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Constitutional Law - Self Incrimination

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CONSTITUTIONAL LAW—Self Incrimination—The fifth amendment, in its direct application to the federal government and its bearing on the states by reason of the fourteenth amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Griffin v. State of California, 85 Sup. Ct. 1229 (1965).

The fifth amendment contains a number of provisions for the protection of persons accused of crimes. One of the more important protections is found in the clause that "no person . . . shall be compelled in any criminal case to be a witness against himself."¹ Of the fifty states' statutes, forty-four prohibit any comment on an accused's failure to testify in his own behalf as "an unwarrantable line of argument."² Six states permit comment and two of these six do so by explicit constitutional qualification of the privilege against self-incrimination. California is such a state:

. . . in any criminal case, whether the defendant testifies or not, his failure to explain or to 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.³

The constitutionality of this section of the California Constitution became the central issue in *Griffin v. California*.⁴

One Eddie Dean Griffin was convicted of murder in the first degree after a jury trial in which he chose not to testify. Both the prosecutor and the trial court, relying upon Article One of the California Constitution, commented upon Griffin's failure to testify and deny or explain evidence which the court contended was "within his personal knowledge." In his closing argument the prosecutor said, "These things he [Defendant] has not seen fit to take the stand and deny or explain."⁵ The trial judge instructed the jury that a presumption of guilt could not be inferred from defendant's failure to testify; however failure to explain or deny "facts within defendant's personal knowledge" could be the basis for unfavorable inferences by the jury as to those facts. Griffin's conviction was affirmed by the California Supreme Court and the United States Supreme Court granted certiorari.

Had the *Griffin* case been a federal trial, the comments by prosecutor and court would have constituted reversible error on the basis of a

1. U. S. Const. amend. V.

2. *State v. Howard*, 35 Sup. Ct. 197 (1892).

3. Cal. Const. art. I, § 13.

4. 85 Sup. Ct. 1229 (1965).

5. The prosecutor made other statements, all of which consistently attacked the accused's position not to testify. See prosecutor's argument quoted in the Court's opinion, *Id.* at 1231.

federal statute.⁶ However, since this was a state case the inquiry remained as to whether the California comment rule in its state constitution violated the fifth amendment of the Federal Constitution.

Discussing the congressional act, cited in *Wilson v. United States*,⁷ the *Griffin* Court gave numerous reasons why an innocent person would choose not to testify in his own behalf. The Court said that timidity or extreme nervousness could be the principal reasons why "it is not every one, however honest, who would therefore willingly be placed on the witness stand."⁸

Prior to the *Griffin* decision, the fifth amendment's self-incrimination clause had been held applicable to the states through the fourteenth amendment in *Malloy v. Hogan*,⁹ where the Court held that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."¹⁰

By synthesizing the federal standard exemplified in *Wilson* and the Court's final determination in *Malloy*, one is led to the inescapable conclusion reached in *Griffin*. In reversing the California conviction, Justice Douglas wrote,

We take that [Malloy v. Hogan] in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.¹¹

California attempted to support its position on its comment rule¹² by insisting that the inference of guilt "naturally and irresistibly" attaches when an accused fails to testify as to facts within his personal knowledge. The Court met this argument squarely as it said, "What the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused . . . is quite another."¹³

6. 18 U.S.C. § 3481 (1948). The original statute was cited in *Wilson v. United States*, 149 U.S. 60 (1893) and then revised in 1948.

7. *Ibid.*

8. See discussion of 18 U.S.C. § 3481 in *Wilson v. United States*, *supra* note 6; and *Griffin v. California*, *supra* note 4, at 1234.

9. 84 S. Ct. 1495 (1964). This case was decided by the Federal Supreme Court after the California Supreme Court had already decided and affirmed the *Griffin* conviction.

10. *Ibid.*

11. *Griffin v. California*, *supra* note 4, at 1233.

12. *People v. Modesto*, 42 Cal. 417, 398 P.2d 753 (1965). The California Supreme Court stated that its "comment" rule squared with *Malloy v. Hogan*, *supra* note 9.

13. *Griffin v. California*, *supra* note 4.

From its own rigid prohibition in *Wilson*, to its application of the self-incrimination clause of the fifth amendment to the States in *Malloy*, the Court in *Griffin* by closing the circle has imposed the federal standard upon the States; for the procedural self-incrimination clause must not only be "a matter of local concern."¹⁴

The concept of prohibiting self-incrimination grew out of the protests against the inquisitorial methods of the English ecclesiastical courts and the Court of Star Chamber, which tortured persons accused of heresy or treason to obtain confessions. By the latter half of the seventeenth century the privilege was well-established in English law and subsequently adopted in the United States.¹⁵ Proponents of the comment rule point to this history and argue that the self-incrimination clause of the fifth amendment has outlived its usefulness, for the coercive methods it sought to exterminate are no longer a part of reality. They contend, as the dissent in *Griffin* does, that ". . . the lurid realities which lay behind enactment of the Fifth Amendment, [are] a far cry from the subject matter of the case before us."¹⁶ It is submitted, however, that the *Griffin* Court, completely cognizant of the far reaching implications of so subtle a procedural device as the "comment rule," contributed much to the safeguard of such a fundamental protection as the Constitution, through the fifth amendment, accords to those accused of crimes. It is a certainty that the Supreme Court will continue, as it did in *Griffin*, to condemn any practice, however slight, of imputing sinister meaning to the exercise of a person's constitutional right under the fifth amendment.¹⁷

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CONSTITUTIONAL LAW—Right to Travel—Area Restrictions—Congressional intent of Passport Act of 1926 and Immigration & Nationality Act of 1952.

Zemel v. Rusk, 381 U. S. 1, 85 Sup. Ct. 1271 (1965).

On March 31, 1962, plaintiff, a Connecticut ski-resort operator, applied by letter to the Director of the Passport Office for permission to have his passport validated for travel to Cuba as a tourist. This request was denied with the explanation that only persons whose travel might be in the best interests of the United States, such as newsmen and businessmen with previously established interest, could travel to Cuba, and that

14. See dissenting opinion, *Id.* at 1237.

15. 1 Tresolini, *AMERICAN CONSTITUTIONAL LAW* 548 (1959).

16. See dissenting opinion, *Griffin v. California*, *supra* note 4, at 1236.

17. *Self Incrimination and the Duty to Testify*, 16 *JOURNAL OF POLITICS* 509 (1954).