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Prosecutorial Comment and Judicial Instruction on a Defendant's Failure to Testify: In Support of a Liberal Application of the Fifth Amendment

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NOTES

PROSECUTORIAL COMMENT AND JUDICIAL INSTRUCTION ON A DEFENDANT'S FAILURE TO TESTIFY: IN SUPPORT OF A LIBERAL APPLICATION OF THE FIFTH AMENDMENT.

INTRODUCTION

The scope of the privilege against self-incrimination, secured by the fifth amendment, generally has undergone a liberal expansion from its early history to the present. The privilege has been enhanced and influenced by liberal policy justifications which have emphasized protection of the individual.[1] Recent Supreme Court decisions, however, have reversed this trend.[2] The Burger Court has tended toward a conservative application of the privilege by ignoring or construing narrowly the underlying policies of the privilege.[3] This narrowing of the fifth amendment privilege has seriously affected the right of the defendant not to have his silence commented upon by the State.

The privilege against self-incrimination developed in England as a weapon against torture and unjust incarceration of the accused.[4] Although such inhumane practices generally were not followed in colonial America, the privilege was used as a means of preventing unfair trial procedure. The framers of the Constitution, by incorporating the privilege into the fifth amendment, acknowledged that the right against compulsory self-incrimination was essential to criminal justice.

In its beginning, the privilege against self-incrimination applied only to the federal courts since the states exercised sovereign control over state criminal proceedings.[5] This policy of comity, however, became overshadowed by concerns for indivdual rights as a basis for expanding the scope of the fifth amendment to the states.[6] These

1. *See* notes 82-92 *infra* and accompanying text.
2. *See* notes 114 and 220 *infra* and accompanying text.
3. *See* notes 219-33 *infra* and accompanying text.
4. *See* notes 18-20 *infra* and accompanying text.
5. *See* notes 45-61 *infra* and accompanying text.
6. Briefly, these policies, are as follows: preservation of an accusatory

concerns also provided the impetus for expanding the scope of the privilege to many areas of criminal procedure. Of particular concern, for example, was the practice among many state prosecutors and judges of commenting on a defendant's failure to testify.[7] This conduct was held by the Supreme Court to be an unconstitutional violation of the fifth amendment.[8]

Liberal application of the fifth amendment to comments on a defendant's failure to testify has been curtailed by recent Supreme Court decisions.[9] No longer does the Court look to the policies underlying the privilege against self-incrimination.[10] Instead, in the process of reversing its liberal trend, the Court has placed emphasis on historical limitations of sovereignty and a narrow interpretation of the privilege. This regressive trend has particularly affected the defendant's right against comment on his failure to testify. One result of the Court's present conservatism has been the application of a "harmless error" test to unconstitutional comments.[11] In addition, the Court recently has shown its unwillingness to guarantee further protection against such comments by refusing to hold that jury instructions on the right to remain silent, when given over the defendant's objections, constitute an impermissible violation of his privilege against self-incrimination.

The purpose of this note is to analyze the development of the privilege against self-incrimination and its underlying policies, and to examine their implications for the accused's right against comment on his failure to testify. The discussion is limited in scope to those cases and issues which have developed around the Supreme Court's interpretations of the constitutionality of prosecutorial and judicial comment, and judicial instructions, on the accused's exercise of his right to remain silent.

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judicial system; protection from unjust conviction; maintenance of fair state-individual balance; insurance of a reliable guilt-determination process; preservation of official integrity. For a discussion of the above policies, *see* notes 84-93 *infra* and accompanying text.

7. States which permitted both comment upon and inference from a defendant's failure to testify were California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio. *See* Note, *Griffin v. California, Comment on An Accused's Failure to Testify Prohibited by the Fifth Amendment*, 70 DICK. L. REV. 98 n.5 (1965).

8. *See* text discussion of Griffin v. California, 380 U.S. 609 (1965), *infra* accompanying notes 101-07.

9. *See* notes 118-23 and 221-31 *infra* and accompanying text.

10. *See* notes 118-23 and 229-31 *infra* and accompanying text.

11. For full discussion of the harmless error rule as applied to unconstitutional comment *see* notes 118-57 *infra* and accompanying text.

HISTORY AND EARLY POLICY OF THE PRIVILEGE

The privilege against self-incrimination developed over many centuries of judicial history and has gone through a number of transformations and interpretations in the process.[12] Despite the long history of the privilege, the records of its development are few in number and sketchy at best. Consequently, historical interpretations have been marked by divergent views.[13] Nevertheless, a brief analysis of the origins of the privilege and the policies surrounding its development may be a valuable tool in understanding the present scope and meaning of the right against self-incrimination and the defendant's right against comment on his courtroom silence.[14]

Struggle between the royal government and the Church of England marked the origins of the privilege against self-incrimination, and only later did this right become an integral element of judicial due process. The main dispute centered around the oath *ex officio mero*.[15] Resistance to the oath had been primarily a jurisdictional struggle between the State and the ordinary church, and between the ecclesiastical and the common law courts.[16] But thereafter, as governmental courts were gaining ground, the objections against compulsory self-accusation focused upon the methods used in criminal proceedings.

In the early 1500's the focus of the privilege shifted with the establishment of two new courts used for essentially political purposes.[17] The government of Charles I had embarked on an anti-Puritan program which embittered many segments of the popula-

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12. *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT, THE RIGHT AGAINST SELF-INCRIMINATION (1968) [hereinafter cited as LEVY]; 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE].

13. *Compare* WIGMORE, *supra* note 12, *with* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination*, 21 VA. L. REV. 763 (1935).

14. Thompson, *Judge Friendly's Amendment to the Fifth Amendment: A Comment on a Recent Criticism of the Supreme Court*, 38 U. CIN. L. REV. 488, 493 (1969). Thompson suggests that the central focus should be on the policies behind the privilege.

15. The oath *ex officio* was a proceeding frequently used by ecclesiastical courts whereby an accused was required to answer all questions asked of him by an inquisitor, no matter how incriminating. *See* WIGMORE, *supra* note 12, § 2250, at 276.

16. WIGMORE, *supra* note 12, § 2250, at 272.

17. The Court of High Commission in Causes Ecclesiastical and the Court of Star Chamber raised special antagonism during Charles I's reign. These courts, both carrying out ecclesiastical rules, vigorously used the *ex officio* oath to destroy heresy. *Id.* at 278-79.

tion, and the struggle against self-accusation became enmeshed in the fight for religious and political freedom.[18] In policing the dioceses, the High Commission conducted inquisitions and used the *ex officio* oaths as the "instruments of these persecutions."[19] The theory of the Commission, which has been echoed today, was that an innocent man had nothing to hide and the truth could not hurt him. Further, the Commission reasoned that only the guilty defendant had reason to refuse the oath and could not thereafter claim injustice when convicted as if he had confessed.[20] This theory provided the rationale for governmental persecution of political and religious dissidents through judicial means.

The courts wielded their persecutory powers under the oath for over one and a half centuries until a feisty and embittered Puritan, John Lilburn, "focused the attention of the whole of England on the injustice of forcing a man to be a means of his own undoing."[21] His famous case[22] in 1641 was the primary cause of the oath's abolition. One of Lilburn's central objections was that he had been denied due process under the law by violations of his right not to be asked questions concerning himself. Parliament decided that his sentence had been illegal, and abolished further administration of the *ex officio* oath.[23] Thereafter, the privilege against self-incrimination became an established rule of the common law.

The right against self-incrimination, enhanced and influenced by other underlying principles and concepts,[24] soon received a more liberal treatment from the courts. One significant development was extension of the privilege to protect a person from being compelled to testify as to matters that merely tended to disgrace him.[25] In fact,

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18. LEVY, *supra* note 12, at 265.

19. Thompson, *supra* note 14, at 489. The Commission would give the oath and require the accused to give a complete and truthful testimony under penalty of death for swearing falsely. *See* WIGMORE, *supra* note 12, § 2250, at 279.

20. LEVY, *supra* note 12, at 269.

21. *Id.* at 271.

22. Lilburn's Trial, 3 How. St. Tr. (1637-45). For a summary of the trial, *see* WIGMORE, *supra* note 12, § 2250 at 782-83.

23. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 115, at 246 (2d ed. 1972) [hereinafter cited as MCCORMICK].

24. Such underlying policies were as follows: an accused is innocent until proven guilty; a person's home should not be searched for papers or documents; torture or cruelty in forcing confessions is illegal; policies of individual freedom and dignity. *See* LEVY, *supra* note 12, at 331; MCCORMICK, *supra* note 23, at 247.

25. The courts also extended the privilege to civil actions, and eventually to papers and documents. LEVY, *supra* note 12, at 317-19; MCCORMICK, *supra* note 23, at 246.

the courts had become so concerned with protecting the right of the accused that the defendant was not permitted to testify on his own behalf.[26] The courts fully accepted the liberal construction given to the privilege, and by the end of the seventeenth century the accused's right against self-incrimination had become part of the due process of law and a fundamental principle of the accusatorial system.[27]

Firmly established in England by the seventeenth century, the privilege against self-incrimination was inherited by the new colonies as part of the common law. The right emerged from circumstances similar to the religious and political turmoil in England.[28] Many of the colonial states had procedural rules that allowed practices similar to the *ex officio* oath, and by the mid-seventeenth century, Puritans who protested forced compliance with an established church demanded protection against self-accusation. As a consequence of such demands, most New England colonies had adopted the privilege by the late 1600's.[29]

As the freedom from self-incrimination became an established and respected right, the courts developed and liberalized the privilege to fit the changing values of the colonists.[30] To the colonial courts, the privilege against self-incrimination meant protection from punishment, forfeiture, or penalty which might force an individual to accuse himself. Later the scope of the privilege was further liberalized by the Bill of Rights.[31] The unique phrase in the Bill, that no one could be compelled to be a witness against himself, was an emphatic step toward a more liberal application of the right.[32]

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26. The reason for the rule was twofold: the defendant would give false testimony since he had a personal stake in the outcome of the trial; and the defendant should be protected from cross-examination to which he might give self-incriminatory responses. LEVY, *supra* note 12, at 327-28. Levy notes further that these divergent principles work toward a common end which was to prevent the accused from being subjected to questions which would lead to self-incriminating answers.

27. *Id.* at 332.

28. America had its share of political and religious problems. The laws against treason and sedition were strictly enforced, and the Non-Conformists were persecuted. *See* Pittman, *supra* note 13, at 775.

29. *Id.* at 775-79; LEVY, *supra* note 12, at 367-68.

30. For the early colonies the privilege was against compulsory self-accusation, and could be invoked by the defendant only during preliminary examinations. The defendant was deprived of counsel, and was subjected to comments and questions from opposing counsel and the court. *See* LEVY, *supra* note 12, at 375.

31. U.S. CONST. amend. I-X.

32. This phrase "[i]mports a principle of wider reach, applicable . . . to the self-production of any adverse evidence that made one the herald of his own infamy, thereby disgracing him." LEVY, *supra* note 12, at 427.

Little debate surrounded the incorporation of the phrase into the Constitution; this fact alone exemplifies the widespread acceptance and respect for such a fundamental right.[33] The privilege embraced by the Constitution had changed significantly from its colonial construction. It had become a flexible right not limited to a ban on torture, but including also the basic belief that an accused should not be forced to aid the state in his own conviction.[34]

The foregoing historical overview affords only a glimpse into the way underlying values and policies shaped and influenced the privilege against self-incrimination. Such an overview, however, demonstrates that the framers of the Constitution inherited a flexible right to be applied in any manner to further due process. The framers did not intend that the phrase "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" be applied in a vacuum. Rather, they most likely intended that the seemingly simple phrase be altered and developed by constantly changing values and notions of due process.[35] If there is one essential lesson to be learned by modern courts from the historical development of the fifth amendment, it is that the privilege against self-incrimination is a flexible and fundamental right meant to further the ends of justice and due process under the law.

COMMENT ON DEFENDANT'S FAILURE TO TESTIFY: APPLICATION OF THE PRIVILEGE

The fifth amendment privilege against self-incrimination received widespread approval among the several states, and eventually almost all states incorporated similar clauses into their constitutions.[36] Along with this general acceptance, however, there emerged strong criticism of these constitutional privileges. Opposition to the privilege, ranging from curtailment to abolition of the right,[37] clash-

33. Levy concludes that the right was "simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation." LEVY, *supra* note 12, at 427.

34. *Id.* at 430-31.

35. "Possibly the framers had the foresight to realize that time would change and that this safeguard had to be flexible enough to bend with the needs of a growing, democratic society." Note, 70 DICK. L. REV., *supra* note 7, at 99.

36. All of the original thirteen colonies except New Jersey adopted similar provisions in their state constitutions. Afterwards, as each state was admitted to the Union, all except Iowa adopted similar provisions. *See* WIGMORE, *supra* note 12, § 2252.

37. *See* notes 59-65 *infra* and accompanying text.

ed with new policies emerging as justification for extension of the privilege to many new areas of judicial process.[38]

The Fifth Amendment and the States

Historically, the privilege against self-incrimination affected the defendant only in regard to pre-trial procedure, since he was not permitted to testify on his own behalf until the nineteenth century.[39] The accused could testify as to extenuating circumstances, but the problem of self-incrimination did not arise in this situation.[40] In the mid-nineteenth century, however, almost every state had passed a statute providing the accused with capacity to testify.[41] Since testifying was itself a form of self-incrimination, many states[42] and the federal government passed statutes forbidding comment on a defendant's failure to exercise the right to testify.[43] Generally, most states and the federal government agreed that comment by the judge or prosecutor on the defendant's failure to testify was incongruous with the right against self-incrimination, but the standards of application of that privilege quickly diverged.[44] The principal inquiry, therefore, became whether the privilege was a fundamental, natural right that uniformly extended to the states.

None of the Bill of Rights provisions was applicable to the states.[45] Consequently, the federal government was powerless to force the states to adopt a uniform standard of application of the right against self-incrimination. This situation remained unchanged until the ratification of the fourteenth amendment,[46] which provided that the privileges and immunities granted all citizens should not be abridged by the states.[47] The fourteenth amendment opened the way

38. *See generally* MCCORMICK, supra note 23, § 118, at 251-53; *see also* Thompson, *supra* note 14, at 495-500.

39. *See* MCCORMICK, *supra* note 23, at 246.

40. Note, 70 DICK. L. REV., *supra* note 7, at 100.

41. *E.g.*, MASS. GEN. LAW. ANN. ch. 233, § 20 (Michie/Law Co-op Cum. Supp. 1972); ME. REV. STAT. ANN. tit. 15, § 1315 (West Cum. Supp. 1965-78); PA. STAT. ANN. tit. 19, § 631 (1964).

42. *See* note 7 *supra*.

43. The Act of Congress of March 16, 1878, provided that the accused's "failure to request to be a witness in the case shall *not create any presumption against him.*" Act of March 16, 1878, 20 Stat. 30, ch. 37 (Emphasis in original).

44. Note, 70 DICK. L. REV., *supra* note 7, at 101.

45. In Barron v. City of Baltimore, 10 U.S. (7 Pet.) 243 (1833), the Court urged that none of the Bill of Rights provisions extended to the states.

46. U.S. CONST. amend. XIV.

47. However, in the Slaughter House cases, 83 U.S. (16 Wall.) 36 (1873), the Court interpreted the fourteenth amendment to apply to national citizenship only.

for extending the federal privilege against self-incrimination to the practice among the states of commenting upon a defendant's failure to testify.

In 1893, the issue of comment on an accused's failure to testify reached the Supreme Court for the first time in *Wilson v. United States*.[48] The Court was not faced with the problem of extending the fifth amendment to the states since the case had been brought from the federal courts; nor did the Court have to decide the constitutionality of comments since a federal statute already covered this situation.[49] Nevertheless, *Wilson* was a significant impetus for later widening the scope of the right to remain silent. The Court held that comment which created or tended to create a presumption against the defendant from his failure to testify violated federal law.[50] The decision emphasized that essential to the privilege was the underlying policy that the accused must be protected from danger of unjust conviction. This danger exists when the defendant who has a poor demeanor risks giving the jury a bad impression from his testimony.[51] The Court indicated further that comment on the accused's silence would violate the fifth amendment, since such practice penalizes the defendant for exercising his constitutional right against compulsion to testify.[52] Consequently, the *Wilson* case opened the door for greater protection of the accused's right to remain silent.

Criticism of the federal law prohibiting comments on the defendant's silence, however, increased as the debate sharpened over whether the federal standard should be extended to the states. In 1908, the Court in *Twining v. New Jersey*,[53] was presented with the same problem it confronted nearly forty years later in *Adamson v.*

Also, it was feared that full extension of the Bill of Rights would destroy the balance of power between the federal and state governments.

48. 149 U.S. 60 (1893). The Court held that comment on the accused's failure to testify violated the federal statute prohibiting such comment. *See* note 51 *infra*.

49. *See* note 43 *supra*.

50. 149 U.S. at 67.

51. The Court stated in the *Wilson* case:

> It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him as to increase rather than remove prejudices against him.

Id. at 66.

52. *Id.* at 67.

53. 211 U.S. 78 (1908).

California.[54] The issue presented in both cases was whether a state court's instruction that the jury may draw an unfavorable inference from defendant's failure to testify was a violation of the fifth amendment privilege against self-incrimination. The *Twining* Court assumed, without deciding, that comment on an accused's silence violated the right against self-incrimination.[55] Nevertheless, the Court held that this right was not extended to the states by the fourteenth amendment.[56] In the *Adamson* case,[57] the argument that comment on the accused's silence as allowed by state practice violated the fourteenth amendment was again rejected.[58] Similar to the *Twining* reasoning, the Court assumed that such comment violated the constitutional guarantee against self-incrimination; yet the Court refused to extend this rule to the sovereign states.

The Court's refusal to extend the privilege against self-incrimination received support from many opponents of an expanded constitutional right to remain silent.[59] Proponents of state sovereignty over state criminal procedure generally agreed that the administration of criminal justice in the various states was a matter of purely local concern.[60] The central policy argument for this position, as reflected in *Twining* and *Adamson*, rested on countervailing notions of federalism. Since the Constitution did not demand that the Bill of Rights regulate state courts, it was argued that no state could be compelled by the fifth amendment to prevent comment on an accused's silence.[61] Such practice, therefore, could only be governed by state law.

In addition to the concern for balance between state and federal governments, many opponents of the expanded right called

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54. 332 U.S. 46 (1947).

55. 211 U.S. at 97.

56. The irony of this decision has been pointed out: "*Twining* in effect said that it was permissible for a state to deprive its citizens of rights fundamental to all free men and to do so without its citizens having any recourse except to the very court that had deprived them of that right." Note, 70 DICK. L. REV., *supra* note 7, at 103.

57. The defendant challenged article one, section three of the California Constitution, which permitted a court to instruct the jury that adverse inferences could be drawn from a defendant's failure to testify, and allowed a prosecutor to comment on a defendant's silence.

58. The Court emphasized in *Adamson*, as in *Twining*, its policy of strong federalism.

59. Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932); Dunmore, *Comment on Failure of the Accused to Testify*, 26 YALE L.J. 464 (1917); Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127 (1905).

60. *See* Terry, *supra* note 59, at 129.

61. *Id.*

for a curtailed standard of application.[62] Other critics argued for complete abandonment of the privilege.[63] Several policy reasons were set forth to support their contention that the fifth amendment should not be used to protect an accused from comment on his exercise of the right to remain silent.[64] Opponents argued that historically the privilege against self-incrimination had evolved as a means of preventing the use of physical torture in compelling a person to respond to general inquiries.[65] Since comment on the accused's failure to testify was not *physical* compulsion, they argued, such practice was not barred by the right against self-incrimination.[66] Still others believed that the liberal extension of the privilege served only as an unwarranted protection of the criminal,[67] while circumventing essential prosecutorial techniques.[68] Such was the basis for support of the practice of many states which permitted the court and prosecutor to mention defendant's failure to testify, and allowed the jury to draw inferences from this silence.[69]

In 1964, the Supreme Court in *Malloy v. Hogan*[70] halted the divergent applications of the privilege against self-incrimination by the state courts. Despite the long line of decisions in which the Court had refused to extend the fifth amendment to the states, the

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62. *See* Bruce, *supra* note 59, at 230-31.

63. *See, e.g.*, Note, *Comment on Defendant's Failure to Take the Stand*, 57 YALE L.J. 145 (1947). "The removal of the statutory prohibition on comment would not only eliminate the constant threat of reversal, but would also remove one of the barriers to truth in criminal trials." *Id.* at 149.

64. *See generally* MCCORMICK, *supra* note 23, § 118; WIGMORE, *supra* note 12, § 2251.

65. *See* MCCORMICK, *supra* note 23, at 251; Note, 57 YALE L.J. 145, *supra* note 63.

66. "All that was in the minds of the framers of the constitutional provisions was the desire to prevent injustice and direct compulsion. Theirs was a protest against and a fear of the inquisition of torture . . . ." Bruce, *supra* note 59, at 233.

67. *See* note 63 *supra*. *See also* J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827).

68. Terry, *supra* note 59, at 129; W. MEYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 229-31 (1959).

69. In 1932, the American Law Institute adopted a resolution that "the judge, the prosecuting attorney and counsel for the defense may comment upon the fact that defendant did not testify." 9 PROC. AM. L. INST. 202-18 (1932). The American Bar Association passed a similar proposal: "[B]y law it should be permitted to the prosecutor to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw reasonable inferences." 56 A.B.A. REP. 137-52 (1932). For a forceful argument against these proposals *see* Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40 (1932).

70. 378 U.S. 1 (1964).

Malloy Court held that the fourteenth amendment prohibited abridgment of the guarantee against self-incrimination by a state. This decision made it clear that state application of the privilege must be consistent with federal constitutional standards:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence.[71]

The court further indicated that a strong basis for its decision was the policy underlying the coerced confession cases—that courts are compelled by the Constitution to establish guilt by evidence independently secured.[72] Thus, in effect, violation of the right to remain silent constituted a penalty which amounted to coercion and was prohibited by the fifth and fourteenth amendments. In speaking of the shift to a broadened application of the fifth amendment, the Court stated that the change reflected a recognition that our "system of criminal prosecution is accusatorial, not inquisatorial," and that the fifth amendment privilege was essential to the furtherance of such a system.[73] *Malloy* made it clear that states could no longer interpret the privilege in a manner inconsistent with the Constitution; rather, they must employ the federal constitutional standard in light of countervailing policies which required its broad application.

The importance of the shift in the Supreme Court's opinion from *Twining* to *Malloy* was not simply that the fifth amendment applied to the states through the fourteenth amendment; the central point of analysis had shifted as well. In *Twining* and subsequent cases,[74] the Court analyzed the problem of extending the fifth amendment privilege to the states in terms of historical concerns for federalism.[75] State sovereignty, however, seemed less important as the desire for procedural due process increased. Therefore, as the Court's emphasis in *Malloy* shifted to countervailing concerns,[76] the

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71. *Id.* at 8.
72. *Id.* at 7-8.
73. *Id.* at 7.
74. *See* notes 53-61 *supra* and accompanying text.
75. *Id.*
76. *See* Noonan, Jr., *Inferences From the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955).

historical foundations gave way to policies which reflected strong due process considerations.[77]

Emerging Policy and Extension of the Privilege

Although the emphasis in analysis had shifted markedly in *Malloy*, the Court did not specifically extend the privilege against self-incrimination to bar prosecutorial and judicial comments on a defendant's failure to testify until it decided *Griffin v. California* in 1965.[78] Perhaps the Court's reluctance to hold in *Malloy* that the fifth amendment prevented such comments stemmed from the endurance of strong opposition to the privilege.[79] Opponents of the privilege had strengthened historical support for federalism, and the *Malloy* Court refused to meet the opposition head-on.[80] These opposing contentions, however, were later disregarded in the *Griffin* case, which, influenced by *Malloy*, extended the prohibition against unconstitutional comment to the states.[81]

The contention that the privilege against self-incrimination was limited historically to physical torture was rejected by *Malloy*, as the Court recognized the necessary policy of protecting an accused from other forms of compulsion less heinous than torture.[82] The use of any form of physical force, such as incarceration or threats of force, to extract admissions of guilt violated the privilege against self-incrimination.[83] More important, other policy justifications for the right to remain silent evolved without regard to its traditional

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77. *See* Note, 70 DICK. L. REV., *supra* note 7, at 109-10, suggesting that *Twining* and *Malloy* are compatible decisions because they each are a reflection of their times. In 1908, strong local interests, which demanded a balancing of powers, ran contra to any extension of federal power to state procedure. In 1964, the *Malloy* Court faced a different society which sought wide protection for individual rights.

78. 380 U.S. 609 (1965).

79. *See* notes 59-69 *supra* and accompanying text for representative arguments in opposition to the privilege.

80. Note, 70 DICK. L. REV., *supra* note 7, at 110.

81. *See* notes 101-11 *supra* and accompanying text.

82. The Supreme Court decided in Spano v. New York, 360 U.S. 315, 323 (1959), that the fifth amendment prohibited inducing a person to confess through "sympathy falsely aroused." Then in Haynes v. Washington, 373 U.S. 503 (1963), the Court determined that obtaining answers to self-incriminatory questions through imprisonment was also unconstitutional. In light of the *Spano* and *Haynes* decisions, the Court held in the *Malloy* case: "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." 378 U.S. at 8.

83. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

role. Consequently, the historical limitations on the right began to weaken under the increasing weight given to individual interests and the right to due process.

The increasing emphasis on procedural due process shifted the function of the privilege from its historical role to one of protecting an accused from unjustified conviction.[84] The Court realized, as it had in *Wilson*,[85] that the accused's demeanor could weigh heavily against him. For instance, if a defendant took the stand despite excessive nervousness or bad mannerisms, this appearance alone would likely create inferences in the juror's mind adverse to the accused.[86] The danger of a defendant being convicted due to his poor demeanor was, therefore, a form of self-incrimination prohibited by the privilege. In addition, the privilege ensured the accusatory nature of our system.[87] In accordance with this view the Court in *Murphy v. Waterfront Commission*[88] held that comment on the refusal to testify was part of the "inquisatorial system of criminal justice,"[89] and repugnant to the policy of preserving the accusatory system.

The above policies which supported the use of the fifth amendment to insure procedural fairness were derived in part from a broader function of the privilege against self-incrimination. The privilege was seen as essential to the policy of "fair contest"[90] between the individual and the state. In this context the privilege ensured "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."[91] The privilege also served the

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84. *See generally* MCCORMICK, *supra* note 23, at 252.

85. *See* note 51 *supra*.

86. *See* Comment, *Comment and Inference Under the Fifth and Fourteenth Amendments*, 25 OHIO S.L.J. 578, 597 (1964).

87. The Court in *Malloy* had emphasized that its decision to extend the fifth amendment was partially based on recognition that the American system of criminal prosecution was accusatorial, not inquisitorial. 378 U.S. at 7.

88. 378 U.S. 52 (1964).

89. *Id.* at 55.

90. *See* MCCORMICK, *supra* note 23, § 118, at 252-53; *see also* WIGMORE, *supra* note 12, at 317.

91. 378 U.S. at 55. *Contra*, Comment, 25 OHIO S.L.J., *supra* note 86, at 594, suggesting that the protection of the individual against the state should not be applied to comment and inference at trial because many trial safeguards are available, and the state has shown good reason to "disturb" the defendant by obtaining an indictment, or through the prosecutor's evidence.

policy of protecting government morality by removing the temptation to employ shortcuts to conviction that degrade judicial integrity.[92] This policy was based on the fear that the government could abuse the right to compel incriminating testimony. Such practice severely undermined the state-individual balance and hindered a defendant's right to due process. Therefore, the best security for the individual against such abuse would be a complete prohibition of *any* form of compulsion to testify.[93]

The *Malloy* case thus opened the door for the *Griffin* decision in two significant ways: first, the Court permitted the fourteenth amendment to be used as an implement in reaching state court application of the privilege; second, the policies underlying that decision justified extension of the privilege in the interests of due process.[94] These basic policies combined with developing state and federal policies to pave the way for elimination of the practice of permitting comment on defendant's failure to testify.[95]

The Privilege Under Griffin v. California—Policy Considerations

In light of the increasing significance of the individual's rights in criminal prosecution, proponents of the privilege argued forcefully against the practice of permitting comment on the accused's failure to testify. Many opponents of the privilege criticized its application to prosecutorial comments, asserting it served only as a shelter for the criminal.[96] This view, however, had been dispelled earlier by the Supreme Court in *Ullman v. United States.*[97] Those who favored the use of comments contended that such practice was not a direct, physical compulsion prohibited by the fifth amendment, but was at best "moral compulsion."[98] Hence, it was argued, comments on a defendant's failure to testify did not violate the right against self-incrimination.

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92. McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193, 199; *see also,* Griswold, *The Right to Be Let Alone* 55 NW. U.L. REV. 216, 223 (1960).

93. Griswold, *supra* note 92.

94. *See* notes 71-77 *supra* and accompanying text.

95. *See* MCCORMICK, *supra* note 23, § 118, at 251-53.

96. *See* Bruce, 31 MICH. L. REV., *supra* note 59, at 233-34; Note, 57 YALE L.J., *supra* note 63, at 149.

97. 350 U.S. 422 (1956). The Court stated in *Ullman* that those who viewed the privilege as a shelter for the wrongdoer too readily assumed that those who invoke it are guilty of crime. "Such a view," the Court stated, "does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying states." *Id.* at 426-27.

98. Bruce, *supra* note 59, at 333.

Proponents of a more flexible application of the privilege responded that comment was indeed compulsion which created a real danger of abridgment of defendant's rights. Even though the nature of the compulsion was mental rather than physical, it was compulsion nonetheless, since an accused will feel more compelled to testify when he is aware that his silence will be commented upon than he would if he knows that his silence will pass unmentioned by the prosecution.[99] Under these circumstances, if the prosecutor were permitted to remark that the defendant had not taken the stand, the accused would have suffered a penalty for exercising his constitutional right because unfavorable inferences would have been created in the jurors' minds.[100] In response to these procedural dangers, strong policy reasons emerged as justification for extension of the fifth amendment privilege against self-incrimination to prohibiting comment on the accused's failure to testify.

Policy arguments against comments on a failure to testify provided the foundation upon which the Supreme Court based its decision to extend the fifth amendment protection to the silent defendant. The fact situation facing the Court in *Griffin v. California*,[101] similar to that presented in *Twining* and *Adamson*, involved a challenge to the California Constitution provision permitting the court to instruct the jury that inferences may be drawn from the accused's silence.[102] The Court in *Griffin* held that the fifth amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[103] Furthermore, the Court made it clear that the "no comment" rule extended to the states by reason of the fourteenth amendment.[104] The Court thereby reached a decision quite different from its opinions in *Twining* and *Adamson*.

This reversal of the Court's stance was not surprising, considering the substantial change in underlying policies which had occurred during the span of time between the decisions. Earlier decisions had been influenced by historical limitations on the

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99. Comment, 25 OHIO S.L.J., *supra* note 86, at 585.

100. *Id.* at 595.

101. 380 U.S. 609 (1965).

102. Article one, section thirteen of the California Constitution provided: a defendant's "failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." CALIF. CONST., art. I, § 13 (1934, repealed 1974).

103. 380 U.S. at 615.

104. *Id.*

privilege against self-incrimination and traditional notions of federalism.[105] The situation in 1965, however, was quite different. By that time the Court had extended the fifth amendment to the states via the fourteenth amendment.[106] More importantly, emerging policies justifying this extension emphasized notions of procedural due process and the rights of the individual against state encroachment.[107]

Policies which emphasized due process and individual rights formed the foundation for the *Griffin* opinion. As in the *Wilson* case, the Court stressed that a defendant often chose not to testify because he feared his presence on the stand would cause the jury to draw unwarranted inferences against him. The fifth amendment therefore granted the defendant a right to remain silent as a means of protection from unfair inferences.[108] Mention of an accused's refusal to testify encouraged adverse inference, and thus constituted a penalty for exercising a constitutional right. The Court emphasized that such practice was contrary to the accusatorial system, and that comment violated a defendant's fifth amendment privilege since "[i]t cuts down on the privilege by making its assertion costly."[109] In rejecting the contention that adverse inferences from defendant's silence were so irresistible that comment thereon did not increase the possibility of inference, the Court stated "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."[110] *Griffin* thereby opened the fifth amendment door wider than ever before, yet left many questions unanswered. For example, the Court did not determine what degree of compulsion was required to constitute a violation of the fifth amendment, or whether all remarks had to be "adverse" before violation could be found. If a violation were found, the Court did not state whether such error would require automatic reversal. Even though not specifically addressed in *Griffin*, these issues, interpreted in light of liberal policies, presented areas for future expansion of the privilege.

The Supreme Court demonstrated in *Griffin*, as it had in *Malloy*, that the fifth and fourteenth amendments were not to be

105. *See* notes 53-61 *supra* and accompanying text.
106. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
107. *See* notes 70-93 *supra* and accompanying text.
108. 380 U.S. at 613.
109. *Id.* at 614.
110. *Id.*

applied in a vacuum, apart from the realities of the legal world. Rather, the privilege against self-incrimination as interpreted by the Court should reflect the policies of the time.[111] The Court showed its willingness to ignore historical limitations on the privilege in order to effectuate fundamental notions of procedural fairness for the state and federal defendants. The Court in essence recognized that the fifth amendment privilege against self-incrimination must be flexible to be effective. The *Griffin* case, however, left open many questions to be determined by future interpretation and application of the privilege.

APPLICATION OF THE "HARMLESS ERROR" RULE

The decision in *Griffin v. California*[112] was encouraging to proponents of a broad application of the privilege against self-incrimination. The fifth amendment was viewed as complete insurance against any encroachments on the defendant's rights; the principles of fair justice and individual dignity would prevail.[113] These assumptions soon ended. Hopes of continued expansion of the accused's privilege against comment on his failure to testify were dissipated by the Supreme Court in 1967 in *Chapman v. California*.[114] This case restricted the impact of the "no comment" rule by formulating a "harmless error" rule for violations of *Griffin*.

Chapman v. California

Shortly after the *Griffin* decision, state courts divided on the issue of whether courtroom comment on defendant's failure to testify required automatic reversal, and, if not, whether states were obliged to apply a federal "harmless error" standard. Many courts held that remarks by a prosecutor or judge were prejudicial per se and required reversal without regard to the character of the comment.[115] Conversely, other states diluted the "no comment" rule through application of state "harmless error" rules to violations of *Griffin*.[116] These states pointed to the fact that there was a split in federal court decisions on whether every violation of due process was prejudicial per se.[117] Thus, it was argued, where comment had

111. *See* notes 84-93 *supra* and accompanying text.
112. 380 U.S. 609 (1965).
113. *See* Note, 70 DICK. L. REV., *supra* note 7, at 117-20.
114. 386 U.S. 18 (1967).
115. *E.g.*, Miller v. State, 240 Ark. 590, 401 S.W.2d 15 (1966); Singleton v. State, 183 So. 2d 245 (Fla. App. 1966).
116. *E.g.*, People v. Bostick, 62 Cal. 2d 820, 402 P.2d 529, 44 Cal. Rptr. 649 (1965).
117. 402 P.2d at 531, 44 Cal. Rptr. at 651.

occurred at trial, the conviction should not be reversed unless the remark constituted prejudicial error under state law.

The problem of whether a comment violative of the fifth amendment privilege was prejudicial per se came before the Court in *Chapman*. The petitioners in *Chapman* had been convicted of murder in a California state court. At their trial, the State's attorney mentioned numerous times that the defendants had not taken the stand. The court then charged the jury that it could draw reasonable inferences from the petitioners' silence. This procedure obviously violated *Griffin*.[118] The California Supreme Court, admitting that petitioners had been denied a federal constitutional right by comments on their silence, affirmed the conviction based on California's harmless error provision.[119] The Supreme Court reversed, holding that whether the violation of a federal right in a trial requires reversal is a matter of federal rather than state law.[120] The Court then considered what federal standard should be applied. In *Chapman*, it was acknowledged that there are some constitutional rights so basic to a fair trial that their infringement could never be regarded as "harmless" error.[121] The Court stated, however, that the right of a defendant not to have his invocation of the privilege commented upon was not a right of this nature.[122] Hence, infractions of the "no comment" rule would be subject to review according to a federal harmless error rule. The rule required that before a federal constitutional error could be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[123] Without further elucidation of the rule, the Court reversed, holding that the extensive comments in *Chapman* were not

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118. *See* Chapman v. California, 386 U.S. at 19.

119. The California Constitution provided: "No judgment shall be set aside, or new trial granted . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." CAL. CONST., art. VI, § 4½ (1911, repealed 1968).

120. 386 U.S. at 21.

121. *Id.* at 23. Constitutional violations which could never be "harmless" were as follows: coerced confession; denial of the right to representation by counsel at trial; right to be tried by an impartial judge.

122. The Court concluded, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S. at 22.

123. *Id.* at 24. The Court based this rule on that espoused in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963): "[W]hether there is reasonable possibility that the evidence complained of did not contribute to the verdict obtained."

harmless. The Court thereby settled the dispute over whether unconstitutional infringement of the "no comment" rule may be harmless. Unfortunately, no explanation was given for the almost total disregard for the policies expounded in *Griffin*.

Problems in Application of the "Harmless Error" Rule

The cursory treatment given the federal harmless error rule in *Chapman*, with little explanation of why the rule applies to violations of a defendant's right to have his silence pass unmentioned, has been the focus of much criticism over the past decade.[124] At the same time, concrete justification for harmless error rule as applied to comment on a defendant's failure to testify has been sparse. One argument favoring the rule's application in these circumstances is that the right of an accused not to have his silence mentioned at trial is not a constitutional right of such importance as requires reversal.[125] This pedantic viewpoint ignores the dependence of the criminally accused upon constitutionally guaranteed rights of fair trial and due process. Abrogation of these rights, no matter how slight, may subject the defendant to the danger of unfair conviction.

Justice Stewart, concurring only in the result of *Chapman*, forcefully opposed the notion that unconstitutional comment is permissible. Stewart pointed to the long line of cases in which the Court had rejected the prospect that constitutional violations might be disregarded on the ground that they were "harmless."[126] Significantly, these cases placed little if any importance on whether the error had played any role in the defendant's conviction, and required automatic reversal for the violations of constitutional rights.[127] Comment on an accused's failure to testify is an impermissible violation of a defendant's constitutional rights, and may require automatic reversal as a safeguard.

Another argument justifying the federal harmless error rule has been that the need for preservation of defendant's rights against impermissible comment is outweighed by the need for judicial economy and finality of judgment.[128] The rule, it is argued, prevents reversal where "small errors or defects" were committed,[129] thereby saving time-consuming retrial. This misguided

124. *See* notes 130-36 *infra* and accompanying text.
125. 386 U.S. at 20.
126. *Id.* at 42-43.
127. *See* Chapman v. California, 386 U.S. at 42-45 (opinion of Stewart, J.).
128. *See* MCCORMICK, *supra* note 23, § 183, at 431.
129. 386 U.S. at 20.

view assumes that comment on defendant's failure to take the stand might constitute an insignificant or technical error. To the contrary, comment which violates the privilege against self-incrimination arguably could rarely be insignificant or unimportant. Such comment permits adverse inferences to be considered and thereby may play a substantial part in the prosecution's case.[130] Moreover, as Justice Stewart predicted, utilizing the harmless error rule in instances of *Griffin* violations actually results in burdensome case-by-case analysis.[131] Hence, judicial economy would be better served by an automatic reversal rule. In any event, abandoning complete protection of an accused's constitutional rights for the sake of preventing retrial of relatively few cases is an unreasonable denial of due process. The purely technical policies of trial economy and finality of judgment should not be allowed to prevail to the detriment of procedural justice.

Besides the general criticism that the harmless error rule abrogates procedural due process, several objections to the rule applied by the Court in *Chapman* have centered particularly around that decision. In essence, the *Chapman* rule requires that before a comment can be described as "harmless" error, the court must conclude beyond a reasonable doubt that: (1) the result would not have been different absent error; and (2) the error could not have contributed to the jury's verdict.[132] By requiring proof beyond a reasonable doubt that the remark did not play a part in conviction, the Court implied that the considerations contributing to a jury's verdict are separable and ascertainable.[133] As a result, the rule may be criticized as unworkable since it is usually impossible for the court to prove the extent to which certain factors have contributed to a defendant's conviction.[134] Due to these difficulties, the rule, if literally construed, actually amounts to an automatic reversal rule.[135]

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130. Comment, *Constitutional Law—Comment on Defendant's Failure to Testify—Harmless Error*, 19 CASE W. RES. L. REV. 757 (1968); *see also* Bruno v. United States, 308 U.S. 287, 294 (1939).

131. Justice Stewart feared that the "harmless error" rule would demand burdensome analyses to determine the extent to which the unconstitutional comment influenced the outcome of each particular trial. *See Chapman*, 386 U.S. at 45.

132. 386 U.S. at 45.

133. Comment, 19 CASE W. RES. L. REV., *supra* note 130, at 761.

134. The Supreme Court in Jackson v. Denno, 378 U.S. 368 (1964), stated, "It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict . . . ." *Id.* at 389.

135. Mause, *Harmless Constitutional Error: The Implication of Chapman v. California*, 53 MINN. L. REV. 519, 540 (1969); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 819 (1970).

The Court's failure to explain its meaning of "contributed to" therefore presents a confusing problem for courts that must apply the harmless error rule.[136]

This difficulty in ascertaining the extent to which certain errors of evidentiary factors have contributed to a jury's verdict has constituted a major problem with the rule. Consequently, many state courts have utilized the rule as a means for weighing the error committed against the evidence presented.[137] Under this interpretation, harmless error has been found where the extent of the error was outweighed by "overwhelming evidence of guilt."[138] This application of the harmless error rule is contrary to the *Chapman* decision, wherein the Court specifically criticized the California court's emphasis on an "overwhelming evidence" criterion.[139] The Court preferred instead a much stricter standard—whether there was "a reasonable possibility that the evidence complained of might have contributed to the conviction."[140] According to this language, any standard that considers the weight of the evidence against an accused is an unacceptable implementation of the harmless error rule.

One may argue that Supreme Court decisions after *Chapman* which have applied the harmless error rule to improper comments[141] show an acceptance by the Court of the "overwhelming evidence" approach.[142] This contention, however, may be considerably weakened in light of a case[143] decided subsequent to *Chapman*. Relying on *Chapman*,[144] the Court reversed without discussion a Calfornia decision which had found harmless error based on the "overwhelming evidence" approach.[145] Justice Traynor dissented forcefully in the

136. *See* notes 137-57 *infra* and accompanying text.

137. *E.g.*, United States v. Haynes, 573 F.2d 236 (5th Cir. 1978); Berryman v. Colbert, 538 F.2d 1247 (6th Cir. 1976); People v. Holman, 19 Ill. App. 3d 544, 311 N.E.2d 696 (1974).

138. For example, in the *Berryman* case the court found that although there were five instances of prosecutorial comment which directly pointed to the defendant's failure to take the stand, such comments amounted to only "harmless error." The court reasoned that since there had been overwhelming and undisputed evidence of defendant's guilt, the error could not have prejudiced the jury's verdict of guilt. 538 F.2d at 1250.

139. 386 U.S. at 23.

140. 386 U.S. at 24.

141. Fontaine v. California, 390 U.S. 593 (1968); Anderson v. Nelson, 390 U.S. 523 (1968).

142. *See* MCCORMICK, *supra* note 23, § 183, at 431-32.

143. Ross v. California, 391 U.S. 470 (1968).

144. The Court also relied on Anderson v. Nelson, 390 U.S. 523 (1968).

145. People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967).

California opinion: "Overwhelming evidence of guilt does not negate the fact that an error . . . contributed to the actual verdict reached, for the jury may have reached its verdict without considering other reasons untainted by error that would have supported the same result."[146] The fact that the Court reversed the California decision may support the proposition that it impliedly affirmed Justice Traynor's view. More importantly, in a later case[147] the Court explicitly reaffirmed its position against placing undue emphasis on overwhelming evidence of guilt.[148] Even so, language indicating that the weight of the evidence may have played some part in harmless error cases cannot be ignored.[149] Such discrepancies suggest that the Court has been paying mere lip service to a stricter interpretation of *Chapman*, while actually applying a more relaxed standard which further erodes protection from unconstitutional infractions of the "no comment" rule.

Also contrary to a strict interpretation of *Chapman* are those decisions which have found that comment is "harmless" error unless there has been a "machine-gun repetition" of unconstitutional comments, calculated to make defendant's version of the evidence worthless.[150] Such application of the harmless error rule is erroneous in that these courts have applied the facts of *Chapman* rather than its rule. While the prosecutor in *Chapman* made repeated references to the defendant's silence, the Court did not indicate that such conduct was necessary for a finding of reversible error.[151] Undoubtedly courts have been troubled by the difficulty of applying the *Chapman* test. However, requiring "machine-gun repetition" is contrary not only to the harmless error rule, but also to the mandate that it is the Supreme Court's responsibility "to protect federal rights by

146. 429 P.2d at 621, 60 Cal. Rptr. at 269 (Traynor, C.J., dissenting).

147. Harrington v. California, 395 U.S. 250 (1969).

148. *Id.* at 255.

149. The Court in *Harrington* ruled that the case against the defendant was "so overwhelming" that the use of unconstitutional confessions as evidence against the accused was harmless error beyond a reasonable doubt. *Id.* at 254. Despite this language, the Court expressly reaffirmed its decision in *Chapman*. *Id.* In a forceful dissent to the *Harrington* opinion, Justice Brennan stated woefully that the Court had in effect overruled *Chapman*. *Id.* at 255.

150. People v. Garrison, 252 Cal. App. 2d 511, 60 Cal. Rptr. 596 (1967). In the *Garrison* case, the comment by the court was identical to that prohibited in *Griffin*. The prosecutor had also commented in his opening and closing arguments on the defendant's failure to testify. Yet the court refused to apply the *Chapman* rule because there had been no "machine-gun" repetition. *See also* Shultz v. Yeagar, 293 F. Supp. 794 (D.N.J.), *aff'd*, 403 F.2d 639 (3rd Cir. 1967), *cert. denied*, 394 U.S. 961 (1968).

151. 386 U.S. at 22-24.

fashioning the necessary rule."[152] While this "machine-gun" approach has appeared only in a few states,[153] it nevertheless indicates that a loose construction of the harmless error rule creates a danger of serious abridgment of the defendant's privilege against self-incrimination.

Other states have rejected any application of the harmless error rule, and require automatic reversal whenever a violation of the *Griffin* "no comment" rule has been found. Since *Chapman* contained no language preventing states from applying a stricter standard than that implemented by the Supreme Court, some states have opted for an automatic reversal rule.[154] Where the prosecutor or the court has commented on a defendant's failure to testify, the reviewing court will find "per se" error and will reverse without regard to the character of the statement, or the motive or intent with which it was made.[155] Such courts have opposed the view that comment on a defendant's silence may be "harmless" on the ground that the right against self-incrimination is fundamental to our system of justice.[156] Other courts have required automatic reversal because of the fear that permitting some instances of comment would be too strong a temptation for prosecutors to resist.[157] The policies underlying the "per se" theory emphasize individual rights and fair justice. Such policies, as seen below, are markedly different from those underlying the "harmless error" theory.

Harmless Error and the Policies of the Privilege

The problem created by the *Chapman* opinion stems from its bare declaration of the harmless error standard and its failure to discuss, to any meaningful extent, the policy considerations underlying the decision. Furthermore, the Court failed to explain why viola-

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152. 386 U.S. at 20.

153. Shultz v. Yeager, 293 F. Supp. 794 (D.N.J.), *aff'd*, 403 F.2d 639 (3rd Cir. 1967), *cert. denied*, 394 U.S. 961 (1968); People v. Garrison, 252 Cal. App. 2d 511, 60 Cal. Rptr. 596 (1967).

154. *See* State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1967); Edwards v. State, ___ Ind. ___ , 328 N.E.2d 470 (1975); Carter v. State, 199 So. 2d 324 (Fla. App. 1967), People v. Alexander, 17 Mich. App. 497, 169 N.W.2d 652 (1969); State v. Gray, 503 S.W.2d 457 (Mo. App. 1973); Koller v. State, 518 S.W.2d 373 (Tex. Crim. 1975).

155. Singleton v. State, 183 So. 2d 245, 251 (Fla. App. 1966). *See also* Mathis v. State, 267 So. 2d 846 (Fla. App. 1972); People v. Helm, 9 Ill. App. 3d 143, 291 N.E.2d 680 (1973); Edwards v. State, ___ Ind. ___ , 328 N.E.2d 470 (1975); State v. Gray, 503 S.W.2d 457 (Mo. App. 1973).

156. 503 S.W.2d at 461.

157. 328 N.E.2d at 474.

tions of the "no comment" rule in particular might amount to "harmless" error. Consequently, state courts have applied the *Chapman* rule divergently, based upon different conceptions of the policies underlying the defendant's rights. It may now be time for the Supreme Court to re-evaluate the harmless error rule in light of the underlying policies of the privilege against self-incrimination upon which the *Griffin* decision was based. Such reconsideration may lead to the conclusion that automatic reversal should be required wherever infractions of the "no comment" rule have been committed.

As mentioned previously, one policy underlying the prohibition of comments on a defendant's failure to exercise his right to testify is that complete protection of the privilege against self-incrimination is essential for the maintenance of a "fair balance" between the individual and the state.[158] This policy assures a fair resolution of the case based upon accurate proof. Fair resolution of a case is guaranteed by assuring the defendant that the exercise of his constitutional right not to testify will not be spotlighted by prosecutorial or judicial statements. If permitted, comment may cause the jury to convict an accused based upon unwarranted adverse inferences from his silence. As a result, the State could win its case through the use of impermissible evidence, and thereby penalize the defendant who exercises his constitutional right.[159] The "no comment" rule is thus a valuable implement for the preservation of a fair and reliable criminal justice system.

Some observers have argued that the Court may have rejected the "fair balance" policy when, in *Chapman*, it applied the harmless error rule to violations of *Griffin*.[160] This view assumes that the *Chapman* Court actually considered the policies underlying *Griffin*. Considering the brief discussion of *Griffin* given by the Court in *Chapman*,[161] such a contention is unsupported. A better explanation may be that the effect of the harmless error rule was not considered to be contrary to the "fair balance" policy. Assertions that *Chapman* stands for the proposition that maintaining a state-individual balance is no longer an integral function of the privilege against self-incrimination, therefore, are unpersuasive.

158. *See* notes 89-93 *supra* and accompanying text. Some writers refer to this policy as the "reliability of guilt-determination process." Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 89 (1967); Mause, *supra* note 135, at 538.

159. *See* notes 108-10 *supra* and accompanying text.

160. *See* Mause, *supra* note 135, at 550, for a somewhat different interpretation of the problem presented by this argument.

161. Chapman v. California, 386 U.S. 18 (1967).

It also has been argued that proper application of the *Chapman* rule will assure the reliability of the judicial system.[162] This contention might be valid if it could be shown that state courts have consistently and uniformly applied the harmless error test to violations of the *Griffin* rule in a "proper" manner which assures fair justice for the accused.[163] As previously noted,[164] however, the courts are far from uniform in their application of the harmless error rule to impermissible comments.[165] Furthermore, standards requiring repetitious "machine-gun-like" comments before error will be found illustrate that the *Chapman* rule may work grave injustices against the accused.[166] Such uses of the harmless error rule may thereby disrupt the "fair balance" between the State and the accused.

The divergent applications of the harmless error rule among the states[167] demonstrate that the harmless error test, when applied to unconstitutional comments, may be contrary to the policy of fairness underlying the privilege against self-incrimination. Perhaps the only way to assure the fair resolution of cases is through the automatic reversal approach.[168] This theory ensures that the accused's right to remain silent without the slightest degree of prejudice is fundamental to the judicial system and requires the highest degree of protection.[169]

Also important to the defendant's right of protection against comment on his failure to testify is the underlying policy of depriving the State of a weapon which is subject to abuse in particularly sensitive areas.[170] This policy is obvious in the "no comment" rule which is directed at preventing the State from commenting on a

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162. *See* Mause, *supra* note 135, at 548.

163. For an example of what might be considered a proper application of the "harmless error" rule in a way that assures a reliable guilt-determination, *see* Commonwealth v. Reichard, 211 Pa. Super. 55, 233 A.2d 603 (1967).

164. *See* notes 141-55 *supra* and accompanying text.

165. *Compare* the "overwhelming evidence," "machine-gun repetition," and "automtic reversal" approaches. *Id.*

166. *See* Note, 20 STAN. L. REV., *supra* note 158.

167. *See* text accompanying notes 141-55 *supra.*

168. "Reliability is best ensured not by inquiring on a case-by-case basis whether the constitutional violation resulted in the conviction of an innocent person, but rather by requiring universal observance of the basic procedural right." Note, 20 STAN. L. REV., *supra* note 158, at 90.

169. *See* Note, 19 CASE W. RES. L. REV., *supra* note 130, at 762-64; Note, 70 DICK. L. REV., *supra* note 7, at 120; *see also* People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 615-21, 60 Cal. Rptr. 254, 263-70 (1967) (Traynor, C.J., dissenting), *rev'd*, 391 U.S. 470 (1968).

170. Griswold, *supra* note 92, at 223.

defendant's silence. Possibly, an automatic reversal rule based on this "deterrence" policy should be applied only to those cases in which the constitutional error depends on the *knowing* misconduct of the prosecutor.[171] A less pedantic interpretation of the deterrence function, however, suggests that the privilege against self-incrimination serves to protect judicial integrity by removing even temptations for abuse.[172] Such protection would be undermined where the existence of any opportunity for a prosecutor to comment on defendant's failure to take the stand creates such an irresistible temptation so as to invite abuse.

In addition to the danger of inviting abuse, it is conceivable that under the *Chapman* rule a remark made by a prosecutor with full knowledge that it violated the "no comment" rule may be held harmless.[173] Even where the harmless error rule is strictly construed, a prosecutor could knowingly make impermissible comments. For example, a prosecutor may make a seemingly unintentional reference to an accused's failure to testify, but if accompanied by certain gestures or glances, the comment might actually play a substantial part in the jury's verdict.[174] On appeal, however, the record would reflect only the bare comment which by itself looks like a harmless error. The only security against such abuse may be total prohibition of the temptation.[175] The policy against inviting abuse thus may be another strong reason for requiring an automatic reversal for all violations of *Griffin*.

In light of the foregoing analysis, the *Chapman* "harmless error" rule, when applied to comments on defendant's failure to testify, may be a harmful rule. The more recent decisions are unclear as to whether the Court has shown a willingness to relax the *Chapman* rule. Indeed, it may be that the Court itself is unsure as to how the harmless error rule should be applied. This lack of a definite framework indicates that reevaluation of the rule as applied to unconstitutional comments is badly needed. The rule has frustrated fundamental notions of due process, and particularly has thwarted the basic policies underlying the privilege against self-incrimination. In fact, the harmless error rule has not achieved the end sought by the Court in *Chapman*: to formulate a rule that will

171. Mause, *supra* note 135, at 553.
172. *See* note 92 *supra* and accompanying text.
173. *See* notes 141-52 *supra* and accompanying text.
174. *See* Comment, 19 CASE W. RES. L. REV., *supra* note 130, at 763.
175. *See* Note, 20 STAN. L. REV., *supra* note 158, at 90.

save the good in harmless error practices while avoiding the bad.[176] When applied to comments on a defendant's silence, the "bad" in harmless error may substantially outweigh the "good." The only safeguard for the accused, therefore, may be an automatic reversal requirement for all instances of impermissible comments on his failure to testify.

JURY INSTRUCTION ON DEFENDANT'S RIGHT TO REMAIN SILENT AS VIOLATING THE "NO COMMENT" RULE

After *Griffin v. California*,[177] liberal safeguards for the rights of the accused against unconstitutional comment seemed guaranteed by the fifth amendment. Due process and the protection of individual rights were strongly emphasized as policies underlying the fifth amendment.[178] It appeared as though the criminal defendant could expect an impenetrable privilege against self-incrimination. Yet the question of whether the right against unconstitutional comments was so fundamental as to require reversal for violations of the "no comment" rule remained unanswered until *Chapman*.[179] In holding that a violation of defendant's right to remain silent might constitute "harmless" error, the *Chapman* court overlooked the more liberal policies which influenced the *Griffin* decision, and thereby implied that further attempts to broaden the scope of the privilege would be curtailed.[180]

The *Griffin* court also left undetermined the question of whether instructions from the court that defendant's silence should not be consrtued against him, given over defendant's objections, should be considered a forbidden violation of his constitutional rights. Influenced by liberally interpreted policies underlying the fifth and fourteenth amendments,[181] the *Griffin* Court might have considered such practice a violation of the privilege against self-incrimination. This possibility became doubtful, however, when the *Chapman* Court affirmed state power over certain aspects of state criminal procedure.[182] State and federal courts, unsure of which approach to take, split on the issue of whether instructions over defendant's objection were constitutionally permissible.[183]

176. Chapman v. California, 386 U.S. 18 (1968).
177. 380 U.S. 609 (1965).
178. *See* text accompanying notes 84-93 *supra*.
179. *See* text accompanying notes 118-23 *supra*.
180. *See* notes 119-24 *supra* and accompanying text.
181. *See* note 6 *supra*.
182. *See* notes 119-24 *supra* and accompanying text.
183. For cases holding the giving of instructions was proper, *see* United States v. Carter, 422 F.2d 519 (6th Cir. 1970); State v. McAlvain, 104 Ariz. 445, 454 P.2d 987

Predictably, the Supreme Court held fast to its trend against further expansion of the fifth amendment.[184] This has been reflected in the most recent decision involving interpretation of the "no comment" rule under the fifth amendment, *Lakeside v. Oregon*.[185] The Supreme Court held in *Lakeside* that a court's instructions that the defendant had the right not to testify and that such silence should not be construed as evidence against him, did not violate the privilege against self-incrimination.[186] This was true even though the defendant had objected to the instruction. Whether or not the arguments supporting such a decision are justifiable in light of fundamental fifth amendment policies will be considered below.

"Failure-to-Testify" Instructions and the Privilege Policies

One of the most obvious and basic policies underlying the privilege against self-incrimination is that of protecting the accused from unjust conviction.[187] Cases involving "failure-to-testify" instructions have introduced a troublesome twist to the problem of protecting the accused from an unfair verdict. Advocates of such instructions contend that under most circumstances the judge's charge to the jury actually *benefits* the accused.[188] This view is based on the belief that the jury, even without comment from the judge or prosecutor, will notice that the accused did not testify and probably will draw adverse inferences from that silence.[189] This viewpoint suggests that a judge's instructions are helpful to the defendant since they remove the possibility of adverse inferences. Accordingly, the jury charge, despite defendant's objections, would present no danger of unjust conviction to the accused, and may in fact protect him from

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(1969); People v. Cooper, 10 Cal. App. 3d 96, 88 Cal. Rptr. 919 (1970); State v. LaBreck, 159 Conn. 346, 269 A.2d 74 (1970); People v. Thomas, 27 Mich. App. 637, 183 N.W.2d 860 (1970); State v. Smart, 485 S.W.2d 90 (Mo. 1970); People v. Mulligan, 40 A.D.2d 165, 338 N.Y.S.2d 488 (1972); State v. East, 3 Wash. App. 128, 474 P.2d 582 (1970). For cases holding the giving of instructions was improper, *see* United States v. Smith, 392 F.2d 302 (4th Cir. 1968); Russell v. State, 240 Ark. 97, 398 S.W.2d 213 (1966); Hill v. State, ___ Ind. ___, 371 N.E.2d 1303 (1978); People v. Hampton, 394 Mich. 437, 231 N.W.2d 654 (1975); State v. Rosen, 280 Minn. 550, 158 N.W.2d 202 (1968); Villenes v. State, 492 P.2d 343 (Okla. Crim. 1971).

184. *See* notes 141-49 *supra* and accompanying text.

185. 435 U.S. 333 (1978).

186. *Id.* at 339.

187. *See* notes 84-89 *supra* and accompanying text.

188. United States v. Bailey, 526 F.2d 139 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976); State v. Garcia, 84 N.M. 519, 505 P.2d 862 (1972).

189. *See* United States v. Garcia, 84 N.M. 519, 505 P.2d 862 (1972).

such danger.[190] Hence, it might be argued that such instruction actually supports the policy against unjust conviction.

The view that failure-to-testify instructions benefit the accused is rather myopic since it ignores the dangers inherent in such instructions. What appears on the surface to be a benefit actually may be detrimental to a defendant who objects to the jury charge. Arguably, permitting instructions on the accused's right to remain silent, over his objections, amounts to comment that is prohibited under the *Griffin* rule,[191] and such instructions constitute "compulsion" in violation of the privilege against self-incrimination.[192] Of course, compulsion under these circumstances does not amount to literal compulsion, but direct pressure has been long abandoned as a requirement of the privilege.[193] Compulsive force arises whenever penalty is threatened.[194] Failure-to-testify instructions may create a penalty by increasing the danger of unfair presumptions against the defendant.[195] As a result, such instructions may subject the accused to the risk of an unjust conviction and thereby circumvent the protective purposes of the privilege against self-incrimination.

Basic to the privilege is the notion that a defendant's failure to testify shall not create any presumption against him.[196] This constitutional mandate was interpreted by the Court in *Wilson v. United States*[197] as excluding *all* references to defendant's silence.[198] Furthermore, *Griffin* specifically held that the State may not add in any way to those inferences already present in the jurors' minds.[199] Even

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190. "The very purpose is to remove from the jury's deliberation any influence of unspoken adverse inference." 435 U.S. at 339.

191. People v. Brady, 275 Cal. App. 2d 984, 80 Cal. Rptr. 418 (1969); People v. Horrigan, 253 Cal. 2d 519, 61 Cal. Rptr. 403 (1967); People v. Molano, 253 Cal. 2d 841, 61 Cal. Rptr. 821 (1967); Hill v. State, ___ Ind. ___ , 371 N.E.2d 1303 (1978).

192. *See* note 195 *infra*.

193. *See* Brooks v. Tennessee, 406 U.S. 605 (1972); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). The *Brooks* case involved a state statute that required a defendant to testify immediately after the government's case closed, or forfeit the right. Although the state had a legitimate purpose—preventing a defendant from adapting his testimony to his witnesses' testimony—the procedure was "not a constitutionally permissible means of insuring his honesty." 406 U.S. at 611.

194. *See* Lakeside v. Oregon, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting).

195. "It is more probable than not that the subtle adverse influence which the silence of the accused produces is augmented when it is specifically pointed out to a jury by an authoritative figure." Comment, 25 OHIO S.L.J., *supra* note 86, at 585.

196. *See* Act of March 16, 1878, 20 Stat. 30, c. 37.

197. Wilson v. United States, 149 U.S. 60 (1893).

198. *Id.* at 67.

199. 380 U.S. at 614.

though a jury may already have some impressions from the defendant's silence, instructions from the court may highlight and emphasize the fact that the accused did not take the stand.[200] Thus, instructions from the court may add to the weight of those inferences previously drawn by the jury and thereby solemnize the defendant's silence into evidence against him,[201] as prohibited by *Griffin*.

Supporters of failure-to-testify instructions contend that such instructions, even when issued over defendant's objections, do not violate the *Griffin* rule or the fifth amendment, because the jury charge merely *explains* the correct law, whereas the "no comment" rule is limited to *adverse* comments.[202] This view, however, may be too narrow. It overlooks the fact that although the instruction is not adverse on its face, it could have serious adverse effects on the defendant by drawing the attention of the jury to his failure to take the stand.[203] Unfavorable inferences, enhanced by instructions referring to defendant's silence, clearly are contrary to the policy of protecting an accused from unjust conviction. Such practice, therefore, weakens the privilege against self-incrimination, and may harm, rather than assist, a defendant.

Besides being contrary to the policy of protection from unjust conviction, permitting failure-to-testify instructions despite a defendant's objections also may be incompatible with the "fair-balance" policy.[204] A fundamental purpose of the privilege against self-incrimination is making the judicial process a fair contest between the state and the individual.[205] Permitting the State to comment on defendant's failure to testify, however, may conflict with this fifth amendment policy and procedural due process. States holding that failure-to-testify instructions do not abridge the accused's constitutional rights assume such instructions always guarantee a fair trial by advising the jury of the defendant's rights.[206] On the contrary,

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200. People v. Molano, 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967); People v. Horrigan, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (1967).

201. 380 U.S. at 614.

202. 435 U.S. at 338. *See also* Hill v. State, ___ Ind. ___ , 371 N.E.2d 1303, 1307 (1978) (Pivarnik, J., dissenting).

203. "For the judge . . . to call the defendant's failure to testify to the jury's attention has an undeniably adverse affect on the defendant. Even if jurors try faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted." 435 U.S. at 345 (Stevens, J., dissenting).

204. *See* notes 90-93 and 158-59 *supra* and accompanying text.

205. *Id.*

206. *E.g.*, Commonwealth v. Sullivan, 354 Mass. 598, 239 N.E.2d 5 (1968), *cert. denied*, 393 U.S. 1056 (1969).

such practice may encourage unwarranted presumptions on the part of the jury, and thereby unfairly add to the State's evidence.[207] The Court has stated expressly: "Governments, both state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured."[208] This mandate ensures the maintenance of a fair state-individual balance by requiring the government to "shoulder the entire load."[209] Allowing the court to spotlight a defendant's silence when he believes the instruction would damage his case, however, may upset this balance.[210] Consequently, failure-to-testify instructions may work against the fifth amendment privilege and the "fair-balance" policy.

The privilege against self-incrimination is also aimed at preserving integrity and reliability in the judicial system,[211] and inherent in this policy is the guarantee of due process for the accused. Basic to procedural due process is the notion that a defendant should not be required to aid the State in his conviction.[212] Permitting inferences from failure-to-testify instructions arguably amounts to "aid" which violates the privilege against self-incrimination. Furthermore, eliminating the instuction on request does not hinder trial procedure, but merely removes the advantage of calling attention to the accused's silence.[213] Unless the defendant chooses to speak in the "unfettered exercise of his own will," calling attention to his silence is prohibited by the Constitution.[214] Arguably, forcing the defendant who objects to failure-to-testify instructions into accepting the same violates his right against unconstitutional comment.[215] Hence, where an accused expressly requests that no instruction on the subject of

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207. *See* Comment, 25 OHIO S.L.J., *supra* note 86, at 585; *see also* Lakeside v. Oregon, 435 U.S. 333, 345 (Stevens, J., dissenting).

208. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

209. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

210. The Court in the *Wilson* case stated, "The minds of the jurors can only remain unaffected . . . by excluding *all references* to [accused's failure to testify]." 149 U.S. at 67 (emphasis added).

211. *See* notes 86-92 and 162-69 *supra* and accompanying text.

212. *See* Field, *The Right to Silence: A Rejoinder to Professor Cross*, 11 J. SOC. PUB. T.L. 76 (1970). Field suggests it is right not to allow either the prosecutor or judge to comment upon defendant's silence: "To permit it would load the dice against him even more than would be the case if his failure to testify passed without comment." *Id.* at 78.

213. Lakeside v. Oregon, 435 U.S. 333, 347 (Stevens, J., dissenting).

214. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

215. Russel v. State, 240 Ark. 97, 398 S.W.2d 213 (1966); People v. Brady, 275 Cal. App. 2d 984, 80 Cal. Rptr. 418 (1969); People v. Hampton, 394 Mich. 437, 231 N.W.2d 654 (1975); Villenes v. State, 492 P.2d 343 (Okla. Crim. 1971).

his silence be given, due process requires that he should have the right to say whether or not his silence should be spotlighted for the jury's attention.[216]

Permitting the State to abridge this right while gaining evidentiary advantages from the defendant's silence is contrary to the policy of preserving integrity and reliability within the guilt-determination process. Abrogation of these policies may upset the fair balance between the accused and the State, and thereby threaten the defendant with unjust conviction. The practice of giving failure-to-testify instructions despite a defendant's objections, therefore, undermines the policies surrounding the privilege against self-incrimination which have justified liberally protecting an accused from unconstitutional comment upon his silence.

Some courts have held that in order for the privilege to be fully effectuated it is paramount that *no remarks* whatever be cast against the accused for his failure to take the stand.[217] Such contentions appear unrealistic since a defendant may request jury instructions that may actually benefit his case. This benefit will occur where the jury fully obeys the court's instructions on a defendant's right to remain silent. Yet it still may be said that to assure fair resolution of the cases based on untainted evidence, it is necessary to closely regulate all judicial statements regarding the accused's silence.[218]

Implications of Lakeside v. Oregon

The privilege against self-incrimination, together with broad notions of individual rights, have supported stringent protection of the accused from comment upon his failure to testify. The trend towards liberal policy interpretations marked by the *Griffin* case,[219] however, has been halted by the Burger Court, as evidenced by its decision in *Lakeside v. Oregon*.[220]

The main issue before the Supreme Court in *Lakeside* was whether failure-to-testify instructions infringed upon defendant's

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216. In *Russell*, the Arkansas Supreme Court reasoned that since the accused has the unfettered right to testify or not to testify, he should have the correlative right to say whether or not his silence should be brought to the attention of the jury. 398 S.W.2d at 215.

217. Gross v. State, 261 Ind. 489, 306 N.E.2d 371 (1974).

218. *Id.*

219. *See* notes 96-111 *supra* and accompanying text.

220. 435 U.S. 333 (1978).

constitutional privilege against self-incrimination.[221] The defendant in *Lakeside* did not take the witness stand at his trial. Over his objection, the trial judge instructed the jury not to draw any adverse inferences from the accused's decision not to testify. The Oregon Court of Appeals reversed the conviction on the ground that the better rule was not to give the instructions over the objections of defendant's counsel.[222] The Oregon Supreme Court reinstated the conviction, holding that the giving of the charge over the objection did not violate the accused's constitutional rights.[223] The defendant appealed to the Supreme Court, maintaining that failure-to-testify instructions amounted to comment which violated "no comment" principles.

The Court rejected the defendant's contention that the failure-to-testify instruction given over his objection was prohibited by the fifth and fourteenth amendments.[224] The *Lakeside* Court interpreted the *Griffin* "no comment" rule as being limited to adverse comment; and since the instruction was not "adverse comment" it was not prohibited under the rule.[225] The Court reasoned further that a necessary element of self-incrimination was some kind of compulsion, and that a jury charge could not produce the degree of pressure found impermissible in *Griffin*.[226] The defendant's contention that the instruction encouraged the jury to draw adverse inferences was likewise rejected. The majority of the Justices maintained that the very purpose of the charge was "to remove from the jury's deliberation any influence of unspoken adverse inferences."[227] With minimal further discussion, the Court held that instructions on the defendant's failure to testify given over his objections did not violate the privilege against self-incrimination.[228]

The *Lakeside* decision indicates that the Court has erected substantial barriers to further attempts at broadening the scope of the privilege against self-incrimination. Unlike the *Griffin* case,

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221. The defendant's second argument was based on his constitutional right to counsel. The Court rejected the argument that this right had been violated when the trial judge refused defense counsel's request that the instruction not be given. Such action, the Court held, was not an unconstitutional interference with counsel's trial strategy.

222. 25 Or. App. 539, 542, 549 P.2d 1287, 1288 (1976).

223. 227 Or. 569, 561 P.2d 612 (1977).

224. 435 U.S. at 338.

225. *Id.* at 338-39.

226. *Id.* at 339-40.

227. *Id.* at 339.

228. *Id.*

Lakeside has narrowly construed the privilege by giving little consideration to its underlying policies. The present trend seems to reflect a disregard for liberal policy justifications underlying the privilege.[229] Rather than giving weight to those policies supporting absolute protection for the individual against self-incrimination, the current emphasis is on state interests in state criminal procedure.[230] Yet, the Court has not articulated what those interests are, nor why they are so compelling. Such emphasis on state sovereignty is reminiscent of the historical limitations of federalism which was rejected long ago when the Court determined that unconstitutional comment was a matter for federal, rather than state, concern.[231] A danger presented by this trend is that in balancing state and individual interests, the underlying policies will be ignored whenever a defendant's right against comment on his failure to testify conflicts with state interests. Consequently, the defendant will be faced with greater threats to due process and the privilege against self-incrimination, since the Court seems no longer persuaded by liberal policy arguments.

CONCLUSION

The privilege against self-incrimination emerged in England as a flexible but narrowly defined concept designed to combat inhumane treatment of the accused. After such treatment was prohibited, the privilege survived as a means of preventing unfair trial procedure and was incorporated into the United States Constitution. Although historical limitations on the privilege and emphasis on state sovereignty at first slowed the growth of the privilege, its scope expanded as interest in individual rights increased. Enhanced and influenced by surrounding policy, the privilege was expanded by the *Griffin* Court holding that the fifth amendment protected an accused from comment on his failure to testify. The *Griffin* decision implied that the choice of whether to testify at trial was to be made free of any pressures. This language, however, proved to be deceptively broad; the Court subsequently held in *Chapman* that unconstitutional comment may constitute "harmless" error. The *Chapman* decision illustrated renewed interest in federalism, which necessarily implied narrow interpretation of policies underlying the

229. The Court stated that "each state is, of course, free to forbid its trial judges from [giving cautionary instructions] as a matter of state law." *Id.*

230. *See* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 431 (1977).

231. *See* notes 78-83 *supra* and accompanying text.

privilege. Similarly, the Burger Court, as demonstrated by the *Lakeside* decision, seems less concerned with the logic and policy of the privilege, and has halted its expansion.[232] Moreover, *Lakeside* manifests a regressive trend rather than a mere refusal to expand the privilege against unconstitutional comment,[233] since it reaches back to traditional interpretations to support its conservative application of the privilege. Hence, the future of this right is not a promising one for advocates of liberal expansion.

Since the right to courtroom silence is such a fundamental feature of the privilege, it is deserving of the most stringent protection by the Court.[234] For example, unconstitutional comment on defendant's failure to testify should not be deemed "cured" by a trial court's admonishment that the jury disregard that comment.[235] Also, a defendant who has failed to object to improper comment should not be deemed to have "waived" his right to object on appeal.[236] It is submitted that a defendant's constitutional right against comment on his silence is so basic to the privilege against self-incrimination that it cannot be waived by the failure to object; nor can such comment be cured by a court's admonishment. These views, however, will not likely be accepted by the present Court, which deprives the privilege of much of its force and leaves the regulation of state criminal procedure, for the most part, to the states.

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232. *See* Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AMER. CRIM. L. REV. 191, 192 (1978).

233. *Id.*

234. *Id.* at 200.

235. State and federal courts are currently divided on the issue of whether unconstitutional comment by the judge or prosecutor is such error as may be "cured" by cautionary instructions. *See* State v. Martin, 84 N.M. 27, 498 P.2d 1370 (1972); Commonwealth v. Reichard, 211 Pa. Super. 55, 233 A.2d 603 (1967) (error not cured). *But see* United States v. Wells, 431 F.2d 434 (6th Cir.), *cert. denied*, 400 U.S. 997 (1970); Moore v. State, ____ Ind. ____ , 369 N.E.2d 628 (1977) (error cured).

236. State and federal courts are presently split on the issue of whether a defendant who fails to object at trial to unconstitutional comment has thereby waived that objection on appeal. *See* State v. Byrd, 109 Ariz. 10, 503 P.2d 958 (1972); State v. Winger, 26 Utah 2d 118, 485 P.2d 1398 (1971) (right to complain held waived). *But see* United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973) (right to complain not waived).