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SILENCE AS INCRIMINATION IN FEDERAL COURTS

It is desirable that the rules governing the admissibility of evidence in federal criminal cases be uniform throughout the federal system, so that prosecutions under a federal statute will not result in a verdict of guilty in one court and an acquittal in another when the same fact situation is presented.¹ Therefore the determination of admissibility must be different from the practice in civil cases, where either the local or federal rule is applied depending upon which rule most favors admissibility.² Rule 26 of the Federal Rules of Criminal Procedure³ provides that the admissibility of evidence is to be governed by the principles of the common law as interpreted by the federal courts in the light of reason and experience. This is a codification of the principles set forth by the Supreme Court in 1933⁴ and 1934,⁵ which overturned the former practice of looking to the local rules of evidence.⁶

Even before adoption of Rule 26, the federal courts did not rely on local rules in the area of adoptive admissions, or admissions by silence,⁷ but applied reason to the common law in determining admissibility. The majority developed a rule based primarily on federal decisions without respect for state lines,⁸ and did not hesitate to use decisions of state courts in other circuits as authority.⁹ The cases have been predominantly concerned with adoptive admissions occurring after the arrest of the accused. The conflict that exists in the federal courts at present¹⁰ is due largely to the failure of the Supreme Court to set standards for the lower federal courts.

⁴. Funk v. United States, 290 U. S. 371 (1933) ; see 18 Minn. L. Rev. 893 (1934).
⁸. See, e.g., United States v. Harris, 45 F. 2d 690 (2d Cir. 1930).
⁹. See, e.g., Graham v. United States, 15 F. 2d 740 (8th Cir. 1926), cert. denied, 274 U. S. 743 (1927) ; Hauger v. United States, 173 Fed. 54 (4th Cir. 1909) ; Sorenson v. United States, 168 Fed. 785 (8th Cir. 1909).
¹⁰. See Fraenkel, From Suspicion to Accusation, 51 Yale L. J. 748, 753 n. 29 (1942).
The General Rule of Adoptive Admissions

The general rule of silence as incrimination is based on the presumption that ordinarily, when an innocent person is accused of a crime he will naturally deny the charge. If a person does not deny such an accusation, but remains silent, he is deemed to have assented to its correctness, and the accusatory statement together with the fact of silence is admissible in evidence against him. If the accusation is denied, it is never admissible as an admission, but it may still be admissible for another purpose. The present majority rule in the federal courts is that no inference of assent can be drawn from the silence of the accused person if he was under arrest at the time the accusation was made. Even before this rule was established, and the fact of arrest was not considered important, failure to respond to testimony given at a hearing before an examining magistrate was not admissible because it was improper to allow an inference against the defendant from his failure to answer. Several of the states follow the present majority rule of the federal courts. Other states and the courts of the District of Columbia place no significance on the fact of arrest, and some of the federal courts allow special circumstances to overcome the right to remain silent while under arrest.

The question whether the fact of arrest per se should render evidence of silence inadmissible can be settled for better or worse by a rule of thumb, but other problems are not so easily put to rest. The problem arises whether the judge or jury shall decide if circumstances are present which could lead to an inference of assent.

14. See United States v. L. Biondo, 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).
15. See Sparf and Hanson v. United States, 156 U. S. 51, 56 (1895) (dictum); Miller v. Territory, 19 Pac. 50, 3 Wash. Terr. 554 (1888).
20. See Rocchia v. United States, 78 F. 2d 966 (9th Cir. 1935); McCarthy v. United States, 25 F. 2d 298, 299 (6th Cir. 1928) (dictum).
It must also be determined which of the parties has the burden of proving the existence of circumstances from which the inference of assent or non-assent could be drawn. As Wigmore points out, each case must be decided in view of its own peculiar circumstances, and most of the rulings on admissibility cannot serve as precedents. However, each case involves a determination of whether judge or jury should evaluate the various factors that must necessarily be considered in deciding whether, under the circumstances, the accused’s silence can be treated as an adoption of the incriminating statements. When the evidence is erroneously admitted, it must be decided whether such error is prejudicial, and if it can be cured by instructions to the jury.

**The Fact of Arrest**

*Sparf and Hanson v. United States,* decided in 1895, is the only case in which the Supreme Court expressly considered the propriety of admitting evidence showing self incrimination by silence. The defendant, a seaman, was being returned to the United States in chains under the charge of murdering his superior officer on the high seas. When a co-defendant made statements in his presence which incriminated both of them, he remained silent. The court considered the statements and the fact of his silence admissible because "... they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth." In all succeeding cases in which the problem has arisen, the Supreme Court has denied certiorari, or has decided the case on other grounds. As recently as 1933, the Circuit Court for the District of Columbia relied on *Sparf* as authority for admitting in evidence incriminatory silence that occurred while the accused was under arrest.

In 1909 the Fourth Circuit said this about testimony showing silence in the face of an accusation: "... he was under arrest, and may not have felt that he was at liberty to speak." Since that time, the doctrine that an accused person under arrest can remain silent

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21. 4 Wigmore, Evidence § 1072 (3d ed. 1940).
22. 156 U. S. 51 (1895).
23. Id. at 56.
27. Hauger v. United States, 173 F. 2d 54, 60 (4th Cir. 1909).
without incriminating himself has grown to have the force of law, and, with variations, it is followed by all of the circuits where the problem has arisen except the District of Columbia.

The courts of the District of Columbia are included within the scope of the Federal Rules of Criminal Procedure, and therefore would be expected to be subject to the provisions of Rule 26 along with the rest of the federal courts. In Griffin v. United States, however, the Supreme Court expressly conceded to the courts of the District of Columbia free rein to develop their own rules of evidence without interference or supervision—in the absence of specific Congressional legislation—perhaps because the circuit court of the District could be compared with a state supreme court in its rule making power. The cases from the District of Columbia involving silence as incrimination have dealt largely with prosecutions for violations of local statutes, so that there was no need for conformity with other circuits. In one case involving a federal crime, the circuit court, by way of dictum, expressed doubt about the admissibility of the defendant's silence in the face of an incriminatory statement made while he was under arrest, but gave no indication that it was influenced by the fact that the statute violated was a federal one. The language of the Supreme Court in Griffin implies that the courts of the District are also free to apply their own evidentiary rules in cases involving federal statutes, even if those rules are at odds with the rules for the other circuits as propounded by the Supreme Court.

Although some courts of the District of Columbia have expressed doubts about their conflict with the majority rule, Judge

28. See note 14 supra.
33. "This Court, in its decisions, and Congress, in its ... statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law." Griffin v. United States, 336 U. S. 704, 712 (1949).
Holtzoff said in 1952, in upholding the admissibility of evidence of the defendant's express refusal to make a statement while under arrest, that "He had a right to decline to make a statement, but I do not think that there was any error in permitting the jury to know that this was his attitude."\(^{35}\) However, two years later, in a similar case where the accused also expressly refused to answer an accusation, the district court held testimony of that fact to be inadmissible, because the court reasoned that the defendant's statements\(^{36}\) were an assertion of his legal right to refuse to make a statement.\(^{37}\) The courts of the other circuits have realistically and logically recognized the right to remain silent when under arrest without an express claim of that right.\(^{38}\) The distinction between silence and an express refusal to answer favors the experienced criminal over the innocent and inexperienced accused person who, being unacquainted with the niceties of the rules of evidence, entertains the popular belief that he has the right to remain silent. In contrast to Judge Holtzoff's statement in 1952 is the vehement condemnation of the use of such evidence in *Helton v. United States*,\(^{39}\) a recent case from the Fifth Circuit:

"Under our law it is not the function of police officers to determine for the benefit of the jury whether or not a person under arrest on suspicion of crime has given a sufficient explanation, or any explanation at all, and the fact that the accused here remained silent rather than risk unwitting distortion of his statement by a police officer at a later date does not give in law, and should not be allowed to give in fact, rise to an inference of guilt."\(^{40}\)

Some of the federal courts allow special circumstances to override the general rule that no inference of assent to an accusation can be drawn from silence when accused is under arrest.\(^{41}\) Thus, in *Rocchia v. United States*,\(^{42}\) the court said that "... a statement by

\(^{35}\) United States v. Peckham, 105 F. Supp. 775, 776 (D. D.C. 1952), rev'd on other grounds, 210 F. 2d 693 (D.C. Cir. 1953). When arrested on a charge of abortion, the defendant was asked if he had anything to say. He replied, "No statement."

\(^{36}\) When confronted with a co-defendant's confession implicating him, the defendant said, "... I'll tell my story to my lawyer; and I have nothing to say at this time," United States v. Kelly, 119 F. Supp. 217, 221 (D. D.C. 1954).

\(^{37}\) Id. at 222.

\(^{38}\) *E.g.*, *Helton v. United States*, 221 F. 2d 338 (5th Cir. 1955); *McCarthy v. United States*, 25 F. 2d 298 (6th Cir. 1928).

\(^{39}\) 221 F. 2d 338 (5th Cir. 1955).

\(^{40}\) Id. at 342.

\(^{41}\) See note 18 supra. According to Wigmore, the better rule is to allow flexibility according to the circumstances rather than categorically to exclude such evidence. 4 Wigmore, Evidence § 1072 (3d ed. 1940).

\(^{42}\) 78 F. 2d 966 (9th Cir. 1935).
one officer to his superior, in the presence of the defendant, that there had been an attempt made by the defendant while in his custody to secure his release by bribery, calls for reply from the defendant, and that his silence in regard thereto would be admissible in evidence. This rule would seem to invite reversals because in reviewing the determination of admissibility, the appellate court must pass on the sufficiency of the circumstances to take the case outside of the general rule. Furthermore, the rule casts an undue burden on the accused, who must make an instantaneous appraisal of the circumstances and decide whether to risk incriminating himself in the course of a denial or to risk producing evidence against himself by silence in case the court, after a leisurely study of the circumstances in retrospect, decides that he should have spoken up.

**DETERMINING ADMISSIBILITY**

Wigmore is of the opinion that all that need be shown to render the evidence admissible is that the incriminating statement was made in the accused's presence and that he remained silent. Under this view, it may either be assumed, or left to the jury to determine, that the accused actually heard the statement, that he understood it, and that it naturally called for a reply. This rule would place the burden on the defendant of proving the negative, which could be difficult. However, the federal courts, with the exception of the District of Columbia, have generally accepted the rule that before the evidence is admissible the prosecution must demonstrate that the accused actually heard the statement, but it need not have been addressed to him. It is error to allow the jury to determine whether the defendant heard or understood the accusatory statement when there is uncontradicted testimony that he did not understand the language, or was semi-conscious at the time. A person cannot

43. Id. at 972.
44. See United States v. Harris, 45 F. 2d 690 (2d Cir. 1930).
45. 4 Wigmore, Evidence § 1071 (3d ed. 1940).
46. Brown v. United States, 32 F. 2d 953 (D.C. Cir. 1929); Harrod v. United States, 29 F. 2d 454 (D.C. Cir. 1928). See also Sorenson v. United States, 168 Fed. 785, 808 (8th Cir. 1909) (dissenting opinion). Professor Wigmore would assume from the party's presence that he heard and understood. 4 Wigmore, Evidence § 1072 (3d ed. 1940).
47. Hauger v. United States, 173 Fed. 54 (4th Cir. 1909); Sorenson v. United States, 168 Fed. 785 (8th Cir. 1909).
48. See, e.g., United States v. Lanza, 85 F. 2d 544 (2d Cir.), cert. denied, 293 U. S. 609 (1936); Rocchia v. United States, 78 F. 2d 966 (9th Cir. 1935).
49. Kalos v. United States, 9 F. 2d 268 (8th Cir. 1925).
be expected to deny a statement when he does not have knowledge to enable him to know whether it is true or false. Furthermore, failure to reply to an incriminatory letter raises no inference of assent to the truthfulness of its contents, since it is unreasonable to assume that a person will always take the trouble to write a letter in answer to a false accusation.

Where adoptive admissions are sought to be entered in evidence, the trial judge must first consider the circumstances surrounding the event and determine whether the jury could reasonably reach a conclusion adverse to the defendant. Judge Learned Hand has taken the position that the mere fact than an accusation was made in the defendant's presence cannot raise an inference that the accused adopted the statement as his own, but there must be a further showing that the accused assented. In the same opinion, the testimony of persons present at the time the accusation was made, as to the contents of that accusation, was held admissible as a prior consistent statement made before there was any motive to falsify, but this cannot justify admitting evidence of the defendant's response. Under the rule that places the burden of showing more than the fact of silence on the prosecution, it must, in order to render the evidence admissible, demonstrate to the judge that the accused heard and understood the statement, and that he should have replied under the circumstances. When a mere showing of silence is sufficient, the burden is shifted to the defendant, who must convince the judge that he did not hear or understand, or that the circumstances were such that he was not required to deny the accusation, and if the judge cannot be persuaded, the defendant must explain away his silence to the satisfaction of the jury.

51. See United States v. Dellaro, 99 F. 2d 781 (2d Cir. 1938). Wigmore would disregard the defendant's knowledge, in admitting the evidence, because of the general rule that a party's admission is receivable irrespective of his personal knowledge. See 4 Wigmore, Evidence § 1072 (3d ed. 1940).

52. E.g., Pay Coon Tom v. United States, 7 F. 2d 109 (9th Cir. 1925); Packer v. United States, 106 Fed. 906 (2d Cir. 1901). But cf. Simons v. United States, 119 F. 2d 539, 555-556 (9th Cir.), cert. denied, 314 U. S. 616 (1941) (defendant tore up the letter, and told witness to tear up his copy); Rumble v. United States, 143 Fed. 772 (9th Cir. 1906) (part of a larger correspondence).


54. Di Carlo v. United States, 6 F. 2d 364, 366 (2d Cir.), cert. denied, 268 U. S. 706 (1925). It would not seem to matter whether or not the defendant had denied the statement.

55. The silence can always be explained away by showing that silence was due to causes other than assent. 4 Wigmore, Evidence § 1072 (3d ed. 1940).
CORRECTION OF ERROR BY INSTRUCTIONS TO THE JURY

The federal courts have sometimes erroneously admitted evidence of the accused's silence while under arrest, and have tried to correct the error by striking the testimony from the record, or by instructions to the jury. Either method would seem to be sufficient to cure the error, but doubt has been expressed that the error can be cured at all. When curative instructions are not given, the effect of the evidence on the jury cannot be evaluated, and the defendant is usually entitled to a new trial, even if the other evidence is overwhelmingly in favor of the conviction.

If the evidence is introduced without objection, and no motion to strike is made nor instructions requested to the effect that the evidence be disregarded, the objection is considered to be waived, and no error results from allowing the jury to consider the evidence. But even if the defendant has made no objection or motion to strike, the trial judge must, at the risk of committing reversible error, give requested instructions to disregard testimony showing the accused's silence while under arrest. When the incriminatory silence has been properly admitted the jury is instructed that it must resolve all doubts in favor of the defendant in determining whether he actually assented to the statement by his silence. However, a conviction can be based upon evidence of an adoptive admission even if the evidence would have been excluded if proper objection had been made.

In On Lee v. United States, the circuit court was unanimous in deciding that the trial court erred in admitting testimony of the defendant's silence while under arrest, but Judge Frank dissented from the proposition that the error was cured by the charge to the jury. The trial judge charged the jury that if the defendant had denied the crime before arrest, the jury should disregard the fact

56. See Miller v. United States, 21 F. 2d 32, 36 (8th Cir. 1927), cert. denied, 275 U. S. 621 (1928).
59. See McCarthy v. United States, 25 F. 2d 298 (6th Cir. 1928).
60. See Helton v. United States, 221 F. 2d 338, 342 (5th Cir. 1955).
61. Reavis v. United States, 106 F. 2d 982 (10th Cir. 1939); Price v. United States, 3 F. 2d 306 (2d Cir. 1934).
62. LoBiondo v. United States, 135 F. 2d 130 (2d Cir. 1943).
64. See Price v. United States, 25 F. 2d 650 (6th Cir. 1925).
65. See id., at 318-319 (dissenting opinion).
of his silence when later accused. There was evidence that the defendant had previously asserted his innocence, but not that he had done so before arrest. Therefore, it was possible for the jury to use the silence as incrimination consistent with the instructions, or to disbelieve the evidence that the defendant had in fact previously denied guilt, and infer his assent to the subsequent accusation from his silence. On appeal to the Supreme Court, the conviction was affirmed in a five to four decision. The majority opinion discussed only the more dramatic assignment of error—the use of a hidden radio transmitter to obtain damaging evidence. None of the dissenting opinions mentioned the assignment of error regarding the admission in evidence of the defendant's silence, although the issue was sharply defined and argued in the parties' briefs to the Court.

Several possible conclusions can be drawn from the failure of the Supreme Court to mention the issue of silence as incrimination in On Lee. The Court may have concluded that there was no error in admitting the evidence; that if there was error the instruction to the jury remedied it; or that even if there was error in the instruction to the jury, it was not prejudicial because the government's case was so strong in other respects that the erroneous evidence was unimportant, and could not have affected the jury's decision. The major issue in the case was perhaps more important than a rule of evidence, and the dissenters may have believed it desirable to devote their whole opinions to the basic issue even though they may have believed that there was error in admitting the evidence of silence. Whatever the purpose of the Supreme Court in refusing to mention the adoptive admission issue, the result is certain. It is continued diversity where there should be uniformity. Sparf and Hanson still stands as a sole pronouncement of the Supreme Court for the courts of the District of Columbia to cite as authority. Despite the autonomy of the District of Columbia in making rules of evidence, its courts could hardly maintain their present position in the face of a statement from the Supreme Court, even if it were only dictum, that silence while under arrest can give rise to no inference against the accused.

67. See id at 318-319 n. 27 (dissenting opinion).
68. See id. at 310.
CONCLUSION

The majority of the federal courts have established the general rule that an accused person under arrest should not have his silence construed against him. Deviations from this rule would seem to favor the experienced criminal. In view of the commonly accepted belief that a person under arrest has a right to remain silent, the contrary rule may be a trap for the ignorant, and can realistically be considered as compelling that accused to testify.\(^7\) If a person's silence while under arrest can be used against him at the trial, the customary warning should be changed to read, "... If you say anything, it will be used against you; if you do not say anything, that will be used against you."\(^8\)

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71. See McCarthy v. United States, 25 F. 2d 298, 299 (6th Cir. 1928).