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IS SILENCE SACRED? THE VULNERABILITY OF *GRIFFIN V. CALIFORNIA* IN A TERRORIST WORLD

Lissa Griffin*

INTRODUCTION

The Supreme Court's interpretation of the Fifth Amendment's privilege against self-incrimination (hereafter "the privilege") has been neither clear nor consistent.¹ For one thing, as many commentators have noted, analysis of the privilege has been "tyrannized by slogans."² The Court's privilege jurisprudence has been marked by

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¹ See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 56 n.5 (1964) ("[T]he law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect." (quoting Harry Kalven Jr., *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 BULL. ATOMIC SCI. 181, 182 (1953))).

The concept of silence being "sacred" is adapted from an article by Judge Henry Friendly, in which he proposed amending the Fifth Amendment, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). In that article he quotes the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 307 (1967), which raised a similar suggestion and noted that "the Constitution contemplates amendment, and no part of it should be so sacred that it remains beyond review." Friendly, *supra*, at 672 n.5.

This Article addresses the Fifth Amendment privilege as it has been applied to prohibit judicial or prosecutorial comment on a defendant's decision to remain silent at trial. See *Griffin v. California*, 380 U.S. 609 (1965), in which the Supreme Court held that such comment was prohibited by the Fifth Amendment. It does not address the impeachment or evidentiary use of a defendant's pre-trial silence.

² See, e.g., *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., dissenting) (the roots of the privilege "go to the nature of a free man and to his relationship to the state"); *In re Gault*, 387 U.S. 1, 47 (1967) (the ideas underlying the privilege "tap the basic stream of religious and political principle"); *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (to allow the government to compel the production of incriminating papers is "contrary to the principles of free government" and inconsistent with "political liberty and personal freedom"); see also Friendly, *supra* note 1, at 679 (commenting on "the extent to which eloquent phrases have been accepted as a substitute for thorough thought"); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 209 (examining Supreme Court cases and concluding that, "[l]anguage like this [that the privilege is a linchpin of an accusatorial system] no matter how often repeated, no matter how eloquently intoned, is merely restatement of the privilege itself").

broad, high-sounding rhetoric that has not always matched an equally broad interpretation of the right. For another, the Court has exhibited two distinct and inconsistent approaches to the privilege. One approach interprets it broadly as the linchpin of an accusatorial system that insures that the government bears the burden of proving guilt without any help from the defendant.³ The other approach, based on text and history, interprets the privilege more narrowly as a protection against coercive methods of interrogation only.⁴ While in practice the two approaches often produce the same result, they clash in one important context—when the government is allowed to use a defendant's silence at trial as substantive evidence of guilt. Under the Supreme Court's decision in *Griffin v. California*,⁵ that use is not allowed: a prosecutor's comment to the jury on a defendant's failure to testify violates the privilege.⁶

In its most recent foray in this area, its 1999 decision in *United States v. Mitchell*,⁷ the Supreme Court extended *Griffin*'s no-comment rule to sentencing, refusing to allow the sentencing court to rely on a defendant's silence to prove facts relevant to sentence.⁸ The Court held, *inter alia*, that the refusal to allow use of a defendant's silence to prove the prosecution's case was one of the hallmarks of the U.S. criminal accusatory process.⁹ Justice Scalia dissented, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Thomas.¹⁰ Justice Scalia argued that *Griffin* lacked historical and textual support, had been a constitutional "wrong turn," and should not be extended.¹¹ Justice Thomas also dissented, but he argued that *Griffin* should be overruled outright.¹²

As the *Mitchell* decision indicates, several reasons demonstrate the need to re-evaluate the constitutional basis for the no-comment rule at this time. The first reason is the uncertain mooring of the privilege doctrinally, as represented in the opinions in *Mitchell*. The second reason is the narrow majority in *Mitchell* for extending *Griffin*, the explicit or implicit willingness to overrule *Griffin* by two members of the Court, and the recent departure and replacement of two Justices in the *Mitchell* majority. The third reason is the privilege's perpetually disfavored status as an anti-truth-seeking

³ See, e.g., *Mitchell v. United States*, 526 U.S. 314 (1999); see also, Friendly, *supra* note 1, at 671–72 (commenting that this view "has become a kind of obsession which has stretched the privilege beyond not only its language and history but any justification in policy, and threatens to go further still").

⁴ Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625–29 (1996).

⁵ *Griffin*, 380 U.S. 609.

⁶ *Id.*

⁷ 526 U.S. 314.

⁸ *Id.* at 315.

⁹ See *infra* notes 68–75 and accompanying text.

¹⁰ *Mitchell*, 526 U.S. at 316.

¹¹ *Id.* at 336.

¹² *Id.* at 341–42.

right.¹³ Finally, of course, this disfavored status is particularly dangerous in light of the modern threat of domestic terrorism.¹⁴ A re-evaluation of the no-comment rule may be significantly aided by examining the United Kingdom's approach to the privilege, particularly its approach to using a defendant's silence at trial. Unlike the situation in the United States, in the United Kingdom, where there is no written constitutional text, the fact-finder is allowed to use a defendant's silence as proof of guilt.¹⁵ While the United States and the United Kingdom share a significant history with respect to the privilege, a history that established the right as an integral part of both criminal processes, the histories diverge following the colonial period. From that point onward, the United States construed the privilege more broadly as a limitation on the powers of government.¹⁶ This uniquely U.S. experience—and one that continued into the twentieth century—explains, to some extent, the differences that exist today. The other explanation is the United Kingdom's experience with Northern Ireland terrorism, an experience that ultimately changed not only criminal procedures relating to terrorists, but mainstream U.K. criminal procedure as well. It remains to be seen whether the U.S. experience with terrorism will lead to similar changes here.

Part I of this Article traces the shared history of the right against self-incrimination from twelfth-century England to the mid-twentieth century. Part II examines the modern history of the privilege in the United States, from the Supreme Court's 1965 decision in *Griffin* to its 1999 decision in *Mitchell*. Part III examines the United Kingdom's modern approach to the privilege, including its re-shaping of the privilege in response to domestic terrorism. Part IV examines why the U.S. and U.K. systems, with a common history and shared values, have moved in such dramatically different directions with respect to the privilege. Part V assesses the possibility that the privilege, already vulnerable, will be curtailed by the new Court along the lines of the United Kingdom's procedures.

¹³ See, e.g., Friendly, *supra* note 1, at 679–80 (while other privileges may retard the search for truth, the Fifth Amendment privilege extends only to people who may have broken the law, defies the “notions of decent conduct,” and prevents restitution to the victim); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014, 1015 (1934) (the privilege does not help the innocent but serves the evil designs of the guilty who are well advised by counsel to employ it). Indeed, in noting the expansive interpretation of the privilege, Professor Wigmore prophesied that “a reaction must come. A true conservatism must recommence to operate.” JOHN HENRY WIGMORE, EVIDENCE § 2251, at 3102 (1st ed. 1904). That has not happened yet, although it is more likely now, as occurred in the United Kingdom, see *infra* pp. 949–55, in light of the threat of domestic terrorism. See *infra* pp. 955–58.

¹⁴ Several commentators have noted the responsiveness of the privilege to contemporary events. See, e.g., WIGMORE, *supra* note 13, § 2251, at 3102 (“Neither the history of the privilege, nor its firm constitutional anchorage, need deter us from discussing at this day its policy.”); Friendly, *supra* note 1, at 678 (“The privilege has always been responsive to the particular needs and problems of the time.”).

¹⁵ See *infra* Part III.

¹⁶ For a full discussion of this historical period, see *infra* Part I.

I. SHARED HISTORY OF THE PRIVILEGE

A. Introduction

Nemo tenetur prodere seipsum—no man is bound to accuse himself—the rule is ancient and has been interpreted in many different and inconsistent ways. Although no one knows its European origin, it is likely that the privilege began as a limitation on the duty to confess one's sins—to accuse one's self without charge—in the ecclesiastic courts. It first appeared in the twelfth century English system of criminal justice. Throughout its early English history, the privilege represented the battleground between the ecclesiastic courts and the royal prerogative, as the common law courts were called upon to exercise control over the ecclesiastic courts and their coercive practices. It also represented the difference between both the accusatory and inquisitorial systems, and among the common law, canon law, and civil law.

B. Confession v. Incrimination

Early on, defendants in England and on the European continent (the *ius commune*)¹⁷ were expected to speak and were regularly interrogated in an effort to establish their guilt. Without any charges being brought or any evidence to support any charges, citizens were brought to ecclesiastical courts, made to swear an oath, and questioned about their religious beliefs and practices.¹⁸ The purpose of the oath was to find a basis for charging a defendant, that is, to get a confession to some ecclesiastical wrong that could then serve as the basis for bringing criminal charges.¹⁹ The earliest form of the doctrine of *nemo tenetur* was intended only to prevent self-accusation by physical torture (secular coercion) or oath ex officio (ecclesiastical coercion).²⁰

By the seventeenth century, the privilege had evolved to include “a right not to be interrogated [in the ecclesiastical courts] under oath in the absence of well-grounded suspicion.”²¹ The ecclesiastical courts could conduct incriminating interrogation but only after there was evidence of criminal conduct and a charge had been brought.²² One had to be accused of something, and imposition of a general oath to answer any and all questions asked was banned.²³ In short, then, what was not allowed was what

¹⁷ R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 6 (1997) (“The term *ius commune*, translated literally as ‘common law,’ refers to the combination of the Roman and Canon laws that was the product of the revival of juristic science in the twelfth century.”).

¹⁸ *Id.* at 101.

¹⁹ *Id.* at 62.

²⁰ Friendly, *supra* note 1, at 677.

²¹ Alschuler, *supra* note 4, at 2640; *see also* HELMHOLZ ET AL., *supra* note 17, at 61.

²² HELMHOLZ ET AL., *supra* note 17, at 61.

²³ *Id.* at 61–62.

would be known today as a “fishing expedition.”²⁴ The rule also prohibited the calling of a person into court for the purpose of examining the “secret thoughts of his heart, or . . . his secret opinion.”²⁵ In other words, no one could be called into court and questioned in an effort to establish heresy. Finally, the rule prohibited examination under oath in all except testamentary or matrimonial cases.²⁶

C. The Ex Officio Oath: The Marian Inquisition and the Puritans

In the early seventeenth century, Puritanism and the common-law courts joined forces to protest the administration of the oath *ex officio* in the ecclesiastical High Commission.²⁷ The use of the oath had evolved beyond forcing someone to reveal the basis for his own accusation to requiring actual testimony against one’s self. This practice was viewed as “an outrage on human dignity and a violation of the very instinct of self-preservation.”²⁸ Opposition to the oath had become both religious and secular: it was based on the belief that the Bible prohibited swearing in God’s name, that the requirement of an oath violated conscience, and that the oath permitted religious persecution without proper accusation by witnesses or a grand jury.²⁹

John Lilburne is credited with the final abolition of the oath *ex officio*.³⁰ Lilburne was made to take the oath in the Star Chamber, which bound him to answer all questions posed to him.³¹ He refused to answer any “‘impertinent questions, for fear that with my answer I may do myself hurt.’”³² Others followed his example.³³ As a result, the courts recognized a right that did not prohibit inquiry or prevent self-incrimination but that did permit a defendant to refuse to answer any questions without penalty.³⁴ Under the statute of 1640, the practice of interrogating defendants under oath in the ecclesiastical courts was prohibited.³⁵ With the abolition of the Star Chamber and the High Commission soon after, in 1641, the common law courts had gained supremacy over coercive ecclesiastical practices.³⁶

Interestingly, no sooner had the right to refuse to answer been recognized then it became virtually useless in light of the disqualification of an accused from testifying. Moreover, while the new right to refuse to answer incriminating questions did impose

²⁴ *Id.* at 62.

²⁵ *Id.* at 63.

²⁶ *Id.* at 63–64.

²⁷ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 262–63 (1968).

²⁸ *Id.* at 263.

²⁹ *Id.*

³⁰ *Id.* at 271–72.

³¹ *Id.* at 274.

³² *Id.* at 273. For a full discussion of the proceedings against Lilburne, see *id.* at 271–78.

³³ *Id.* at 278.

³⁴ *Id.* at 282.

³⁵ *Id.* at 278–82.

³⁶ *Id.* at 281–83.

some limitations on pre-trial interrogation, it did not prohibit it.³⁷ The Marian Committal Statute of 1555 remained in effect and required justices of the peace, who were prosecutors as well as justices, to examine suspects and to record anything material.³⁸ The record of such examination was then read into trial against the defendant.³⁹ Such suspects, however, could not be forced to take an oath, because the oath was viewed as coercion.⁴⁰ Coerced or extorted confessions could not be used, largely because they were deemed unreliable.⁴¹ However, "until the mid-eighteenth century, the record of the . . . examination was read routinely at . . . trial."⁴² If the defendant had refused to speak to the justice of the peace—as was his or her right—this fact would be reported to the jury.⁴³

Coercive practices also existed at trial. Although defendants charged with felonies could not be compelled to speak at trial, they were not entitled to counsel and, as a practical matter, they were expected to respond to the prosecution's evidence and prove their innocence.⁴⁴ Most defendants therefore defended themselves by answering questions or rebutting witnesses. While the trial judges tried to help the defendants, a defendant's silence was inevitably suicidal, since there was no one else to help conduct a defense.⁴⁵

Thus, by the colonial era, although the accused had a right to silence, as a practical matter he was expected to be a source of at least unsworn evidence pretrial, which could be read into the record at trial. Certainly in this era there was no prohibition against use of his silence at trial.⁴⁶

D. British North America

These same conditions existed in the colonies. Indeed, British North Americans claimed no more than the rights of English subjects and English common law. As in England, only two protections existed: absent well-grounded suspicion, a suspect had a right to silence; and suspects could not be subjected to torture or physical coercion or forced to take an oath.⁴⁷ The Body of Liberties of 1641 (Liberty 45) stated that torture could not be used to secure a confession except after conviction in capital cases

³⁷ HELMHOLZ ET AL., *supra* note 17, at 91.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Alschuler, *supra* note 4, at 2649.

⁴¹ LEVY, *supra* note 27, at 328.

⁴² Alschuler, *supra* note 4, at 2654.

⁴³ *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting).

⁴⁴ For a thorough description of the criminal trial during this period, see HELMHOLZ ET AL., *supra* note 17, at 82–96.

⁴⁵ *Id.* at 107.

⁴⁶ *Id.* at 92.

⁴⁷ *Id.* at 121.

to find conspirators.⁴⁸ But even in that circumstance there could be no “[b]arbarous and inhumane” torture.⁴⁹ Again, following the Marian procedures, justices of the peace were expected to elicit a confession from the defendant that could be used against him at a trial, but only if he had not been sworn.⁵⁰ These interrogation procedures were well established and widely accepted.⁵¹

E. The Fifth Amendment

As noted above, when the Constitution was drafted, it was not meant to reform the law. Instead, it was intended to protect existing procedures from the whims of the distant king, i.e. to protect the status quo from incursions by the Crown.⁵² The King had begun to use the vice-admiralty procedures to try ordinary criminal offenses on land.⁵³ These were military courts, presided over by judges from England, and relied upon the hated oath *ex officio*.⁵⁴ They did not allow juries.⁵⁵ Ultimately, Parliament threatened to re-enact Henry VIII’s Treason Act, which required that the trials actually take place in England.⁵⁶

In the face of these increasingly intrusive imperial measures, the rhetoric of individual rights increased in intensity. Clearly, however, the cluster of individual rights ultimately embodied in the Bill of Rights was intended as defensive, not as reform.⁵⁷ The Virginia Declaration of Rights contained similar provisions, and other state constitutions reflected this rights cluster as well.⁵⁸ In this historical context, the Fifth Amendment was born.

F. Nineteenth Century Developments

Despite U.S. independence, the right to remain silent continued to be treated similarly by both the United States and the United Kingdom. The development of the no-comment rule in the nineteenth century was influenced by (1) the appearance of defense counsel; (2) the abolition of the defendant and disqualification based on interest; and (3) the creation of a statutory no-comment rule.

⁴⁸ LEVY, *supra* note 27, at 344–45.

⁴⁹ *Id.*

⁵⁰ Alschuler, *supra* note 4, at 2649 & nn.86–88.

⁵¹ LEVY, *supra* note 27, at 333–44; Alschuler, *supra* note 4, at 2655 & n.108.

⁵² HELMHOLZ ET AL., *supra* note 17, at 129–33.

⁵³ *Id.* at 131–33.

⁵⁴ *Id.*

⁵⁵ *Id.* at 131.

⁵⁶ *Id.* at 133.

⁵⁷ *Id.* at 134–35.

⁵⁸ *Id.*

1. The Role of Defense Counsel

In both the U.S. and U.K. systems lawyers began to appear more frequently, allowing the defendant to take a more passive role. Thus, at this point, "the dignity of defendants lay not in their ability to tell their stories fully, but rather in their ability to remain passive, to proclaim to the prosecutor 'Thou sayest,' and to force the state to shoulder the entire load."⁵⁹ As defendants were allowed and expected to participate less, they began to be seen as potential victims of state coercion.⁶⁰

Nevertheless, in the United States the pre-trial Marian Committal procedures continued. Suspects continued to be questioned, unsworn, before trial and their statements or silence used in evidence at trial.⁶¹

Similarly, in the United Kingdom after the American revolution, reformers in Parliament began to argue that requiring the defendant to speak was unfair to uneducated and inarticulate defendants who could not tell their stories well.⁶² The reformers argued for an increased role of counsel to protect these defendants, and thus, in 1836, the right to counsel was secured.⁶³ Similar to what was occurring in the United States at the time, defendants were able to take a more passive role at trial.⁶⁴ Then, in 1848, Sir John Jervis's Act made a substantial change to the pre-trial Marian Committal procedures: for the first time, an accused was required to be cautioned, before pretrial questioning, that he need not answer any questions and that if he did answer, his answers could be used against him at trial.⁶⁵

2. Abolition of the Disqualification for Interest

The next significant step was the abolition of the testimonial disqualification of defendants. Maine was the first U.S. jurisdiction to allow defendants to offer sworn testimony in criminal cases, in 1864.⁶⁶ By the end of the 1890s, Georgia was the only state to disqualify defendants.⁶⁷

Abolition of the disqualification was hotly contested on both continents. In the United States, those in favor of abolition argued that the disqualification presumed guilt and a willingness to commit perjury.⁶⁸ Those in opposition argued that abolition would force defendants to speak, contrary to the Fifth Amendment.⁶⁹ They argued that

⁵⁹ Alschuler, *supra* note 4, at 2660.

⁶⁰ *Id.*

⁶¹ *Id.* at 2654–55.

⁶² HELMHOLZ ET AL., *supra* note 17, at 96.

⁶³ *Id.* at 147.

⁶⁴ *Id.* at 144, 147.

⁶⁵ *Id.* at 169–70.

⁶⁶ Alschuler, *supra* note 4, at 2661.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

the failure of a defendant to testify would be seen as a confession of guilt and that jurors would draw this inference regardless of any instructions they might receive.⁷⁰ To avoid the inference, many defendants would commit perjury.⁷¹

3. The Statutory No-Comment Rules

In deference to these concerns, the federal statute of 1878, and many others, gave the defendant a right to testify, provided that the prosecutor could not comment on the failure of a defendant to testify, and prohibited any presumption against the defendant from his failure to take the stand.⁷² In *Wilson v. United States*,⁷³ the Supreme Court reversed a federal conviction based on a prosecutor's argument that the defendant's silence was evidence of guilt.⁷⁴ The no-comment rule was determined to be statutory. At no time in that opinion or elsewhere did the Court hold that a negative inference from silence was prohibited by the Constitution.⁷⁵

Indeed, in *Twining v. New Jersey*⁷⁶ and *Adamson v. California*,⁷⁷ the Supreme Court explicitly held that state rules permitting adverse comment on a defendant's failure to testify at trial were not prohibited by the Due Process Clause. In *Twining*, the Court held that the state law permitting a prosecutor to argue for an adverse inference from a defendant's silence at trial did not violate the Fourteenth Amendment Due Process Clause.⁷⁸ In *Adamson*, the Court reached the same conclusion when it refused to hold that the Fifth Amendment privilege against self-incrimination was an element of due process that could bind the states.⁷⁹ In so holding, it assumed, but did not decide, that the Fifth Amendment would prohibit such comment in a federal proceeding.⁸⁰ At this point in history, then, there was no authority to support the conclusion

⁷⁰ *Id.*

⁷¹ *Id.* at 2661–62.

⁷² *Id.* at 2662 (citing Act of Mar. 16, 1878, 20 Stat. 30 (codified at 18 U.S.C. § 3481 (1994))).

⁷³ 149 U.S. 60 (1893).

⁷⁴ *Id.* at 66–67.

⁷⁵ *See, e.g., id.* at 64. Thereafter, the Supreme Court held that drawing adverse inferences from selective silence by a testifying defendant, *see Caminetti v. United States*, 242 U.S. 470 (1917), and impeaching a defendant's testimony by disclosing his silence at an earlier trial, *see Raffel v. United States*, 271 U.S. 494 (1926), were consistent with the Fifth Amendment privilege.

⁷⁶ 211 U.S. 78 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁷⁷ 332 U.S. 46 (1947), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁷⁸ *Twining*, 211 U.S. at 114.

⁷⁹ *Adamson*, 332 U.S. at 46–47. In a series of cases, the Court continued to reaffirm that the self-incrimination privilege in the Fifth Amendment did not apply to the states. *See Knapp v. Schweitzer*, 357 U.S. 371, 374 (1958); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969); *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁸⁰ *Adamson*, 332 U.S. at 50–51.

that the right against self-incrimination prohibited comment on a defendant's failure to testify.

In the Criminal Evidence Act of 1898, the English counterpart of the U.S. Act of 1878,⁸¹ the United Kingdom abolished the disqualification based on interest and the no-comment rule. Similar to the U.S. act, the Criminal Evidence Act stated that "'the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution.'"⁸²

Now that defendants could testify, the courts were faced with a quandary. Was the "witness rule," i.e., the rule of evidence that permitted witnesses (but not defendants) a privilege against self-incrimination that was not waived by partial answers now applicable to defendant-witnesses?⁸³ Or should the defendant's testimony be subject to the "confession rule," under which the privilege was waived by partial answer but an incriminatory statement by a defendant would be excluded if given under duress?⁸⁴ Essentially, the U.K. courts merged the two doctrines: the "witness rule" was extended to defendants, but it was given the exclusionary and waiver principles of the "confession rule."⁸⁵ Where a defendant testified as a witness he or she retained a privilege against self-incrimination that was waived by partial answers; any testimony given could be excluded if given under duress.⁸⁶ In this context, the giving of an oath was considered duress *per se*.⁸⁷ Thus, defendants could not be made to testify at trial.

II. THE MODERN U.S. PRIVILEGE

A. Incorporation Through the Due Process Clause

Ultimately in 1964, the federal statutory no-comment rule was constitutionalized. In *Malloy v. Hogan*, the Supreme Court finally held that the privilege against self-incrimination was protected against state action by incorporation in the Due Process Clause of the Fourteenth Amendment.⁸⁸ *Malloy* did not involve the no-comment rule. In *Malloy*, the petitioner pled guilty to state charges of selling pools. After his guilty plea he was ordered to testify before a referee investigating gambling.⁸⁹ Petitioner

⁸¹ Alschuler, *supra* note 4, at 2662; Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System*, 44 U. KAN. L. REV. 929, 933-35 (1996).

⁸² Chase, *supra* note 81, at 934 (quoting Criminal Evidence Act, 1898, Eliz. § 1(a) (Eng.)).

⁸³ HELMHOLZ ET AL., *supra* note 17, at 156-61.

⁸⁴ *Id.* at 153-56.

⁸⁵ *Id.*

⁸⁶ *Id.* at 162, 171-74.

⁸⁷ *Id.* at 174.

⁸⁸ 378 U.S. 1 (1964).

⁸⁹ *Id.* at 3.

invoked his Fifth Amendment right not to testify.⁹⁰ The lower court held that the Fifth Amendment privilege was not available to a witness in a state proceeding.⁹¹ However, re-examining and overruling its decisions in *Adamson* and *Twining*, the Supreme Court held that the federal Fifth Amendment privilege was binding on the states through incorporation of the Fourteenth Amendment Due Process Clause.⁹² In doing so, the Court rejected the suggestion that a less stringent constitutional standard applied to the states, and required state conformity with the entire federal standard.⁹³

Justice Harlan, joined by Justice Clark, dissented.⁹⁴ The dissenters took issue with the Court's approach of "incorporating into due process, without critical examination, the whole body of law which surrounds a specific prohibition directed against the Federal Government."⁹⁵ To Justice Harlan, the Court's precedent established that the standard for incorporation of any part of the Bill of Rights was due process.⁹⁶ Rights that have been applied to both federal and state equally, for example, First Amendment or Sixth Amendment right-to-counsel protections, were applied equally because the fundamental fairness of due process demanded it. According to Justice Harlan, the basic structure of federalism prohibited the kind of uniformity that the Court's decision would require of the states.⁹⁷

1. *Griffin v. California*

In 1964, the Court re-considered the specific question posed in *Twining* and *Adamson*: whether the Fifth and Fourteenth Amendments prohibited a prosecutor in a state criminal trial from arguing, and a court from inviting a jury to draw an unfavorable inference from a defendant's failure to testify. In *Griffin*, a murder prosecution, the prosecutor, relying on a California statute, had argued to the jury in summation that the defendant, who had not testified but who had been with the victim before her death and was the only person who could provide details related to the murder, had

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2–3.

⁹³ *Id.* at 11 ("It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.").

⁹⁴ *Id.* at 14. Justice White, joined by Justice Stewart, dissented separately on the ground that the privilege had not been properly invoked because there was insufficient evidence that respondent had a "reasonable apprehension" of self-incrimination. *Id.* at 34, 38.

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 16–17.

⁹⁷ *Id.* at 28. Referring to the above noted argument, Justice Harlan said, "Such 'incongruity,' however, is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be." *Id.* at 27.

“not seen fit to take the stand and deny or explain.”⁹⁸ In addition, in accordance with the statute,⁹⁹ the trial court had instructed the jury that “a defendant has a constitutional right not to testify” and the defendant’s silence did not “create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.”¹⁰⁰ However, the state court then charged that, as to the facts within the defendant’s knowledge, “the jury may take that failure into consideration as tending to indicate the truth of [the state’s] evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.”¹⁰¹

In an opinion by Justice Douglas for a five-member majority, the Supreme Court reversed the conviction, with Justice Harlan concurring, Justices Stewart and White dissenting, and Chief Justice Warren taking no part.¹⁰² Calling adverse comment on silence a remnant of “the ‘inquisitorial system of criminal justice,’”¹⁰³ the Court held that the instruction created a penalty for the decision to remain silent that “cuts down on the privilege by making its assertion costly.”¹⁰⁴

The *Griffin* decision is an unusual one, remarkably oblique. It begins by stating, “[i]f this were a federal trial, reversible error would have been committed.”¹⁰⁵ The Court based its conclusion on *Wilson v. United States*,¹⁰⁶ a decision it acknowledged rested on an act of Congress and not the Fifth Amendment.¹⁰⁷ It went on to hold, however, that the prosecutor’s comment and the court’s instructions also violated the Fifth Amendment.¹⁰⁸ The majority did not, however, rest its conclusion on history, prevalence, or actual text, the analytical bases for constitutional analysis.¹⁰⁹ Rather, the Court continued,

If the words ‘Fifth Amendment’ are substituted for ‘act’ and for ‘statute,’ the spirit of the Self-Incrimination Clause is reflected.

⁹⁸ *Griffin v. California*, 380 U.S. 609, 611 (1965).

⁹⁹ *Id.* at 609–10 (citing CAL. CONST. art I, § 13 (repealed 1974)).

¹⁰⁰ *Id.* at 610.

¹⁰¹ *Id.*

¹⁰² *Id.* at 609, 615, 617.

¹⁰³ *Id.* at 614 (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 612.

¹⁰⁶ 149 U.S. 60 (1893).

¹⁰⁷ *Griffin*, 380 U.S. 612–13; *see also* *Adamson v. California*, 332 U.S. 46 (1947); *Bruno v. United States*, 308 U.S. 287 (1939).

¹⁰⁸ *Griffin*, 380 U.S. at 613. The Court noted that the federal statute was designed in part to protect those “who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him.” *Id.* (citing *Wilson*, 149 U.S. at 66).

¹⁰⁹ *See id.*

For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws.¹¹⁰

Having converted a statutory enactment into a constitutional one, the Court then relied on precedent to impose that standard on the states:

We said in *Malloy v. Hogan* that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.¹¹¹

In his concurring opinion, Justice Harlan began by agreeing that the Fifth Amendment would bar adverse comment on a defendant's silence in federal court.¹¹² He also agreed, in light of *Malloy's* holding incorporating the Fifth Amendment against the states, that there was "no legitimate escape from today's decision."¹¹³ He thus concurred in the majority decision, but explained:

I do so, however, with great reluctance, since for me the decision exemplifies the creeping paralysis with which this Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system.

. . . .

While I would agree that the accusatorial rather than inquisitorial process is a fundamental part of the 'liberty' guaranteed by the

¹¹⁰ *Id.* at 613–14 (citation omitted).

It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614.

¹¹¹ *Id.* at 615 (citation omitted). The Court reserved decision on whether such an instruction would be constitutionally required if requested. *Id.* at 615 n.6.

¹¹² *Id.* at 615.

¹¹³ *Id.* at 615–16.

Fourteenth Amendment, my Brother Stewart in dissent, . . . fully demonstrates that the no-comment rule 'might be lost, and justice still be done.' As a 'non-fundamental' part of the Fifth Amendment, I would not, but for *Malloy*, apply the no-comment rule to the States.¹¹⁴

Justice Harlan noted that the incongruity, within fundamental fairness limits, between state and federal standards "is at the heart of our federal system. The powers and responsibilities of the State and Federal Governments are not congruent, and under the Constitution they are not intended to be."¹¹⁵ He concluded, "Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history."¹¹⁶

Justice Stewart, joined by Justice White, dissented.¹¹⁷ He focused on a textual analysis, and framed the central issue as whether anything in the California statute "compelled" Griffin to be a witness against himself.¹¹⁸ Of course, Justice Stewart noted, Griffin did not testify, so he could not have been compelled to do so.¹¹⁹ Moreover, Justice Stewart disputed the majority's conclusion that the comment rule compelled testimony by imposing a penalty on the exercise of the right to remain silent.¹²⁰ According to him, a jury is aware on its own, that a defendant has not testified; a prosecutor's comment and a court's charge do not create that awareness.¹²¹ Thus, he concluded that the Court must be looking at some other compulsion which "the Court does not describe and which I cannot readily perceive."¹²² Relying, then, on history,¹²³ Justice

¹¹⁴ *Id.* at 616 (citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 617.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 620.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 620–21.

¹²¹ *Id.* at 621.

¹²² *Id.*

¹²³ *Id.* at 620. Contrasting the California procedure to those of the Star Chamber, Justice Stewart continued:

When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Stewart concluded that, “if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee.”¹²⁴

Indeed, Justice Stewart viewed the court’s instruction as a legitimate means of

articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury’s consciousness. The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts.¹²⁵

Finally, Justice Stewart noted that the Model Code of Evidence, the Uniform Rules of Evidence, the American Bar Association and the American Law Institute had all endorsed the use of the California procedure.¹²⁶

2. Applying the Rule

The next decision on the no-comment rule, following *Griffin*, was *Tehan v. Shott*.¹²⁷ In *Tehan*, the Court held that *Griffin* was not to be applied retroactively because it was not based on protection of the accuracy of the truth-seeking function of a trial.¹²⁸ In so holding, the Court abandoned the idea that the no-comment rule was a protection for the innocent,¹²⁹ but rather explained that it is based on the “complex of values” the privilege represents.¹³⁰ Those values exist independent of the truth-seeking function of a trial, and include the right to individual autonomy, a right to be left alone by the government, and a right to require the government to bear its burden of proof without

¹²⁴ *Id.*

¹²⁵ *Id.* at 622.

¹²⁶ *Id.* at 622 & nn.6–7; see Andrew A. Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932); Walter T. Dunmore, *Comment on Failure of Accused to Testify*, 26 YALE L.J. 464 (1916); Herbert S. Hadley, *Criminal Justice in America: Present Conditions Historically Considered*, 11 A.B.A. J. 674, 677 (1925); Frank H. Hiscock, *Criminal Law and Procedure in New York*, 26 COLUM. L. REV. 253, 258–62 (1926); Note, *Comment on Defendant’s Failure to Take the Stand*, 57 YALE L.J. 145 (1947). Later, in *Chapman v. California*, 386 U.S. 18 (1967), the Court determined that violation of the no-comment rule could be subjected to harmless error analysis. See *United States v. Hasting*, 461 U.S. 499 (1983) (holding a *Griffin* violation harmless beyond a reasonable doubt).

¹²⁷ 382 U.S. 406 (1966).

¹²⁸ *Id.*

¹²⁹ *Id.* at 415.

¹³⁰ *Id.* at 414 (citing *Malloy v. Hogan*, 378 U.S. 1, 7–8 (1964)).

the assistance of the defendant.¹³¹ Accordingly, the no-comment rule was interpreted to be symbolic.

The next decision in this area was *Lakeside v. Oregon*.¹³² There, the Court held that the giving of a no-inference instruction over objection did not violate the Fifth Amendment.¹³³ Ostensibly narrowing the *Griffin* rule prohibiting *comment* on a defendant's silence, the Court made clear that the only comment on the defendant's silence that was prohibited by *Griffin* was a negative comment.¹³⁴

In dissent, Justice Stevens, joined in part by Justice Marshall, reiterated that the right to remain silent at trial was designed, in part, to protect the innocent defendant who decides not to testify.¹³⁵ For a judge or prosecutor to call that silence to a jury's attention in any way "will make the defendant's silence costly indeed."¹³⁶ He saw no reason to override a defendant's decision as to whether that instruction should be given.¹³⁷

Later that same year the Court decided *Lockett v. Ohio*.¹³⁸ There, the Court held that a prosecutor's references to the state's evidence as "unrefuted" and "uncontradicted," indirect references to the defendant's silence, did not violate the Fifth and Fourteenth Amendments.¹³⁹ In that case, defense counsel had drawn the jury's attention to the defendant's silence by stating that she would testify and by outlining her defense.¹⁴⁰ The Court held that, "[w]hen viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand."¹⁴¹

¹³¹ See *id.* at 416. The Court eloquently explained that the privilege represents "the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life."'" *Id.* at 416 & 414 n.12 (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (1956)).

¹³² 435 U.S. 333 (1978).

¹³³ *Id.* at 340-41.

¹³⁴ *Id.* at 338-39.

It is clear from even a cursory review of the facts and the square holding of the *Griffin* case that the Court was there concerned only with *adverse* comment, whether by the prosecutor or the trial judge—comment by the prosecution on the accused's silence or instructions by the court that such silence . . . is evidence of guilt.

Id. (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965)).

¹³⁵ *Id.* at 343.

¹³⁶ *Id.* at 347.

¹³⁷ *Id.*

¹³⁸ 438 U.S. 586 (1978).

¹³⁹ *Id.* at 595.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Next, in 1981, in *Carter v. Kentucky*,¹⁴² the Court entertained an issue that had been specifically reserved in *Griffin* and *Lakeside*: whether the state court was required, under the Fifth and Fourteenth Amendments, to give a requested jury instruction that the jury could not draw negative inferences from a defendant's failure to testify.¹⁴³ The Court held that a requested instruction was constitutionally required.¹⁴⁴ Concurring, Justice Powell made clear that he felt compelled by *Griffin* to join the Court's conclusion but that he believed *Griffin* was wrongly decided.¹⁴⁵ Then-Justice Rehnquist, dissenting, held that the Court's decision was an erroneous extension of *Griffin*.¹⁴⁶

In *Baxter v. Palmigiano*,¹⁴⁷ the Court held that the use of a defendant's silence in a prison disciplinary proceeding did not violate the Fifth Amendment.¹⁴⁸ In doing so, however, it explained that "his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege."¹⁴⁹

Later, in *United States v. Robinson*,¹⁵⁰ the Court held that the prosecutor's comment that defendant could have taken the stand to testify did not violate the Fifth Amendment.¹⁵¹ Similar to its reasoning in *Lockett*, the Court held that the prosecutor's comment was a fair response to defense counsel's argument.¹⁵² defense counsel had argued that the prosecutor had prevented the defendant from explaining his side of the case.¹⁵³ Thus, the Court held that, even though the prosecutor's comment that the defendant could have taken the stand and explained his argument to the jury may have imposed "some 'cost'" on the defendant for remaining silent, the Fifth Amendment had not been violated.¹⁵⁴ The Court rejected the lower court's position that "any 'direct' reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*."¹⁵⁵

¹⁴² 450 U.S. 288 (1981).

¹⁴³ *Id.* at 295.

¹⁴⁴ *Id.* at 288.

¹⁴⁵ *Id.* at 307.

¹⁴⁶ *Id.* at 310. In so holding, Justice Rehnquist quoted Justice Harlan's concurring opinion in *Griffin*: "Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history." *Id.* (citing *Griffin v. California*, 380 U.S. 609, 617 (1965)).

¹⁴⁷ 425 U.S. 308 (1976).

¹⁴⁸ *Id.* at 309, 316.

¹⁴⁹ *Id.* at 318.

¹⁵⁰ 485 U.S. 25 (1988).

¹⁵¹ *Id.* at 26.

¹⁵² *Id.* at 32.

¹⁵³ *Id.* at 34.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 31. The Court held, "[w]e decline to give *Griffin* such a broad reading, because we think such a reading would be quite inconsistent with the Fifth Amendment, which protects

Finally, in *Portuondo v. Agard*,¹⁵⁶ the Supreme Court addressed the question whether a prosecutor's comment during summation—that the defendant had been the only witness with the opportunity to be present and hear the other witnesses and thus to tailor his testimony—violated the *Griffin* no-comment rule.¹⁵⁷ The Court held that it did not, declining to extend *Griffin*.¹⁵⁸ Interestingly, it pointed to the lack of any historical evidence prohibiting the sort of comment at issue, relying on the long-standing disqualification for interest that prohibited a defendant from testifying in the first place.¹⁵⁹ In addition, the Court noted that the comment in *Griffin* asked the jury to do what it was prohibited from doing (using the defendant's silence as evidence of guilt) while the comment in *Portuondo* asked the jury to do what it was perfectly entitled to do (consider the defendant's presence in evaluating his credibility).¹⁶⁰ Moreover, asking the jury not to consider a defendant's presence was deemed by the Court to be impossible.¹⁶¹ Finally, the Court opined that *Griffin* prohibited comment on the defendant's silence as evidence of guilt, while *Portuondo* limited the comment to credibility.¹⁶²

Justice Ginsburg, joined by Justice Souter, dissented.¹⁶³ Relying on *Griffin* and *Doyle v. Ohio*,¹⁶⁴ Justice Ginsburg held that the comments in question violated the defendant's constitutional rights because “where the exercise of constitutional rights is ‘insolubly ambiguous’ as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant.”¹⁶⁵ According to Justice Ginsburg, while a trial is a search for truth, a generic comment in summation “undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?”¹⁶⁶ Moreover, Justice Ginsburg took the majority to task for arguing that the negative inference from presence in *Portuondo* is different from the negative inference from silence in *Griffin* because the inference from silence is not “natural or irresistible.”¹⁶⁷ In doing so, Justice Ginsburg relied on *Griffin* and *Mitchell* to show that the Court had indeed considered the negative inference from silence natural and irresistible;

against compulsory self-incrimination.” *Id.* at 31–32; *see also* *United States v. Hasting*, 461 U.S. 499, 515 (1983).

¹⁵⁶ 529 U.S. 61 (2000).

¹⁵⁷ *Id.* at 65.

¹⁵⁸ *Id.* at 61.

¹⁵⁹ *Id.* at 65.

¹⁶⁰ *Id.* at 68.

¹⁶¹ *Id.*

¹⁶² *Id.* at 67–68.

¹⁶³ *Id.* at 62.

¹⁶⁴ 426 U.S. 610 (1976).

¹⁶⁵ *Portuondo*, 529 U.S. at 77 (Ginsburg, J., dissenting) (quoting *Doyle*, 426 U.S. at 617).

¹⁶⁶ *Id.* at 79.

¹⁶⁷ *Id.* at 84.

indeed, that was why the Court in *Carter* had required that a limiting instruction be given whenever requested by the defense.¹⁶⁸ In language that could well apply to *Griffin*, Justice Ginsburg concluded, “[i]n the end, we are left with a prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial’s aim of sorting guilty defendants from innocent ones, and that is not supported by our case law.”¹⁶⁹

3. Extending the Rule to Sentencing

In 1999, the Court decided *Mitchell v. United States*.¹⁷⁰ In *Mitchell*, the Court addressed the question of whether *Griffin* should be extended to prohibit a negative inference against a defendant who does not testify at sentencing.¹⁷¹ The Court held that *Griffin* should be extended to sentencing.¹⁷²

The charges against Mitchell arose out of a conspiracy to distribute cocaine.¹⁷³ Mitchell was charged with one count of conspiracy to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. § 846, and with three counts of distributing cocaine within one thousand feet of a school or playground, in violation of 18 U.S.C. § 860(a).¹⁷⁴ She pleaded guilty to all four counts, and reserved the right to contest the drug quantity attributable to her under the conspiracy count.¹⁷⁵ The district court indicated that the drug quantity would be determined at sentencing.¹⁷⁶

During the plea colloquy, after the government presented the underlying facts, the judge asked Mitchell, “Did you do that?” and she responded “[s]ome of it.”¹⁷⁷ She stated that although she had been present for one of the transactions charged in the distribution count, she had not delivered the cocaine.¹⁷⁸ The government maintained that she was liable as an aider and abettor.¹⁷⁹ After the court advised her that she might have a defense to one count on the theory that she was only present, Mitchell confirmed her desire to plead guilty and the court accepted her plea; three other co-defendants also agreed to testify.¹⁸⁰ Later at Mitchell’s sentencing hearing, the three witnesses adopted their trial testimony supplemented by additional evidence about the amount of cocaine

¹⁶⁸ *Id.* at 84–85.

¹⁶⁹ *Id.* at 88.

¹⁷⁰ 526 U.S. 314 (1999).

¹⁷¹ *Id.* at 316–17.

¹⁷² *Id.* at 317. The Court also held that, in a federal criminal case, a guilty plea does not waive the self-incrimination privilege as to sentence. *Id.* at 321.

¹⁷³ *Id.* at 317.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 318.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

sold by Mitchell.¹⁸¹ According to this testimony, Mitchell worked two or three times a week selling one and one-half to two ounces of cocaine a day from April to August 1992, and three to five times a week from August 1992 to December 1993.¹⁸² From January to March 1994 she was one of the people in charge of cocaine distribution.¹⁸³

On cross-examination one of the witnesses conceded he had not seen Mitchell on a regular basis during these time periods.¹⁸⁴ In addition, Mitchell and the government both referred to the trial testimony of another of the co-defendants, who attributed a total of two ounces of cocaine to Mitchell in 1992.¹⁸⁵ Mitchell put on no evidence and did not testify.¹⁸⁶

The sentencing court credited the testimony that Mitchell had been a regular drug courier and that she had sold more than five kilograms of cocaine, thus requiring a mandatory ten-year minimum sentence.¹⁸⁷ One of the reasons the court gave for relying on the testimony of the codefendants was Mitchell's "not testifying to the contrary."¹⁸⁸ The court sentenced her to a mandatory "minimum of [ten] years imprisonment, [six] years of supervised release, and a special assessment of \$200."¹⁸⁹

The Court of Appeals for the Third Circuit affirmed.¹⁹⁰ The court held that Mitchell had waived her Fifth Amendment privilege by pleading guilty.¹⁹¹ Judge Michel concurred.¹⁹² He reasoned that any error in drawing an adverse inference from Mitchell's silence was harmless because the evidence supported the judge's finding on quantity without considering Mitchell's silence.¹⁹³

The Supreme Court disagreed on both issues.¹⁹⁴ First, the Court held that the defendant's guilty plea did not waive her right against self-incrimination as to sentence because a guilty plea does not complete the incrimination process where a defendant is yet to be sentenced.¹⁹⁵ Although the Court began its opinion by noting the general rule that a witness may not testify about some subjects and invoke the privilege against self-incrimination about the details, the Court held that the narrow inquiry at a plea colloquy is not the equivalent of an inquiry into the facts of the crime itself: indeed, at the

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 318–19.

¹⁸⁶ *Id.* at 319.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 319–20.

¹⁹² *Id.* at 320.

¹⁹³ *Id.* at 320–21.

¹⁹⁴ *Id.* at 314–15.

¹⁹⁵ *Id.* at 321.

plea colloquy the defendant takes the facts out of controversy, so that under the circumstances, there is "little danger that the court will be misled by selective disclosure."¹⁹⁶

Moreover, "[t]reating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants."¹⁹⁷ Essentially it would convert the current accusatorial system into an inquisitorial one, where the defendant is compelled to assist in her own punishment.¹⁹⁸

The Court also found nothing in the Federal Rules of Criminal Procedure 11 that contemplated such a broad waiver of the privilege.¹⁹⁹ Rule 11(c)(3) requires a court to ascertain that the defendant understands that he or she is giving up the right to self-incrimination at trial.²⁰⁰ The purpose of this rule is to inform the defendant of what she is giving up by deciding not to go to trial, but not to elicit a waiver for any other proceedings.²⁰¹

With respect to the negative inference, the Court extended its *Griffin* prohibition to sentencing proceedings.²⁰² The Court held that, while negative inferences are available in civil proceedings, a sentencing hearing falls within the "criminal case" language of the Fifth Amendment.²⁰³ Moreover, drawing such an inference would compel a defendant to participate in her own punishment, which the Court held would violate the right against self-incrimination.²⁰⁴

The Court's holding follows the line of jurisprudence that places the right to silence at the core of the accusatorial system. It does not rely on text or history. Thus, in holding that the government may not rely on the defendant to establish his or her own guilt, the Court eloquently articulated the importance of the Fifth Amendment privilege to the U.S. system of justice:

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The

¹⁹⁶ *Id.* at 315.

Here, petitioner's statement that she had done "some of" the proffered conduct did not pose a threat to the integrity of factfinding proceedings, for the purpose of the District Court's inquiry was simply to ensure that petitioner understood the charges and that there was a factual basis for the Government's case.

Id. at 323.

¹⁹⁷ *Id.* at 324.

¹⁹⁸ *Id.* at 325 (citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

¹⁹⁹ *Id.* at 323.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 323–24.

²⁰² *Id.* at 327.

²⁰³ *Id.* at 328–29.

²⁰⁴ *Id.* at 329.

Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.²⁰⁵

Significantly, however, the Court limited its holding with respect to adverse inferences only to the essential facts of the charged crime.²⁰⁶ That is, because it relied on the linchpin-of-the-accusatorial-process argument, requiring the prosecution to bear the burden of proof without the help of the defendant, it did not explicitly discount the probative worth of silence as evidence of guilt, or address the other policy or practical arguments against the no-comment rule. The Court clearly opted for the role of the privilege as requiring the prosecutor to bear the burden of establishing essential sentencing-based facts without any help from the defendant.²⁰⁷

Justice Scalia dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas.²⁰⁸ Justice Thomas also dissented separately.²⁰⁹ Although Justice Scalia agreed with the majority that a guilty plea is not a waiver of the right against self-incrimination, Justice Scalia would have held that Mitchell "did not have the right to have the sentencer abstain from making the adverse inferences that reasonably flow from her failure to testify."²¹⁰

Not surprisingly, the dissent relied heavily on the text and history of the right against self-incrimination and, in particular, the circumstances that existed at the time the Fifth Amendment was drawn.²¹¹ According to the dissent, early colonial courts expected a defendant to testify and drew a negative inference from a defendant's silence.²¹² Eventually, state legislatures enacted statutes prohibiting such an inference, but that did not elevate the prohibition to constitutional dimension.²¹³ As to *Griffin*, the dissenters explained that, as a matter of constitutional law, *Griffin* was an aberration.²¹⁴ Indeed, Justice Scalia characterized it as a "wrong turn" that should not be extended to sentencing proceedings.²¹⁵

In his separate dissent, Justice Thomas reiterated his position that *Griffin* lacked historical or logical support.²¹⁶ He characterized it as a decision that "constitutionalizes a policy choice that a majority of the Court found desirable at the time."²¹⁷ Justice

²⁰⁵ *Id.* at 330.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 331.

²⁰⁹ *Id.* at 341.

²¹⁰ *Id.* at 331.

²¹¹ *Id.* at 332.

²¹² *Id.* at 333.

²¹³ *Id.* at 335.

²¹⁴ *Id.* at 332.

²¹⁵ *Id.* at 336.

²¹⁶ *Id.* at 341.

²¹⁷ *Id.* at 343.

Thomas concluded that he would be willing to reconsider *Griffin*, but since he agreed with Justice Scalia that it should not be extended, he joined Justice Scalia's dissent.²¹⁸

III. THE MODERN U.K. APPROACH

A. *The Modern Debate*

In 1972, the Criminal Law Revision Committee, a part-time advisory committee to the Home Secretary, recommended that, although a defendant would be permitted to remain silent in the police station and in the courtroom, negative inferences based on that silence would be permissible.²¹⁹ The Committee's position was that the existing rule unduly favored the guilty.²²⁰ The recommended change was roundly denounced by all commentators and was not implemented.²²¹

In 1979, the government tried again.²²² The Philips Royal Commission was appointed to study the question and concluded that the right to silence was essential to the accusatorial system and should not be changed.²²³ According to the Commission, changing the rule concerning pre-trial silence might increase the risk to the innocent person who was under police suspicion for the first time, and, on the other hand, would do nothing to help convict the guilty, who would continue in any event to remain silent.²²⁴ As to the right to silence at trial, the Commission concluded that the principle of requiring the prosecution to prove its case did not permit the use of the defendant to make that case and that the defendant should not be penalized by comment if she failed to do so.²²⁵ This report was adopted by the government, and public debate was considered to be at an end.²²⁶

B. *Responding to Domestic Terrorism*

In 1987, in what has been characterized as an "odd" turn of events, the Home Secretary suddenly announced that there would again be a "public debate about the right to silence."²²⁷ In a speech given to the Police Foundation, the Secretary queried

²¹⁸ *Id.*

²¹⁹ CRIM. LAW REVISION COMM., ELEVENTH REPORT, EVIDENCE, 1972, Cmnd. 4991, at 16.

²²⁰ MICHAEL ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 123–24 (9th ed., Butterworths 1999).

²²¹ Michael Zander, *You Have No Right to Remain Silent: Abolition of the Privilege Against Self-Incrimination in England*, 40 ST. LOUIS U. L.J. 659, 665 (1996).

²²² *Id.*

²²³ *Id.* at 665–66.

²²⁴ *Id.* at 665.

²²⁵ *Id.* at 665–66.

²²⁶ ZANDER, *supra* note 220, at 125–26; Mark Berger, *Reforming Confession Law British Style: A Decade of Experience With Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243, 254 (2000).

²²⁷ Zander, *supra* note 221, at 666.

whether the interests of justice were being served by allowing "experienced criminals" to refuse to answer "police questions secure in the knowledge that the trial jury would never learn of [that silence]." ²²⁸ As one commentator noted, the thrust of the Secretary's position was that, "[b]y allowing the exercise of the right to silence to be free of logical adverse evidentiary consequences . . . the legal system wrongly afforded protection to the guilty rather than the innocent." ²²⁹

The Government ultimately issued Criminal Evidence (Northern Ireland) Order 1988 (the "Northern Ireland Order"), which changed the rule for all criminal cases in Northern Ireland. ²³⁰ That order permitted, *inter alia*, the drawing of adverse inferences from an accused's failure before being charged or upon being charged to mention any fact relied on in his defense at trial. ²³¹ The Order also stated that silence could be corroboration of other evidence. ²³² The same inferences could be drawn where a suspect failed to explain the presence of any suspicious object, substance or mark, or where his presence at the scene or at the time of the crime seemed "reasonably suspicious" but he failed to explain it. ²³³ The order was not limited to terrorism-related cases, but applied to all prosecutions in Northern Ireland. ²³⁴

During the next year, the Home Office Working Group issued a report that recommended similar provisions for England and Wales, i.e. that a defendant's failure to answer questions or to mention a fact later relied on at trial could be used to support an inference that his subsequent defense was untrue or to impeach his credibility generally. ²³⁵ It could not, however, be used to support an inference of guilt. ²³⁶

The Government did not adopt this report. ²³⁷ This was probably due to a public climate dominated by concern over several highly publicized miscarriages of justice, the Guildford Four, the Maguires, and the Birmingham Six. ²³⁸ However, when these convictions were quashed, a new commission was set up, the Royal Commission on Criminal Justice ("The Runciman Commission"). ²³⁹ The mandate of this Commission was to study the entire system of criminal justice, largely to figure out why these miscarriages had occurred, but the right to silence was specifically mentioned in its terms of reference. ²⁴⁰ Opponents of change argued that permitting a negative inference would increase the likelihood of wrongly convicting the innocent either by (1) permitting

²²⁸ Berger, *supra* note 226, at 253.

²²⁹ *Id.*

²³⁰ Criminal Evidence (Northern Ireland) Order, 1988, SI 1988/1987 (N. Ir. 20).

²³¹ Berger, *supra* note 226, at 254.

²³² *Id.* at 254–55.

²³³ *Id.* at 255.

²³⁴ *Id.* at 254.

²³⁵ ZANDER, *supra* note 220, at 158.

²³⁶ *Id.* at 158–59.

²³⁷ Zander, *supra* note 221, at 666.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 666–67.

an inference of guilt based on silence that was not empirically strong; or (2) forcing the otherwise vulnerable to testify before the jury.²⁴¹ Others argued that a new law would shift the burden of proof from the prosecution by requiring a silent defendant to give a reason for the silence.²⁴² Proponents argued that the then-existing law ignored common sense and allowed criminals and terrorists to “make a mockery of [the British] system of . . . justice.”²⁴³ They also argued that it was reasonable to expect an accused person to offer an explanation of incriminating circumstances and thus that there was no reason not to allow a jury or court to take the absence of such an explanation into account.²⁴⁴ Proponents disagreed that the new law would abolish the right to silence: the right to silence would remain, and no one would be compelled to give any evidence.²⁴⁵

The Runciman Commission reached the same conclusion as the earlier Philips Commission and recommended, by a vote of 9 to 2, that the existing right to silence be maintained.²⁴⁶ However, the Home Secretary announced that he intended to adopt the view of the minority.²⁴⁷ According to him, “The so-called right to silence is ruthlessly exploited by terrorists. What fools they must think we are. It’s time to call a halt to this charade. The so-called right to silence will be abolished.”²⁴⁸ The next year, Parliament passed the Criminal Justice and Public Order Act 1994 (CJPOA).²⁴⁹ In that statute, the provisions of the Northern Ireland Order were extended to all criminal cases in England and Wales.²⁵⁰

Section 34 of that CJPOA permits the drawing of a negative inference based on a suspect’s failure to mention any fact on which he relies at trial.²⁵¹ Thus, for example, if a suspect remains silent and then continues that silence as a defendant at trial, no negative inference is allowed. However, the Act also permits a negative inference to be drawn based on a defendant’s failure to testify at trial.²⁵²

The House of Lords upheld this provision in *Murray v. Director of Public Prosecutions*.²⁵³ Thereafter, the European Court of Human Rights upheld it against

²⁴¹ *Id.* at 665.

²⁴² *Id.* at 666.

²⁴³ Chase, *supra* note 81, at 938 (quoting 237 PARL. DEB., H.C. (6th Ser.) (1994) 430).

²⁴⁴ Zander, *supra* note 221, at 667–68, 670.

²⁴⁵ *Id.* at 666–67.

²⁴⁶ *Id.* at 667.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Criminal Justice and Public Order Act, 1994, c. 33 (Eng.) [hereinafter “CJPOA”].

²⁵¹ *Id.* § 34(1). Accordingly, the U.K. version of the U.S. Miranda warnings reads: “You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.” Police and Criminal Evidence Act, 1984, c. 60 (Code C, para. 10.5.); ZANDER, *supra* note 220, at 160.

²⁵² CJPOA § 35(2); ZANDER, *supra* note 220, at 443–44.

²⁵³ *Murray v. D.P.P.*, [1992] A.C. 1 (H.L.) (U.K.).

a claim that the drawing of adverse inferences from the accused's silence violated Article 6 of the European Convention of Human Rights.²⁵⁴

Several limitations exist in the Act. First, it is clear that a finding of guilt may not rest solely on an inference based on the defendant's failure to testify;²⁵⁵ nor may the inference assist the prosecution to make out a *prima facie* case.²⁵⁶ Moreover, a court may still instruct a jury against drawing an adverse inference if there is an evidentiary basis for doing so or some exceptional factor in the case makes that the fair course to take.²⁵⁷ However, no standards for exercising this discretion are laid out in the Act. In this connection, the courts have held that the fact that a defendant may decide not to testify because he may be cross-examined as to his bad character is relevant, but is not in and of itself sufficient to avoid the usual negative inference instruction.²⁵⁸

In 1998, in response to a deadly terrorist bombing in Omagh, Northern Ireland, the British government submitted what was ultimately enacted as the Criminal Justice (Terrorism and Conspiracy) Act 1998.²⁵⁹ This act is applicable only to Northern Ireland terrorism prosecutions, which are defined under other, earlier legislation.²⁶⁰ The Act permits a fact finder evaluating alleged membership in a terrorist organization to draw adverse inferences from an accused's failure to mention any fact material to any question asked that "he would reasonably [have] been expected to answer."²⁶¹ The only condition is that he be "charged, informed that he might be prosecuted, or was being questioned under caution by an officer for a covered offense."²⁶² Unlike the CJPOA, the negative inference is not limited to those trials at which a fact is subsequently relied upon by the defendant that had not been mentioned earlier.²⁶³ By this extension of the earlier Act, the adverse inference can be drawn whenever a suspect fails to provide information to the police.²⁶⁴ Interestingly, although the CJPOA was passed under a conservative government, this extension was passed under a liberal government.²⁶⁵

IV. EXPLAINING THE DIFFERENT APPROACHES

Several reasons help to explain why the United States and the United Kingdom have adopted different approaches to the no-comment rule. Chief among them are: (1) the difference between U.S. Constitutional supremacy and U.K. Parliamentary

²⁵⁴ *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29 (1996).

²⁵⁵ CJPOA § 38(3); *R v. Cowan*, (1996) Q.B. 373 (U.K.).

²⁵⁶ CJPOA § 34(2)(c); *Cowan*, Q.B. at 373-74;.

²⁵⁷ ZANDER, *supra* note 220, at 444.

²⁵⁸ *R v. Taylor*, 1999 CRIM. L.R. 77.

²⁵⁹ *Berger*, *supra* note 226, at 266.

²⁶⁰ *Id.* at 266 & n.101.

²⁶¹ *Id.* at 266 & n.102.

²⁶² *Id.* at 266.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

supremacy; (2) the complex problems of federalism in the United States; (3) the U.S. historical experience in the protection of individual rights against state encroachment; (4) the U.K.'s monarchy and class structure; and (5) the U.K.'s exposure to domestic terrorism.

A. *Constitutional v. Parliamentary Supremacy*

In the United States, the Constitution is the supreme law of the land. Any law passed by Congress is subject to judicial review for constitutionality. If a statute is found to be unconstitutional, Congress must enact a new one.²⁶⁶ In the United Kingdom, however, until recently, there was no written constitution. Parliament was supreme, and there was no provision for judicial review of statutes. If appropriate fact finding and new policy judgments dictate the passage by Parliament of a new law, no precedent prevents it or effects its contents.

In the United States, of course, that is not the case. In *Griffin*, for example, the Court had to wrestle not only with the simple question of whether the no-comment rule was wise policy; it had to determine that question in light of its precedent on federalism. The first judgment is legislative, the second, judicial. The first is much easier to change, as social circumstances change; the second, being bound by precedent and laden with federalism concerns, is much more difficult.

B. *Federalism*

One way to look at *Griffin* is that it was the result of the Court's attempt, through selective incorporation, to set a constitutional minimum for state criminal proceedings at a time when constitutional protections were otherwise missing from state proceedings. Much has been written about the selective incorporation debate.²⁶⁷ Briefly, over the course of many decisions, the Supreme Court held that most parts of the first eight amendments should be absorbed through the Fourteenth Amendment Due Process Clause and were thus binding on the states.²⁶⁸ Ultimately, however, as part of that absorptive process, the Court held that the full extent of the specific right as it applied to the federal courts was also binding on the states.²⁶⁹ Thus, whatever interpretation of the specific right applied in the federal courts was also deemed to apply to the states through the Due Process Clause.

As many justices and commentators have noted, this approach was no more than a compromise without historical or analytic support.²⁷⁰ It also drastically altered the

²⁶⁶ *Id.* at 245–46.

²⁶⁷ See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

²⁶⁸ *Id.* at 934.

²⁶⁹ *Id.* at 933.

²⁷⁰ *Id.* at 934.

federalist system set up by the Constitution, by virtue of which the states were supposed to serve as laboratories; the states were to have the freedom to vary their procedures consistent with a minimum standard of fundamental fairness.²⁷¹ Arguably, as a result of incorporation, the states have been forced into uniformity.

Of course, the doctrine of incorporation applied only to the Bill of Rights. It did not bind the states to federal procedural statutes, rules of evidence, or exercises of the federal court's supervisory power. Thus, when Congress passed 18 U.S.C. § 3481, which abolished the disqualification of the defendant as a witness and included the no-comment rule, that new statute applied only to the Federal courts.²⁷² Just like any other act of Congress, it had no applicability to state courts. When, in *Griffin*, the Supreme Court was asked to review a state statute that disagreed with the federal statutory no-comment rule, it had already decided (in *Malloy*) that the state and federal Fifth Amendment standards had to be exactly the same.²⁷³ Having taken that step, it was a short additional, if erroneous, step to the conclusion that the Fifth Amendment required states to adopt the statutory no-inference rule under the doctrine of selective incorporation. Indeed, that is exactly how the *Griffin* majority opinion reads: it substitutes the language of the Fifth Amendment for the federal statute.²⁷⁴

C. The Relative Importance of Individual Rights

As noted above,²⁷⁵ British colonial Americans claimed the rights of British citizens. In addition, however, they sought to protect those rights against increasingly intrusive encroachments by the far-away monarch. In short, the United States was born out of revolt against the arbitrary power of central authority. For more than two centuries, the distrust of the state and the protection of the individual from encroachment by the state has continued to be a dominant concern in U.S. jurisprudence. Interestingly, the Fifth Amendment gained renewed respect during the McCarthy period, when it was publicly invoked against the persecution of the House Un-American Activities Committee in the period just before *Griffin* reconsidered its constitutional status.²⁷⁶

The extent to which geography and location influenced these values is clear. North America was far away. Once the British began to use English judges to try the colonists, or even to require the colonists to be tried in England, the injustice became apparent: they were there and we were here. In addition, North America was very, very big. One of the causes of the revolution was the King's refusal to let the colonists settle

²⁷¹ *Id.* at 936–38.

²⁷² See 18 U.S.C. § 3481 (2000).

²⁷³ *Griffin v. California*, 380 U.S. 609, 615 (1965).

²⁷⁴ *Griffin*, 380 U.S. at 613–14 (“If the words ‘Fifth Amendment’ are substituted for ‘act’ and for ‘statute,’ the spirit of the Self-Incrimination Clause is reflected.”).

²⁷⁵ See *supra* pp. 932–33.

²⁷⁶ See *Friendly*, *supra* note 1, at 671 (the history of the privilege includes defending it “against the opprobrium that Senator Joseph McCarthy and others sought to heap on many who properly invoked it”).

west of the Appalachian Mountains.²⁷⁷ This must of course have seemed arbitrary, too, since there was so much land and so much opportunity. The sense of an inherent right to this limitless opportunity free from the state's intrusion has always characterized the U.S. personality.

The United Kingdom's political and geographic experiences are quite different. British citizens are, and have always been, subjects. Far from rebelling against centralized authority, they consider themselves subjects of the monarchy, the antithesis of the U.S. 'individual rights' mentality. Moreover, in comparison to the United States, the country is small and densely populated. As a result, U.K. citizens demand more of each other, and are willing to give up more to maintain social cohesion. Aside from the far-flung, historical empire, there is no open frontier for expansion.

Socially, of course, the countries are also very different. Throughout most of its history, the United States has not had a rigid class structure. Importantly, mobility between the classes has always been considered theoretically possible and every individual entitled to seek it. The Horatio Alger story has always been a central cultural theme. U.K. society has never been that way. Because of the long-standing class structure in England, the English do not have a social experience of limitless opportunity. There is little social mobility; thus expectations of any individual's opportunity for social mobility are extremely limited.

D. Domestic Terrorism

As noted above, the United Kingdom's decision to allow a negative inference from silence arose directly in response to IRA terrorism in Northern Ireland.²⁷⁸ The changes were first applied in Northern Ireland in 1988; six years later, rising crime rates led Parliament to expand the rules to everyone charged with a crime in England and Wales, rules that had before only seemed appropriate for terrorists.²⁷⁹ Ultimately, the idea simply became more acceptable, and the balance between public safety and individual freedoms dictated the choice by Parliament to permit the drawing of adverse inferences from silence in all criminal trials.

V. THE UNCERTAIN FUTURE OF *GRIFFIN V. CALIFORNIA*

As noted above, the *Griffin* decision has always been subject to substantial criticism. Four factors place it in unique jeopardy now. First, commentators and dissenting judges have identified its analytical vulnerability, i.e. lack of textual support, its illogic and its conflation of statutory and constitutional rules. Second, critics have traced its lack of historical support.²⁸⁰ Its text repeatedly has been deemed inconsistent with its

²⁷⁷ H. COMMANGER, DOCUMENTS OF AMERICAN HISTORY 48–50 (8th ed. 1968).

²⁷⁸ See *supra* Part III.A.

²⁷⁹ Chase, *supra* note 81, at 930.

²⁸⁰ See *supra* Part II.A.1.

history, its history with its underlying policy, and its policy inconsistent with its text.²⁸¹ Third, the right to silence operates aggressively in opposition to the search for truth.²⁸² Importantly, as well, it has been recognized many times that the Fifth Amendment is uniquely responsive to contemporary events.²⁸³ Fourth, given the Court's modern conservative leanings, the Fifth Amendment's unique responsiveness to contemporary events, and the modern threat of terrorism, it is likely that the conservative course pursued in the United Kingdom and predicted by Wigmore will occur here.²⁸⁴ The no-comment rule may not survive.

A. Griffin's *Analytic Vulnerability*

As Justice Scalia pointed out in his dissent in *Mitchell*, the text of the Fifth Amendment does not support the conclusion that it prohibits adverse comment on silence.²⁸⁵ The language prohibits compulsion; in the no-comment situation, the defendant is not being compelled to testify at all.²⁸⁶

Moreover, while the *Griffin* majority viewed jury instructions as a penalty for the exercise of the right to silence, in some senses it may cabin the fact-finders use of silence in a way that is helpful to the defendant. After *Griffin*, a judge can instruct the jurors that they may not base a guilty verdict on the defendant's silence, that silence may only be used in determining the credibility of evidence as to which the defendant would have information, and that the prosecution bears the burden of proof nonetheless.²⁸⁷ Without such instructions, a jury could use a defendant's silence to support a conclusion of guilt. Even if the comment rule is viewed as a penalty, however, which in effect compels a defendant to testify to avoid it, the penalty is too minimal to be of constitutional dimension; the inference of guilt from silence is one that the jury will draw regardless of a court or prosecutor's comments.

Closely connected to this criticism is the claim that prohibiting an adverse inference from silence is illogical. It is undisputed that evidence of a defendant's conduct generally is admissible.²⁸⁸ The evidentiary significance of silence in the face of accusation is also well-established.²⁸⁹ When a person remains silent in the face of accusation, that conduct is deemed to be acquiescence. The Supreme Court has

²⁸¹ See, e.g., Dep't of Justice, Office of Legal Policy, *Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1009–11 (1989) [hereinafter DOJ Report]; Friendly, *supra* note 1; McKay, *supra* note 2.

²⁸² See, e.g., *Mitchell v. United States*, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting); DOJ Report, *supra* note 281, at 1007; Friendly, *supra* note 1.

²⁸³ See, e.g., Friendly, *supra* note 1, at 677 n.33, and cases cited therein.

²⁸⁴ See *supra* note 13.

²⁸⁵ *Mitchell*, 526 U.S. at 331.

²⁸⁶ *Id.* at 341.

²⁸⁷ *Griffin v. California*, 380 U.S. 609, 615 (1965).

²⁸⁸ DOJ Report, *supra* note 281, at 1010.

²⁸⁹ *Id.* at 1049, 1099.

also held that, where a defendant testifies but refuses to answer certain questions, that silence may be commented upon before the jury.²⁹⁰ Similarly, where a defendant fails to testify at his first trial, but testifies at a retrial, his silence at the first trial may be used in evidence at his second trial.²⁹¹ Most recently, the *Mitchell* majority, while extending the no-comment rule to the facts underlying sentence, left open the possibility that comment could be made on a defendant's silence as to other facts, implicitly recognizing that silence can be probative of guilt.²⁹² These rulings indicate that the Court may indeed conclude that silence has some evidentiary significance in fact. Moreover, it is generally permissible to ask the jury to draw an adverse inference where a party fails to proffer a witness or other source of proof that is within his control and that could offer favorable, relevant evidence.²⁹³ Adverse comment on a party's silence is also permitted in clemency cases, deportation proceedings, and prison disciplinary actions.²⁹⁴ Yet the no-comment rule essentially requires that jurors leave the natural relevance of such evidence behind.

Moreover, as Justice Scalia so succinctly put it, "in a breathtaking act of sorcery [*Griffin*] simply transformed legislative policy into constitutional command."²⁹⁵ While the Court relied upon its then-recent holding in *Malloy v. Hogan* that the Fifth Amendment was to bind the states to the same standards to which it bound the Federal courts,²⁹⁶ *Malloy* did not apply to statutory standards, but only to constitutional ones. Incorporation through the Due Process Clause was never meant to require the states to conform to acts of Congress.

B. Griffin's Lack of Historical Support

It is difficult to discern historical support for the no-comment rule. Negative inferences from silence were indeed permitted throughout history until they were prohibited by statute in 1878.²⁹⁷ For most of that history, defendants were disqualified from

²⁹⁰ *Caminetti v. United States*, 242 U.S. 470, 493 (1917) (upholding jury instruction where defendant testified that, "if he has failed to deny or explain acts of an incriminating nature," comment and consideration by the jury would be proper "since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so").

²⁹¹ *Raffel v. United States*, 271 U.S. 494 (1926); *see also* *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

²⁹² *Mitchell v. United States*, 526 U.S. 314, 320 (1999).

²⁹³ DOJ Report, *supra* note 281, at 1010.

²⁹⁴ For a list of these types of cases, *see Mitchell*, 526 U.S. at 1337–38 (Scalia, J., dissenting).

²⁹⁵ *Mitchell*, 526 U.S. at 336. In *Griffin*, the Court held that, "[i]f the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." *Griffin v. California*, 380 U.S. 609, 613–14 (1965).

²⁹⁶ 378 U.S. 1, 8–11 (1964).

²⁹⁷ *See supra* note 72 and accompanying text.

testifying under oath based on interest, but negative inferences at trial were routinely drawn from their failure to speak before trial when questioned by a magistrate under the Marian Committal Statute.²⁹⁸ In addition, because there was no right to counsel, defendants were expected to speak, albeit unsworn; the failure to answer questions was deemed to support the conclusion that the defendant could not deny the truth.²⁹⁹ In any event, without counsel, silence was suicidal, and so most defendants chose to speak.³⁰⁰

Thus, at the time the Fifth Amendment was passed, the colonists were concerned with something else: the not-so-distant memory of compulsion by oath or torture and the then-current unrestrained power of the distant King and his judges.³⁰¹ Negative inferences based on silence were routinely drawn. It is undisputed that the Fifth Amendment was not meant to be a mechanism for law reform, but rather to protect the individual against the power of the King.³⁰²

History establishes that it was not until Congress and the states began to enact statutes rescinding the disqualification for interest that the no-comment question ever arose.³⁰³ Although these statutes were passed, the provision prohibiting adverse inferences was criticized by uniquely respected judges, professional organizations, and commentators.³⁰⁴ That criticism has continued unabated to the present.³⁰⁵

Moreover, the privilege itself was created to prevent punishment for religious and private beliefs.³⁰⁶ It continued as a protection against a distant and arbitrary monarch.³⁰⁷ It gained respect during the McCarthy period as a protection against political persecution.³⁰⁸ One must seriously ask whether these historical contexts and the values they represent necessarily required that the privilege and its no-comment rule be adopted in full through selective incorporation in state proceedings involving, as they generally do, murder, rape, robbery, burglary and other serious crimes.³⁰⁹ Now, of course, the question is even more stark; should the history of the privilege in preventing religious and political persecution apply in cases involving terrorism?

²⁹⁸ See *supra* note 38 and accompanying text.

²⁹⁹ See *supra* note 44 and accompanying text.

³⁰⁰ See *supra* note 45 and accompanying text.

³⁰¹ See *supra* notes 47–51 and accompanying text.

³⁰² See *supra* notes 57–58 and accompanying text.

³⁰³ See *supra* Part I.F.2.

³⁰⁴ See, e.g., *Griffin v. California*, 380 U.S. 609 (1965).

³⁰⁵ See, e.g., *Mitchell v. United States*, 526 U.S. 314 (1999).

³⁰⁶ Friendly, *supra* note 1, at 678.

³⁰⁷ HELMHOLZ ET AL., *supra* note 17, at 131–32.

³⁰⁸ Friendly, *supra* note 1, at 671.

³⁰⁹ See *id.* at 678–79 (“While no one could sustain the thesis that in 1789 the privilege was limited to political and religious crimes, neither can anyone demonstrate that it would ever have come into existence if its proponents had been murderers and rapists rather than John Lilburne in London and William Bradford in Philadelphia.”).

C. *Evolving Supreme Court Standards*

1. The Ascendancy of Accuracy

Accuracy, fairness, federalism, efficiency, and the protection of the individual against the state are all values underlying the U.S. adversary system.³¹⁰ Over the years, the Supreme Court's balance of these values has changed. When *Griffin* was decided, in the Warren Court era, the Court was attempting to create a constitutional minimum for the entire country, and the balance favored fairness and individual/state protection. The incorporation doctrine reflected this, based as it was on determining which enumerated rights were essential to fundamental fairness.³¹¹ *Griffin* was a product of that jurisprudential thinking.

Over the years, the Supreme Court's balance of these factors has changed. As a result of incorporation, the Court has had to contend with the effects of its decisions on a huge volume of dangerous state crimes, and, in response, has veered away from fairness and individual autonomy in favor of state's rights, accuracy, and efficiency. No longer concerned about conformity to a minimum of fairness among the states, the Court's focus has been on federalism—allowing the states more leeway in setting their own criminal justice standards to deal with their own serious public safety concerns.³¹²

Thus, to the extent that the no-comment rule is not about protecting the innocent from wrongful conviction, it will receive less protection.³¹³ It has become a right of individual autonomy, a right to be left alone by the government³¹⁴ and a right to require the government to “shoulder the entire load.”³¹⁵ None of these values relate to accuracy in truth-seeking.³¹⁶

Indeed, the right to silence interferes with the accuracy, or truth-seeking function of a trial. The defendant is one of the best sources of evidence, and is indeed, used as the best source of evidence in an inquisitorial justice system. The fact that a defendant

³¹⁰ See, e.g., JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 51–57 (2003).

³¹¹ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³¹² See, e.g., *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

³¹³ *Tehan v. Shott*, 382 U.S. 406, 415 (1966).

³¹⁴ *Id.* at 414 n.12.

³¹⁵ *Id.* at 415.

³¹⁶ The purpose of the no-comment rule

is to be found in the whole complex of values that the privilege against self-incrimination itself represents, values described in the *Malloy* case as reflecting “recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.”

Id. at 414 (quoting *Malloy v. Hogan*, 378 U.S. 1, 7–8 (1964)).

may, with impunity, remain silent hinders both investigatory efforts and truth-seeking efforts. As such, it is a natural target to those concerned with the threat of terrorism.

2. The Ascendancy of History and Text

Another analytic trend appears to be in the making: the ascendancy of history and text over underlying purpose as the basis for constitutional interpretation. For example, in *Crawford v. Washington*,³¹⁷ the conservative justices on the Court brought to a screeching halt the Court's modern Confrontation Clause jurisprudence as it applied to the relationship between the Confrontation Clause and the hearsay rule.³¹⁸ Over the course of many decisions over many years, the Court had held that the underlying purpose of the Confrontation Clause was to ensure reliability of evidence and thus that the admission of hearsay did not violate the Clause as long as the evidence was reliable.³¹⁹ Instead, in *Crawford* the Court held that history and text supported the conclusion that the Confrontation Clause required cross-examination of any hearsay evidence that could be characterized as "testimonial," *e.g.*, prior testimony, depositions, affidavits, statements to police, and the like, and had no relevance whatsoever to any other form of hearsay proof.³²⁰ Were a similar abrupt shift in analysis to occur with respect to the no-comment rule, its support would be further weakened.

D. Domestic Terrorism

One need look no further than the United Kingdom to see that the public threat of domestic terrorism can have a major impact on the balance of criminal justice values. The first Parliamentary inroads on the no-comment rule were made in Northern Ireland in response to IRA terrorism.³²¹ These changes were made despite a background of long standing social and political opposition to suggestions for similar change.³²² From there, the Northern Ireland rules were applied throughout the United Kingdom.³²³

There is reason to believe that the same re-balancing of values will occur in the United States. As noted above, the privilege has been viewed as uniquely responsive to contemporary events. Its historical underpinnings would require it to prevent religious and political persecution, and even the arbitrary power of the state in state criminal prosecutions. But, despite the value of individual autonomy, terrorism may push the privilege beyond where it can go. This is what happened in the United Kingdom.

³¹⁷ 541 U.S. 36 (2004).

³¹⁸ *Id.*

³¹⁹ *See, e.g.,* *Ohio v. Roberts*, 448 U.S. 56, 57 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

³²⁰ *Crawford*, 541 U.S. at 43–52.

³²¹ *See supra* Part IV.D.

³²² *See supra* Part III.A.

³²³ *Id.*

There are signs that the United States is not immune from these changes. Indeed, the passage and extension of the Patriot Act, with its information-gathering provisions, and the ultimate acceptance of the President's program of warrantless eavesdropping show that increased concern about public safety has already caused a rebalancing of values.³²⁴ This rebalancing has resulted in a new individual-versus-the-state calculus and accompanying limitations on personal autonomy. The already vulnerable privilege against self-incrimination, particularly its no-comment rule, may well be the next victim.

On the other hand, in *Mitchell*, the Supreme Court majority took a stand in favor of the no-comment rule as an essential component of the U.S. accusatorial system, a component of the system that reinforces the government's burden of proof and the requirement that it shoulder that burden entirely without the assistance of the defendant. To continue its narrow margin, the Supreme Court justices in the majority should emphasize the consistent historical evidence of that role. Even in its present, more conservative and fearful state of mind, mainstream U.S. opinion would likely still reject the image of a prosecutor using a defendant's decision to remain silent—the statement “Prove your case against me”—as actual evidence of guilt.

CONCLUSION

Griffin's no-comment rule has never faced a challenge as daunting as that posed by modern domestic terrorism. Although *Griffin* was recently reaffirmed and extended to sentencing in *Mitchell*, it garnered the narrowest majority, at least one justice is prepared to overrule it, and three others doubt its analytic integrity. To the extent that the Supreme Court's support for the rule is based neither on text nor history, it has been criticized and continues to be vulnerable.

If the United States follows the path the United Kingdom chose to take in response to domestic terrorism and retools its individual/state calculus, the no-comment rule may not survive. However, the United States has a written Constitutional provision preventing self-incrimination. And, for several social, demographic, and political reasons, individual rights are more valued in the United States than in the United Kingdom's equation. As in *Mitchell*, judicial adherence to core U.S. values concerning the relationship of the state and the individual would preserve the no-comment rule. These values were present when the United States was formed and are firmly grounded in United States history.

³²⁴ See, e.g., *Bush Holds Press Conference, Aggressively Defends NSA Eavesdropping, Patriot Act*, WHITE HOUSE BULL., Dec. 19, 2005; Maura Reynolds, *Renewal of Patriot Act Passes Senate*, L.A. TIMES, Mar. 3, 2006, at A1; Scott Shane, *N.S.A. Audit of Spying Is Not Assessing Legality*, N.Y. TIMES, Jan. 11, 2006, at A19; Sheryl Gay Stolberg, *Republican Speaks Up, Leading Others to Challenge Wiretaps*, N.Y. TIMES, Feb. 11, 2006, at A1; Editorial, *This Call May Be Monitored . . .*, N.Y. TIMES, Dec. 18, 2005, § 4, 11; see also Douglas C. McNabb & Matthew R. McNabb, *Of Bugs, The President, and the NSA: National Security Agency Intercepts Within the United States*, THE CHAMPION, March 2006, at 10.