. 6, 87 Atl. 79 (1913).

<sup>26</sup> 85 Miss. 416, 37 So. 1018 (1905).

<sup>27</sup> *Ibid.* at ..., 37 So. at 1019 (1905).

shoot you.”<sup>28</sup> The court held “no admission, expressed or implied, could be attributed to either from such a conversation, because the very fact they are charging each other separately excludes the implication of an admission in any respect.”<sup>29</sup>

It is interesting to note, however, that this same Court reached the opposite conclusion in *People v. Seff*.<sup>30</sup> In that case the defendant was brought to a hospital and there was accused by a dying man of being his assailant. The defendant began to reply, but his accuser gestured with his hands that he would not listen to him. In spite of this the Court held admissible the testimony of the accusation and of the defendant’s failure to reply.

f) *The accused must have an opportunity to deny.* Courts have often said that where the accused is restrained from speaking either by fear of physical harm or instructions given to him by his attorney, his remaining mute does not amount to the admission of the charges against him. In *People v. Kozlowski*<sup>31</sup> there was evidence that shortly prior to the time that the incriminating statements were made, the accused was kicked and slapped by police officers and told to keep quiet. The Supreme Court of Illinois held that it was error to admit both the incriminating statement and the testimony as to the defendant’s silence. In *People v. Hodson*<sup>32</sup> similar evidence was excluded on the grounds that the defendant’s attorney had previously instructed him not to make any statement about the case.

The Illinois Court has also stated that it will exclude this type of evidence where the accused is “restrained from speaking . . . by doubt of his rights . . . or a reasonable belief that it would be better or safer for him if he kept silent.”<sup>33</sup> However, it would seem that the Court is only giving lip service to these two restrictions, for it continues to apply this rule of tacit admissions, even though the accused is under arrest at the time the incriminating statement was made. When would a person under arrest not be in “doubt of his rights?” When would a person under arrest not entertain “a reasonable belief that it would be better or safer for him if he kept silent?”

### III. EFFECT OF THE RULE

When a defendant has previously remained silent under an accusation of crime, this may be construed against him as an admission. What this ac-

<sup>28</sup> *People v. Willson*, 401 Ill. 68, 71, 81 N.E.2d 485, 487 (1948).

<sup>29</sup> *Ibid.* at 73, 81 N.E.2d at 488 (1948).

<sup>30</sup> 296 Ill. 120, 129 N.E. 533 (1920).

<sup>31</sup> 368 Ill. 124, 13 N.E.2d 174 (1938).

<sup>32</sup> 406 Ill. 328, 94 N.E.2d 166 (1950).

<sup>33</sup> *People v. Bennett*, 3 Ill.2d 357, 361, 121 N.E.2d 595, 598 (1954).

tually means is that the silence of a defendant may constitute conduct from which guilt may be inferred by the finder of fact.<sup>34</sup>

In order to determine the effect of allowing into evidence the fact that a defendant has previously remained silent under accusation of a crime, it is necessary to distinguish between confessions and admissions. A confession is a direct acknowledgment by the accused of the truth of all essential elements of the guilty fact charged.<sup>35</sup> An admission is an acknowledgment of a subordinate fact not in itself constituting all the elements of crime, but from which guilt may be *inferred*.<sup>36</sup> Thus, since an admission can be made without any intention of actually confessing guilt, it is obvious that in admissions, unlike confessions, a person need not necessarily intend to acknowledge guilt.<sup>37</sup>

However, whereas a confession, if upheld, will sustain a conviction, an admission in itself is insufficient. This was clearly demonstrated in *People v. LaCoco*<sup>38</sup> where the sole evidence against co-defendant Wagner was the confession made by LaCoco in Wagner's presence. The confession implicated Wagner in the robbery of a currency exchange. The question presented to the Illinois Supreme Court was whether Wagner's ambiguous reply to the confession by LaCoco constituted an admission.<sup>39</sup> The Court, however, found it unnecessary to decide this question since this was the sole evidence against Wagner, and even if his reply was construed as an admission, it would be insufficient to sustain a conviction. Thus, although guilt may be inferred from an admission, the courts realize that it does not necessarily follow.

Another result of considering the defendant's silence as an admission is that it operates as an exception to the hearsay rule.<sup>40</sup> Lengthy statements of third persons who may or may not later appear as witnesses are admitted into evidence in the form of an accusation. The hearsay rule would render such statements inadmissible were it not for the fact that the accusations are allowed into evidence only to predicate the reaction of the accused.<sup>41</sup> It is necessary to admit these accusations since otherwise the

<sup>34</sup> *People v. Neimoth*, 409 Ill. 111, 98 N.E.2d 733 (1951).

<sup>35</sup> 3 WIGMORE EVIDENCE § 821 (3rd Ed. 1940).

<sup>36</sup> *Commonwealth v. Haywood*, 247 Mass. 16, 141 N.E. 571 (1923); *State v. Red*, 53 Iowa 69, 4 N.W. 831 (1880).

<sup>37</sup> *People v. Wynekoop*, 359 Ill. 124, 194 N.E. 276 (1934).

<sup>38</sup> 406 Ill. 303, 94 N.E.2d 178 (1950).

<sup>39</sup> The confession was made in Wagner's presence. A confession of the co-defendant is not admissible against the accused unless the latter was present when the co-defendant confessed. *People v. Vehlon*, 340 Ill. 511, 173 N.E. 104 (1930).

<sup>40</sup> *Goldsby v. State*, 123 So.2d 429 (Miss. 1960).

<sup>41</sup> *State v. Sawyer*, 230 N.C. 713, 53 S.E.2d 464 (1949); *State v. Kobylarz*, 44 N.J. Super. 250, 130 A.2d 80 (1957).

defendant's response, on which the jury is to pass, is meaningless. It is not the accusation itself which constitutes the evidence against the accused, it is his own reaction.<sup>42</sup> The defendant, because he remained silent under police interrogation or another's accusation, is forced to testify at the trial level to explain his actions if he desires to rebut the inference of guilt which can be drawn from his silence. Thus, in effect, the defendant is given the choice of making a statement at the police station or a statement at the trial.

#### IV. EVALUATION OF THE RULE

a) *The rule violates the spirit of the privilege against self incrimination.* In the Fifth Amendment to the Constitution of the United States there is contained the phrase "nor shall any person . . . be compelled, in any criminal case, to be witness against himself. . . ." This phrase grants the privilege against self incrimination. Most states, including Illinois, have in their constitutions similar guarantees. Article II of the Constitution of the State of Illinois states that "[n]o person shall be compelled in any criminal case to give evidence against himself. . . ." However, when one remains silent in the face of an accusation, his silence may be used as incriminating evidence in Illinois and many other jurisdictions which have similar constitutional provisions. The question proposed is whether this evidence is violative of the rights guaranteed under the Fifth Amendment or, as concerns the various states, the similarly worded provisions in the state constitutions.<sup>43</sup>

The federal courts, with the exception of the District of Columbia courts have held that after arrest testimony concerning defendant's silence when accused is not admissible.<sup>44</sup> However, only one circuit has seen fit to examine the constitutional question. In *Helton v. United States*<sup>45</sup> the court of appeals for the fifth circuit was confronted with a defendant who had refused to explain the presence of a can of marijuana found in his apartment when accused of illegally possessing it by a police officer. Testimony of the police officer had been allowed at the trial level to the effect that when confronted with the evidence the defendant remained

<sup>42</sup> *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946).

<sup>43</sup> The Fourteenth Amendment to the United States Constitution does not incorporate the self incrimination privilege of the Fifth, and therefore the Fifth Amendment is not applicable to the states. *Adamson v. California*, 332 U.S. 46 (1947).

<sup>44</sup> See *United States v. LoBiondo*, 135 F.2d 130 (2d Cir. 1943); *Yep v. United States*, 83 F.2d 41 (10th Cir. 1936); *McCarthy v. United States*, 25 F.2d 298 (6th Cir. 1928). As to the District of Columbia see *Allen v. United States*, 273 F.2d 85 (D.C. Cir. 1959) which holds the opposite of the above cases despite a strong dissent citing *Helton v. United States*, 221 F.2d 338 (5th Cir. 1955).

<sup>45</sup> 221 F.2d 338 (5th Cir. 1955).



silent. On appeal, the circuit court held that the admission of such evidence violated "the spirit, if not the letter of the Fifth Amendment."<sup>46</sup> The court further interpreted the Fifth Amendment as applicable to preliminary inquisition as well as actual judicial proceedings. Condensing the problem, the court of appeals found that by remaining silent the defendant challenged the government to full proof, but the government, seeking to avoid the challenge, sought to convict him by his very silence.

Decisions bearing on the constitutionality of admitting such evidence are also notable by their absence on the state level. Only one state court has specifically held that testimony which shows that a defendant remained silent under an accusation of crime does not violate constitutional guarantees. In *Owens v. Commonwealth*,<sup>47</sup> the Supreme Court of Virginia, interpreting Section 8 of the Virginia Constitution,<sup>48</sup> denied the privilege against self incrimination to a criminal suspect on the grounds that it protects only against "*testimonial compulsion*."<sup>49</sup> Owens, after denying all knowledge of any crime, was detained at a police station pending further investigation by police. When Owens was later faced by his alleged confederate and accused by him of being his accomplice, Owens stood mute. The Court in allowing testimony as to the defendant Owens' silent answer to this accusation quoted Wigmore to the effect that the historical concept of the privilege against self incrimination was the protection from *forced admissions* in *legal proceedings*.<sup>50</sup> The Court noted that the historical concept of the rule was to protect those under accusation from medieval judicial torture. Therefore, since no inquisitorial method was used to force Owens to implicate himself by *his testimony*, he could not claim the privilege. However, it must be noted that the Court was careful to distinguish that the defendant was not yet formally under arrest. Thus the question of whether or not a person's statements or silence after arrest constitute a part of the judicial proceedings did not arise.

In 1908, the Oklahoma Supreme Court, in *Ellis v. State*,<sup>51</sup> held that what occurs after arrest constitutes part of the judicial proceedings. The Court found that if a person's failure to reply to a statement made in his presence could be used against him, then the state was being allowed to do indirectly that which it was forbidden by its constitution from doing directly. Oklahoma has been the only state to expressly hold that the use

<sup>46</sup> *Id.* at 341.

<sup>47</sup> 186 Va. 689, 43 S.E.2d 895 (1947).

<sup>48</sup> This section provides: "nor be compelled in any criminal proceeding to give evidence against himself. . . ."

<sup>49</sup> *Owens v. Commonwealth*, 186 Va. 689, 695, 43 S.E.2d 895, 899 (1947).

<sup>50</sup> 8 WIGMORE EVIDENCE § 2263 (3 ed. 1940).

<sup>51</sup> 8 Okla. Cr. 522, 128 Pac. 1095 (1913).

of one's silence in response to an accusation to create an implied admission of truth of the accusation violates the privilege against self incrimination.<sup>52</sup> Some states have adopted the rule that if, when confronted, the defendant attempts to invoke his privilege against self incrimination, his subsequent silence cannot be used against him.<sup>53</sup> However, it is not clear from the cases that this rule is supported on constitutional grounds. More likely the accusation and reaction are excluded because the courts consider that a person attempting to invoke the privilege is *in doubt of his rights*. Thus one of the standard requirements for allowing testimony concerning a defendant's silence into evidence is not met and no constitutional questions are actually raised.

As previously stated, if the requirements of the rule are properly met, Illinois courts will consider a defendant's silence to an accusation as an admission.<sup>54</sup> However, in cases where it has been found by the Illinois courts that the requirements are lacking, a noticeable undertone of constitutional questions runs through the opinions.

In *People v. Nitti*<sup>55</sup> three defendants were on trial for murder. The sole evidence against all three was an account of the crime related by one of the defendants in the presence of the others and not denied by them. The account was later retracted by the defendant who gave it. It was also found that one of the defendants who remained silent did not understand English and the other had previously denied his guilt consistently. The Supreme Court of Illinois, while concentrating on the fact that an admission alone will not sustain a conviction, said that the federal and state constitutions guarantee the right of a person accused of a crime to remain silent. It was also noted by the Court that it would be unreasonable to convict a person on the basis of his silence before the trial when the Illinois Criminal Code expressly prohibits silence at the trial from raising any presumption of guilt.<sup>56</sup> The Court, therefore, implied that if one had the right to remain silent, his silence could not be construed as an admission. The Court, however, did not hold testimony as to the silence of the accused inadmissible on constitutional grounds, but because various requirements were not met.

Since the *Nitti* case, the Illinois Supreme Court has often repeated, as a principle, that a person accused of a crime has a constitutional right to

<sup>52</sup> *Crabb v. State*, 86 Okla. Crim. 323, 192 P.2d 1018 (1948).

<sup>53</sup> *Commonwealth v. Ford*, 193 Pa. Super. 588, 165 A.2d 113 (1960); *People v. Abbott*, 47 Cal.2d 362, 303 P.2d 730 (1956); *United States v. Kelly*, 119 F. Supp. 217 (D.D.C. 1954).

<sup>54</sup> *People v. Bennett*, 3 Ill.2d 357, 121 N.E.2d 595 (1954).

<sup>55</sup> 312 Ill. 73, 143 N.E. 448 (1924).

<sup>56</sup> Ill. Rev. Stat. ch. 38, § 734 (1961).

remain silent.<sup>57</sup> However, in the later cases where this principle has been stated, it has always held testimony concerning the defendant's silence inadmissible on other grounds.<sup>58</sup> Still, when all the requirements are met, the Supreme Court is not hesitant to allow an inference of guilt from the defendant's silence.<sup>59</sup> Thus, there is a division in the cases of the Illinois Supreme Court, some cases inferring that a constitutional right has been violated, others completely ignoring this aspect. It is not that the courts of Illinois are acting in derogation of the state constitution in allowing one's silence to raise an inference of guilt since it is for the Supreme Court to interpret the state constitution and by allowing such evidence they, perhaps, have recognized its validity. On the other hand, as the *Helton* case<sup>60</sup> pointed out, and some Illinois cases infer,<sup>61</sup> since a defendant is in effect being forced to incriminate himself, the spirit of the self incrimination privilege is being violated. In view of this, it would seem quite proper for the Illinois courts, and other courts that wished to follow this line of reasoning, to extend the privilege as granted in the federal and state constitutions to cover this area. This would adequately control any attempt by the police to manufacture evidence by accusation<sup>62</sup> which, if unchecked, could prove as dangerous as medieval judicial torture.<sup>63</sup> Moreover, since it is unreasonable for the courts to dictate what an individual's reaction to an accusation should be, using as a yardstick an arbitrary rule, the rule of tacit admissions can certainly be shown to be unreliable.

*b) The rule is unreliable.* If one were to attack the rule, he would do best to attack it at its very foundation. One of the strongest objections made in regard to the rule is the major premise upon which it rests—"the age-long experience of mankind (is) that ordinarily an innocent person will spontaneously repel false accusations"—is invalid. As Justice Maxey said in *Commonwealth v. Vallone*,<sup>64</sup> "I do not so read the record of the age-long experience of mankind and I am equally convinced that the

<sup>57</sup> *People v. Hodson*, 406 Ill. 328, 94 N.E.2d 166 (1950); *People v. Kozlowski*, 368 Ill. 124, 13 N.E.2d 174 (1938); *People v. Blumenfeld*, 330 Ill. 474, 161 N.E. 857 (1928).

<sup>58</sup> *Ibid.*

<sup>59</sup> *People v. Lee*, 23 Ill.2d 80, 177 N.E.2d 199 (1961).

<sup>60</sup> *Helton v. United States*, 221 F.2d 338 (5th Cir. 1955).

<sup>61</sup> *People v. Hodson*, 406 Ill. 328, 94 N.E.2d 166 (1950); *People v. Kozlowski*, 368 Ill. 124, 13 N.E. 2d 174 (1938); *People v. Blumenfeld*, 330 Ill. 474, 161 N.E. 857 (1928); *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924).

<sup>62</sup> See, Inbau and Reid, *Lie Detection and Criminal Interrogation* 230 (3d ed. 1953) where such methods are recommended for criminal interrogators.

<sup>63</sup> For further discussion of this problem see Morgan, *The Privilege Against Self Incrimination*, 34 Minn. L. Rev. 1 (1949).

<sup>64</sup> 347 Pa. 419, 32 A.2d 889 (1943).

cliché 'silence gives consent' is an unreliable basis for a rule of evidence."<sup>65</sup> The Justice proceeded to show that there were instances in history where innocent men remained mute in the face of accusations against them. One of his examples was Christ before Pilate. Others he included were Presidents Washington, Grant and Garfield.

The application of the rule becomes particularly unreliable where the accused is under arrest. Here, even more so, men generally believe that they are under no obligation to speak. A man under arrest is likely to remain silent in the face of an accusation not because he acquiesces in the truth of the accusation, but because he stands on what he believes to be his constitutional right to remain silent.

One Court<sup>66</sup> pointed out that as a practical matter, if the accused had legal counsel, his attorney would undoubtedly instruct him to remain silent. His silence, of course, could not be used against him. Yet if he doesn't have counsel, "he should not be prejudiced thereby."<sup>67</sup>

c) *The rule is dangerous.* A third objection made against the rule is that juries are being exposed to a vast amount of evidence which, were it not for the rule, would be hearsay.<sup>68</sup>

For example, a well recognized corollary of the hearsay rule prohibits the admission into evidence of confessions made by an alleged co-conspirator implicating the defendant unless the confessor is able to testify in court.<sup>69</sup> However, a popular practice among police<sup>70</sup> (used to evade this rule) is to have the alleged co-conspirator repeat his confession in the presence of all those whom he has implicated. Should the ones implicated make the mistake of remaining silent, their failure to deny can be construed as an acquiescence to the truth of the statement. The accusation can now be entered into evidence to predicate this silence for the jury's consideration. Thus, a confession by a third party implicating the defendant can be introduced in the trial of the defendant although the one who made the confession is not used as a witness. This would seem to follow even if the one making the confession later repudiated it. True, the jury is instructed to receive these inculpatory statements not as substantive evidence of facts asserted, but merely as a basis of showing the reaction of the accused to the statements. However, it would be unrealistic to say that an accusation or confession of an alleged co-conspirator injected into

<sup>65</sup> *Id.* at 424, 32 A.2d at 889 (1943) (dissenting opinion).

<sup>66</sup> *People v. Rutigliano*, 261 N.Y. 103, 184 N.E. 689 (1933).

<sup>67</sup> *Id.* at 107, 184 N.E. 689, 690 (1933).

<sup>68</sup> *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946).

<sup>69</sup> *People v. Kozlowski*, 368 Ill. 124, 13 N.E.2d 174 (1938).

<sup>70</sup> See note 62, *supra*.

the minds of the jurors would not have any effect on them in their deliberations.

#### CONCLUSION

Thus it can be seen that a rule which allows a person's silence to be used against him in criminal proceedings is not only dangerous and unreliable, but is also violative of the spirit of a basic right fundamental to all citizens of the United States. It might be contended that in most cases, deprivations of this right are of a limited scope. First, basic requirements must be met. Second, the defendant's silence is only a fact to be considered by the jury and, in itself, will not sustain a conviction. However, the fact that deprivations are limited in scope in this instance is of no importance since there is no practical benefit to society or more specifically, proper law enforcement. Disallowing a person's silence will not create a right behind which the guilty will find protection. To grant citizens this protection will not in any way hamper officers of the law from gathering more or other evidence against suspects, but only from manufacturing evidence. Certainly an experienced criminal will find it easier to issue the vague "I'm innocent," or other general denial, to any accusation, than would an innocent person, possibly never before in a police station. Thus, the present rule makes it more likely that the innocent will be jailed than the guilty freed. This is not an enviable position when our legal heritage constantly reminds us that it is better to free the guilty than convict the innocent.

Realistically, the rule may be too well established for the courts to repudiate it. They may consider it as an appropriate sphere only for legislative action. Until the legislature sees fit to take such action, however, it is suggested that the courts modify the rule by adding a seventh requirement which must be met before any evidence is accepted—*where the accused is under arrest, he must be warned that his failure to deny any accusation may be used as evidence.*<sup>71</sup> After this warning, it would be clear to the accused that the cliché "Be silent and safe—silence never betrays you," has no legal counterpart in many jurisdictions.

<sup>71</sup> Such a requirement is easily likened to the caution which must be issued by the police of Great Britain upon their making an arrest. There, under the Judges' Rules, when an interrogating or arresting officer decides that he has sufficient evidence to arrest a suspect, he must caution the suspect that *although the suspect need not make any further statement*, anything the suspect may say will be taken down and may later be used as evidence. Devlin, *The Criminal Prosecution In England* 28-37 (1960). Under English law, the judge or prosecuting counsel may comment on the defendant's silence, but the silence cannot be represented to the jury as something from which they may infer guilt. *R. v. Leckey* [1943] 2 All E.R. 665.