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Adoptive Admissions in Custody and the Constitution

logically be the preferable forum, as state judges are presumably more thoroughly versed in the intricacies of state law.[104]

The advisability of a literal reading of *Kenrose* seems questionable. Certainly, little exception can be taken to a finding by the Fourth Circuit that the exercise of ancillary jurisdiction in a particular case would exceed the limits of trial court discretion. In so far as the opinion is grounded upon the inadequacy of the trial court's jurisdictional power, however, the basis of the decision is less than clear. If the decision rests solely upon a finding that the dismissal of the third-party complaint reduced Kilodyne to the position of a mere co-defendant, then a ruling based upon the rule of *Strawbridge v. Curtiss* may be justified. Such is not the case where this decision is based upon the question of whether federal ancillary jurisdiction extends, as a matter of principle, to plaintiffs' claims against third-party defendants. The constitutional power analysis of *Gibbs* as applied in *Revere* casts a long shadow which seems to reach the heart of the Fourth Circuit's rationale. It would appear that this question has not yet been answered clearly and convincingly by the Fourth Circuit. Consequently, it is conceivable that, upon a fact situation calling more clearly for a comprehensive federal adjudication and presenting only the question of extending ancillary jurisdiction to a plaintiff's claim against a third-party defendant, the imprecise mandate of *Kenrose* might not be found to control.

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ADOPTIVE ADMISSIONS IN CUSTODY AND THE CONSTITUTION

In order for a statement by an accused in custody[1] to be admissible in court, the statement must have been preceded by a warning to the suspect of his right to remain silent.[2] However, the police agent is not

[104] WRIGHT § 23, at 75.

[1] For discussion of the term "custody," see text accompanying notes 41-48 *infra*.

[2] In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court specified procedural safeguards required to secure the fifth amendment right against compelled self-incrimination:

> [The accused] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

required to warn the person accused that his silence may be used against him.[3] Thus, the adoptive admissions rule of evidence, which creates an inference of acquiescence in a personally inculpatory statement from a failure to deny that statement,[4] sanctions possible punishment for reliance upon a constitutional right. This result appears to violate the defendant's fifth amendment protection against compelled self-incrimination and his fourteenth amendment right of due process of law. For this reason, the courts have restricted application of this rule of evidence.[5] The recent

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[3]*Id.* The quoted language of note 2 *supra* is all the warning required to be given a suspect before questioning.

[4]This rule is predicated upon the "natural" reaction of a person to deny an untrue inculpatory statement about him made in his presence and hearing. IV J. WIGMORE, EVIDENCE, § 1071 (Chadbourne rev. 1972) [hereinafter cited as WIGMORE]; C. MCCORMICK, EVIDENCE, § 270 (2d ed. 1972) [hereinafter cited as MCCORMICK]. *See, e.g.*, Sparf v. United States, 156 U.S. 51 (1895). *Accord,* MODEL CODE OF EVIDENCE rule 507(b) (1942); RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, effective July 1, 1973, adopted by the Supreme Court, 93 S. Ct.—(1972) [hereinafter cited as FEDERAL RULES]. Rule 801 reads in pertinent part:

> (d) . . . A statement is not hearsay if . . . (2) The statement is offered against a party and is . . . (B) a statement of which he has manifested his adoption or belief in its truth . . . .
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> Advisory Committee's Note
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> Subdivision (d).
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> (2) *Admissions*
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> (B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. . . . Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

[5]*E.g.*, Slochower v. Board of Educ., 350 U.S. 551, 557-58 (1956); United States v. McKinney, 379 F.2d 259, 261-62 (6th Cir. 1967). *See also* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

case of *Miller v. Cox*[6] illustrates the problems inherent in the employment of adoptive admissions in criminal cases.

Miller v. Cox

Howard Miller and Lavone Robbs were apprehended as suspects in a gas station robbery and abduction of the attendant which occurred in Richmond, Virginia. The police took the suspects to the police station and placed them in a room with Grover Robbs, Lavone's brother, also a suspect in the robbery and abduction. The police read them an enumeration of their constitutional rights pursuant to the requirements in *Miranda v. Arizona.*[7] A police detective then drew Grover Robbs aside; in the presence and hearing of Miller and Lavone Robbs, Grover admitted that the three had executed the robbery and abduction. Neither Miller nor Lavone Robbs made any response at that time, but they had previously denied participation in the crime and were subsequently to repeat this denial.

A judge sitting without a jury tried the three suspects. The gas station attendant who had been abducted identified all three co-defendants, noting his opportunity to observe them during the abduction. Although Grover Robbs did not testify, both his confession and Miller's silence in response thereto were admitted as evidence bearing on the latter's guilt. All three were convicted of armed robbery, abduction, and unauthorized used of an automobile. The Supreme Court of Appeals of Virginia affirmed this conviction.[8] Having exhausted his state remedies,[9] Miller applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3).[10] The petition was dismissed by the district court;[11] Miller appealed this dismissal to the Fourth Circuit Court of Appeals, which upheld the district court's decision.

In his appeal to the circuit court, Miller raised four claims for relief, two of which pertained to the use of the adoptive admission.[12] One of

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[6]457 F.2d 700 (4th Cir.), *cert. denied,* 93 S. Ct. 433 (1972).

[7]384 U.S. 436 (1966).

[8]457 F.2d at 701. The denial of the writ by the Supreme Court of Appeals of Virginia, rendered December 6, 1968, is unreported.

[9]*Id.*

[10]28 U.S.C. § 2241(c) reads in pertinent part:

> The writ of habeas corpus shall not extend to a prisoner unless . . .
> (3) He is in custody in violation of the Constitution or Laws or Treaties of the United States . . . .

[11]This decision by the United States District Court for the Eastern District of Virginia, rendered October 7, 1970, is unreported.

[12]The other two grounds for relief involved Miller's sixth amendment right to the assistance of counsel. In ruling that Miller's representation by counsel was adequate, the Fourth Circuit rejected the claimed incompetence of counsel. 457 F.2d at 701. The other

these two claims was the contention that Miller's fifth amendment right to remain silent was abridged by the trial judge's reliance on Miller's silence in response to Grover Robbs' confession. The Fourth Circuit ruled that the fifth amendment is a bar only to confessions compelled by the government; since, according to the court, Miller was not under police custodial interrogation at the time, this compulsion was absent.[13]

The single meritorious ground for relief, according to the Fourth Circuit, was the claim that, since Grover Robbs could not have been compelled to testify,[14] the introduction of his confession implicating Miller violated Miller's sixth amendment right to confront an opposing witness. The court ruled that the confession was not offered as proof of the truth of its contents but only to show that the statement was made and that Miller did not respond verbally to it. Because the veracity of the confession was not in issue, the Fourth Circuit felt Miller could have gained nothing by cross-examining Grover about the confession.[15] Thus the court intimated that Miller's sixth amendment right of confrontation was not abridged.[16]

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ground for relief was the alleged denial of Miller's effective assistance of counsel, because all three co-defendants were represented by a single attorney at a joint trial. The Fourth Circuit disposed of this claim by finding the interests of the co-defendants were not significantly in conflict. *Id.* at 701-02.

[13]*Id.* at 703.

[14]*E.g.*, Douglas v. Alabama, 380 U.S. 415 (1965).

[15]457 F.2d at 703. The distinction between the use of grover Robbs' confession as a predicate for Miller's silence vis-à-vis proof of the veracity of the facts therein asserted appears insufficient. The Virginia law on adoptive admissions, adhering to the majority position, provides:

> [W]hen a statement accusing one of the commission of an offense is made in his presence and hearing and is not denied, both the statement and the fact of his failure to deny are admissible in a criminal proceeding against him as evidence of his acquiesence in its truth . . . . [T]he statement is not offered in evidence as proof of a fact asserted . . . .

Dykeman v. Commonwealth, 201 Va. 807, 811-12, 113 S.E.2d 867, 871 (1960). By thus accepting Grover's confession as a statement in which Miller acknowledged his belief and then using this tacit assent as a basis for its decision, the court avoided determining the validity of the confession.

[16]The Fourth Circuit did not state that the sixth amendment right was not abridged, but it did state that cross-examination would have been unproductive. 457 F.2d at 703. The court apparently felt that the sixth amendment claim was inapposite in this particular case. The right of confrontation could have been rightly invoked if the truth of the confession had been in issue, and the truth of the confession would have been in issue if the confession had been offered to prove substantive evidence. *E.g.*, California v. Green, 399 U.S. 149 (1970); Pointer v. Texas, 380 U.S. 400 (1965). Instead, the court held that the confession was merely a statement with which Miller agreed, and thus the veracity of the confession was not in issue. Noting the narrow scope of the sixth amendment protection, Mr. Justice Harlan commented that the confrontation clause is "not well designed for taking into

In deciding this point, the Fourth Circuit noted that, under Virginia law, Grover Robbs' confession was inadmissible as a context for Miller's silence. Virginia law requires that the adoptive admission of guilt be a logical interpretation of the defendant's failure to speak.[17] Here, certain circumstances, including the receipt of the *Miranda* warning[18] and Miller's previous denial of guilt,[19] preclude this logical inference of guilt from silence.[20] Because it found other evidence overwhelmingly indicative of Miller's guilt,[21] the Fourth Circuit deemed this error under Virginia law harmless beyond a reasonable doubt.[22]

By finding "it was error [only] under the Virginia law of evidence to receive Robbs' confession as explanatory of Miller's silence when accused,"[23] the court refrained from ruling on the constitutionality of adoptive admissions in custody as used in criminal cases. It may be argued that the Fourth Circuit should have disposed of the constitutional claims more conclusively, since a court should determine prior to its admission that evidence was not procured in derogation of the constitutional rights of the accused. With respect to adoptive admissions, two constitutional barriers seem to emerge:[24] the fifth amendment protection against com-

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account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence." Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring).

[17]*See* Knight v. Commonwealth, 196 Va. 433, 83 S.E.2d 738 (1954); Plymale v. Commonwealth, 195 Va. 582, 79 S.E.2d 610 (1954).

[18]457 F.2d at 701.

[19]*Id.*

[20]*Id.* at 702.

[21]The Fourth Circuit noted that Miller fled when he was not pursued, that the police search of his person produced rolls of coins similar to those taken in the robbery, and that the abducted victim persuasively identified Miller. 457 F.2d at 703.

[22]*Id.* In applying the overwhelming evidence test, the Fourth Circuit followed the Supreme Court in Harrington v. California, 395 U.S. 250 (1969). The majority in *Harrington* endorsed the overwhelming evidence test as the proper analytical tool for determining whether a constitutional error falls within the scope of "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). Representing a minority of three, Mr. Justice Brennan's dissenting opinion in *Harrington* enunciated another method of analysis, the impact test, as the harmless error test. The impact test as premised in *Chapman v. California*, 386 U.S. at 26, requires "for an error to be 'harmless' it must have made *no* contribution to a criminal conviction." 395 U.S. at 255 (emphasis by the Court). This test apparently considers the "bombshell effect" of the error on the trier of facts. Subsequent decisions such as Schneble v. Florida, 405 U.S. 427 (1972) and Whiteley v. Warden, 401 U.S. 560, 569 n.13 (1971) indicate the Supreme Court's apparent acceptance of the overwhelming evidence test, although this acceptance is less than unanimous. *E.g.*, Dutton v. Evans, 400 U.S. 74 (1970).

[23]457 F.2d at 703.

[24]In certain circumstances, the use of an adoptive admission has also been found violative of the defendant's sixth amendment right to confront an opposing witness. *E.g.*, Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).

pelled self-incrimination[25] as extended by *Miranda,* and the fourteenth amendment right to procedural due process.[26]

The paradigm adoptive admission frequently produces a violation of fifth amendment protection,[27] but the fifth amendment affords the defendant little in the way of a shield because courts, able to consider such a violation "harmless,"[28] often ignore this infringement.[29] The due process clause of the fourteenth amendment will provide the necessary protection if courts treat adoptive admissions and involuntary confessions as equally injurious to the defendant. However, courts are hesitant to recognize such a violation of the due process clause,[30] since an involuntary confession is considered an error of such import so as to merit automatic reversal.[31] It is contended that, in the instant case, both the fifth and fourteenth amendment rights of the defendant were breached. Thus, the Fourth Circuit Court of Appeals should have reversed Miller's conviction.

Adoptive Admissions and Miranda

The Supreme Court emphasized the liberal scope of the fifth amendment protection in custodial interrogation in footnote 37 in *Miranda v. Arizona,*[32]

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[33]

For discussion of the Fourth Circuit's treatment of this claim in *Miller v. Cox,* see note 16 *supra.*

[25]U.S. CONST. amend. V reads in pertinent part:

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

[26]U.S. CONST. amend. XIV, § 1 reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[27]*E.g.,* United States v. Allsenberrie, 424 F.2d 1209 (7th Cir. 1970); United States v. Wick, 416 F.2d 61 (7th Cir.), *cert. denied,* 396 U.S. 961 (1969).

[28]Note 22 *supra.*

[29]Note 27 *supra.*

[30]*E.g., In re* Luallen, 321 F. Supp. 1236 (E.D. Tenn. 1970), *rev'd on other grounds sub nom.* Luallen v. Neil, 453 F.2d 428 (6th Cir. 1971).

[31]Note 101 *infra.*

[32]384 U.S. 436 (1966).

[33]*Id.* at 468 n.37.

Because the silence of the defendant is a requisite element of adoptive admissions, there appears to be little doubt that the fifth amendment bars the introduction into evidence of an adoptive admission obtained during custodial interrogation.[34] Accordingly, in *Cockrell v. Oberhauser*,[35] a conviction involving an adoptive admission procured during police questioning of a suspected confederate was reversed as violative of the constitutional protection from compelled self-incrimination. In that case, Cockrell and a co-defendant were in the same room in the police station when the co-defendant identified Cockrell to the interrogating officer as the person who sold her marijuana. Cockrell remained silent, even when "[t]he officer asked . . . what he had to say about [the confession] . . . ."[36]

The difference in the situations in *Cockrell* and in the instant case is minimal, for in both cases the suspect's reaction to the confession of a confederate comprised the challenged evidence. The interrogating officer in *Cockrell* invited a reaction to the co-defendant's statement and noted Cockrell's responsive silence.[37] In the instant case, Miller was not encouraged to reply to Grover's confession, but his silence in response thereto was duly noted.[38]

Like Cockrell, appellant Miller claimed a violation of his constitutional right to be free from compelled self-incrimination.[39] Discussing this contention, the Fourth Circuit intimated that custodial interrogation of a suspect triggers an extension of this fifth amendment protection to him.[40] The court then denied Miller's claim by ruling that this prerequisite was not met since Miller was not considered to have been in custodial interrogation when Grover confessed.[41] The determination that Miller was not under custodial interrogation at that time was arguably erroneous.

The court employed a questionable application of *Miranda* to explain this determination. In apparent reliance upon a footnote in *Miranda* which purported to define "custodial interrogation" as "an investigation

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[34]*E.g.*, Luallen v. Neil, 453 F.2d 428, 430 (6th Cir. 1971). The fifth amendment right "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ." Schmerber v. California, 384 U.S. 757, 761 (1966). The silence of the defendant, as used in adoptive admissions, is as "testimonial" or "communicative" as are the nods and headshakes noted by the Court as being included in this fifth amendment protection. 384 U.S. at 761 n.5.

[35]413 F.2d 256 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).

[36]413 F.2d at 257.

[37]*Id.*

[38]457 F.2d at 701.

[39]*Id.* at 703.

[40]*Id.*

[41]*Id.*

which had focused on an accused,"[42] the Fourth Circuit noted that "the attention of the police detective was focused on Grover Robbs and not upon Miller."[43] However, the investigation had focused on the defendant sufficiently for the police detective to note Miller's lack of verbal response to Grover Robbs' confession.[44] Further, this declaration by the Fourth Circuit appears to limit unduly the application of "custodial interrogation" as that term is defined and used in the text of *Miranda*. This textual definition is an interrogation, by police officers, of a person "taken into custody or otherwise deprived of his freedom of action in any significant way."[45]

Miller appears to have been in custodial interrogation when Grover confessed, despite the finding of the Fourth Circuit. Miller was in custody,[46] for he was apprehended by the police, taken to the police station, placed in a room with other suspects in the same crime, and advised of his constitutional rights.[47] Because the warning of constitutional rights is required before the police may interrogate a subject who is in custody,[48] the reading of the warning by the police indicates they believed Miller was in custody. Miller also appears to have been interrogated by police officers while he was in custody, because he had denied participation in the crime prior to Grover Robbs' confession.[49] Further, the facts, although sketchy, imply that Miller's interrogation had not been completed:[50] he was detained in the same room with another suspect being questioned about the crime for which Miller had been apprehended,[51] and the police detective expected Miller to respond to the confession.[52]

Without considering these points, the Fourth Circuit ruled that Miller was not under police interrogation, because his silence was in response to an accusation volunteered by Grover Robbs and not to questions propounded by police officers.[53] It is contended that this distinction, which

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[42]384 U.S. at 444 n.4.

[43]457 F.2d at 703.

[44]*Id.* at 701.

[45]384 U.S. at 444.

[46]*Accord*, Commonwealth v. Moody, 429 Pa. 39, 239 A.2d 409, *cert. denied*, 393 U.S. 882 (1968).

[47]457 F.2d at 701.

[48]Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[49]457 F.2d at 701.

[50]Even if Miller's interrogation had been completed, his right to remain silent did not evaporate upon the conclusion of the questioning. The Supreme Court has ruled that, once a defendant has manifested a desire to remain silent, the interrogation must cease until the defendant subsequently initiates the conversation voluntarily. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

[51]457 F.2d at 701.

[52]*Id.*

[53]*Id.* at 703. *Contra*, Ivey v. United States, 344 F.2d 770, 773 (5th Cir. 1965).

ignores the practical aspects of police questioning, is not warranted by *Miranda*. The Court in *Miranda* spoke of the constitutional perils inherent in "interrogation of individuals in a police-dominated atmosphere,"[54] and it held the fifth amendment privilege jeopardized "when an individual is taken into custody or otherwise deprived of his freedom by the authorities . . . and is subjected to questioning. . . ."[55] The elaboration upon this theme indicates that the police officer requirement in custodial interrogation was not intended to distinguish an accusation levelled by a police officer from an accusation by a co-defendant, if the defendant was in police custody when either accusation was made. It appears that the police officer requirement was included to distinguish between questioning by police officers and questioning by civilians, when the suspect was not in police custody.[56]

Adoptive Admissions and Due Process

Even if the Fourth Circuit had found an infringement upon Miller's fifth amendment right, his conviction may still have been sustained, because the other evidence may have been so overwhelming as to make this error harmless beyond a reasonable doubt.[57] However, the possibly abusive exploitations of adoptive admissions—for example, as methods of presenting an accusation without subjecting the accuser to cross-examination[58] or of introducing evidence highly prejudicial to the defendant[59]—indicate a need for providing greater protection of the criminal defendant in such cases. If the use of an adoptive admission can be shown to abridge the fourteenth amendment guarantee of due process,[60] this needed protection may be provided.

Although appellant Miller did not do so, it is arguable that he could have used the due process clause as an additional constitutional attack on the validity of admitting his adoptive admission. Presently the fifth and fourteenth amendments may be used almost interchangeably to defeat compelled self-incrimination;[61] but prior to the 1964 decision in *Malloy v. Hogan*,[62] the Supreme Court distinguished two types of pres-

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[54]384 U.S. at 445.

[55]*Id.* at 478.

[56]*Id.* at 457-61.

[57]*E.g.*, United States v. Guzman, 446 F.2d 1137 (9th Cir. 1971). For discussion of the overwhelming evidence rule, see notes 21-22 *supra*.

[58]*E.g.*, United States *ex rel.* Dukes v. Wallack, 414 F.2d 246 (2d Cir. 1969).

[59]*E.g.*, United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970).

[60]For relevant portion of the fourteenth amendment, see note 26 *supra*.

[61]*E.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Garrity v. New Jersey, 385 U.S. 493 (1967) (fourteenth amendment).

[62]378 U.S. 1 (1964).

sures to speak. The first, legal compulsion, is duress by the judicial process,[63] such as the threat of a contempt citation for silence, and the fifth amendment prohibits such compulsion.[64] The second form of compulsion is a pressure, such as torture, which violates "the dignity and integrity of human beings."[65] The Supreme Court has declared involuntary confessions illustrative of this second form of compulsion,[66] and the due process clause of the fourteenth amendment protects against this type of compulsion to speak.[67]

Four undesirable attributes of involuntary confessions contribute to the determination of unconstitutionality under the due process clause, and these four traits are found in adoptive admissions in custody as well. One of these undesirable features is the likelihood that such confessions are unreliable as evidence.[68] This unreliability is predicated upon the thought that involuntary confessions are often voiced merely to terminate torture by appeasing the oppressor. Thus they are considered likely to be only what the victim hoped the torturer wanted to hear, and less reliable than a confession prompted by free will.[69]

A second objectionable feature of an involuntary confession is the "bombshell effect"[70] it has on a jury, an impact which is both unquantifiable[71] and very persuasive.[72] This effect, imputed to the status of the confession as a statement of the defendant,[73] is so overwhelming that juries are considered incapable of either limiting the implications of a confession

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[63]The Supreme Court has cited as legal compulsion the "processes of justice by which the accused may be called as a witness and required to testify." Brown v. Mississippi, 297 U.S. 278, 285 (1935).

[64]*E.g.*, Kastigar v. United States, 406 U.S. 441, 458 (1972). In the 1964 case of Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court held the fifth amendment applicable to the states through the fourteenth amendment, expressly overruling the 1908 decision of Twining v. New Jersey, 211 U.S. 78 (1908) which had held the fifth amendment available only in federal courts.

[65]1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 5.81 (1969). *Accord,* Brown v. Mississippi, 297 U.S. 278 (1935).

[66]Brown v. Mississippi, 297 U.S. 278, 285 (1935).

[67]*E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Lisenba v. California, 314 U.S. 219 (1941).

[68]*E.g.*, Jackson v. Denno, 378 U.S. 368 (1964); Lisenba v. California, 314 U.S. 219, 236 (1941). Ritz, *Twenty-Five Years of State Criminal Confessions in the U.S. Supreme Court,* 19 WASH. & LEE L. REV. 35, 43 (1962); MCCORMICK § 147; 1 C. ANTIEAU, *supra* note 65, at § 5.81.

[69]Culombe v. Connecticut, 367 U.S. 568, 625 (1961); Reck v. Pate, 367 U.S. 433 (1961).

[70]People v. Schader, 62 Cal. 2d 716, 401 P.2d 665, 674, 44 Cal. Rptr. 193, 202 (1965).

[71]*E.g.*, Payne v. Arkansas, 356 U.S. 560, 568 (1958); *cf.* Estes v. Texas, 381 U.S. 532 (1965).

[72]*E.g.*, People v. Schader, 62 Cal. 2d 716, 401 P.2d 665, 44 Cal. Rptr. 193 (1965).

[73]*Id.*

to the single confessor among multiple defendants[74] or disregarding the confession if it is later deemed involuntary.[75] This bombshell effect is minimized when a judge tries the case without a jury, for judges are deemed able to disregard inadmissible evidence in their deliberations.[76]

A third undesirable feature of involuntary confessions is that they are extracted from the defendant against his will. In order to be admissible in court, a confession must be found to be "voluntary."[77] The case law development of this voluntariness requirement has culminated in the stipulation that a voluntary confession must be the product of both a rational intellect[78] and the "unfettered exercise of [the defendant's] own will,"[79] which will was not "overborne by official pressure, fatigue, [or] sympathy falsely aroused . . . ."[80] In applying this standard, the Supreme Court has recognized that psychological coercion inflicts no demonstrable damage on the defendant yet is as damnable as physical coercion.[81] Thus, although the circumstances surrounding involuntary confessions differ from case to case,[82] the Supreme Court has condemned the coercive extraction of confessions from suspects who would not have confessed freely.[83]

This coercive extraction of involuntary confessions is related to police misconduct, the fourth undesirable facet of involuntary confessions. Such misconduct may be either physical coercion[84] or mental coercion.[85] The former is condemned for twisting the body of the defendant[86] and the latter for twisting the defendant's mind by overcoming his will.[87] Under the rubric of mental coercion, the Supreme Court has reversed convictions which involved confessions obtained by the use of drugs,[88] exhaus-

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[74]*E.g.*, Bruton v. United States, 391 U.S. 123 (1968).

[75]*E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960); Lisenba v. California, 314 U.S. 219 (1941).

[76]*E.g.*, Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970); United States v. Krol, 372 F.2d 776 (7th Cir. 1967). *But see* Young v. Maryland, 455 F.2d 679, 681 (4th Cir. 1972) (Sobeloff, J., dissenting).

[77]*E.g.*, Payne v. Arkansas, 356 U.S. 560 (1958).

[78]*E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960).

[79]Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[80]Spano v. New York, 360 U.S. 315, 323 (1959).

[81]*E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Miranda v. Arizona, 384 U.S. 436 (1966). As the Supreme Court has said, "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[82]Notes 77-81 *supra*.

[83]*Id.*

[84]*E.g.*, Brown v. Mississippi, 297 U.S. 278 (1935).

[85]*E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960).

[86]*E.g.*, White v. Texas, 310 U.S. 530 (1940).

[87]*E.g.*, Chambers v. Florida, 309 U.S.227 (1939).

[88]*E.g.*, Townsend v. Sain, 372 U.S. 293 (1963). At his request, defendant Townsend, a

tive questioning by relays of police teams,[89] threats,[90] holding the suspect incommunicado for a period of days,[91] or refusal to provide requested counsel.[92] In summary, the Court has declared that the due process clause prohibits the acquisition of a confession by any procedure that amounts to "fundamental unfairness."[93]

The determination of this fundamental unfairness is a subjective determination, based on a close scrutiny of the facts,[94] that the circumstances made "a suspect the unwilling collaborator in establishing his guilt."[95] Factors considered include personality traits of the individual defendant,[96] the interrogation procedure,[97] and the degree to which the subtle pressure inherent in a police-dominated atmosphere[98] affected the defendant.[99] In the interest of verbal economy, the Court has adopted the phrase "totality of circumstances" as a shorthand reference to a complex of improper circumstances which, in aggregate, violate the defendant's due process right although no single circumstance is violative of that right alone.[100] If a defendant has confessed in such a totality of circumstances which was subject to police control, a subsequent conviction will be reversed on the ground of undesirable police action.[101] This reversal transmutes the police

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heroin addict, received an injection of phenobarbital to combat withdrawal pains. However, the phenobarbital had been secretly laced with hyoscine, a "truth serum."

[89]*E.g.*, Clewis v. Texas, 386 U.S. 707 (1967).

[90]*E.g.*, Payne v. Arkansas, 356 U.S. 560 (1958).

[91]*E.g.*, Reck v. Pate, 367 U.S. 433 (1961).

[92]*E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

[93]Lisenba v. California, 314 U.S. 219, 236 (1941).

[94]*E.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962).

[95]Culombe v. Connecticut, 367 U.S. 568, 575 (1961).

[96]In considering personality traits, the Supreme Court has noted the defendant's physical condition, Reck v. Pate, 367 U.S. 433 (1961); mentality, Blackburn v. Alabama, 361 U.S. 199 (1960); age, Haley v. Ohio, 332 U.S. 596 (1948); education, Harris v. South Carolina, 338 U.S. 68 (1949); prior criminal experience, Gallegos v. Colorado, 370 U.S. 49 (1962); nationality, Spano v. New York, 360 U.S. 315 (1959); and the extent to which the police provided for the suspect's basic needs, Watts v. Indiana, 338 U.S. 49 (1949).

[97]Interrogation procedures considered include number of questioners, Chambers v. Florida, 309 U.S. 227 (1940); elapsed time of interrogation, Blackburn v. Alabama, 361 U.S. 199 (1960); hour of interrogation, Spano v. New York, 360 U.S. 315 (1959); relay questioning, Reck v. Pate, 367 U.S. 433 (1961); deception, Lynumn v. Illinois, 372 U.S. 528 (1963); moral pressure, United States v. Carignan, 342 U.S. 36 (1951); threat of mob action, Payne v. Arkansas, 356 U.S. 560 (1958); and the use of drugs, Townsend v. Sain, 372 U.S. 293 (1963).

[98]Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[99]*E.g.*, Haynes v. Washington, 373 U.S. 503 (1963).

[100]*E.g.*, Culombe v. Connecticut, 367 U.S. 568 (1961); Fikes v. Alabama, 352 U.S. 191 (1957).

[101]*E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960). In the past, this reversal was pro forma upon the appearance of the involuntary confession in the record without regard to

misconduct into a liability, thereby encouraging its termination.[102]

The four features of an involuntary confession which render its use unconstitutional appear in adoptive admissions as well. Thus it is arguable that the due process clause of the fourteenth amendment should also prohibit the use of adoptive admissions in custody.

Adoptive admissions are unreliable due to the inconclusiveness of the underlying premise. The adoptive admissions rule is premised on the maxim "Qui tacet consentire videtur" (He who is silent consents).[103] Under certain circumstances this adage may be valid, but conflicting maxims may be equally valid in other circumstances.[104] Further, there are instances in which persons did not react vocally to certain accusations.[105] The Supreme Court has identified the fallacy inherent in this type of premise for a rule of evidence:

> It is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper.[106]

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the quality or quantity of admissible evidence extrinsic of the confession. This reversal was automatic because the introduction of an involuntary confession was considered so injurious to the defendant as to be deemed harmful per se. *E.g.*, Lynumn v. Illinois, 372 U.S. 528 (1963). Two other errors widely accepted as elements in this class of errors causing automatic reversals are a decision by a prejudiced judge, *e.g.*, Tumey v. Ohio, 273 U.S. 510 (1927), and the denial of counsel for the defendant. *E.g.*, Gideon v. Wainwright, 371 U.S. 335 (1962). In Chapman v. California, 386 U.S. 18 (1967), the Supreme Court ruled that the "setting" surrounding a constitutional error must be considered when determining the harm attributable to the error prior to deciding whether to reverse. By requiring consideration of the setting surrounding the error, the Court possibly intimated the abolition of a class of errors, including involuntary confessions, that requires reversal upon mere appearance in the record. However, many commentators have concluded that *Chapman* did not dissolve this class of errors. W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 52.01 (1972); G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 857, unnumbered note (8th ed. 1970); MCCORMICK § 148, n.35; Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 539 (1969) [hereinafter cited as HARMLESS ERROR]; *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 209 (1967). Subsequent cases appear to support this conclusion. *E.g.*, United States v. Wade, 388 U.S. 218 (1967); Clewis v. Texas, 386 U.S. 707 (1967).

[102]*E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960).

[103]IV WIGMORE § 1071.

[104]Silence in the face of accusation is "always lawful and often wise." Allen v. United States, 273 F.2d 85, 87 (D.C. Cir. 1959) (Bazelon, J., dissenting).

[105]One example is the trial of Jesus:

> And when He was accused of the chief priests and elders, He answered nothing. Then said Pilate unto Him, Hearest thou not how many things they witness against thee? And He answered him to never a word; insomuch that the governor marvelled greatly.

Matthew 27:12-14.

[106]Alberty v. United States, 162 U.S. 499, 511 (1896).

Thus, due to the fallacy of the underlying phrase,[107] the adoptive admissions rule is inconclusive at best.

Recognizing certain of the flaws in the blanket acceptance implied in "He who is silent consents," the courts have established certain limitations which provide greater reliability. For example, the accused must hear and understand the statement,[108] and he must not be physically or emotionally restrained from responding.[109] Further, the expectation of a response must be reasonable under the circumstances.[110] As the Fourth Circuit noted, the receipt of the *Miranda* warning and a previous denial of participation in the crime deaden any "natural inclination to speak out in . . . defense"[111] and thus make an expectation of response unreasonable under those circumstances.[112] However, the determination by the trial judge, in possession of the same facts as the Fourth Circuit, that Miller could reasonably have been expected to respond[113] demonstrates the insufficiency of these safeguards to insure the reliability of adoptive admissions.

In addition to unreliability, the bombshell effect in also present in adoptive admissions, because an adoptive admission is regarded as a statement with which the defendant agrees.[114] Although an inference of guilt may be consistent with silence in certain circumstances, the possibility of other personal reasons for the silence[115] renders that inference a mere possibility vis-à-vis a conclusive probability.[116] By stamping the defendant's imprimatur on the statement, the adoptive admissions rule transforms equivocal silence, often the product of a matrix of emotions,[117] into a deceptively clear confession. Although relevant empirical evidence

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[107]Text accompanying notes 104-06 *supra*. *See* Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967).

[108]*E.g.*, Sparf v. United States, 156 U.S. 51 (1895); Sandez v. United States, 239 F.2d 239 (9th Cir. 1956) (non-English speaking defendant, accusation in English); Owens v. United States, 186 Va. 689, 43 S.E.2d 895 (1947).

[109]*E.g.*, Gowen v. Bush, 76 F. 349 (8th Cir. 1896) (accident victim semiconscious); People v. Allen, 300 N.Y. 222, 90 N.E.2d 48 (1949) (defendant intoxicated); Owens v. United States, 186 Va. 689, 43 S.E.2d 895 (1947).

[110]*E.g.*, State v. Guffey, 261 N.C. 322, 134 S.E.2d 619 (1964).

[111] 457 F.2d at 701.

[112]*Id.*

[113]*Id.* at 702.

[114]*E.g.*, Arpan v. United States, 260 F.2d 649 (8th Cir. 1958).

[115]*E.g.*, Wilson v. United States, 149 U.S. 60, 66 (1893) ("Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character"); Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963).

[116]*E.g.*, Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967).

[117]*E.g.*, Wilson v. United States, 149 U.S. 60 (1892).

is unavailable, jurors may be thus deceived as to the extent of the defendant's agreement with the statement.[118]

The third undesirable feature of involuntary confessions, the extraction of an involuntary statement by a violation of the defendant's will, is inherent in adoptive admissions. The warning that "anything [you] say may be used against [you] in a court of law"[119] tends to promote silence, thereby encouraging the defendant to stifle any impulse to speak.[120] The idea that a confession will terminate coercion is comparable to the idea that silence in the face of accusation will be a safe course of action. The former is inherent in police interrogations that produce involuntary confessions,[121] while the latter is a reasonable deduction from the police warning that "anything [you] say may be used against [you] in a court of law."[122] Thus it appears that the pressure to remain silent, although subtle, is sufficient to inhibit a natural impulse and thus overbear the suspect's will.

In order to permit a suspect to assess more effectively his available alternatives of silence or speech, the Sixth Circuit stated:

> [T]he customary formula of warning should be changed, and the respondent should be told, "If you say anything, it will be used against you; if you do not say anything, that will be used against you."[123]

However, even this warning does not render the adoptive admission voluntary, for these alternatives merely focus the "option" available to the accused: remain silent and permit the court to infer assent to the statement,[124] or speak against a desire to remain silent.[125] The mere election of the lesser of two evils does not exclude duress,[126] and thus that "option" presents no "free choice"[127] as required by the Supreme Court.[128]

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[118]This uncertainty is not recognized when a judge tries the case without a jury, for judges are deemed able to employ the evidence properly in their deliberations. United States v. Krol, 374 F.2d 776 (7th Cir. 1967).

[119]Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[120]*E.g.*, Culombe v. Connecticut, 367 U.S. 568, 580 (1961); FEDERAL RULES, Advisory Committee's Note to rule 801(d)(2)(B), the text of which appears in note 4 *supra*.

[121]Culombe v. Connecticut, 367 U.S. 568, 580 (1961); Reck v. Pate, 367 U.S. 433 (1961).

[122]*E.g.*, United States *ex rel.* Staino v. Brierly, 387 F.2d 597 (3d Cir. 1967); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

[123]McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928).

[124]Note 4 *supra*.

[125]Text accompanying notes 129-33 *infra*.

[126]*E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67 (1918).

[127]Garrity v. New Jersey, 385 U.S. 493, 497 (1967).

[128]*E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967) (option to testify without immunity

In order for the accused to make a free choice between speech and silence, it appears that he must be warned that, if he remains silent in the face of incriminating statements, his silence can be introduced as an indication of his guilt. The suspect should be further informed that these statements alone cannot be used against him only if he unequivocally denies them.[129] Thus the suspect would be certain of the possible consequences of both speech and silence in the face of accusation as well as the safest method of denying these statements. The desire for a similar certainty in the mind of the defendant prompted the Supreme Court to write that

> no system of criminal justice can, or should, survive, if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.[130]

Since the only option presently offered the defendant must be inferred from the notice of his right to remain silent (and, impliedly, a concomitant right to speak), the suspect is apparently unable to make a rational decision whether to speak or not.

Further, the environment surrounding an adoptive admission obtained after the suspect had received the *Miranda* warning[131] indicates that the adopting admitter intended to admit nothing. This conclusion is based on the provision, by the *Miranda* warning,[132] of a milieu in which the accused may confess with full knowledge of, and protected by, his constitutional rights. If a defendant wishes to confess, he may waive his right to remain silent[133] and make the precise statement he intends. Yet adoptive admissions are obtained only when the suspect remains silent. Thus an adoptive admission should be considered involuntary because the defendant did not choose to avail himself of an opportunity to confess.

Police misconduct, the fourth objectionable attribute of involuntary confessions, may be present in an adoptive admission. A confession is a statement, by the defendant, acknowledging facts necessary for conviction for a crime.[134] This acknowledgement is made by speech and, in involuntary confessions, this speech is extracted from the defendant against his will. An adoptive admission is an acquiescence in the state-

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from prosecution or lose job); Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67 (1918) (option to pay registration fee or be unable to market bonds).

[129]*E.g.*, Commonwealth *ex rel.* Smith v. Rundle, 423 Pa. 93, 223 A.2d 88 (1966).

[130]Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[131]Note 2 *supra.*

[132]Note 2 *supra.*

[133]Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[134]*E.g.*, Gladden v. Unsworth, 396 F.2d 373, 375 n.2 (9th Cir. 1968). WIGMORE § 1050; MCCORMICK § 144.

ment of another, which acquiescence is manifested by silence.[135] As noted above, by reading the *Miranda* warning[136] to the defendant, the police elicit this inculpatory silence. Because the police control the circumstances producing the pressure to remain silent and due to their knowledge of the adoptive admission rule, any subsequent conviction obtained by the abusive use of the resulting silence arguably should be reversed due to police misconduct.

Commonwealth v. Dravecz[137] illustrates a reversal possibly predicated on such police misconduct.[138] Defendant Dravecz remained silent while a police officer read him the statement of a third person connecting Dravecz with the theft for which he was indicted.[139] This silence, subsequently introduced in court as an adoptive admission,[140] was censured by the Supreme Court of Pennsylvania which ruled the defendant was protected by the fifth amendment right against compelled self-incrimination as applied to the states by the fourteenth amendment's due process clause.[141] This determination appears consistent with the Supreme Court's position on the accused's silence during custodial interrogation.[142]

The police misconduct in *Dravecz* differs from that in *Miller v. Cox*. In the instant case, the detective noted, perhaps casually, that Miller made no vocal response to Grover Robbs' confession.[143] However, the policy of discouraging police misconduct should militate against different treatment of the two defendants.[144] The police impropriety in *Dravecz* jeopardized the conviction by precipitating a reversal.[145] Reversal in such situations hastens the termination of this sort of interrogation procedure.[146] The incomplete facts in the instant case reveal, at the least, reproachable police conduct. Although Miller was informed of his constitutional right to remain silent, he was penalized for exercising that very

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[135]FEDERAL RULES, Advisory Committee's Note to rule 801(d)(2)(B), the text of which appears in note 4 *supra*.

[136]Note 2 *supra*.

[137]424 Pa. 582, 227 A.2d 904 (1967).

[138]The Pennsylvania Supreme Court did not specify police misconduct, but it did state "[s]pringing a statement on him in this fashion suggests artifice." 227 A.2d at 908.

[139]*Id.* at 905.

[140]*Id.*

[141]*Id.* It may be contended that the court could have also found the police impropriety of actively eliciting the inculpatory silence so similar to police coercion of involuntary confessions that the introduction of Dravecz's adoptive admission was prohibited by the due process clause of the fourteenth amendment.

[142]Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). *Accord*, Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).

[143]457 F.2d at 701.

[144]HARMLESS ERROR at 551-52.

[145]227 A.2d at 909.

[146]Text accompanying note 102 *supra*.

right.[147] If the Fourth Circuit had reversed Miller's conviction, it would have rendered such action by the police a handicap to the state's prosecution, thereby providing a strong inducement for the abandonment of this practice.

Thus it may be argued that the four undesirable features of involuntary confessions are present in adoptive admissions, and therefore adoptive admissions should be subjected to the same constitutional scrutiny as involuntary confessions.[148] Adoptive admissions and involuntary confessions do not correspond perfectly, for the adoptive admission evokes the same visceral objection as coerced confessions only when the police misconduct is egregious, as in *Dravecz* and *Cockrell.* However, the defendant's reception of his *Miranda* warning[149] triggers the fifth amendment protection[150] and calls into question the reliability and voluntariness of any adoptive admission obtained subsequently.[151] There may be instances in which the introduction of such an adoptive admission may properly be deemed harmless error. However, it is contended that the court, unlike the Fourth Circuit in *Miller v. Cox,* should consider carefully whether the fourteenth amendment guarantee has been breached before labelling the error harmless.[152]

Conclusion

It is urged that the courts apply the same standards of constitutionality to involuntary confessions and to adoptive admissions in criminal cases. The Fourth Circuit declined to do so, ruling that the use of such an adoptive admission in *Miller v. Cox* was not error of a constitutional magnitude.[153] Because the introduction of this adoptive admission arguably violated the defendant's fifth and fourteenth amendment rights, this determination appears erroneous. The error would have been com-

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[147]457 F.2d at 701.

[148]Some courts have compared adoptive admissions with prosecutorial comment on the defendant's declination to testify. *E.g.,* Baker v. United States, 357 F.2d 11 (5th Cir. 1966). The Supreme Court has consistently censured such prosecutorial comment. *E.g.,* Stewart v. United States, 366 U.S. 1 (1961). But it has also intimated that under some circumstances such comment would not require a reversal. Griffin v. California, 380 U.S. 609 (1965). However, there is an important distinction between adoptive admissions and prosecutorial comment. The former channels the thoughts of the trier of facts to a predetermined end, while the latter merely invites such triers to generate their own conjectures as to why the defendant elected not to testify. This distinction appears sufficient to invalidate the analogy.

[149]Note 2 *supra.*

[150]Text accompanying notes 33-56 *supra.*

[151]Text accompanying notes 110-12 *supra.*

[152]Notes 22 and 101 *supra.*

[153]457 F.2d at 703.