

NOTES

DISTRICT COURT DISCIPLINE OF STATE PROSECUTOR FOR FAILURE TO ENFORCE STATE LAWS*

FAILURE of public prosecutors to enforce state laws has evoked in the several states a variety of constitutional and legislative responses.¹ In most states a lax prosecutor can be removed from office without resort to cumbersome impeachment procedures;² in others, prosecutorial indifference is, in specified instances, a criminal offense.³ To this arsenal a federal district court has added a new and unprecedented weapon of considerable political potential—exclusion from practice before that particular court.

The suspension and disbarment of attorneys for unethical conduct has long been a judicial prerogative,⁴ and state tribunals generally have not hesitated to

* *Wilbur v. Howard*, 70 F. Supp. 930 (E.D.Ky. 1947).

1. In Colorado mandamus will lie to compel prosecution of peddlers of obscene literature. COLO. STAT. ANN., c. 48, § 219(1) (Supp. 1946). Georgia solicitors receive relatively high fees for gambling convictions. GA. CODE ANN. § 24-2904 (1937). The governor of one state is free to shuffle the state's attorneys around the various districts. FLA. STAT. ANN. § 27.14 (1943).

A number of states permit temporary replacement of a recalcitrant district attorney by the attorney general, KAN. GEN. STAT. ANN. § 21-921 (Corrick, 1935); N. J. STAT. ANN. § 2:182-12 (1939); WASH. REV. STAT. § 112-1 (Remington, Supp. 1940); or by the courts, IND. STAT. ANN. § 49-2505 (Burns, 1933); N. D. REV. CODE § 11-1605 (1943).

For appraisal of these and other types of prosecutor controls see DeLong and Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. CRIM. L. & CRIMINOLOGY 926, 953-7 (1933).

2. For removal by the governor, see *e.g.*, MINN. STAT., c. 47, § 6954 (Mason, 1927); N. Y. CONST. ART. IX, § 6; by the attorney general, DEL. REV. CODE, c. 17, § 1 (1935), R. I. GEN. LAWS ANN., c. 10, § 6 (1938); or by some level of the judiciary, ARIZ. CODE ANN. §§ 12-609, 12-610 (1939); CONN. GEN. STAT. § 5365 (1930); OKLA. STAT. ANN., tit. 22, §§ 1181, 1191, 1193 (1937) (after jury trial).

3. ARK. DIG. STAT. § 3340 (Pope, 1937) (non-enforcement of gambling laws); KAN. GEN. STAT. ANN. § 21-2125 (Corrick, 1935) (liquor laws); MONT. REV. CODE ANN., § 11171 (1935) (gambling laws); ORE. COMP. LAWS ANN. §§ 23-930, 23-931 (1940) (gambling laws).

4. See, *e.g.*, *Bradley v. Fisher*, 13 Wall. 335 (U.S. 1872) (threat of violence to judge); *United States v. Porter*, 27 Fed. Cas. 595, No. 16,072 (C.C.D.C. 1812) (fraudulently taking client's property); *In re Snyder*, 24 Fed. 910 (C.C.E.D. Tenn. 1885) (fleecing relatives of weak-minded innocent by convincing latter he was guilty of crime). See generally 2 THORNTON, ATTORNEYS AT LAW §§ 758-61 (1914).

Constitutional objections to exercise of this disciplinary power have been uniformly unsuccessful. *Ex parte Wall*, 107 U.S. 265 (1882); *In re Coffey*, 123 Cal. 522, 56 Pac. 448 (1899). On the general question of the constitutional status of the practice of law, compare *Yeiser v. Dysart*, 267 U.S. 540 (1925); *In re Summers*, 325 U.S. 561 (1945); *Mitchell v. Greenough*, 100 F.2d 184 (C.C.A. 9th 1938), *cert. denied*, 306 U.S. 659 (1939); *Overton v. Los Angeles*, 263 Fed. 951 (S.D. Cal. 1920).

impose such discipline on state prosecutors for affirmative misconduct.⁵ The novelty of the decision in *Wilbur v. Howard*,⁶ where the district court branded as unfit and struck from its rolls⁷ a Kentucky Commonwealth's Attorney⁸ for persistent and blatant failure to enforce state anti-gambling laws,⁹ does not lie in its application to a public official, but rather in its extension to one whose only offense was inaction. In addition, as the first instance of such action by a federal court, the case raises the question of the propriety of a federal judge's initially disciplining a slothful state prosecutor. This latter issue is underlined by the failure of two prior attempts in state courts to remove

5. See Notes, 9 A.L.R. 189, 197-200 (1920), 43 A.L.R. 107, 109-10 (1926). Louisiana is an exception to the general rule. *In re Borie*, 166 La. 855, 857, 118 So. 45 (1928) ("... the official conduct of public officers is not subject to review in disbarment proceedings, for what they do *officially* is not done in the capacity of attorneys at law, but by virtue of their office").

6. 70 F. Supp. 930 (E.D. Ky. 1947).

7. To "strike from the rolls" is to remove from the list of those eligible to practice before the particular court. To "disbar" is to oust from membership in the bar of the particular court, thereby producing the same result. Whichever expression is used, such action by an authorized state tribunal automatically bars practice before all other courts of that state. Similar federal decisions, however couched, do not work automatic final exclusion from other federal or state courts. This difference in effect between federal and state action and the fact that state decisions invariably use "disbarred" appear to underlie the unexplained distinction between "disbarred" and "stricken from the rolls" drawn by the court in the instant case. *Wilbur v. Howard*, 70 F. Supp. 930, 935 (E.D. Ky. 1947).

The Supreme Court specifies "disbarred." Rule 2 (5), RULES OF THE UNITED STATES SUPREME COURT, 11 Sup. Ct. Dig. 6 (1939). "Disbarred" is also used in the rules of the following Circuit Courts of Appeal: First Circuit, Rules 7(3), 11 *id.* at 41 (Supp. 1943); Third Circuit, Rules 8(3), 11 *id.* at 58 (Supp. 1943); Fourth Circuit, Rules 7(3), 11 *id.* at 257; Fifth Circuit, Rules 7(3), 11 *id.* at 267; Tenth Circuit, Rules 7(3), 11 *id.* at 43 (Supp. 1947).

"Stricken from the rolls" appears in the rules of the following circuit courts: Sixth Circuit, Rules 7(2), 11 *id.* at 75 (Supp. 1943); Seventh Circuit, Rules 6(2), 11 *id.* at 88 (Supp. 1943); Eighth Circuit, Rules 7(4), 11 *id.* at 294. The rules of the Circuit Courts of Appeals for the Second and Ninth Circuits contain no reference to discipline at all.

8. Respondent holds this elective office for Kentucky's sixteenth judicial district (Kenton County), whose principal city, Covington, lies just across the state border from Cincinnati, Ohio. A primary duty is to "... attend each circuit court in his district, and prosecute all violations of the criminal and penal laws therein." KY. REV. STAT. ANN. § 69.010 (Baldwin, 1943). Kentucky also has "county attorneys." For description of the jurisdictions of the two classes of officers, *see* *Commonwealth v. Euster*, 237 Ky. 162, 163-6, 35 S.W.2d 1, 2-3 (1931).

9. For the last twelve years of respondent's twenty-year incumbency the court found that bookies had operated openly and that slot-machines abounded in restaurants and night clubs. A poll of school children disclosed that 92% of them had seen the machines, 87% had seen others play them and 42% had played them. 300 Kenton County slot-machine operators paid the federal occupational tax on the machines in 1941-2; these taxpayers' names were both published in county newspapers and available at the office of the Internal Revenue Collector in nearby Louisville. *Wilbur v. Howard*, 70 F. Supp. 930, 933-4 (E.D. Ky. 1947).

Although Judge Swinford explicitly grounds his decision on respondent's inaction, his

Howard, temporarily or permanently, both of which were thwarted by constitutional provisions.¹⁰

State decisions suspending or disbaring state prosecutors supply precedent for the district court's rejection of several of Howard's defenses, including claims that his constituents were unenthusiastic about the gaming laws¹¹ and that disciplinary proceedings must await his conviction of a crime.¹² But the

critical mention of Howard's handling of crucial grand jury indictments and his non-committal attitude towards the unproved bribery charge suggest that malfeasance claims may have influenced his holding. *Wilbur v. Howard*, 70 F. Supp. 930, 934 (E.D. Ky. 1947). Judge Swinford was probably well informed about Kenton County conditions, having been United States Attorney for the Eastern District of Kentucky (1933-7) prior to his appointment to the bench. 24 WHO'S WHO IN AMERICA 2318 (1946-7).

10. In *Northcutt v. Howard*, 279 Ky. 219, 130 S.W.2d 70 (1939), a state circuit judge requested a temporary substitute for Howard to aid a prospective grand jury probe of Howard's official behavior. The request was denied on the ground that otherwise a circuit judge could remove a Commonwealth's attorney at will. Previously the same judge had suggested Howard's withdrawal from the inquiry, but the latter declined, labeling himself competent to investigate his own conduct. The present circuit court judge is satisfied with Howard's deportment. See note 33 *infra*. In *Commonwealth ex rel. Attorney General v. Howard*, 297 Ky. 488, 180 S.W.2d 415 (1944), an attorney general charged Howard with corruption and dereliction of duty and asked that he be fined and removed from office. This suit was also unsuccessful because the court held that this type of removal from office was not specified in the state constitution.

Thus, in Kentucky, impeachment and state disbarment appear to be the only means of removing an inactive prosecutor from office. Because Kentucky requires its prosecutors to be attorneys in good standing, prosecutor disbarment by the Court of Appeals forfeits the offender's office. *Commonwealth ex rel. Pike County Bar Ass'n v. Stump*, 247 Ky. 589, 57 S. W.2d 524 (1933). About half the states have this requirement (that prosecutors must be attorneys) written into statute or constitution, and the same result has been reached by judicial ruling in other states. *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1925); *People ex rel. Hughes v. May*, 3 Mich. 598 (1855).

A frequent argument, therefore, is that such disbarment amounts to unconstitutional removal from office. Almost universally unavailing, the claim has been specifically denied in Kentucky. *Commonwealth ex rel. Pike County Bar Ass'n v. Stump*, *supra*; *accord*, *In re Jones*, 70 Vt. 71, 39 Atl. 1087 (1898); *State v. Hays*, 64 W. Va. 45, 61 S.E. 355 (1908).

11. Actually the court did not pass on the validity of this defense but merely asserted that ". . . the people in Kenton County are definitely and conscientiously opposed to these widespread practices." *Wilbur v. Howard*, 70 F. Supp. 930, 934 (E.D. Ky. 1947). In view of the notoriety of conditions, the previous suits against Howard, and Howard's reelection to office in 1933, 1939 and 1945, the accuracy of this observation seems questionable. But even if the court has optimistically misinterpreted county sentiment, there is recourse to the language of *In re Voss*, 11 N.D. 540, 547, 90 N.W. 15, 19 (1902) ("State's attorneys are not permitted to thus practically repeal laws deemed obnoxious by their constituents.").

For discussion of the factors which hamper the prosecutor's enforcement of the law see Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933); MOLEY, POLITICS AND CRIMINAL PROSECUTION 221-38 (1929).

12. *In re Norris*, 60 Kan. 649, 57 Pac. 528 (1899). The court's findings in the instant case reveal no basis for a criminal charge. The receipt of or agreement to receive a bribe is a crime. KY. REV. STAT. ANN. § 432.190 (Baldwin, 1943). But the court does not find bribery as charged. See note 9 *supra*. A "peace officer's" failure to prosecute gamblers as

state cases are not authority for the revocation or even the suspension of professional privileges for official non-feasance. Most holdings applying such sanctions against prosecutors embrace only instances of malfeasance—*e.g.*, accepting bribes,¹³ selling contraband liquor,¹⁴ or pressuring known innocents to plead guilty.¹⁵ In no case has mere inaction been the sole cause of suspension or disbarment, and where it has been a factor, it has always been accompanied by specific misdeeds.¹⁶ Furthermore, three recent cases involving similarly flagrant non-feasance resulted only in removal of the prosecutors from office. In one case the same court which had previously ousted the offender from office¹⁷ declined in a subsequent disbarment action to do more than issue a reprimand,¹⁸ indicating that neglect of official duty warrants re-

well as his general negligence are also crimes. KY. REV. STAT. ANN. §§ 61.170, 436.470 (Baldwin, 1943). But a Commonwealth's attorney is not a "peace officer." *Id.* at § 61.310; Commonwealth *ex rel.* Attorney General v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944).

13. People *ex rel.* Colorado Bar Ass'n v. Anglim, 33 Colo. 40, 78 Pac. 687 (1904); *In re* Norris, 60 Kan. 649, 57 Pac. 528 (1899); Commonwealth *ex rel.* Pike County Bar Ass'n v. Stump, 247 Ky. 589, 57 S.W.2d 524 (1933) (also violated professional code as private attorney); State v. Hays, 64 W. Va. 45, 61 S.E. 355 (1908).

14. Underwood v. Commonwealth, 32 Ky. Law Rep. 32, 105 S.W. 151 (1907) (disbarment).

15. People *ex rel.* Stead v. Phipps, 261 Ill. 576, 104 N.E. 144 (1914) (one-year suspension—in addition, as master in chancery, respondent had misappropriated \$3,000).

Other cases involving only malfeasance include: *In re* McCowan, 177 Cal. 93, 170 Pac. 1100 (1917) (one-year suspension—coercion of grand jury and abuse of judge); *In re* Faubion, 101 S.W. 2d 103 (Mo. App. 1937) (three-month suspension—intercourse with a prisoner's wife); *In re* Waggoner, 49 S.D. 78, 206 N.W. 427 (1925) (three-month suspension—illegally receiving part of reward for recovery of stolen goods).

16. *In re* Simpson, 9 N.D. 379, 83 N.W. 541 (1900) (disbarment—licensed outlawed liquor dealers and took a share of the resulting fees); *In re* Voss, 11 N.D. 540, 90 N.W. 15 (1902) (nine-month suspension—patronized illegal gambling houses); *In re* Jones, 70 Vt. 71, 39 Atl. 1087 (1898) (disbarment—respondent deceitfully secured judge's signature which was a prerequisite to payment of his salary).

17. State *ex inf.* McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91 (1940). Like Howard, Graves disclaimed knowledge of any law infractions and asserted that his duties did not embrace detection. The court disagreed: ". . . where the crime is one against the body politic generally . . . experience teaches that a private prosecuting witness will rarely come forward to initiate proceedings. . . . It is not only the right but the duty of the prosecutor in such cases to himself take the initiative." *Id.* at 1002-3, 144 S.W.2d at 98.

18. *In re* Graves, 347 Mo. 49, 146 S.W.2d 555 (1941) (emphasis on the absence of corrupt motives and on the fact that unprosecuted liquor and gambling law transgressions were not major crimes).

Prosecutors often have been reprimanded for affirmative misconduct. People *ex rel.* Colorado Bar Ass'n v. _____, Attorney at Law, 90 Colo. 440, 9 P.2d 611 (1932) (collected money from county on fictitious claims); *In re* Truder, 37 N.M. 69, 17 P.2d 951 (1932) (dismissed criminal charges on condition the accused release all damage claims arising out of prosecution); *In re* Sittou, 72 Okla. 13, 177 Pac. 555 (1918) (retained county funds until county paid his salary).

removal from office but not suspension from practice. In the other two cases further disciplinary proceedings were not even initiated.¹⁹

If, however, Howard's conduct is judged by general professional standards, the holding in the principal case seems more orthodox. Of course, the more flagrant violations of established canons of behavior—*e.g.*, advertising, "ambulance chasing" and fomenting of litigation—are clearly not involved.²⁰ Invocation of less specific precepts depends upon straining the attorney-client

19. Displaced for toleration of lawbreaking, Carl F. Wymore, Cole County (Mo.) prosecutor, had also pleaded ignorance of statute violations. Holding that slot machines were "plastered" throughout the county, the court declared: "It is not contended that the machines were so constructed that an enforcement officer, on approaching, would be temporarily blinded." *State ex rel. McKittrick v. Wymore*, 345 Mo. 169, 180, 132 S.W.2d 979, 986 (1939). No proceedings looking to eventual disbarment, suspension or even reprimand were begun against Wymore, who is now a member of the Missouri bar in good standing. Communication to YALE LAW JOURNAL from Fred B. Hulse, General Chairman of the Missouri Bar Administration, July 17, 1947.

Nor were proceedings instituted against C. Jay Hardee, Hillsborough County (Fla.) solicitor, whose removal by the governor was sanctioned in *State ex rel. Hardee v. Allen*, 126 Fla. 878, 172 So. 222 (1937). Communication to YALE LAW JOURNAL from Guyte P. McCord, Clerk of the Supreme Court of Florida, July 21, 1947. Undisturbed, large-scale gambling caused Hardee's ouster.

A different pattern of events followed two earlier Massachusetts removals, where the district attorneys' transgressions were largely affirmative. *Attorney General v. Tufts*, 239 Mass. 458, 132 N.E. 322 (1921) (conspiring to entrap and "throwing" business, as well as protecting brothel operator); *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407 (1922) (extortion, bribery, blackmail, incitement to crime as a Boston mayoral candidate). Both men were disbarred shortly thereafter. Communication to YALE LAW JOURNAL from Charles S. O'Connor, Clerk of the Supreme Judicial Court of Massachusetts, July 21, 1947.

20. The well-known ethical canons of the American Bar Association are primarily beamed at orthodox attorney-client relationships. The only specific mention of prosecutors is that defining their duty as ". . . not to convict, but to see that justice is done." Canon 5, *Canons of Professional Ethics of the American Bar Association*, in CHEATHAM, *CASES AND MATERIALS ON THE LEGAL PROFESSION* 520 (1938). Canon 6 proscribing the representation of conflicting interests has been the source of prosecutor discipline. *Ferguson v. Hooker*, 169 Okla. 84, 36 P.2d 18 (1934) (disbarment with leave to apply for readmission after one year—concluded condemnation proceedings against his own property); *In re Williams*, 174 Okla. 386, 50 P.2d 729 (1935) (reprimand—assistant district attorney represented client in civil case where facts the same as in criminal case against client). *But cf. In re Baum*, 32 Idaho 676, 186 Pac. 927 (1920); *Maginnis's Case*, 269 Pa. 186, 112 Atl. 555 (1921). The concept has been invoked against a prosecutor who broke the law on the ground that he could not be expected to prosecute himself. *Underwood v. Commonwealth*, 32 Ky. L. Rep. 32, 105 S.W. 151 (1907).

For the development and influence of these canons see Radin, *The Achievements of the American Bar Association: A Sixty Year Record*, 26 A.B.A.J. 135 (1940). *Cf. People ex rel. Chicago Bar Ass'n v. Baker*, 311 Ill. 66, 142 N.E. 554 (1924) (four-to-three decision against disbarment of successful cram school proprietor charged with enabling the mentally unfit to infiltrate the profession). For a pessimistic or realistic picture of the pervasiveness of the canons in everyday practice see GISNER, *A LAWYER TELLS THE TRUTH* 81-8. 121-30 (1931); SCHLOSSER, "LAWYERS MUST EAT" (1933).

relationship to accommodate that of prosecutor and public.²¹ Once this is accomplished, Howard's chronic apathy may be branded as infidelity to his clients.²² Analogous reasoning was employed in the *Chicago Sanitary District* case,²³ where attorneys whose names had graced the district's payroll, but whose labors had been negligible, were held to be unfaithful to their clients, the public, and were suspended from practice for terms inversely proportional to the extent of their services.²⁴ Additional support for the district court's position lies in the occasional acceptance of mere negligence as sufficient reason for disciplining private attorneys.²⁵

Even if Howard's activities were held to be extra-professional, precedent would have authorized the court's exercise of its disciplinary power.²⁶ Appraisal of private conduct has two general aims—protection of the public and the courts from the unfit and the maintenance of craft decorum. The indefinite nature of these goals induces judgments based on conceptions of general morality, and in view of the highly subjective character of that criterion, Howard's stubborn inertia may well be a fatal delinquency.²⁷

Although there is this legal basis for the holding in *Wilbur v. Howard*, the court might well have pondered the proper role of the federal judiciary in the elimination of prosecutorial sloth. The federal court decree does not depose Howard as Commonwealth's attorney, but it has immediate consequence.²⁸

21. "It is the duty of a Commonwealth's Attorney to represent his client. He is the lawyer for the people." *Wilbur v. Howard*, 70 F. Supp. 930, 935 (E.D.Ky. 1947).

22. Cf. *In re Jones*, 70 Vt. 71, 39 Atl. 1087 (1898).

23. *In re Sanitary District Attorneys*, 351 Ill. 206, 184 N.E. 332 (1933).

24. ". . . the respondents, with reason to believe that adequate services would not be required or expected of them, continued to thus take public funds . . . knowing that they were violating their obligations . . . to deal fairly. . . ." *In re Sanitary District Attorneys*, 351 Ill. 206, 221, 184 N.E. 332, 339 (1933).

But that decision differs sharply from the instant one in that there the terms of suspension were scaled down because of the novelty of the finding of misconduct. *Id.* at 283, 184 N.E. at 362-3.

25. *Trusty v. State Bar of California*, 16 Cal.2d 550, 107 P.2d 10 (1940); *In re McKenna*, 16 Cal.2d 610, 107 P.2d 258 (1940); Notes, 29 CALIF. L. REV. 427, 14 So. CALIF. L. REV. 349 (1941). For disapproval of the California trend see Carter, J., dissenting in *In re McKenna*, *supra* at 614, 107 P.2d at 260 (" . . . if The State Bar . . . is permitted to . . . [discipline] all the attorneys . . . who . . . commit some act of negligence . . . their task will be limitless . . . probably overtaking some of the members of the board of governors who sat in judgment in this case").

26. A cluster of early American cases indicated otherwise, but more recently the assessing of private behavior has become commonplace. See cases in Notes, 9 A.L.R. 189 (1919), 43 A.L.R. 107 (1926) and 55 A.L.R. 1373 (1928). See generally, Note, 43 Col. L. Rev. 409 (1943).

27. See generally, Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9 (1935); Note, 79 U. PA. L. REV. 506 (1931). Compare *Branch v. State*, 99 Fla. 444, 128 So. 487 (1930) (assault with intent to murder—no discipline) and *State v. Byrket*, 4 Ohio D. 89, 3 Ohio N.P. 28 (1895) (seduction of secretary—no discipline), with *State v. Bieber*, 121 Kan. 536, 247 Pac. 875 (1926) (illegal at-home possession of small amount of liquor—disbarment).

28. Shortly after the district court decree, one hundred and twenty employees of al-

Strong leverage is exerted on the state authorities and courts to remove him via the disbarment route.²⁹ A possible source of his income disappears.³⁰ Perhaps most important, the court-inflicted stigma will plague the incumbent in any future campaign for reelection.³¹ Moreover, had Howard been a state prosecutor in those states where attendance in federal courts is obligatory, a similar judicial order might well have effected his automatic displacement.³² The resultant anomaly would find an elected state official removed from office by a federal court for failure to enforce state laws.

Consideration of these political factors or of the possibility of federal-state conflict did not occupy the court in the instant decision; yet this novel exercise of a traditional prerogative would appear to entail intrusion upon matters of concern to the state whose laws, elections, officials, and disbarment and removal procedures are as much enmeshed in the case as is Howard's unfitness. The utilization or implementation of these instruments to insure enforcement of a state's anti-gambling statutes is within the power of its citizens.³³ But the

leged gambling establishments in Howard's district filed applications for state unemployment compensation. Louisville Courier-Journal, April 19, 1947, § 2, p. 1, col. 6.

29. Since the case was decided, the Kentucky Bar Association has launched an investigation to determine if it should seek Howard's discipline. Communication to YALE LAW JOURNAL from H.H. Harned, Registrar of the Kentucky State Bar Association, July 9, 1947.

30. Kentucky's Commonwealth's attorneys can retain a private practice. One of respondent's clients was the local telephone company, some of whose unlisted phones were used by the bookies. Howard v. Wilbur, 70 F. Supp. 930, 935 (E.D.Ky. 1947).

31. The next election will take place in 1951.

32. The following statutes require federal court attendance: ALA. CODE, tit. 13, § 226 (5) (1940); GA. CODE ANN. § 24-2909 (1937); N. C. GEN. STAT. § 147-59 (Michie, 1944); TENN. CODE ANN. § 9966(21) (Williams, 1934); VA. CODE ANN. § 4971 (Michie, 1942). In Arkansas judicial interpretation of an ambiguous statute has produced the same requirement. Graham v. Parham, 32 Ark. 676 (1878). An opposite result was reached in Kentucky. Slayton v. Rogers, 128 Ky. 106, 107 S.W. 696 (1908); accord, Comm'rs of Leavenworth v. Brewer, 9 Kan. 307 (1872).

Cases demanding such attendance would arise primarily under that section of the Judicial Code which sanctions removal to a federal court in criminal cases where certain federal officers are defendants. 39 STAT. 532 (1916), 28 U.S.C. § 76 (1940). Tennessee v. Davis, 100 U.S. 257 (1880); *In re Neagle*, 135 U.S. 1 (1890) (deputy United States marshal charged with murder while protecting Supreme Court Justice Field); Carter v. Tennessee, 18 F.2d 850 (C.C.A. 6th 1927); Jones v. McGill, 46 F.2d 334 (D.N.H. 1931) (county jailor having custody of federal prisoners); *Ex parte Dierks*, 55 F.2d 371 (D.Colo. 1933).

33. Anyone can request the Board of Governors of the Kentucky Bar Association to start disciplinary proceedings, the outcome of which rests with the Court of Appeals. RULE 3.220, RULES OF KENTUCKY COURT OF APPEALS, KY. REV. STAT. p. 3211 (1946). If the Board declines to press for any discipline, the complainant may go directly to the Court of Appeals, RULE 3.580, *id.* at p. 3222. For analysis of Kentucky discipline cases see Note, *Grounds for Disbarment and Suspension in Kentucky*, 28 Ky. L. J. 336, 338-44 (1940). For survey of disciplinary procedures in all the states see Potts, *Disbarment Procedure*, 24 TEX. L. REV. 161 (1946).

Another possible mode of attack is to invoke the statute calling for salary deductions

threat of federal discipline of state prosecutors gives the federal court indirect control over the enforcement of state laws involving no federal right. Thus the decision diverges from the increasingly abstentionist policy of the federal courts towards controversies more attuned to state treatment.³⁴ These circumstances suggest that in a case such as this a district court should decline to exercise its conceded prerogative. Adoption of that course would have avoided this decision's unfortunate concomitant—federal poaching on a state domain.³⁵

DOUBLE JEOPARDY AND THE MULTIPLE-COUNT INDICTMENT*

LIKE most present-day vestiges of the early common law, the doctrine of double jeopardy was utilitarian in its inception. In the days when few trials, civil or criminal, were resolved solely on their merits, the rich and powerful litigant was frequently the successful one. Especially was this true of criminal proceedings, where the prosecutor was the almighty sovereign himself.¹ Be-

for the days in which an officer ". . . failed or neglected to discharge his duty. . . ." KY. REV. STAT. ANN. §61.120 (Baldwin, 1943). But the circuit judge is to enforce this against the Commonwealth's attorney, *id.* at §61.130, and the present judge in Howard's district testified that respondent had always done his duty. Louisville Courier-Journal, April 12, 1947, §2, p. 1, col. 4-6. The county judge and county attorney were also witnesses for Howard. *Ibid.*

34. See *Hawks v. Hamill*, 288 U.S. 52 (1933) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (refusal to enjoin enforcement of state commission orders); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940) (federal court with exclusive control of debtor's estate submitted issue vital to estate to state tribunal); *cf.* *Colegrove v. Green*, 328 U.S. 549 (1946); *Turman v. Duckworth*, 68 F. Supp. 744 (N.D.Ga. 1946), *bill dismissed*, 67 Sup. Ct. 21 (1946). See Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 291 (1933). The Supreme Court recently widened the scope of the statute prohibiting injunctions by federal courts against state court proceedings. 36 STAT. 1162 (1911), 28 U.S.C. §379 (1940), *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941).

The October, 1946, term of the Supreme Court has witnessed invocation of the doctrine of *forum non conveniens* on several occasions. *E.g.*, *Koster v. Lumbermens Mut. Casualty Co.*, 67 Sup. Ct. 828 (1947); *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839 (1947). For evaluation of this proclivity for self-restraint, see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Comment, 56 YALE L. J. 1234 (1947).

35. If state courts were to discipline U.S. Attorneys for laxity in enforcing federal laws, the consequences would be no less distasteful. But so far no state court has imposed such discipline. Where disbarment of a U.S. Attorney was requested, the charges were solicitation of clients and use of position to foster private settlements. *In re Lyons*, 162 Mo. App. 688, 145 S.W. 844 (1912) (dismissal for want of evidence).

* *United States v. Michener*, 67 Sup. Ct. 1509 (1947).

1. The accused "never saw the indictment until it was read to him. He could call no witnesses on his behalf. He was not permitted to have counsel. It is small wonder

cause acquittal of a felony was difficult to win and conviction meant death or dismemberment,² the courts soon became reluctant to re-try anyone for the same crime after a prior acquittal or conviction.³ This inhibition against two prosecutions for a single offense took root in the English common law⁴ and eventually was expressly incorporated in the United States Constitution.⁵

Today, improved trial procedure and diminished danger of governmental tyranny have obviated the danger of repeated prosecutions for the same crime, so that the original basis for the doctrine no longer exists.⁶ However, the extensive power wielded by prosecutors still requires some limitation against possible abuse. This problem has been accentuated by the development, in the quest for more efficient law enforcement, of a drafting technique which extends the coverage of criminal statutes by defining a single substantive offense into a series of separate crimes. Multiple-count indictments, drawn under such statutes, not only minimize the likelihood of unwarranted acquittal but also greatly enhance the potential penalty for any given criminal transaction.⁷ In opposition, the double jeopardy inhibition against successive prosecutions is frequently invoked to limit the amount of permissible punishment.

that in England, just as on the Continent, accusation was practical conviction. Acquittals were extremely rare." RADIN, *ANGLO-AMERICAN LEGAL HISTORY* 223-9 (1936). Not until the nineteenth century was defense counsel allowed. The court, it was quaintly explained, was the prisoner's counsel. *Id.* at 229. Involuntary confessions, hearsay testimony, and jury attain were freely used as late as the reign of Elizabeth. Holdsworth admits that the prosecution had "all the advantages it could wish for." 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 229 (2d ed. 1938).

2. For a description of the savagery of medieval punishments, see RADIN, *op. cit. supra* note 1, at 236-7. By the fourteenth century all felonies were punished by death. Misdemeanors and trespasses such as petty theft (less than one shilling) were dealt with comparatively mildly—*e.g.*, loss of an ear. Treason, as a personal affront to the sovereign, merited disemboweling, quartering, stoning, burning, or any combination thereof.

3. The plea of former acquittal "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution . . . he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 BL. COMM. *335. The plea was used in Bracton's time. STAUND. P.C. *105. Its counterpart appeared in the early Spanish *Fuero Real*, *Kepner v. United States*, 195 U.S. 100, 120-1 (1904), but fell into disuse and is no longer accepted on the Continent. RADIN, *op. cit. supra* note 1, at 228. See 4 BL. COMM. *336 for a description of the plea of "former conviction."

4. "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 18 Wall. 163, 169 (U.S. 1873).

5. ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. AMEND. V.

6. It has been objected that the "net result has been not to protect the innocent but to accomplish the escape of the guilty." Comley, *Former Jeopardy*, 35 YALE L. J. 674 (1926).

7. See Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 820 (1937).

Although the vital administrative goal is no longer to safeguard the innocent from persecution but to insure proper treatment for the guilty, the courts are still using in this new context the old tests which were designed to meet an entirely different problem.

For determining the "sameness"⁸ required for upholding a double jeopardy plea, two formulae have been employed. Most jurisdictions, including the federal, use the "Same Evidence" test, which, in its usual statement, finds fatal identity if proof of the second count would sustain conviction under the first.⁹ Another version, however, demands that proof of the first count sustain the second.¹⁰ A few courts have broadened the test by accepting either of these alternatives.¹¹ A minority follows the "Same Transaction" test, which finds "sameness" if there is a common motivating intent aimed at a single ultimate goal;¹² or only one physical act;¹³ or no more than a single injury to society, which is said to depend on whether the statute prohibits the individual acts or the course of action which they comprise.¹⁴

8. At common law the former jeopardy rule was based on the conception of "one and the same" offense. The plea "must be upon a prosecution for the same identical act and crime." 4 BL. COMM. *336.

9. *Morgan v. Devine*, 237 U.S. 632 (1915); 1 WHARTON, CRIMINAL LAW 535 (12th ed., Ruppenthal, 1932). This formula is traceable to Lord Buller in *The King v. Vandercomb*, 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796).

10. *Hans Nielsen, Petitioner*, 131 U.S. 176, 190 (1889); *Rutkowski v. United States*, 149 F.2d 481 (C.C.A.6th 1945); *Cain v. United States*, 19 F.2d 472 (C.C.A. 8th 1927).

11. *Morey v. Commonwealth*, 108 Mass. 433 (1871); accord: *Gavieres v. United States*, 220 U.S. 338, 342 (1911); *Sims v. Rives*, 84 F.2d 871, 876 (App.D.C. 1936); *United States v. St. Clair*, 62 F. Supp. 795, 799 (W.D.Va. 1945); 1 BISHOP, CRIMINAL LAW § 1051(5) (9th ed., Zane and Zollman, 1923). *Contra*: *United States v. Marzani*, 71 F. Supp. 615, 618 (D.C. 1947) (where different counts refer to different times or different parties, the test is "whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict").

12. *Burnam v. State*, 2 Ga. App. 395, 396, 58 S. E. 683 (1907) ("... if by separate shots the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault of these two persons. The intent of the defendant determines the matter."). This principle is frequently used to limit criminal liability for unintended consequences. *State v. Cooper*, 13 N. J. L. 361 (Sup. Ct. 1833) (arson resulting in accidental killings). In *Smith v. State*, 159 Tenn. 674, 682, 21 S. W.2d 400, 402 (1929), the intent was "an imputed disregard of the safety of all persons who might be in the way of the recklessly and unlawfully driven automobile. . ." See, further, 1 WHARTON, *op. cit. supra* note 9, at 52 ("The distinction is this: when the impulse is single, but one indictment lies, no matter how long the action may continue").

13. *Landers v. State*, 26 Ala. App. 506, 162 So. 550 (1935) (drunken driving and reckless driving); *State v. Mowser*, 92 N. J. L. 474, 106 Atl. 416 (1919) (conviction for robbery bars prosecution for murder of robbery victim); *People v. Webster*, 269 App. Div. 887, 56 N.Y.S.2d 155 (3d Dept. 1945) (possessing burglar's tools and unlawful entry); *People v. Weinstock*, 55 N.Y.S.2d 330 (Sup. Ct. 1945) (abortion and practicing medicine without a license); *Petty v. State*, 129 Tex. Crim. Rep. 20, 83 S.W.2d 995 (1935) (stolen flock included sheep belonging to different owners).

14. 1 WHARTON, *op. cit. supra* note 9, § 34 n. 13; 51 HARV. L. REV. 925 (1938); 20 HARV. L. REV. 642 (1907). This vague criterion is implicit in most of the "Same Trans-

When the sole inquiry is purely penological—*i.e.*, how much punishment is called for in a specific situation—these criteria are wholly inadequate, as illustrated by *United States v. Michener*.¹⁵ In 1935 Michener and an accomplice were indicted in the United States District Court of Minnesota on counts of (1) "procuring the manufacture" and (2) "possession" of an engraving plate designed for counterfeiting currency¹⁶—both "on or about" August 25, 1934. The only plate involved was one which Michener at pistol point forced an engraver to make. Michener, who pleaded guilty to both counts, received consecutive sentences of fifteen years and a \$5,000 fine on each count. The severity of the punishment (the statutory maximum) was no doubt commensurate with the prisoner's record, which included an Oregon felony conviction, at the age of nineteen, and a thirty-five year Wisconsin forgery sentence imposed in 1935.¹⁷ Originally the counterfeiting sentences were to run from the expiration of Michener's then-current state term, but in 1939 he was released from the Wisconsin penitentiary to begin the federal sentences in Alcatraz.¹⁸ Although this arrangement lessened the danger of jail-break, it in effect reduced his total imprisonment some thirty-one years.¹⁹ After serving the first of the federal sentences, a motion to vacate the second was filed in the convicting court.²⁰ Denial of this motion was appealed to the Eighth Circuit, which reversed the lower court.²¹ In a memorandum without opinion the Supreme Court in turn reversed the Circuit Court, three justices dissenting.²²

Neither of the appellate tribunals even discussed the factors—psychological, sociological, and penological—which should be weighed before releasing a given convict. Instead, both courts turned to conceptualism and conflicting case precedent. Applying the "Same Evidence" test, the Circuit Court was convinced that both offenses were "the same" on the theory that proof of manufacture necessarily proves the included element of possession, it being impossible to manufacture something without simultaneously possessing it.²³

action" cases. Cf. AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW § 5 (1935).

15. 67 Sup. Ct. 1509 (1947).

16. Thus violating 35 STAT. 1116 (1909), 18 U.S.C. § 264 (1940), which makes it unlawful to "make or execute, or cause or procure to be made or executed" a plate designed for counterfeiting or to have "control, custody, or possession" of such plate.

17. *Michener v. Johnston*, 141 F.2d 171, 172-3 (C.C.A.9th 1944).

18. Brief for Petitioner, p. 4, n. 1, *United States v. Michener*, 67 Sup. Ct. 1509 (1947).

19. This computation does not include possible time off for good behavior.

20. Michener had first tried to win his freedom on habeas corpus in the District Court for the Northern District of California. *Michener v. Johnston*, 141 F.2d 171 (C.C.A.9th 1944) (dismissal of petition affirmed).

21. *Michener v. United States*, 157 F.2d 616 (C.C.A.8th 1946).

22. Douglas, Murphy and Rutledge, JJ.

23. *Patilo v. United States*, 7 F.2d 804 (C.C.A.8th 1925); *Morgan v. United States*, 294 Fed. 82 (C.C.A.4th 1923); accord: *Goetz v. United States*, 39 F.2d 903 (C.C.A.5th 1930); *Dexter v. United States*, 12 F.2d 777 (C.C.A. 5th 1926); *Rossman v. United*

Although Michener procured the manufacture instead of engraving the plate himself, the Court thought that "control" or "constructive possession" through the engraver was the statutory equivalent of actual physical possession.²⁴ On this logically plausible reasoning, amply supported by circuit court prohibition cases, it would have vacated the second sentence as double punishment repugnant to the Fifth Amendment.²⁵

Without indicating any more awareness than the Eighth Circuit of the basic considerations, the Supreme Court merely cited the *Gavieres*,²⁶ *Albrecht*,²⁷ and *Blockburger*²⁸ cases. Doctrinally, none of the three seems exactly in point because none deals with the particular situation represented by the instant case, where the second offense is apparently included in the first and continues after the first is complete. In the *Gavieres* case, for example, the two indictments were for offensive public behavior and for insulting a government official to his face.²⁹ The *Blockburger* case held that narcotics sales on consecutive days were separately provable; also, that there was no necessary connection between proof of sales without a written order and sales from a broken package. The first count in the *Albrecht* indictment charged possession of liquor antecedent to its sale in the second count.³⁰ The one thing these cases have in common is emphasis on *theoretical* as opposed to *factual* separability in applying the "Same Evidence" test—*i.e.*, if several offenses are hypothetically provable by different evidentiary facts it is immaterial that in a specific case separate proof is impossible.

It appears, then, that reliance on the "Same Evidence" test can produce directly opposite results with respect to the same indictment, depending on

States, 280 Fed. 950 (C.C.A.6th 1922). *Contra*: *Matthews v. Swope*, 111 F.2d 697 (C.C.A.9th 1940); *see Michener v. Johnston*, 141 F.2d 171 (C.C.A.9th 1944).

24. The following cases approve the idea of "procurement" and constructive possession: *Moffitt v. United States*, 154 F.2d 402, 406 (C.C.A.10th 1946), *cert. denied*, 328 U.S. 853 (1946); *United States v. De Normand*, 149 F.2d 622 (C.C.A.2d 1945), *cert. denied*, 326 U.S. 756 (1945); *Minella v. United States*, 44 F.2d 48 (C.C.A.8th 1930); *Richardson v. United States*, 181 Fed. 1 (C.C.A.3d 1910). Inasmuch as the statutory prohibition against possession, custody, or control is in the disjunctive, proof of any one of the three in the course of proving manufacture would have sufficed for the "possession" count. *Cf. Crain v. United States*, 162 U.S. 625 (1896).

25. The double jeopardy clause "was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Miller, J.*, in *Ex parte Lange*, 18 Wall. 163, 173 (U.S. 1873).

26. *Gavieres v. United States*, 220 U.S. 338 (1911).

27. *Albrecht v. United States*, 273 U.S. 1, 11 (1927).

28. *Blockburger v. United States*, 284 U.S. 299 (1932).

29. "While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." *Gavieres v. United States*, 220 U.S. 338, 345 (1911).

30. "One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case." *Albrecht v. United States*, 273 U.S. 1, 11 (1927).

which conceptual approach and line of case precedent is followed.³¹ Although this uncertainty and inconsistency should of itself suffice to discredit the test, a further objection is that it allows the prosecutor to determine the number of punishable offenses by the form in which he draws the indictment. For example, where there are continuing or included offenses, as in the present case, the result may depend on the sequence of charges; that is, whether "manufacture" appears before "possession" in the indictment or vice versa.³² Conversely, mere surplusage may make distinct offenses identical.³³ Emphasis on the indictment's form, which is reminiscent of the common law cause-of-action artificialities, obscures a consideration of the realities inherent in the problem of crime and punishment.

Nor is the "Same Transaction" test any more functional. Essentially a defendant's rule in requiring relatively little similarity of offenses, its application would have returned Michener to society.³⁴ Under the statement of the test that relies on the physical act, the indictment would have stated but a single offense, since both the procurement of manufacture and the possession occurred at approximately the same time and place. A like result would have been achieved under the "single intent" statement of the rule, for clearly

31. Compare *Matthews v. Swope*, 111 F.2d 697 (C.C.A.9th 1940), with cases cited in note 23 *supra*; *Robinson v. United States*, 143 F.2d 276 (C.C.A.10th 1944), with *Crespo v. United States*, 151 F.2d 44 (C.C.A.1st 1945) (both involving illicit transportation of several women simultaneously); *Albrecht v. United States*, 273 U.S. 1 (1927), with *Gray v. United States*, 14 F.2d 366 (C.C.A.8th 1926); *Morey v. Commonwealth*, 103 Mass. 433 (1871), with *Hans Nielson, Petitioner*, 131 U.S. 176 (1889) (both alleging first, cohabitation and second, adultery); *Stevens v. McClaughry*, 207 Fed. 18 (C.C.A.8th 1913) (larceny of pouch of registered letters and larceny of registered letters and their contents held one offense), with *Poffenbarger v. United States*, 20 F.2d 42 (C.C.A.8th 1927) (taking mail bags from train and abstracting their contents held separate crimes).

32. Compare *United States v. Mulligan*, 67 F.2d 321 (C.C.A.2d 1933) (possession and sale of counterfeiting equipment held separate offenses), with *Schroeder v. United States*, 7 F.2d 60 (C.C.A.2d 1925) (transportation and possession of whiskey held only one offense); *Freeman v. United States*, 146 F.2d 978 (C.C.A.6th 1945) (illegal narcotics sales and conspiracy to sell held same offense), with *Carter v. McClaughry*, 183 U.S. 365 (1902) (conspiracy to defraud and defrauding held separate), and *Pinkerton v. United States*, 328 U.S. 640 (1946) (conspiracy and the substantive offense held distinct crimes even though there was only one overt act).

33. This is possible only if the "evidence" in the test refers to evidentiary allegations in the indictment. Cf. *State v. Nash*, 86 N.C. 650, 41 Am. Rep. 472 (1882). In *State v. Lippard*, 223 N.C. 167, 25 S.E.2d 594 (1943), prior cases stressing the indictment's allegations were quoted approvingly, but no double jeopardy was found as to offenses alleged in a former indictment but not submitted to the jury. See also Comment, 40 *YALE L. J.* 462, 463 (1931).

34. For the types of situations in which the test has validity see Horack, *The Multiple Consequences of a Single Criminal Act*, 21 *MINN. L. REV.* 805 (1937). Where the offense is inherently continuous, having duration, the "Same Transaction" test is more realistic than the "Same Evidence" test. In *re Snow*, 120 U.S. 274 (1887) (unlawful cohabitation); *Crepps v. Durden*, 2 Cowp. 640, 98 Eng. Rep. 1283 (K. B. 1777) (baking on Sunday); cf. *Braverman v. United States*, 317 U.S. 49, 53 (1942) (conspiracy to violate several provisions of Internal Revenue Code held a single offense).

the only intent was the making of counterfeit money. It is equally difficult to see how there would have been more than one crime under the "injury to society" test, although the prosecution attempted to introduce the concept of legislative intent to show more than one social wrong. It maintained that unauthorized manufacture was in the eyes of Congress an evil substantially distinct from possession with intent to counterfeit, hence each was separately punishable.³⁵

The "Same Evidence" and "Same Transaction" tests—like any mechanistic formulae designed to solve the problem of extent of confinement—must be illusory in omitting the sociological and psychological factors which are really germane.³⁶ It is therefore unfortunate that the Supreme Court in the *Michener* case did not expressly recognize the futility of the classical criteria and take occasion to weed out this terminological undergrowth.³⁷ What is needed is not a mathematically exact rule couched in legalistic jargon but a utilitarian approach. A salutary holding would have been that sentences are best determined at the trial level on all the facts of the particular case rather than by appellate application of theory-of-the-pleader standards. Review of sentences on the merits is a step in this direction,³⁸ because it would allow the desired result to be achieved without turning conceptualistic handsprings. A more promising development is the complete divorcement, by means of a sentencing board, of the disparate functions of fact-finding and punishment-determination.³⁹ Under this plan individualized treatment is prescribed with a view toward reforming the reformable and incapacitating the incorrigible.

35. Brief for Petitioner, pp. 9-12, *United States v. Michener*, 67 Sup. Ct. 1509 (1947). The legislative history is reviewed in *United States v. Raynor*, 302 U.S. 540 (1938). See *Albrecht v. United States*, 273 U.S. 1, 11 (1927) ("There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction"). The propriety of punishing minutiae of a crime has been accorded particular approval in offenses against the mails. *Ebeling v. Morgan*, 237 U.S. 625 (1915) (tearing open each of several mail bags held separately punishable); *Badgers v. United States*, 240 U.S. 391 (1916) (mailing of seven letters held seven violations of Mail Fraud Act).

36. See CANTOR, *CRIME AND SOCIETY* 205 (1939).

37. See concurring opinion of Rutledge, J., in *District of Columbia v. Buckley*, 128 F.2d 17, 21 (App. D.C. 1942) (The "Same Evidence" test tells only "what the difference is, not whether it is important enough to prevent operation of the constitutional guaranty").

38. Six states have adopted this procedure: IOWA CODE ANN. § 19-2721 (1932); IOWA CODE § 793.18 (1946); NEB. REV. STAT. § 29-2308 (1943); N. Y. PEN. LAW § 1931; OKLA. STAT. ANN., tit. 22, § 1066 (1938); TENN. CODE ANN. § 11764 (Williams, 1934).

39. See, e.g., CALIF. PEN. CODE § 1168 (Deering, 1941); ILL. ANN. STAT., c. 38, § 902 (Smith-Hurd, 1936); IND. STAT. ANN. § 9-1821 (Burns, 1942); IOWA CODE § 789.13 (1946); KAN. GEN. STAT. ANN. §§ 62-1521 to 1529 (Corrick, 1935); UTAH CODE ANN. § 105-36-20 (1943); W. VA. CODE ANN. § 6128 (1943); WISC. STAT. § 359.05 (1945). This type of law in effect gives the trial court no sentencing discretion whatever. After commitment, an administrative board fixes the term of imprisonment within the statutory limits.

FULL FAITH AND CREDIT: PREFERENTIAL TREATMENT OF FRATERNAL INSURERS*

THE privileged position of fraternal benefit societies in the insurance field, due to their statutory exemption from the general provisions of state insurance laws,¹ has been even further enhanced by a series of Supreme Court decisions since 1915 in the field of conflict of laws.² In any action between a fraternal benefit society and one of its members, arising in a state other than that of the society's incorporation, these decisions, although not entirely clear, seem to require the forum to give full faith and credit to all provisions of the society's charter and constitution which are valid in the state of domicil.³

*Order of United Commercial Travelers of America v. Wolfe, 67 Sup. Ct. 1355 (1947).

1. An examination of the statutes reveals that all states exempt fraternal benefit societies from the provisions of the general state insurance laws and subject them to a special code of regulation. See, e.g., CAL. INS. CODE §10970 (Deering, Supp. 1945); OHIO GEN. CODE §9465 (Page, 1937); PA. STAT. ANN., tit. 40, §1054 (Purdon, Supp. 1946). These codes all reflect the influence, in a greater or lesser degree, of the so-called New York Conference Bill, drafted in 1912 by representatives of the National Convention of Insurance Commissioners, National Fraternal Congress, Associated Fraternities of America, and Federated Fraternities. BASYE, HISTORY AND OPERATION OF FRATERNAL INSURANCE c. 8 (1919). Cf. MINN. STAT. §§3446-91 (Mason, 1927) (adopted in 1907, with subsequent amendments); OHIO GEN. CODE §§9462-509 (Page, 1937) (substantially as enacted in 1911); OKLA. STAT. ANN., tit. 36, §§271-92 (1938) (adopted in 1910); GA. CODE ANN. c. 56-16 (Supp. 1945.) (adopted in 1943). Efforts are currently being made by the National Fraternal Congress and the National Association of Insurance Commissioners to promulgate an up-to-date Uniform Fraternal Code. Perrin, *Negotiations for a Uniform Fraternal Code*, THE FRATERNAL AGE, Oct., 1944, p. 29.

2. Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915); Modern Woodmen of America v. Mixer, 267 U.S. 544 (1925); Sovereign Camp v. Bolin, 305 U.S. 66 (1938); cf. Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).

3. For a thorough discussion of these cases, see CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS §28 (1942). The obscurity of the rationale of these decisions is indicated by the subsequent confusion as to the scope of the rule, in state and federal courts. Compare, e.g., the following: Kohler v. Kohler, 104 F.2d 38 (C.C.A. 9th 1939) (law of insurer's domicil governs validity of contract between insured and beneficiary); Meyer v. Meyer, 79 F.2d 55 (C.C.A. 8th 1935) (law of insurer's domicil governs in "respect of the funds from which rights are to be enforced"); Asel v. Order of U.C.T. of America, 197 S.W.2d 639 (Mo. 1946) (forum need not enforce a by-law contrary to its public policy); Young v. Order of U.C.T. of America, 142 Neb. 566, 7 N.W.2d 81 (1942) (by-law upheld only because contract was made in state of insurer's domicil); Wolfe v. Order of U.C.T. of America, 18 N.W.2d 755 (S.D. 1945) (rule applies only to cases not relating to "persons and events within the state of the forum," and cases involving substantive rather than remedial rights); Henry v. Railway Mut. Ben. Assn., 179 S.W.2d 333 (Tex. Ct. Civ. App. 1944) *rev'd on other grounds*, 182 S.W.2d 798 (1944), (full faith and credit only to interpretations of the by-laws by courts of the state of domicil).

Legal writers, too, have disagreed on the effect of the *Green*, *Mixer* and *Bolin* cases.

The rule of the earlier cases is firmly restated and its effect clearly illustrated in *Order of United Commercial Travelers of America v. Wolfe*.⁴ The society, incorporated in Ohio, defended an action brought in South Dakota by the beneficiary of a member of a local lodge, on the ground that it was barred because not instituted within six months after the claim had been disallowed by the society, as required by one of its by-laws. Recognizing that such a by-law is valid in Ohio,⁵ the South Dakota Supreme Court held⁶ that it was contrary to public policy in South Dakota,⁷ and that the action was not barred.⁸ The United States Supreme Court reversed, in a 5-4 decision. Conceding that the by-law is against public policy in South Dakota, and expressly denying any reliance upon the place where the contract was made or performed, Mr. Justice Burton's majority opinion asserts that the holding falls squarely within the line of earlier judgments.⁹ Although the Court could have distinguished each of those cases,¹⁰ it chose instead to interpret them as establishing that by-laws of fraternal benefit societies valid in the state of incorporation are entitled to full faith and credit. This rule, of course, gives insurance certificates issued by such societies a binding and conclusive effect denied to policy provisions of other insurers.¹¹

A Comment on the *Green* case, 25 YALE L. J. 324 (1916), recognized no advance in doctrine, finding only a requirement that a judgment in one state is binding in another. But Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 550 *et seq.* (1926), and Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 ILL. L. REV. 383, 399 *et seq.* (1929), both interpret the *Green* and *Mixer* cases as requiring full faith and credit to state statutes. See also Comment, 40 YALE L. J. 291 (1930).

4. 67 Sup. Ct. 1355 (1947).

5. The court inferred the validity of the by-law from Ohio decisions upholding similar periods of limitation in other types of insurance policies. *Bartley v. National Business Men's Assn.*, 109 Ohio St. 585, 143 N.E. 386 (1924); *Appel v. Cooper Ins. Co.*, 76 Ohio St. 52, 80 N.E. 955 (1907). Apparently the particular by-law has never been tested in Ohio.

6. *Wolfe v. Order of U.C.T. of America*, 18 N.W.2d 755 (S.D. 1945).

7. The court relied upon a statutory provision making void any contract provision limiting the time for bringing an action. S.D. CODE § 10.0705 (1939).

8. The action was brought within the six years allowed by the statute of limitations. S.D. CODE § 33.0232 (1939).

9. See cases cited note 2 *supra*.

10. None of the cases involved statutes of limitation. In the *Green* case the by-law in question had previously been upheld in a class suit in the state of incorporation. *Reynolds v. Supreme Council of the Royal Arcanum*, 192 Mass. 150, 78 N.E. 129 (1906). In the *Mixer* case, too, the highest court of the state of incorporation had upheld the validity of the by-law, but not in a class suit. *Steen v. Modern Woodmen of America*, 296 Ill. 104, 129 N.E. 546 (1920). Further, the forum was not the state in which the contract was made, nor the residence of the insured. In the *Bolin* case, the by-law had been declared ultra vires and void by the highest court of the state of incorporation in a class suit. *Trapp v. Sovereign Camp, Woodmen of the World*, 102 Neb. 562, 168 N.W. 191 (1918).

11. The Supreme Court has recognized the right of state courts to refuse to give effect to non-fraternal benefit policy provisions which are contrary to statutes or public

This reaffirmation of preferential treatment for fraternal benefit societies invites re-examination of the possible justification for such a policy. Certainly in outward appearances there is much to support Mr. Justice Black's contention that the differences between fraternal benefit societies and other types of insurers "are too fragmentary and inconsequential to justify any Constitutional difference in treatment."¹² Preferential treatment may have been necessary in the early days of fraternal insurance, when the total business was small, the financial structures and operations of the societies very different from those of old-line companies, and insurance only an incidental part of the activities of the fraternal societies.¹³ Today fraternal insurance is a multi-billion dollar business.¹⁴ More important, fraternal societies have lost many of their distinguishing characteristics as insurers, and now conduct their business along orthodox lines developed by the old-line companies. Whereas the societies once depended for new blood upon the efforts of old members to induce their friends to join, today trained, accredited and licensed agents are often employed.¹⁵ Although the societies' benefit funds at one time often con-

policy of the forum. *E.g.*, Metropolitan Co. v. Brownell, 294 U.S. 580 (1935) (provision requiring suit within 15 months of loss); National Ins. Co. v. Wanberg, 260 U.S. 71 (1922) (provision that policy should not take effect until received and accepted by home office); Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907) (provision that liability of insurer should be limited to one-tenth of the face value of the policy in the event of suicide); New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900) (provision that the policy should be governed by the laws of another state); Orient Ins. Co. v. Daggs, 172 U.S. 557 (1899) (provision that insurer should not be liable beyond actual value of property destroyed).

Not only does the *Wolfe* decision thus give a greater effect to by-laws of fraternal benefit societies than to similar provisions of other insurance policies, but, so far as the full faith and credit clause is concerned, it seems to place them upon a higher level than state statutes. Despite assertions that the by-law is entitled to full faith and credit as a public act of Ohio, 67 Sup. Ct. 1355, 1356, 1362, 1367, it seems clear that the decision does not treat the by-law in the same way that an Ohio statute would be treated. First, the Court apparently ignores the "balancing of governmental interests" doctrine. *Pink v. A.A.A. Highway Express*, 314 U.S. 201 (1941); *Pacific Ins. Co. v. Commission*, 306 U.S. 493 (1939); *Alaska Packers Assn. v. Commission*, 294 U.S. 532 (1935). See Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557, 609 *et seq.* (1943); Hilpert and Cooley, *The Federal Constitution and the Choice of Laws*, 25 WASH. L. Q. 27, 41 (1939); Comment, 45 YALE L. J. 339, 342 (1935).

Second, the Court discards the generally accepted rule that, since statutes of limitations are procedural, the forum may apply its own rather than that of another jurisdiction. See cases cited in the dissenting opinion at 1375 n. 1. See also 3 BEALE, CONFLICT OF LAWS §§ 603.1 *et seq.* (1935); GOODRICH, CONFLICT OF LAWS, 201-4 (2d ed. 1938); STUMBERG, CONFLICT OF LAWS, 141-5 (1937); Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L. J. 492 (1919). *Cf.* *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941); *John Hancock Ins. Co. v. Yates*, 299 U.S. 178 (1936).

12. 67 Sup. Ct. 1355, 1381 (1947) (dissent).

13. See BASYE, *op. cit. supra* note 1, c. 3-4, for a description of the early structure and development of fraternal benefit societies.

14. 67 Sup. Ct. 1355, 1381-2 (1947) (dissent).

15. For illustrative data on one large society, see *Polish National Alliance v.*

tained little more than enough money to pay a month's death claims, today the societies operate on a level-premium plan, with assessments based upon a proven mortality table,¹⁶ large reserve funds, and actuarial solvency usually undisputed.¹⁷

The sole justification advanced by the Court for continued preferential treatment seems to be the paramount need for uniform membership rights¹⁸—a need assumed rather than demonstrated by the Court and apparently confined to fraternal benefit societies. The validity of this justification is questionable. In the first place, although the opinion clearly points out that the rationale applies only to fraternal benefit societies,¹⁹ the need for uniform membership rights seems to be equally demonstrable in mutual insurance companies. As insurers, most mutual companies and fraternal benefit societies have essentially the same characteristics, including the power to levy special assessments, the control of management by, and the distribution of profits to, policy-holders.²⁰ The only real distinction is the absence of fraternal and

N.L.R.B., 322 U.S. 643, 644 (1944), indicating that in 1941 that society employed more than 225 full and part-time organizers and field agents in 26 states whose travelling expenses were paid by the society and who received commissions for new memberships. The Fraternal Field Managers Association, a national organization, has established a course of training for agents, and by August, 1945, had graduated 267 "Fraternal Insurance Councilors." *THE FRATERNAL AGE*, Aug., 1945, p. 10. The increasing use by fraternal benefit societies of insurance salesmen has led to adoption of licensing requirements in some states: TENN. CODE ANN. § 6137 (Williams, 1934); CAL. INS. CODE § 11160 (Deering, Supp. 1945). The National Association of Insurance Commissioners reportedly favors licensing requirements. Perrin, *Negotiations for a Uniform Fraternal Code*, *THE FRATERNAL AGE*, Oct. 1944, p. 29.

16. The New York Conference Bill, note 1 *supra*, requires a stated periodical premium, based on the National Fraternal Congress Mortality Table, with a maximum interest assumption of 4%. See, e.g., OHIO GEN. CODE § 9470 (Page, 1937). Some states require the use of other mortality tables and lower interest rates: N. Y. INS. LAW § 461(3); MO. REV. STAT. ANN. § 6113 (1942); ILL. ANN. STAT., c. 73, § 905 (Smith-Hurd, 1936).

17. Actuarial, as distinguished from commercial, solvency is determined by the ratio of actual and contingent assets to actual and contingent liabilities. To encourage all societies to achieve and maintain 100% solvency, the New York Conference Bill, note 1 *supra*, requires annual valuation, certified by an accountant or actuary. Any society whose valuation solvency is less than 100% at the time of the enactment of the Act must maintain that solvency, but need not increase it. See, e.g., OHIO GEN. CODE § 9485 (Page, 1937). Cf. ILL. ANN. STAT., c. 73, § 909 (Smith-Hurd, 1936) (requiring 100% solvency of all societies by 1946); MO. REV. STAT. ANN. § 6130 (1942) (100% of all societies by 1950); N. Y. INS. LAW § 470(4) (requiring establishment of special contingency reserve for the protection of certificates valued on an interest assumption greater than 3½%).

18. 67 Sup. Ct. 1355, 1362, 1364 (1947).

19. *Id.* at 1364.

20. These characteristics necessarily result from complete ownership of the company by its policy-holders, rather than by stock-holders. Although mutual companies lack the uniformity of definition which fraternal benefit societies achieved through the New York Conference Bill, note 1 *supra*, it is generally agreed that ownership of a

social activities in mutual companies,²¹ which hardly controls when the relationship in question is that between insurer and insured, as in the *Wolfe* case.

Secondly, even if the *sui generis* claim is accepted arguendo, there are convincing indications that the need for uniform membership rights in fraternal benefit societies is more apparent than real. The Court emphasizes the "indivisible unity" between the fraternal and insurance phases of the societies' activities, as well as the intimate relation between the policy-holder and his society. The constitution of the insurer in the *Wolfe* case furnishes one indication that this emphasis is unjustified, in providing that insurance funds must be segregated and may not be used for fraternal purposes²²—a statutory requirement in some states.²³ Equally significant are two wide-spread practices which result in carrying insurance on non-members. First, many societies write endowment insurance, and the holders of such policies are permitted to stop paying dues at the end of the specified term and withdraw from the society.²⁴ Their insurance continues in force, and the only remaining relationship is that between insurer and insured. The same situation results from the second practice—that of continuing in effect the insurance of those who have been expelled from the society for reasons other than non-payment of dues. This has recently been required of all fraternal societies doing business in New York by a statute²⁵ which is said to be generally agreeable to the societies.²⁶ Another revealing fact is that in 1941 the United Commercial Travelers, the insurer in the *Wolfe* case, amended its constitution to provide that: "If any time limitation in this Constitution . . . within which an action at law or in equity must be commenced is less than that permitted by the laws applicable to fraternal beneficiary societies in the State or Province whose laws govern the contract, such limitation is hereby extended to agree with the

mutual company is in its policy-holders, who are its members. *Pink v. Town Taxi Co.*, 138 Me. 44, 21 A.2d 656 (1941). See RICHARDS, LAW OF INSURANCE § 5 (4th ed. 1932); 2 COOLEY, BRIEFS ON INSURANCE 1108 (2d ed. 1927); 1 COUCH, CYCLOPEDIA OF INSURANCE LAW § 40 (1929). This may be a matter of express statutory definition. See, e.g., OHIO GEN. CODE §§ 9607-6 (Page, 1937); OKLA. STAT. ANN., tit. 36, §§ 383, 427 (1938). More often, it is only implied. See, e.g., IOWA CODE § 510.3 (1946); NEV. COMP. LAWS § 3656.11 (Supp. 1931-41); N. J. STAT. ANN. § 17:35-2 (1939).

21. *Comm. Travelers' Life & Acc. Assn. v. Rodway*, 235 Fed. 370 (N.D. Ohio 1913). See RICHARDS, LAW OF INSURANCE § 5 n. 15 (4th ed. Long, 1932). Although the Court in the *Wolfe* case also included among the "critical factors," 67 Sup. Ct. 1355, 1364 (1947), the non-profit character of fraternal benefit societies, under the definition of the New York Conference Bill, note 1 *supra*, they may distribute dividends to policy-holders, just as mutual companies do. THE FRATERNAL COMPEND-DIGEST (1947) indicates that at least 85 of the 216 societies whose annual statements are there digested paid dividends in 1946. Some statutes condition the right to declare dividends upon the achievement of a specified valuation solvency. See, e.g., N. Y. INS. LAW § 461 (4-5).

22. *Order of U.C.T. of America v. Wolfe*, 67 Sup. Ct. 1355, 1381 (1947) (dissent).

23. N. Y. INS. LAW § 461 (1) and (4); cf. Mo. REV. STAT. ANN. § 6115 (1942).

24. THE FRATERNAL AGE, June 1945, p. 10.

25. N. Y. INS. LAW § 458 (2) (h).

26. THE FRATERNAL AGE, June 1947, p. 10.

minimum period permitted by such laws."²⁷ This provision indicates that not even the societies themselves recognize the need for absolute uniformity of rights among their members.

Finally, even if uniformity is necessary, it seems clear that the *Wolfe* decision will have little or no effect in bringing it about. When a fraternal benefit society extends its business beyond the borders of the state of domicile, it encounters various state statutes regulating the licensing of foreign societies. Most states have enacted statutes similar to South Dakota's, providing merely that a license will be issued if the society files certain information and complies with the statutory requirements applicable to domestic societies.²⁸ The apparent South Dakota practice has been to consider the existence of a by-law contrary to statutory provisions—*e.g.*, the shortened period of limitations in this case—insufficient ground for refusal or revocation of a license, under the assumption that the by-law is not binding in the face of the contrary statutory provision. With this assumption rendered untenable by the *Wolfe* decision, the states must either abandon their efforts to protect their citizens against contract provisions deemed undesirable, or exclude from their borders societies whose certificates, constitutions or by-laws contain such provisions. The latter course of action seems more probable, and may well be accompanied by the wide-spread adoption of the positive type of regulation recently enacted in several states,²⁹ which specifically prohibits the issuance or delivery within the state of any certificate which does not meet certain requirements.³⁰ In the face of such regulation, the only way in which a society can assure absolute uniformity of membership rights is to refrain from doing business in states which condemn certain of its contract provisions. If the example of the insurer in the *Wolfe* case is a true indication, it seems probable that most societies will choose the alternative of amending their constitutions to conform to varying state requirements, sacrificing uniform membership rights in order to preserve their interstate insurance business.

27. *Asel v. Order of U.C.T. of America*, 197 S.W.2d 639, 646 (Mo. 1946).

28. S. D. CODE § 31.2124 (1939). This provision corresponds to § 16 of the New York Conference Bill, note 1 *supra*.

29. GA. CODE ANN. § 56-1609 (Supp. 1945); ILL. ANN. STAT. §§ 902, 903 (Smith-Hurd, 1936); MO. REV. STAT. ANN. § 6112 (1942); N. Y. INS. LAW § 458. The Missouri statute includes, among the prohibited provisions, any time limitation of less than five years. In the other three, the minimum period is 18 months.

30. The constitutional validity of such regulation would appear to be well established. *Osborn v. Ozlin*, 310 U.S. 53 (1940); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943). Any question of state power to impose such regulations since the decision of *U.S. v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), which held interstate insurance business subject to federal regulation under the Commerce Clause, seems to be settled by the McCarran Act, 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-1015 (Supp. 1946), which recognizes the validity of state insurance regulation. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *Robertson v. California*, 328 U.S. 440 (1946).

COMMENT ON DEFENDANT'S FAILURE TO TAKE THE STAND*

EMBODIED in the statutes or judicial decisions of all but six jurisdictions of the United States is the rule that the defendant's failure to take the stand may neither give rise to an inference against him nor be the subject of comment by court or counsel.¹ This restriction, a by-product of the statutory abolition of the accused's common law incapacity to testify² and the constitutional privilege against self-incrimination, has encountered vigorous criticism from legal commentators and advocates of a more efficient criminal procedure.³

Until 1936, a trend toward abolition of the rule forbidding comment appeared to be gaining momentum.⁴ In that year, however, and again in 1938,

* *State v. Baker*, 53 A.2d 53 (May 6, 1947).

1. For a complete listing of state and federal statutes see 8 WIGMORE, EVIDENCE §2272 n. 2 (3d ed. 1940). The jurisdictions prohibiting comment by judicial decision are Georgia (accused not a competent witness) *Bird v. State*, 50 Ga. 585 (1874), Nevada (no instruction on defendant's silence except on request of defendant) and South Carolina. See *State v. Clarke*, 48 Nev. 134, 149, 228 Pac. 582, 587 (1924); *State v. Howard*, 35 S.C. 197, 203, 14 S.E. 481, 482-3 (1892). Of the six states that allow comment, California and Ohio do so by constitutional amendment: CAL. CONST. ART I, § 13, amended Nov. 6, 1934 (Treadwell, 1944); CAL. PEN. CODE §§ 1093(6), 1127, 1323, 1439 (Deering, 1941); OHIO CONST. ART I § 10, amended Sept. 3, 1912; OHIO GEN. CODE ANN., § 13444-3 (Page, 1939) (comment by counsel only). Iowa and New Jersey by judicial interpretation absent a constitutional privilege against self-incrimination: *State v. Stennett*, 220 Iowa 388, 260 N.W. 732 (1935); *State v. Ferguson*, 226 Iowa 361, 233 N.W. 917 (1939); *Parker v. State*, 61 N.J.L. 308, 39 Atl. 651 (1898). Connecticut by judicial decision in the face of a constitutional privilege: *CONN. GEN. STAT. § 6480* (1930) interpreted in *State v. Ford*, 109 Conn. 490, 146 Atl. 828 (1929); *State v. Heno*, 119 Conn. 29, 174 Atl. 181 (1934) (comment by court only); Vermont by statute in the face of a constitutional privilege: VT. PUB. LAWS § 2383 (1933), amended by Vt. Laws 1935, No. 52 (comment by court and counsel).

2. Maine in 1864 became the first state to enact a statute permitting the accused to testify at his own request. In passing a similar law two years later, Massachusetts added the stipulation: "nor shall the neglect or refusal to testify create any presumption against the defendant." Thereafter, other states followed Massachusetts' example adopting similar provisos in their competency statutes. See Reeder, *Comment upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41 (1932).

3. See, e.g., MODEL CODE OF EVIDENCE, Rule 201 (1942); Dunmore, *Comment on Failure of Accused to Testify*, 26 YALE L. J. 464 (1917); Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932); Hadley, *Criminal Justice in America*, 11 A.B.A.J. 674, 677 (1925); Hiscock, *Criminal Law and Procedure in New York*, 26 COL. L. REV. 253, 258-62 (1926); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 465-70 (1938); Storey, *Some Practical Suggestions as to the Reform of Criminal Procedure*, 4 J. CRIM. LAW & CRIMINOLOGY 495, 500-6 (1914). See also GLUECK, CRIME AND JUSTICE 94 (1936); 8 WIGMORE, EVIDENCE § 2272a (3d ed. 1940). *Contra*: Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in his own Behalf in Criminal Proceedings*, 3 WASH. L. REV. 161 (1928); Reeder, *supra* note 2.

4. In 1931 the American Law Institute adopted the resolution: "The judge, the

legislative efforts in that direction were nullified by the highest courts of South Dakota and Massachusetts in two landmark cases which declared the revisions unconstitutional.⁵ This judicial action put a sudden quietus on like proposals in other states,⁶ and apparently left the cumbersome process of constitutional amendment as the only means of attacking the "no-comment" rule.⁷

In *State v. Baker*,⁸ however, the Vermont Supreme Court recently upheld a statute⁹ authorizing the state's attorney to comment upon, and the jury to

prosecuting attorney and counsel for the defense may comment on the fact that defendant did not testify." 9 PROCEEDINGS A.L.I. 202, 203 (1931). The American Bar Association, in 1931, passed a resolution that the prosecutor be allowed to comment, 56 A.B.A. REP. 137-59 (1931); and in 1934 voted to give court and defense counsel a similar right. 59 A.B.A. REP. 130-41 (1934); Att'y Gen.'s Conf. on Crime, Dec. 10, 1934, Resol. VII, Prov. 6 recommended adoption of rule "permitting court and counsel to comment to the jury on the failure of the defendant in a criminal case to testify in his own behalf." 21 A.B.A.J. 9, 10 (1935).

For reform movements initiated in Illinois see Deck, *Proposed Reforms in Illinois Criminal Law and Procedure*, 12 J. CRIM. L. & CRIMINOLOGY 381, 385 (1921); in New York, N.Y.S., THE JUDICIAL COUNCIL, Second Report, 187 (1936); in Wisconsin, Reid, *The Wisconsin Branch*, 2 J. CRIM. L. & CRIMINOLOGY 868, 870 (1912).

Tangible results of this trend are embodied in the constitutional amendments authorizing comment adopted by Ohio in 1912, and California in 1934, *supra* note 1; and in the repeal of the statutory prohibition on comment by Iowa in 1929 (IOWA CODE §13891 (1927) repealed by Iowa Acts 1929, c. 269). South Dakota also revised its statute to allow comment in 1927 but this was later declared unconstitutional. *State v. Wolfe*, 64 S.D. 178, 266 N.W. 116 (1936).

5. *State v. Wolfe*, *supra* note 4. (S.D. REV. CODE 1919, § 4879, amended by S.D. Sess. LAWS 1927, c. 93 held invalid); *In re Opinion of the Justices*, 300 Mass. 620, 15 N.E.2d 662 (1938) (advisory opinion on proposed Senate bill authorizing comment).

6. Prior to 1938 recommendations for bills authorizing comment were offered in New York, N.Y.S., THE JUDICIAL COUNCIL, Second Report, 195 (1936); N.Y. ASSEMBLY JOURNAL, Vol. I, pp. 47, 56, 97, 223 (1937) (proposed bills, Ass. Int. Nos. 162, 191, 394); Wisconsin (Bill No. 498A presented at the 1935 legislative session), Gausewitz, *The Work of the Wisconsin Legislature for the 1935 Session*, Sec. IV, 11 WIS. L. REV. 147, 160 (1935); and Minnesota, MINN. CRIME COMM'N REPORT 42-3 (1934).

It is not unlikely that the decisions of the South Dakota and Massachusetts Supreme Courts persuaded a number of lawmakers that statutory revision of the "no-comment" rule would be futile, accounting perhaps for the relative paucity of agitation on the question after 1938. *But cf.* MODEL CODE OF EVIDENCE (1942), *supra* note 3.

7. "It may be that the right to comment upon the failure of the accused to exercise his right to become a witness in his own behalf should be conferred upon prosecutors as a matter of public policy; but if prosecutors are to have such a right it must be conferred upon them by constitutional amendment." *State v. Wolfe*, 64 S.D. 178, 187, 266 N.W. 116, 121 (1936). California and Ohio successfully utilized this method to avoid conflict with the constitutional provision against self-incrimination, *supra* note 1.

8. 53 A.2d 53 (May 6, 1947).

9. VT. PUB. LAWS §2383 (1933) amended by Vt. LAWS 1935, No. 52. "In the trial of complaints, in formations, indictments, and other proceedings against persons charged with crimes or offenses, the person so charged shall at his own request and not otherwise, be deemed a competent witness . . . but the failure of such person to testify

draw inferences from, the accused's failure to testify—the first time an enactment of this kind has received judicial approval in the face of a constitutional privilege against self-incrimination.¹⁰ Relying upon the historical derivation of the privilege, the court concluded that it was intended to restrain compulsion of a direct and physical nature rather than indirect pressure within the courtroom.¹¹ Despite the objection of the dissent that such a limited construction disregarded the "positive and unequivocal terms" in which the privilege was cast, this interpretation finds support in many quarters.¹² Admittedly, a number of other state courts have expressed the contrary view that comment violates the privilege against self-incrimination,¹³ yet clear-cut holdings to that effect are notably few.¹⁴ Moreover, the inap-

may be a matter of comment to the jury and the jury may draw reasonable inferences therefrom."

10. Iowa and New Jersey have no constitutional provisions against self-incrimination. Courts in these two states have interpreted general competency statutes to permit comment. See *supra* note 1. The Connecticut statute construed to allow comment by the court does not affirmatively authorize this practice. The statute reads: ". . . The neglect or refusal of an accused party to testify shall not be commented upon to the court or jury." CONN. GEN. STAT. § 6480 (1930). Maine, at one time, sanctioned comment despite the existence of a constitutional privilege against self-incrimination. *State v. Bartlett*, 55 Me. 200 (1867). However, this action was taken prior to the passage of the enactment stipulating that defendant's silence was not to be taken as evidence of guilt. MAINE REV. STAT. c. 135, § 22 (1944).

11. For parallel conclusions, see Justice Lummus dissenting in *In re Opinion of the Justices*, 300 Mass. 620, 630, 15 N.E.2d 662, 667 (1938); Bruce, *supra* note 3, at 233. An excellent account of the historical setting of the privilege is presented in 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940). See also 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 167 *et seq.* 1922; 1 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND, c. XI (1883).

12. See *State v. Ford*, 109 Conn. 490, 497-8, 146 Atl. 828, 830 (1929); *People v. Courtney*, 94 N.Y. 490, 493 (1884); *State v. Wolfe*, 64 S.D. 178, 189, 266 N.W. 116, 122 (1936) (dissenting opinion); *Kops v. Queen*, (1894) A.C. 650, 653; BALDWIN, MODERN POLITICAL INSTITUTIONS 117-23 (1898); 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 250 *et seq.* (1827); 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE §1559 (1911); Taft, *Administration of Criminal Law*, 15 YALE L. J. 1, 9 (1905); Hadley, *supra* note 3, at 677; KNOX, *Self-Incrimination*, 74 U. OF PA. L. REV. 139, 142 (1925); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 85-6 (1891); Note, *Some Reasons for the Growing Disrespect for the Law*, 1 J. CRIM. LAW & CRIMINOLOGY 968, 969-70 (1911).

13. See, e.g., *Petite v. People*, 8 Colo. 518, 519-20, 9 Pac. 622, 623 (1886); *Commonwealth v. Harlow*, 110 Mass. 411 (1872); *Commonwealth v. Scott*, 123 Mass. 239, 241 (1877); *Ruloff v. People*, 45 N.Y. 213, 222 (1871); *Tate v. State*, 76 Ohio St. 537, 540, 81 N.E. 973 (1907); *Jarman v. State*, 57 Okla. Cr. 226, 229, 47 P.2d 220, 222 (1935); *State v. Howard*, 35 S.C. 197, 203, 14 S.E. 481, 482-3 (1892); *State v. Vroman*, 45 S.D. 465, 473, 188 N.W. 746, 749 (1922); *State v. Cameron*, 40 Vt. 555, 565 (1868); *State v. Pavelich*, 150 Wash. 411, 415, 273 Pac. 182, 183 (1928); *Anderson v. State*, 27 Wyo. 345, 365, 196 Pac. 1047, 1053 (1921); *Cf. State v. Taylor*, 57 W.Va. 223, 234-5, 50 S.E. 247, 249 (1905) (comment on failure of accused's wife to testify); *But see Parker v. State*, 61 N.J.L. 308, 314, 39 Atl. 651, 654 (1898); *People v. Courtney*, 94 N.Y. 490, 493 (1884); *People v. Reese*, 258 N.Y. 89, 101-2, 179 N.E. 305, 309 (1932).

14. Most cases treating the constitutionality of comment have done so only by way of dicta, since in all but a few instances statutes prohibiting comment have controlled

plicability of the federal Constitution appears to leave each state free to adopt the interpretation of the Vermont court.¹⁵ By pointing the way for judicial approval of statutes authorizing comment by court and counsel, the *Baker* case may serve to stimulate new legislative attacks upon the widely accepted ban, making pertinent a reappraisal of the conflicting views.

Modern criminal procedure places a high premium on surrounding the accused with numerous protections and privileges.¹⁶ Nevertheless, the requirement that the jury ignore the failure of the defendant to testify has been criticized as an unrealistic rule of evidence, for there is little doubt that the jury does notice and take into consideration this obvious occurrence.¹⁷ Nor do instructions from the court avail to erase from the minds of the jurymen this "natural and irresistible" inference.¹⁸ But despite the fact that defendant's silence is patent, numerous retrials have been granted merely because of some inadvertent statement by court or counsel.¹⁹

the courts' decisions. See Reeder, *supra* note 2, at 41; Hiscock, *supra* note 3, at 260. A holding that comment infringes upon the constitutional privilege appears in *People v. Tyler*, 36 Cal. 522 (1869). *Contra*: *State v. Ford*, 109 Conn. 490, 497, 146 Atl. 828, 830 (1929); *State v. Bartlett*, 55 Me. 200 (1867) (see *supra* note 10).

15. The United States Supreme Court has ruled that the Fifth Amendment is not operative upon the states. *Barron v. Baltimore*, 32 U.S. 243 (1833). Comment in a state court is not prohibited by either the "privilege or immunities" or "due process" clauses of the Fourteenth Amendment. *Twining v. New Jersey*, 211 U.S. 78 (1908); *Adamson v. People of Calif.*, 67 Sup. Ct. 1672 (1947) (5-4 decision).

16. For some of the procedural benefits accorded defendant see GLUECK, *op. cit. supra* note 3, at 77-81; U.S. Nat. Comm'n on Law Observance and Enforcement, No. 8, REPORT ON CRIMINAL PROCEDURE, 16 *et seq.* (1931).

The contentious nature of the criminal proceeding with its emphasis upon tactical refinements has led to the charge that American trials subscribe to a "sporting theory of justice." See GLUECK, *op. cit. supra* note 3, at 92; 5 BENTHAM, *op. cit. supra* note 12, at 238-9; Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 290, 297 (1897).

17. ". . . it is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends toward confusion and a disrespect for the law's reasonableness." 8 WIGMORE, EVIDENCE 416 (3d ed. 1940). To the same effect see Mr. Justice Frankfurter, concurring in *Adamson v. People of Calif.*, 67 Sup. Ct. 1672, 1680 (1947); *State v. Ford*, 109 Conn. 490, 498, 146 Atl. 828, 830 (1929); *State v. Cleaves*, 59 Me. 298, 301 (1871); *Parker v. State*, 61 N.J.L. 308, 314, 39 Atl. 651, 654 (1898); *State v. Wolfe*, 64 S. D. 178, 190, 266 N.W. 116, 125 (1936) (dissenting opinion); 2 CHAMBERLAYNE, *op. cit. supra* note 12, at § 1076b and § 1544c, n. 1; Hiscock, *supra* note 3, at 259; Taft, *supra* note 12, at 9.

18. See *Parker v. State*, *supra* note 17 at 314, 39 Atl. at 654. Instructions are required in two states, Indiana and Washington. IND. STAT. ANN. § 9-1603 (Burns, 1933); WASH. REV. STAT. ANN. § 2148 (Remington, 1932). As to other jurisdictions the situation is somewhat confused since the very act of instructing the jury carries with it a "comment" on defendant's silence. For collection of cases dealing with this subject see 8 WIGMORE § 2272 n. 7 (3d ed. 1940).

19. *E.g.*, *Keifer v. State*, 204 Ind. 454, 184 N.E. 557 (1933) (prosecutor in argument remarked that no one, not even the defendant, had fixed the time of the act); *Jarman v. State*, 57 Okl. Cr. 226, 47 P.2d 220 (1935) (court called attention to failure of

The removal of the statutory prohibition on comment would not only eliminate the constant threat of reversal, but would also remove one of the barriers to truth in criminal trials. When the defendant exercises his privilege against self-incrimination and refrains from taking the stand, complete revelation of the facts often becomes impossible, particularly in cases dealing with such crimes as bribery, graft, and conspiracy which are difficult to prove without the testimony of the principals.²⁰ Comment is designed to foster a more complete presentation of facts by applying an insistent pressure upon defendants to take the stand and submit to cross-examination. Experience in Ohio, where comment has been an accepted practice since 1912, indicates that this pressure has in fact influenced the accused to testify.²¹ In New Jersey, too, the fear that comment by the prosecutor will seriously impair the likelihood of acquittal has proved sufficient to overcome defendant's apprehension of embarrassing cross-examination.²²

In view of this experience, it seems unrealistic to deny that commenting on accused's silence places him in a dilemma from which escape can be

defense attorney to offer evidence sustaining opening statement); *People v. Forte*, 277 N.Y. 440, 14 N.E.2d 783 (1938) (court instructed jury of right to hold certain facts uncontroverted by defendant against him); *People v. Manning*, 278 N.Y. 40, 15 N.E.2d 181 (1938) (court warned: "You simply must not infer anything except to know that he did not take the stand."); *Harper v. State*, 133 Tex. Cr. 255, 110 S.W.2d 67 (1937) (county attorney said, "defendant has not denied—," and was then cut off by an objection). For an extensive list of older cases in which comment has been held prejudicial consult Note, 84 A.L.R. 784 (1933).

In some states, courts have made reversal mandatory upon wrongful comment. *E.g.*, *Bruntz v. State*, 137 Neb. 565, 290 N.W. 420 (1940); *Turner v. State*, 138 Tex. Cr. 223, 135 S.W.2d 488 (1940); Note, 84 A.L.R. 784, at 799 (1933). Most courts have held that the error may be cured by prompt instructions from the presiding judge. See Note 84 A.L.R. 784, at 795 (1933); 8 WIGMORE, EVIDENCE § 2272 n.6 (3d ed. 1940).

20. New York Constitutional Convention Committee, Vol. IX, Problems Relating to Judicial Administration and Organization: Chap. XII, Privilege against Self-Crimination, p. 920 (1938), reported in 8 WIGMORE, EVIDENCE 314 (3d ed. 1940); Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L. J. 127, 128 (1906); Lowell, *supra* note 16, at 297; Storey, *supra* note 3, at 503.

21. A survey was taken four years after the passage of the Ohio constitutional amendment authorizing comment by counsel, *supra* note 1. It revealed that the accused took the stand in his own behalf in 1507 of the 1658 criminal cases conducted during this period. The author does not present parallel figures covering the pre-comment situation but asserts nevertheless that ". . . it is reasonably certain that the fact of an inference being available for the prosecution has a somewhat decided tendency to cause the accused to take stand." Dunmore, *supra* note 3, at 466; see also Price, *On the Right of the Prosecutor to Comment on Defendant's Refusal to Take the Stand*, 13 J. CRIM. L. & CRIMINOLOGY 292, 295 (1922) where the author, an Attorney General in Ohio, says: "I think it [the Ohio Amendment] has in a great many cases caused defendants to take the stand, where otherwise they would not have done so."

22. See Way, *The Rule Permitting Comment on the Failure of Accused to Testify*, 65 N.J.L.J. 97, 104 (1942). Six common pleas judges and one prosecutor in New Jersey were polled on the question, "Does the privilege to comment put effective pressure on the accused to testify?" Six answered in the affirmative, one in the negative.

bought only at the price of appearing on the witness stand. Because the accused feels "compelled" to testify when placed in this position, a number of courts have concluded that his constitutional right is impaired.²³ The counter argument to this rationale is based on two grounds. First, the privilege against self-incrimination became part of the common law of England long before the accused was made eligible to testify in his own behalf.²⁴ Similarly, in the United States, the adoption of the privilege in the constitutions of several states predated, by more than half a century in a number of instances, statutes making defendant a competent witness.²⁵ It is difficult to see, therefore, how the privilege in its inception could have been intended as a protection against indirect pressure within the judicial forum. Secondly, the entire mechanism of the criminal trial may be regarded as a form of psychological pressure directed toward eliciting testimony from the defendant.²⁶ It is a form of compulsion merely to formulate charges and proffer evidence against the accused²⁷ or to require, on penalty of suffering an adverse inference, that he produce certain witnesses or evidence at the trial even though these might tend to incriminate him.²⁸ Finally, the very fact that defendant is rendered competent to testify has been termed coercive.²⁹

23. Compare *State v. Wolfe*, 64 S.D. 178, 187-8, 266 N.W. 116, 121 (1936), with *State v. Cleaves*, 59 Me. 298, 301 (1871). See also *Ruloff v. People*, 45 N.Y. 213, 221 (1871); *People v. Adamson*, 27 Cal.2d 478, 494, 165 P.2d 3, 11-2 (1946), *aff'd* 67 Sup. Ct. 1672 (U.S. 1947); *Dills*, *supra* note 3, at 166.

24. Defendant was not made a competent witness in criminal trials in England until 1898. 2 WIGMORE, EVIDENCE § 579 (3d ed. 1940). On the other hand the privilege against self-incrimination had taken its place as an established principle by the end of the 17th century. 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

25. In 1864 the first statute permitting the defendant to testify in a criminal case went into effect in Maine. By 1784, however, seven states had already incorporated the privilege in their constitutions or Bills of Rights: Virginia (1776), Pennsylvania (1776), Maryland (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), New Hampshire (1784). Iowa and New Jersey are the only states today without the privilege in their constitutions. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

26. See *State v. Wolfe*, 64 S.D. 178, 196, 266 N.W. 116, 125 (1936) (dissenting opinion).

27. *Ibid.* See also remarks of Mr. Justice Reed in *Adamson v. People of California*, 67 Sup. Ct. 1672, 1678 (1947) as to pressure upon defendant faced with choice of leaving adverse evidence unexplained or subjecting himself to impeachment on cross-examination.

28. For the effects of an accused's failure to produce witnesses or evidence see *U.S. v. Fox*, 97 F.2d 913 (C.C.A. 2d 1938) (privilege does not protect defendant from inference arising from failure to call wife as witness); 2 WIGMORE, EVIDENCE §§ 285-91 (3d ed. 1940). Difficulties arise when courts are called upon to decide whether comment is being made on accused's failure to submit evidence or on his failure to offer his own testimony. On this general problem see 8 WIGMORE, EVIDENCE § 2273 (3d ed. 1940) and cases cited therein.

29. It was on this ground that early opposition to statutes granting testimonial competency to the accused was based. See *People v. Tyler*, 36 Cal. 522, 528 (1869); *Ruloff v. People*, 45 N.Y. 213, 221-2 (1871); *State v. Cameron*, 40 Vt. 555, 565-6 (1868); TRAIN, *THE PRISONER AT THE BAR* 210-11 (1922).

The further contention, however, that only the guilty are confronted with this dilemma seems unjustified. A desire to remain silent is not necessarily inconsistent with innocence.³⁰ If the accused makes a bad appearance when questioned, or desires to shield some person not connected with the crime, or possesses a criminal record, he may be well advised not to testify, although free from guilt. This fact has led to the objection that prosecutors will become slothful, relying excessively upon innuendo or damaging cross-examination to win the jury, rather than upon independent evidence of guilt.³¹ Recognizing the danger that such practice might, in turn, lead to the conviction of innocent men, courts in jurisdictions permitting comment have ruled that the state cannot avail itself of the inference against the accused until it has made out a prima facie case calling for a reply.³² In New Jersey and California the prosecutor may call the jury's attention to the silence of the accused only when the defendant is in a position to shed some light on the evidence or by his testimony "meet or disprove any particular fact or circumstance".³³ Similarly, the fear that overzealous prosecutors may abuse the right to comment by constant repetition has been tempered in at least one state by the requirement that references of the prosecutor must be confined to "specific parts of the evidence that defendant could reasonably be expected to explain or deny".³⁴

30. "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Wilson v. U.S.*, 149 U.S. 60, 66 (1893). *But see State v. Cleaves*, 59 Me. 298, 301 (1871), where the court asserts that ". . . it is his own fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered." This rationale seems to ignore the possibility that the prior misconduct which the accused is anxious to hide may have no relation to the crime with which he is presently charged.

31. Wigmore stresses this point as the principal danger involved in permitting inferences to be drawn from the refusal to testify, and as the foremost reason for retention of the privilege. 8 WIGMORE, EVIDENCE 309, 425 (3d ed. 1940).

32. *State v. McDonough*, 129 Conn. 483, 29 A.2d 582 (1942); *State v. Wines*, 65 N.J.L. 31, 46 Atl. 702 (1900); *see People v. Adamson*, 27 Cal.2d 478, 489-90, 165 P.2d 3, 9 (1946), *aff'd* 67 Sup. Ct. 1672 (1947); *Markowitz v. Cleveland*, 7 Ohio L. Abs. 360 (Ohio App. 1929), *State v. Baker*, 53 A.2d 53, 62 (1947).

33. *See Parker v. State*, 61 N.J.L. 308, 314, 39 Atl. 651, 654 (1893). California recently adopted the New Jersey limitation that the plaintiff must be in a position to deny or explain the evidence before his silence may be commented on. *See People v. Adamson*, *supra* note 32, at 488-9, 165 P.2d 3, 9 (1946) *aff'd*, 67 Sup. Ct. 1672 (1947).

Where the trial judge instructed the jury that they could attach such importance to the accused's failure to take the stand as they saw fit, reversal was granted on the grounds that the charge tended to deprive the accused of his presumption of innocence. *State v. Kisik*, 99 N.J.L. 385, 125 Atl. 239 (1924).

34. *See People v. Adamson*, 27 Cal.2d 478, 494-5, 165 P.2d 3, 12 (1946) (borderline of permissible comment) *aff'd*, 67 Sup. Ct. 1672 (1947).

Experience reaffirms the position that this procedure can have the salutary effect of inducing more defendants to take the stand without leading to improper or prejudicial practices.³⁵ In one survey of 178 judges sitting in five states which authorize the practice of comment, an overwhelming majority of those polled expressed the belief that commenting on the accused's silence was an important aid in the administration of justice and that the prosecuting attorney had not been less diligent in his search for evidence of the accused's guilt.³⁶ In spite of the generally favorable attitude of that segment of the legal profession which has had experience with comment, it would seem desirable to afford an additional protection to innocent defendants by restricting the scope of cross-examination to exclude references to the accused's criminal record,³⁷ for it is clear from reports of public defenders and independent surveys that the admissibility of evidence of prior misconduct by the defendant is a "chief reason" for his failure to take the stand.³⁸ Although in theory the introduction of such evidence is intended only to impeach the accused's credibility as a witness,³⁹ it is a well-known fact that juries constantly misuse it to prejudge him.

Incorporation of the restriction on cross-examination within the statute authorizing comment would not only assure needed protection to the accused who testifies, but would also make defendants with criminal records less hesitant to take the stand. The reconciliation of two apparently conflicting ideals—the search for truth and protection for the accused—and the generally satisfactory results achieved in those states permitting comment are powerful arguments for statutory revision, now that *State v. Baker* has provided precedent for judicial approbation.

35. Dunmore, *supra* note 3; Heintz, *Criminal Justice in Ohio*, 26 J. CRIM. L. & CRIMINOLOGY 180 (1935); Price, *supra* note 21, at 294.

36. Poll taken by American Bar Association, Criminal Law Section, at the request of the Committee on the Improvement of the Law of Evidence, reported 8 WIGMORE, EVIDENCE 426 (3d ed. 1940). 93.65% regarded comment favorably, while 2.65% considered it unfair. 85% stated that the right to comment did not in their experience cause the prosecuting attorney to become lax in his search for evidence of accused's guilt. Cf. 8 WIGMORE, EVIDENCE 425 (3d ed. 1940).

37. This is recommended by the American Law Institute. MODEL CODE OF EVIDENCE, Rule 106 (1942) states: "If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him. . . ." In support of this proposal see Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 223 (1942).

Of course this restriction on cross-examination would not mitigate the harmful effects of comment on innocent defendants who because of extreme nervousness or desire to shield someone else refuse to testify. However, these considerations are only infrequently the reason for the accused's failure to take the stand. See *infra* note 38. On such occasions, moreover, comment would probably aid the cause of defendant since the court and defense counsel would be empowered to offer some explanation to the jury.

38. See MODEL CODE OF EVIDENCE, Rule 106, Comment on Par. 3 (1942); Price, *supra* note 21, at 295; Way, *supra* note 22, at 104.

39. See 3 WIGMORE, EVIDENCE §§ 926, 980 (3d ed. 1940).