# IS SILENCE GOLDEN?

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*Absolute constitutional rights are rare—even the venerable rights of free speech and freedom of religion are not absolute. In criminal prosecutions, the Sixth Amendment's right to counsel has been described as the most important of all rights because it affects a defendant's ability to assert his or her other rights. But even the right to counsel is not unlimited.*

*Yet one right is absolute. A criminal defendant has an absolute right not to testify in his own criminal trial. The text of the Self-Incrimination Clause of the Fifth Amendment—"No person . . . shall be compelled in any criminal case to be a witness against himself"—confirms that the defendant and his counsel have "the absolute right to decide that the accused shall not become a witness against himself." That clause "commands that the decision be made free of any compulsion by the State." Because the Bill of Rights is not meant to create "parchment barriers," invoking a constitutional right should matter, especially where a person's life or liberty is at stake, and the consequences of invocation should not undermine the right itself or deter future assertion of the right. This logic equally applies to the Fifth Amendment.*

*In 1965, the Supreme Court held in* Griffin v. California *that an instruction from a judge or a comment from a prosecutor that urges jurors to draw an adverse inference from a defendant's refusal to testify and to use that inference as substantive evidence of guilt violates the Fifth Amendment. After* Miranda v. Arizona, Griffin *is the Warren Court's most controversial Fifth Amendment ruling. Since its announcement, the result and reasoning in* Griffin *have been roundly criticized by jurists, lawyers, and scholars. One legal scholar has noted that the conservative Justices on the modern Court "treat* Griffin *like a virus under quarantine."*

*Some have urged that* Griffin *be overruled. But that has not happened—yet. In* Mitchell v. United States, *a 1999 ruling, Justice Kennedy described the rule in*

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Griffin *as "of proven utility" and "an essential feature of our legal tradition." But the five Justices who signed* Mitchell *are no longer on the Court. Justice Thomas thinks* Griffin *should be "reexamined," which is his politic way of saying that he is ready to overrule it. A majority of the Court may agree with him.*

Griffin *was poorly written, but correctly decided. The absolute right not to testify is meaningless if state officials can urge jurors to use a defendant's silence as substantive evidence of guilt. If the state ordered a defendant to testify on pain of contempt or physical abuse and then used his incriminating testimony as evidence of guilt, compulsion under the Fifth Amendment would be undeniable. The state should not be able to achieve the same result—eliciting involuntary, incriminating testimony—by urging jurors to view the refusal to testify as evidence of guilt. In that instance, silence is as damning as oral testimony. And in both scenarios, the accused is unable to avoid self-incrimination: when forced to testify, the accused is subject to cross-examination and required to testify against himself; and when he refuses to testify, the accused's silence becomes unavoidably incriminating when the state is permitted to comment and invite an adverse inference.*

*Thus, the absolute right not to be a witness against oneself means that the choice to remain silent should not be used as evidence either. Otherwise, the right is no longer absolute. To paraphrase Justice Scalia, a harsh critic of* Griffin, *the accused's absolute right to demand that the prosecution prove its case without his assistance "is not to be impaired by the jury's counting the defendant's silence at trial against him."*

*This Article does three things. First, it provides a historical account of the rise and fall of the constitutional principle announced by* Griffin. *Second, it identifies and explains the Court's significant decisions addressing adverse comment and its nexus with the Fifth Amendment. Finally, this Article offers a normative defense of* Griffin *and shows why its holding is consistent with the purpose of the Fifth Amendment as it is understood in the twenty-first century.*

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"Innocence never takes advantage of it, innocence claims the right of speaking, as guilt invokes the privilege of silence."

JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (1825)

"What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.

The lawyers' answer would be more complex."

JOHN HENRY WIGMORE, EVIDENCE § 2272 at 426 (McNaughton rev. 1961).

"[I]f an accused person is innocent, he should be willing to say so, and to explain the facts of his conduct and vindicate himself."

John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 86 (1891).

"Whatever else may be said about the privilege against self-incrimination, . . . . it does not seem to have been part of any general spirit of 'tenderness' towards the accused."

Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91,117 (1981-82).

## INTRODUCTION

Absolute constitutional rights are rare. The venerable rights of free speech and freedom of religion are not absolute.[1] In criminal prosecutions, the Sixth Amendment's right to counsel has been described as the most important of all rights

1. *See, e.g.*, KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 942–46 (19th ed. 2016); Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–79 (1990) (noting that the Court has never "held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

because it affects a defendant's ability to assert his or her other rights.[2] But even the right to counsel is not unlimited.[3]

Yet one right is absolute. A criminal defendant has an absolute right not to testify in his own criminal trial.[4] The text of the Self-Incrimination Clause of the Fifth Amendment—"No person . . . shall be compelled in any criminal case to be a witness against himself"[5]—confirms that the defendant and his counsel have "the absolute right to decide that the accused shall not become a witness against himself."[6] That clause "commands that the decision be made free of any compulsion by the State."[7] Because the Bill of Rights is not meant to create "parchment barriers,"[8] invoking a constitutional right should matter, especially where a person's life or liberty is at stake, and the consequences of invocation should not undermine the right itself or deter future assertion of the right. This logic equally applies to the Fifth Amendment.[9]

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2. *See* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."); Lakeside v. Oregon, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.").

3. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that the Sixth Amendment's right to counsel guarantees "an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers").

4. *See* Salinas v. Texas, 570 U.S. 178, 184 (2013) ("[A] criminal defendant has an absolute right not to testify") (citations omitted); Dickerson v. United States, 530 U.S. 428, 453 (2000) (Scalia, J., dissenting) ("[T]he Fifth Amendment's bar on compelled self-incrimination is absolute."); *cf.* MARK BERGER, TAKING THE FIFTH 76 (1980) ("Acceptance of the right of a defendant to decline to testify after being formally accused has been universal in the United States.").

5. U.S. CONST. amend. V.

6. *Lakeside*, 435 U.S. at 344 (Stevens, J., dissenting); *see also* Carter v. Kentucky, 450 U.S. 288, 300 (1981) (footnote omitted) (referencing "the absolute constitutional guarantee against compulsory self-incrimination"). Throughout this Article, I sometimes refer to the protection provided by the Self-Incrimination Clause as the "privilege." Of course, the protection afforded by the Fifth Amendment is a "right," whereas "[p]rivileges are concessions granted by the government to its subjects and may be revoked." LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT, at xv (2d ed. 1986) [hereinafter LEVY, ORIGINS].

7. *Lakeside*, 435 U.S. at 344 (Stevens, J., dissenting); *see also* BERGER, *supra* note 4, at 194 ("Indeed, it can be argued that the language the framers used demonstrates a clear intent not to permit the state to so interfere with the invocation of the privilege.").

8. THE FEDERALIST NO. 48 (James Madison).

9. Leonard G. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 473 (1957) (footnote omitted) ("If a person is constitutionally protected from being forced to give testimony which may be used against him in a criminal prosecution for crime, such protection would be illusory if the very act of asserting the privilege constituted an admission of incriminating facts which could be used as evidence against him in a criminal case."); BERGER, *supra* note 4, at 193–94 ("If the Fifth Amendment were read to legitimize a refusal to answer a self-incriminatory question but to

In 1965, the Supreme Court held in *Griffin v. California*[10] that an instruction from a judge or a comment from a prosecutor that urges jurors to draw an adverse inference about a defendant's refusal to testify and to use that inference as substantive evidence of guilt violates the Fifth Amendment. After *Miranda v. Arizona*,[11] *Griffin* is the Warren Court's most controversial Fifth Amendment ruling. Since its announcement, the result and reasoning in *Griffin* has been described as "a breathtaking act of sorcery" that "transformed legislative policy into constitutional command," a "wrong turn,"[12] employing "a questionable manner of constitutional exegesis,"[13] "untenable as an article of Fifth Amendment jurisprudence,"[14] "lack[ing] cogency and analytical rigor,"[15] "grotesquely naïve,"[16] "exaggerat[ing] the privilege to senseless lengths,"[17] and "not supported by a coherent, text-based,

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have no role in controlling state inducements against its invocation and the severity of penalties imposed for its assertion, the privilege would be little more than an empty formality. Few would feel able to invoke the Fifth Amendment, the consequences they would face for doing so might be worse than the results of incriminating themselves."); *see also* Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 146 (R.H. Helmholz et al. eds, 1997) ("The more draconian the consequences of invoking a right to silence, the less often it can be invoked by sensible defendants, and therefore the less effective it can be.").

10. 380 U.S. 609, 615 (1965).

11. 384 U.S. 436 (1966). The most significant of *Griffin*'s progeny and the most significant of the Court's decisions on the right to remain silent is *Miranda*. One might expect a paper about the right to silence to be mostly about *Miranda* and the vast caselaw it has generated. But this Article will not discuss *Miranda*. The soundness of *Griffin* should not turn on one's view of *Miranda*. *Griffin* preceded *Miranda* by a year. Moreover, *Griffin* involved an application of the Fifth Amendment in the courtroom of a criminal prosecution, a forum that the text, history, and purposes of the Fifth Amendment clearly had in mind. *Miranda*, by contrast, applied the Fifth Amendment to the police station, which was a controversial application of the amendment, according to many in 1966.

12. Mitchell v. United States, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting).

13. Portuondo v. Agard, 529 U.S. 61, 72 n.3 (2000).

14. Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 869 (1980).

15. Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1342 (2009).

16. *Id.* at 1343.

17. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21 (1978).

doctrinal rationale."[18] One legal scholar has noted that the conservative Justices on the modern Court "treat *Griffin* like a virus under quarantine."[19]

With this amount and tenor of criticism for a Warren Court ruling benefitting a criminal defendant, one would think that the conservative Justices of the Rehnquist and Roberts Courts would have overruled *Griffin* forthwith. But that has not happened—yet. In *Mitchell v. United States*,[20] a 1999 ruling, Justice Kennedy described the rule in *Griffin* as "of proven utility" and "an essential feature of our legal tradition."[21] But the five Justices who signed *Mitchell* are no longer on the Court. Justice Thomas thinks *Griffin* should be "reexamined," which is his politic way of saying that he is ready to overrule it.[22] A majority of the Court may agree with him.[23]

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18. Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 285 (2010) [hereinafter Bellin, *Reconceptualizing*]; *see also* Kelsey Craig, *The Price of Silence: How the* Griffin *Roadblock and Protection Against Adverse Inference Condemn the Criminal Defendant*, 69 VAND. L. REV. 249, 261 (2016) ("*Griffin* is arguably without a textual constitutional basis and should be revisited"); Lissa Griffin, *Is Silence Sacred? The Vulnerability of* Griffin v. California *in a Terrorist World*, 15 WM. & MARY BILL RTS. J. 927, 956–57 (2007) (criticizing *Griffin* as not based on the text or history of the Fifth Amendment). Judge Henry Friendly's celebrated 1968 lecture criticizing the privilege is critical of *Griffin* but does not call for its overruling "if it stood alone." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 700 (1968). Similarly, Professor Bellin, while highly critical of *Griffin*'s reasoning, believes that "the Fifth Amendment can be construed to prohibit adverse comment, but only if the prohibition's scope is narrowed." Bellin, *Reconceptualizing*, *supra*, at 234.

19. James J. Duane, *The Extraordinary Trajectory of* Griffin v. California*: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 STAN. J. CRIM. L. & POL'Y 1, 6 n.32 (2015).

20. 526 U.S. 314 (1999).

21. *Id.* at 329, 330.

22. *Id.* at 342 (Thomas, J., dissenting); *see also* Salinas v. Texas, 570 U.S. 178, 192 (2013) (Thomas, J., concurring). Justice Thomas's negative view of stare decisis is well known. *See* Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along*, N.Y. TIMES (Mar. 4, 2019) https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html [https://perma.cc/KA7N-ZA22] (quoting Justice Scalia's assessment of Thomas's view of precedent: "'He does not believe in stare decisis, period.'"); *cf.* JEFFREY TOOBIN, THE NINE 103 (2007) ("At an appearance at a New York synagogue in 2005, Scalia was asked to compare his own judicial philosophy with that of Thomas. 'I'm an originalist,' Scalia said, 'but I am not a nut.'"). Unlike Justice Thomas, by 1999, Justice Scalia had made his peace with *Griffin*. *Mitchell*, 526 U.S. at 336 (Scalia, J., dissenting) ("To my mind, *Griffin* was a wrong turn—which is not cause enough to overrule it, but is cause enough to resist its extension.").

23. Justice Thomas's influence on the Court is beyond dispute. *See* Jill Abramson, *This Justice is Taking Over the Supreme Court, and He Won't Be Alone*, N.Y. TIMES (Oct. 15, 2021) https://www.nytimes.com/2021/10/15/opinion/clarence-thomas-supreme-court.html [https://perma.cc/25SY-63LR] (stating "what is remarkable is the extent to which the Supreme Court, with the addition of three Donald Trump nominees who create a 6-to-3 conservative majority, seems to be reshaping itself in Justice Thomas's image"); Corey Robin, *The Self-Fulfilling Prophecies of Clarence Thomas*, NEW YORKER (July 9, 2022)

*Griffin* was correctly decided. While championing *Griffin*, I hope to avoid the type of "Fourth of July speech" and "benedictions of the privilege"[24] that are sometimes offered when defending the Fifth Amendment. The absolute right not to testify is meaningless if state officials can urge jurors to use a defendant's silence as substantive evidence of guilt. If state officials ordered a defendant to testify on pain of contempt or physical abuse and used his incriminating testimony as evidence of guilt, compulsion under the Fifth Amendment would be undeniable.[25] The state should not be able to achieve the same result—eliciting involuntary, incriminating testimony—by urging jurors to view the refusal to testify as evidence of guilt. In that instance, silence is as damning as oral testimony. And in both scenarios, the accused is unable to avoid self-incrimination: when forced to testify, the accused is subject to cross-examination and required to testify against himself; and when he refuses to testify, the accused's silence becomes unavoidably incriminating when the state is permitted to comment and invite an adverse inference.[26] Thus, the absolute right not to be a witness against oneself means that the choice to remain silent should not be used as evidence either. Otherwise, the right is no longer absolute. To paraphrase Justice Scalia, a harsh critic of *Griffin*, the accused's absolute right to demand that the prosecution prove its case without his assistance "is not to be impaired by the jury's counting the defendant's silence at trial against him."[27] *Griffin* reached the correct result because it protects the accused's absolute right to refuse to testify against himself.

This Article does three things. First, it provides a historical account of the origin of adverse comment and inference laws and explains how those laws intersected with the constitutional right against compelled self-incrimination. Second, it identifies the Court's significant decisions prior to *Griffin v. California*, analyzes *Griffin* itself, and critiques the post-*Griffin* cases addressing adverse

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https://www.newyorker.com/news/daily-comment/the-self-fulfilling-prophecies-of-clarence-thomas [https://perma.cc/TDJ6-THNY] ("Thomas's significance far outstrips his captaincy of the Court's war on liberalism. The most powerful Black man in America, Thomas is also our most symptomatic public intellectual, setting out a terrifying vision of race, rights, and violence that's fast becoming a description of everyday life. It's no longer a matter of Clarence Thomas's Court. Increasingly, it's Clarence Thomas's America.").

24. Friendly, *supra* note 18, at 684.

25. Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 316 (1991) ("[E]veryone agrees that the Fifth Amendment stands as an absolute bar to calling the defendant to the stand, against his will, in his own criminal trial."); Nathan B. Hall, Note, *I Don't Believe That Answers Our Question: The Story of* White v. Woodall *and How the Supreme Court's Silence Is Adversely Affecting the Fifth Amendment Privilege*, 69 OKLA. L. REV. 53, 71 (2016) ("The classic case of Fifth Amendment compulsion involves the use of torture to produce adverse evidence. . . . If on threat of violence the accused speaks, all would agree that he has been compelled to testify against himself.").

26. Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889, 965 (2017) ("[T]he striking thing about a rule that permits a defendant's failure to testify to be used as evidence of guilt is that the defendant is left with no means to avoid becoming a 'witness' who has provided evidence."); *id.* at 965–66 ("When a defendant's failure to testify is treated as evidence of guilt, accordingly, the defendant is deprived of the option of declining to become a 'witness' who provides evidence.").

27. Portuondo v. Agard, 529 U.S. 61, 67 (2000).

comment and its nexus with the Fifth Amendment. Finally, it offers a normative defense of *Griffin* and shows why its holding is consistent with the purpose of the Fifth Amendment as it is understood in the twenty-first century.

## I. A HISTORY OF ADVERSE COMMENT ON SILENCE AND THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION

The Constitution's text is the place to start when determining whether adverse comment by a judge or prosecutor on a defendant's refusal to testify violates the Fifth Amendment. The text—"No person . . . shall be compelled in any criminal case to be a witness against himself"—does not directly address the issue.[28] And there is no evidence that those who wrote and ratified the Constitution considered the question. When the Constitution was established in 1789 and the Bill of Rights was ratified in 1791, criminal defendants were not permitted to give sworn testimony at trial.[29] Under the common law, persons—whether they were parties or witnesses—with an interest in the outcome of a civil or criminal trial were disqualified from testifying, and the "criminal defendant was, of course, *par excellence* an interested witness."[30] The right against compelled self-incrimination, which was written into the federal and most state constitutions, "meant little to the defendant at trial as long as he was not legally competent to testify."[31] As Justice Scalia has remarked, what defendants "said at trial was not considered to be evidence, since they were disqualified from testifying under oath."[32]

None of this meant that criminal defendants were not heard in court. Just the opposite was true. During the colonial period and through the beginning of the nineteenth century, criminal defendants were interrogated at preliminary examinations by magistrates or "justices of the peace." At these examinations, the

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28. Ayer, *supra* note 14, at 848; Hall, *supra* note 25, at 72–73 (footnote omitted) ("The Fifth Amendment does not talk about silence, it does not talk about inferences, and it does not talk about warnings. Moreover, it does not reference torture, trilemmas, or trials.").

29. Ferguson v. Georgia, 365 U.S. 570, 574 (1961) ("Disqualification for interest was . . . extensive in the common law when this Nation was formed. Here, as in England, criminal defendants were deemed incompetent as witnesses."); United States v. Grunewald, 233 F.2d 556, 578 (2d Cir. 1956) (Frank, J., dissenting) (noting that when Fifth Amendment was adopted "a federal jury could not in fact, and would not, infer that the defendant's silence in any way indicated his guilt"), *rev'd*, 353 U.S. 391 (1957).

30. *Ferguson*, 365 U.S. at 574.

31. DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM 64 (1990); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 835 (1999) (footnote omitted) (explaining that disqualification of the accused from testifying made the privilege an "insignificant proposition. The party disqualification rule itself ensured that a disqualified defendant could never be compelled to testify by the prosecution. In this respect, the constitutional self-incrimination clauses appear to have been redundant.").

32. *Portuondo*, 529 U.S. at 66 (citing 2 J. WIGMORE, EVIDENCE § 579 (3d ed. 1940)); *see also* Department of Justice Office of Legal Policy, *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1024 (1989) [hereinafter *Report to the Attorney General*] (explaining that in American jurisdictions in the early years of the eighteenth century, "the defendant's remarks had no legal status as evidence").

accused "was not warned that he need not answer; and indeed, any refusal to answer, whether of his own initiative or on advice of another, was reported and stated by the magistrate in his testimony at the trial."[33] Although not permitted to give sworn testimony, defendants regularly spoke to the judge and jury at their criminal trials. They had no other choice. In America, the utilization of lawyers for criminal defendants charged with felonies only gradually became more common in the nineteenth century, though some states had extended the right to counsel when the Constitution was ratified.[34] Because defense counsel was unavailable to present his case, the accused had to speak for himself. "The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege."[35] At the Founding, self-representation was the norm in criminal cases, and the accused spoke in court whether he wanted to or not. This process and predicament for the accused "was apparently not the kind of compulsion to testify that lawyers, courts, or commentators understood to implicate the constitutional" principle against self-incrimination.[36]

In sum, neither the text of the Constitution nor the history of the Framing Era resolves the question of whether adverse comment on a defendant's refusal to testify at trial is permissible.[37] Yes, the accused provided unsworn statements, but

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33. E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949); *see also* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part 1)*, 53 OHIO ST. L.J. 101, 124 (1992) (explaining that during the period 1553–1603, an English common law defendant who invoked silence at a pretrial hearing would have been denied bail, and silence before or during trial would have been called to the attention of the factfinder). The traditional view that suspects were not warned of a right to remain silent has been contradicted by documentary evidence that shows, before and during the Framing Era, magistrates were warning suspects of their right to remain silent. *See* Brief of Amici Curiae Historians of Criminal Procedure in Support of Respondent, Vega v. Tekoh, 142 S. Ct. 2095 (2022) (No. 21-499). By 1838, three states (New York, Missouri, and Arkansas) required magistrates to warn defendants that they had a right to remain silent. *See* George C. Thomas, III & Amy Jane Agnew, *Happy Birthday* Miranda *and How Old Are You, Really?*, 43 N. KY. L. REV. 301, 301 (2016).

34. YALE KAMISAR, ET AL., BASIC CRIMINAL PROCEDURE 65 (15th ed. 2019) ("From the earliest times, the general practice in serious criminal cases in the American colonies was self-representation, not representation by counsel. But by the time the nation was about to ratify the Constitution, most states had granted criminal defendants the right to be represented by a lawyer. No state, however, guaranteed the right to appointed counsel.").

35. John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 87 (R.H. Helmholz et al. eds, 1997) [hereinafter Langbein, *The Privilege and Common Law Criminal Procedure*].

36. Witt, *supra* note 31, at 835.

37. Rosenthal, *supra* note 26, at 964 (hypothesizing that "a defendant's silence was so infrequent in the framing era that the question of an adverse inference rarely arose," and concluding that the "historical record is . . . too mixed to permit reliable conclusions" on the constitutional validity of adverse comment). Justice Scalia, a fierce critic of *Griffin*, has conceded that he was "unable to find any case adverting to [adverse] inference in upholding

those statements were not evidence. If what a defendant said at trial was not evidence, logically, his silence could (or should) not be considered evidence either.[38] Ultimately, the historical practice during the Framing Era does not establish either the constitutionality or the unconstitutionality of using an adverse inference as evidence of guilt. Put simply, this issue was not on the Framers' radar.[39]

### A. *The Push to Have Defendants Testify*

In the mid-1800s, a movement began in England and America to allow criminal defendants to testify. Jeremy Bentham, a well-known opponent of the privilege against self-incrimination, and his followers in America urged legislatures to repeal disqualification rules in both civil and criminal cases. Seeking to reform the legal process, their "central argument was that the exclusion of testimony hindered the 'great object of judicial investigation, the discovery of truth.'"[40] After eliminating disqualification laws for interested witnesses and civil parties, the reformers targeted disqualification of criminal defendants. In America, opponents of making criminal defendants competent to testify contended that the reform would undermine the presumption of innocence and the privilege against self-incrimination recognized in most state constitutions.[41] The latter assertion was based on two

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a conviction—which suggests that defendants rarely thought it in their interest to remain silent." Mitchell v. United States, 526 U.S. 314, 334 (1999) (Scalia, J., dissenting). Another critic of *Griffin* concedes that while "the Framers had no objection to drawing an adverse inference from an unsworn defendant's silence before a magistrate or at trial, they might not have approved of drawing an adverse inference from a defendant's refusal to offer sworn testimony." Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 853 n.18 (2017) [hereinafter Alschuler, *Fourfold Failure*]. In sum, invoking "original meaning" as a basis for criticizing (and overruling) *Griffin* fails for the ultimate reason that historical practice during the Framing Era does not establish the constitutionality of drawing an adverse inference from a defendant's refusal to testify.

38. While the accused's unsworn statements were not considered testimony, according to some scholars, the accused's silence would be incriminating. *See* Alschuler, *Fourfold Failure*, *supra* note 37, at 852 (footnote omitted) ("At the Framing, although defendants were not sworn, they were expected to explain incriminating evidence during pretrial interrogation by a magistrate and then to explain it again at trial. Few if any defendants remained silent, and jurors would have viewed their silence as incriminating if they had.").

39. *See Report to the Attorney General*, *supra* note 32, at 1024 ("The exclusion of the defendant as a source of testimonial evidence at trial essentially mooted the question whether adverse inferences should be authorized from his silence in that context until legislative reforms in the late nineteenth century made the defendant a competent witness."); *cf. Comment on Defendant's Failure to Take the Stand*, 57 YALE L.J. 145, 150 (1947) (arguing that framing-era state constitutional provisions barring compelled self-incrimination were not intended to ban adverse comment by judges and prosecutors because those constitutional provisions predated by more than half a century laws making criminal defendants competent to testify).

40. Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 94 (1981–82) (quoting E. LIVINGSTON, INTRODUCTORY REPORT TO THE CODE OF EVIDENCE [OF LOUISIANA] [circa 1830], reprinted in 1 COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 411, 424 (1873)).

41. *See, e.g.*, Seth Ames, *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443, 444 (1867) (arguing that Massachusetts's statute making defendants competent to testify

premises. First, the decision to testify, while labeled voluntary, was in fact coercive because factfinders would inevitably draw an adverse inference from a defendant's failure to take the stand. Second, most defendants, including the innocent, would not voluntarily testify based on the advice of counsel or others.[42]

The common-law rule preventing the accused from testifying was first modified in 1859 when Maine authorized defendants charged with lesser offenses to testify. Five years later, Maine became the first state to establish competency for all criminal defendants. Maine's statute was promoted by John Appleton, a follower of Bentham and future Chief Justice of the Maine Supreme Judicial Court.[43] "When Appleton first challenged the universal prohibition against hearing the defendant under oath in 1835, he stood alone."[44] Before serving on the bench, Appleton wrote that the exclusion of a defendant's testimony helped criminals avoid punishment and that the constitutional privilege against self-incrimination inhibited the search for truth in trials.[45] Appleton argued that the privilege was meant only to ban physical torture.[46] And Appleton saw no constitutional vice when jurors are urged to draw an adverse inference from a defendant's silence at trial. "Silence is tantamount to confession."[47] A defendant had no legitimate grounds for objection because he could prevent adverse inferences of guilt by testifying.[48] In 1866, two years later, California adopted the Maine statute verbatim. In the same year, Massachusetts

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"substantially and virtually destroys the presumption of innocence; and it compels an accused party to furnish evidence which may be used against himself"); Bodansky, *supra* note 40, at 114–15; Ferguson v. Georgia, 365 U.S. 570, 578 (1961).

42. Bodansky, *supra* note 40, at 115.

43. Nearly a century later, the Supreme Court would acknowledge that "[n]either Bentham nor Appleton was a friend of the privilege against self-incrimination." *Ferguson*, 365 U.S. at 579.

44. GOLD, *supra* note 31, at 61.

45. John Appleton, *Admission of Parties in Criminal Procedure*, 13 AM. JURIST & L. MAG. 50, 52–53 (1835); GOLD, *supra* note 31, at 65.

46. Appleton, *supra* note 45, at 62; Gold, *supra* note 31, at 65. Appleton was not alone on this point. As late as 1947, the Vermont Supreme Court upheld a statute that permitted adverse comment to the jury on a defendant's silence at trial and allowed jurors to draw reasonable inferences therefrom. State v. Baker, 53 A.2d 53, 59 (Vt. 1947) (noting that the "history of the privilege, and the weight of authority, show that the constitutional provision was directed against torture, force, and the inquisitorial practices of past centuries. It has no concern with tactical refinements."). The Vermont court concluded that the privilege against self-incrimination was intended to bar direct and physical compulsion, as opposed to state-induced pressure to testify in the courtroom. *Id.* at 59. *See also Comment on Defendant's Failure to Take the Stand*, 57 YALE L.J. 145, 147 n.12 (1947) (citing judicial opinions and legal scholarship embracing the view that the constitutional privilege was intended to bar only direct and physical compulsion, rather than indirect pressure in the courtroom).

47. Appleton, *supra* note 45, at 61. As Chief Justice of the Maine Supreme Judicial Court, Chief Justice Appleton upheld as proper jurors' viewing the accused's refusal to testify as evidence of her guilt. *See* State v. Cleaves, 59 Me. 298, 301 (1871) ("The silence of the accused,—the omission to explain or contradict, when the evidence tends to establish guilt is a fact,—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur,—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye.").

48. GOLD, *supra* note 31, at 61.

enacted a similar law, and Appleton played a role in its passage.[49] "By the end of the decade a dozen states had followed Maine's initiative and a thirteenth allowed the defendant to make a sworn statement before the jury."[50] Congress allowed criminal defendants to testify in federal trials in 1878.[51]

**B. *Defendant Competency and the Privilege: A Difficult Marriage?***

Leading the charge for enacting the nation's first law allowing criminal defendants to testify was the "crowning accomplishment of Appleton's career."[52] But that achievement triggered a constitutional quarrel that intensified in the late 1800s after states enacted laws permitting defendants to testify. Both then and now, the crucial question is whether the threat or use of comment and adverse inference from silence constitutes compulsion within the meaning of the Fifth Amendment and state constitutional provisions providing that the accused shall not be compelled to furnish evidence against himself. Nineteenth-century advocates of comment, like Appleton, rarely addressed that question directly. Instead, they argued that jurors on their own will inevitably draw an adverse inference whenever a defendant does not testify; jurors do not need a prosecutor or judge to point out the obvious. Even opponents of comment recognized this phenomenon. Shortly after Massachusetts allowed defendants to testify, Seth Ames, an Associate Justice of the Massachusetts Supreme Judicial Court and an opponent of Appleton's efforts in the Bay State, conceded this point:

> [J]urors all know that the defendant has the privilege (as it is called) of making himself a witness if he sees fit; and they also know that he would if he dared. They will, and they must draw every conceivable inference to his disadvantage if he do [sic] not. His neglect or refusal to testify will, and inevitably must, create a presumption against him even if every page of the statute-book contained a provision that it should not.[53]

In 1880, another legal commentator expressed a similar view:

> It is a fact in the case which the jury have derived from the infallible evidence of their own senses, and which must needs force itself on their minds. The failure of an accused to make an explanation in reply to an extra-judicial imputation of crime is not only relevant but strong evidence against him; but how tremendous must be the effect of his

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49. *Id.* at 62.

50. *Id.*

51. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (current version at 18 U.S.C. § 3481).

52. GOLD, *supra* note 31, at 59.

53. Ames, *supra* note 41, at 445. More than 153 years after Ames's critique of allowing criminal defendants to testify, Professor Jeffrey Bellin convincingly argues that empirical data show that "Ames was right that for many defendants the privilege to testify is more curse than blessing." Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 401 (2018) [hereinafter Bellin, *Silence Penalty*]. Professor Bellin, relying on empirical evidence from mock juror experiments and data from real trials, contends that jurors penalize defendants who refuse to testify by inferring guilt from silence.

> silence on that supreme occasion which is to decide for the question of his guilt or innocence?[54]

Unsurprisingly, prosecutors favored adverse comment. But prosecutors recognized that comment "indirectly forced [the accused] to take the stand."[55] In 1917, a law professor's survey found that prosecutors unanimously supported Ohio's constitutional provision that allowed comment and the drawing of an adverse inference, "and many were very emphatic in stating their approval."[56] The Ohio prosecutors believed that the practical impact of adverse comment was real and significant: when comment is allowed, the accused usually takes the stand. And these prosecutors saw a distinct difference between the inference jurors might reach on their own without prompting by a judge or prosecutor, and "the inference driven home as an admission of guilt by skillful counsel."[57]

Prosecutors were not the only ones to recognize that comment affected the decision to testify. Five of the first dozen state legislatures to allow defendants to testify barred adverse comment by statute.[58] State courts also recognized that adverse comment on a defendant's silence at trial constituted a form of compulsion to testify. California copied Maine's competency law, which did not bar adverse comment or the drawing of inferences, and in 1869, the California Supreme Court ruled that a prosecutor's comment and the adverse inference he asked the jury to draw, when combined with the law authorizing a defendant to testify, violated the state's constitutional provision against compelled self-incrimination:

> If the inference in question could be legally drawn the very act of exercising [the defendant's] option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent

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54. Wm. A. Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM. L. REV. 753, 763–64 (1880). Maury argued that competency laws—whether or not they contained provisions declaring that the failure of the defendant to testify shall not operate against him or be considered by the jury—violate the accused's right not to be compelled to give incriminating testimony:

> [B]oth classes of statutes are invalid, as being contrary to the great principle that a man shall not be compelled to be his own accuser, in this, that, although they profess to leave it to the accused to become a witness or not, they, in reality, force him to take the stand to protect himself from the inference of guilt which is almost sure to be drawn against him if he fail to do so, and the case call for an explanation on his part. He may be never so innocent, yet his omission to testify must always be at the risk of condemnation on the presumption of guilt found on his silence when the law gives him an opportunity to speak.

*Id.* at 762–63.

55. Walter T. Dunmore, *Comment on Failure of Accused to Testify*, 26 YALE L.J. 464, 468 (1917). As John G. Price, then-Attorney General of Ohio, stated: "I think [adverse comment] has in a great many cases caused defendants to take the stand, where otherwise they would not have done so." *On the Right of the Prosecutor to Comment on Defendant's Refusal to Take the Stand*, 13 J. AM. INST. CRIM. L. & CRIMINOLOGY 292, 295 (1922).

56. Dunmore, *supra* note 55, at 466.

57. *Id.* at 466–67.

58. GOLD, *supra* note 31, at 67.

> of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.[59]

Put simply, by refusing to testify, the accused has no way of avoiding incriminating testimony that is inferred from his silence. As Appleton remarked, "Silence is tantamount to confession."[60] For the next 65 years, the California Supreme Court would adhere to the view that a defendant's refusal to testify could not be used in any manner to prejudice him.[61]

On the East Coast, the right against self-incrimination was clearly on the minds of Massachusetts lawmakers when they enacted a defendant competency statute in 1866. Article 12 of the Declaration of Rights in the Massachusetts Constitution provides: "No subject shall . . . be compelled to accuse, or furnish evidence against himself."[62] Massachusetts's competency law, unlike Maine's version, included a provision stating "nor shall the neglect or refusal to testify create any presumption against the defendant."[63] Although this provision did not invoke Article 12 or expressly bar adverse comment by a prosecutor when a defendant refused to testify, Massachusetts's Supreme Judicial Court, in a series of cases, left no doubt that adverse comment was prohibited and based its rulings on the state constitutional right against compelling a defendant to provide evidence against himself. According to Massachusetts' highest court: "[The statute] is doubtless intended to carry out the spirit and purpose of the clause in the Declaration of Rights, that no subject shall 'be compelled to accuse or furnish evidence against himself.'"[64]

In the 1877 case *Commonwealth v. Scott*,[65] Chief Justice Gray explained that the statute's "no presumption" language recognizes the defendant's state constitutional protection against compelled self-incrimination and erects a bar against prejudicial comment by a prosecutor about a defendant's silence at trial.[66] This interpretation was consistent with other state court rulings that competency

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59. People v. Tyler, 36 Cal. 522, 530 (1869). The reasoning of the California Supreme Court "places the locus of compulsion not on the prosecutor's comment, but on the statute that qualified the defendant to testify in the first place." Caleb J. Fountain, *Silence and Remorselessness*, 81 ALB. L. REV. 267, 277 (2017/2018).

60. Appleton, *supra* note 45, at 65.

61. *See* People v. Modesto, 398 P.2d 753, 766 n.3 (Cal. 1965) (Peters, J., concurring and dissenting) (citing cases establishing and reaffirming this rule); *cf.* People v. Adamson, 165 P.2d 3, 8 (1946) (upholding state adverse comment provision), *aff'd*, 332 U.S. 46 (1947).

62. MASS. CONST. art. XII, § 1.

63. Act of May 26, 1866, ch. 260, 1866 Mass. Acts 245 (current version at MASS. GEN. LAWS ch. 233, § 20 (2018)).

64. Commonwealth v. Maloney, 113 Mass. 211, 214 (1873); *see also* Commonwealth v. Harlow, 110 Mass. 411, 411 (1872); Commonwealth v. Nichols, 114 Mass. 285, 287 (1873); Commonwealth v. Scott, 123 Mass. 239, 240–41 (1877).

65. 123 Mass. 239 (1877).

66. *Id.* at 241–42.

statutes had to include either provisions outlawing adverse comment by a prosecutor or instructions barring the drawing of an adverse inference.[67]

Massachusetts's law and the judicial interpretation it prompted played an important role when Congress debated whether to permit criminal defendants to give sworn testimony. On November 5, 1877, Representative William Frye from Maine introduced a bill "to make persons charged with crimes and offenses competent witnesses in the United State courts."[68] On January 16, 1878, Frye, on behalf of the Committee on the Judiciary, reported back the bill with the following language:

> [Sect. 1.] That in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts and courts-martial and courts of inquiry in any State or Territory, including the District of Columbia, the person so charged, shall, at his own request, but not otherwise, be a competent witness.
>
> [Sect. 2.] That nothing herein shall be construed as compelling any such person to testify; nor shall any inference of his guilt result if he does not testify; nor shall the prosecution comment thereon in case the respondent does not testify.[69]

The House Committee on the Judiciary suggested three amendments: (1) strike out the words "and courts-martial and courts of inquiry"; (2) add "and his failure to make such request shall not create any presumption against him"; and (3) strike out the entire second section.[70] The second and third amendments were passed. After the amendment to remove the no-comment provision passed, Representative John G. Carlisle from Kentucky asked "whether the amendment already adopted prohibits the counsel of the prosecution from commenting upon the defendant's refusal to testify."[71] Frye responded, "It does, under the provision of the bill that no presumption shall arise against the prisoner by reason of his refusal to testify. That is the law of Massachusetts, and we propose to adopt it as a law of the United States."[72] Frye's statements aligned with the Massachusetts Supreme Judicial Court precedents discussed above, which affirmed that Massachusetts's statute barred

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67. Bodansky, *supra* note 40, at 115; Ruloff v. People, 45 N.Y. 213, 222 (1871) ("Neither the prosecuting officer or the judge has the right to allude to the fact that a person has not availed himself of this [competency] statute."); Staples v. State, 89 Tenn. 231, 233 (1898) ("The Act of 1887, c. 79, permits the defendant in a criminal trial, 'at his own request, but not otherwise,' to testify as a witness therein. The act further provides 'that the failure of the parties defendant to make such request, and to testify in his own behalf, shall not create any presumption against him.'"). *See generally* Robert P. Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41–55 (1932) (discussing various state statutes and state court rulings). To be sure, the state courts were not unanimous in concluding that adverse inference instructions or comments violated the right against compelled self-incrimination. The first ruling from a state high court, State v. Bartlett, 55 Me. 200, 215–17 (1867), upheld a judge's instruction to the jury that they could consider the accused's refusal to testify.

68. H.R. 912, 45th Cong., 6 CONG. REC. 235 (1877).

69. H.R. 912, 45th Cong., 7 CONG. REC. 363 (1878).

70. 45th Cong., 7 CONG. REC. 385 (1878).

71. *Id.*

72. *Id.*

comment on a defendant's refusal to testify. On March 11, 1878, the proposed statute was passed in the Senate.[73] One week later, President Rutherford Hayes signed the bill into law.[74] Thus, in federal trials a defendant was given the choice to testify or not, and "his failure to make such request shall not create any presumption against him."[75]

As the end of the nineteenth century approached, defendants could testify in federal trials and almost every state.[76] While defendants could choose to testify, Congress, state legislatures, and state courts also protected defendants' right to remain silent at trial by precluding comment or the drawing of adverse inferences. By 1883, one legal commentator concluded that such protective laws or judicial rulings were "universal throughout the Union."[77] Even Maine, Appleton's home state, enacted a law in 1879 that barred using the accused's silence at trial as evidence of guilt.[78] "The legislature felt that the custom of commenting in effect compelled unwilling defendants to give evidence against themselves; and since the privilege against self-incrimination 'like the rain descend[ed] upon the innocent and guilt alike,' the lawmakers passed the prohibitory act."[79]

By 1932, 42 of the 48 states had statutes providing that "the failure of the accused to testify shall not create any presumption against him or that it shall not be subject to comment," with some states having both.[80] Similarly, state courts "usually, but not always," held that state constitutional provisions barring compulsory self-incrimination forbid adverse comment and adverse inferences, or they ruled that laws allowing comment and the drawing of adverse inferences "would be of doubtful constitutionality."[81]

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73. 7 CONG. REC. 1732 (1878).

74. The statute provided:

> That in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

7 CONG. REC. 1842 (1878); Act of Mar. 16, 1878, ch. 37, 20 Stat. 30-31 (current version at 18 U.S.C. § 3481).

75. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30-31 (current version at 18 U.S.C. § 3481).

76. Ferguson v. Georgia, 365 U.S. 570, 577 (1961) (listing states and years in which general competency laws were enacted).

77. R.V.W. DuBois, *The Accused as Witnesses*, 4 CRIM. L. MAG. 323, 353 n.1 (1883).

78. Maine's statute provided: "The fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be taken as evidence of his guilt." Act of Feb. 14, 1879, ch. 92, sec. 1, 1879 Me. Laws 112.

79. GOLD, *supra* note 31, at 68.

80. Reeder, *supra* note 67, at 43 (footnotes omitted).

81. *Id.* at 45. In a 1989 Report to the Attorney General, the Department of Justice argued that by the mid-1950s, "there was no consensus or near-consensus among the state

In sum, while the accused was offered the choice to testify, most state legislatures and courts recognized that allowing comment on silence and adverse inference was a form of compulsion that had to be barred for the accused to freely decide whether to take the stand. But the constitutional controversy "refused to die."[82] In 1931, two influential legal organizations, the American Law Institute and the American Bar Association, adopted resolutions supporting comment and adverse inference.[83]

Throughout this period, the Supreme Court said nothing about the constitutionality of adverse comment laws. Until 1878, federal defendants were not permitted to testify, and the Fifth Amendment's Self-Incrimination Clause did not apply to the states.[84] So, there was no reason for the Court to speak to the issue. However, shortly after the start of the twentieth century, the Court entered the fray. The next Part describes the Court's initial cases on the topic. These cases show that the Court was, at best, agnostic on whether adverse comment implicated the privilege.

## II. THE SUPREME COURT'S INITIAL CASES ON SILENCE AND ADVERSE COMMENT

The Supreme Court's first cases on adverse comment sent mixed signals on whether a prosecutor's references to a defendant's silence at trial implicate the Fifth Amendment. The Court's initial encounter with a prosecutor's adverse comment on a defendant's refusal to testify came in *Wilson v. United States*,[85] an 1893 ruling interpreting the 1878 federal statute making defendants competent to testify. George E. Wilson was charged with using the mail to provide information on obtaining obscene and lewd publications. Wilson refused to testify, and the federal prosecutor said in his summation to the jury: "[I]f I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime."[86] A unanimous Court found that this statement effectively told the jury "that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify."[87] This "plainly disregarded"[88] the 1878 federal statute, which stated that a defendant's failure to testify "shall not

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courts about the advisability of permitting adverse comment and inferences concerning a defendant's failure to testify." *Report to the Attorney General*, *supra* note 32, at 1042. The Department contended that "[a]uthority was also divided on the constitutional issue, but the courts in several states held that permitting comment was consistent with the self-incrimination right." *Id.* The "several" state courts that the Department listed as allowing comment were six states: Maine, Connecticut, Iowa, Vermont, New Jersey, and New Mexico. *See id.* at 1042 n.89.

82. GOLD, *supra* note 31, at 68.

83. See 54 ANN. REP. A.B.A. 1, 137–59 (1931); 9 A.L.I. PROC. 202-18 (1931); *Report of the Attorney General*, *supra* note 32, at 1030.

84. Act of March 16, 1878, ch. 37, 20 Stat. 30-31 (current version at 18 U.S.C. § 3481).

85. 149 U.S. 60 (1893).

86. *Id.* at 62.

87. *Id.* at 66.

88. *Id.*

create any presumption against him."[89] Accordingly, Wilson's conviction was reversed. In passing, Justice Field famously explained that the federal statute was framed with the presumption of innocence in mind:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.[90]

While *Wilson* did not mention the Fifth Amendment, as discussed below, some judges and scholars would later read this language as reflecting the meaning of the right against compelled self-incrimination. Fourteen years later, in *Twining v. New Jersey*, the Court was directly confronted with the issue of whether the Constitution barred adverse comment on a defendant's refusal to testify.[91] Albert C. Twining and David C. Cornell were charged with making false statements to a state bank examiner. A state trial judge made adverse comments on the defendants' failure to testify and told the jury it could draw an adverse inference from the defendants' silence. The defendants were convicted. On appeal, they challenged the judge's comments.

As the Court saw it, the key issue was whether the Fifth Amendment's Self-Incrimination Clause applied to the states. If it did not, there was no occasion for deciding whether the judge's instruction violated the privilege.[92] Writing for the Court, Justice Moody held that the privilege is not a right included in either the Privileges or Immunities or Due Process Clauses of the Fourteenth Amendment. Justice Harlan filed a lone dissent.

Years later, in another adverse comment case, Justice Frankfurter described Justice Moody's opinion in *Twining* "as one of the outstanding opinions in the history of the Court."[93] That statement was hyperbole and far from accurate. In fact, Moody's opinion was a straightforward application of settled law. More importantly, his view of the privilege was based on "inaccurate and insufficient [historical] data."[94]

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89. Act of March 16, 1878, ch. 37, 20 Stat. 30-31 (current version at 18 U.S.C. § 3481).

90. *Wilson*, 149 U.S. at 66.

91. 211 U.S. 78, 79–82 (1908).

92. *Id.* at 91.

93. Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

94. Leonard W. Levy, *The Right Against Self-Incrimination: History and Judicial History*, 84 POL. SCI. Q. 1, 8 (1969) [hereinafter Levy, *History and Judicial History*].

Regarding the privilege, Moody noted that the right to be free from testimonial compulsion was "universal in American law" and "a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions."[95] Yet, according to Moody, the Fourteenth Amendment's Privileges or Immunities Clause did not protect American citizens' privilege against self-incrimination from state abridgment. Nor was the privilege part of the substantive concept of liberty protected by the Fourteenth Amendment's Due Process Clause, which bars the states from denying individuals life, liberty, or property without due process of law. The "privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it."[96] If the privilege was neither an essential freedom of American citizenship nor a fundamental liberty guaranteed against state infringement, what was its constitutional status? Justice Moody explained that the exemption from compulsory self-incrimination "came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision."[97]

As constitutional historian Leonard Levy has explained, *Twining*'s historical analysis of the privilege was unsound from many angles. "Contrary to the Court's assertion, the right against self-incrimination did evolve as an essential part of due process and as a fundamental principle of liberty and justice."[98] And *Twining*'s refusal to acknowledge the right against self-incrimination as a fundamental liberty contradicted earlier Court rulings holding that the privilege is a fundamental right.[99]

Rather than offering an accurate understanding of the privilege's constitutional status, *Twining* illustrated the post-Civil War Court's refusal to extend the Bill of Rights to the states. Although the issue would become highly contested in the mid-twentieth century, in the late nineteenth and early twentieth centuries, a majority of the Court consistently interpreted the Civil War Amendments as not extending the Bill of Rights to the states.[100] When understood in this context, "the Fifth Amendment privilege against self-incrimination was largely irrelevant to the decision" in *Twining*.[101] At the same time, *Twining* offered some pointed criticism of the privilege itself. Citing America's preeminent evidence scholar, John Henry Wigmore, who considered the privilege "[a]s bequest of the 1600s" and "a relic of controversies and convulsions which have long ceased,"[102] Moody opined: "The wisdom of the [privilege] has never been universally assented to since the days of

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95. *Twining*, 211 U.S. at 91.
96. *Id.* at 110.
97. *Id.* at 106.
98. Levy, *History and Judicial History*, *supra* note 94, at 8.
99. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886); Counselman v. Hitchcock, 142 U.S. 547 (1892); Brown v. Walker, 161 U.S. 596 (1896); and Bram v. United States, 168 U.S. 532 (1897).
100. Perhaps the most important (and controversial) precedent establishing this point was the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
101. BERGER, *supra* note 4, at 47.
102. JOHN HENRY WIGMORE, EVIDENCE § 2272, § 2251 (McNaughton rev. 1961).

Bentham; many doubt it today, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient."[103]

In the last paragraph of his opinion, Justice Moody remarked that the Court had only assumed that the judge's comments violated the Fifth Amendment; it did not intend "to lend any countenance to the truth of that assumption."[104] This was a curious and unnecessary observation because, as Justice Harlan's dissent noted, if the majority was unwilling to conclude that the privilege had been violated, there was no need for the Court to hold that the privilege was not applicable to the states. For Harlan, there was no doubt that the privilege applied to the states.[105]

Starting in 1937, President Franklin Roosevelt's eight appointments would drastically transform the Court's membership and its view of the privilege. Before that transformation, the Court would announce two more Fifth Amendment rulings affecting a defendant's decision to remain silent—one rarely studied by constitutional scholars and the other better known. Both were unanimous rulings from the Taft Court that included Justices Holmes, Brandeis, and Stone, who would never be described as reactionaries. The first and more obscure case, *Yee Hem v. United States*,[106] rejected a Fifth Amendment challenge to a federal statutory presumption that possession of opium "shall be deemed sufficient to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."[107]

The Court thought little of the defense claim that the presumption compels the accused to testify to avoid conviction. According to the Court, the "statute compels nothing."[108] It simply makes possession of opium *prima facie* evidence of guilt. "It leaves the accused entirely free to testify or not as he chooses."[109] The accused might be the only person who could negate the presumption that would be drawn from his possession of opium, but that was just a fact. If there were no statutory presumption, the accused would still need to explain his possession to avoid conviction. In either scenario, the accused might need to take the stand to avoid conviction. The pressure to testify arises "simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."[110]

*Yee Hem* dismissed with scant analysis a serious constitutional contention. The Court's conclusion that the statutory presumption "leaves the accused entirely free to testify or not as he chooses" proves too much and assumes that a valid Fifth Amendment claim arises only when the government literally compels the accused

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103. Twining v. New Jersey, 211 U.S. 78, 113 (1908).

104. *Id.* at 114.

105. *Id.* at 122–27 (Harlan, J., dissenting); *id.* at 123 ("The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself.").

106. 268 U.S. 178 (1925).

107. *Id.* at 182; Act of Feb. 9, 1909, ch. 100, 35 Stat. 614, as amended by the Act of Jan. 17, 1914, c. 9, 38 Stat. 275.

108. *Yee Hem*, 268 U.S. at 185.

109. *Id.*

110. *Id.*

to testify on pain of punishment or contempt. Compulsion under the privilege should not be "limited to situations where an individual is deprived of the choice of remaining silent."[111] Theoretically, the accused "can always accept the consequences of refusing to give up his self-incrimination protection, even if they reach the severity of torture."[112]

More importantly, the statutory presumption put the accused between a rock and a hard place. As a practical matter, the defendant in *Yee Hem* had to testify and explain his possession of opium to have any chance of an acquittal. Testifying, of course, would mean waiving his privilege. Thus, Yee Hem was offered a Hobson's choice: either testify or risk being convicted.[113] That comes close to being compulsion under the Fifth Amendment. Under the circumstances, the statutory presumption *ex ante* waives the privilege for the accused.[114]

The second decision, *Raffel v. United States*,[115] written by Justice Stone, rejected a constitutional challenge to using a defendant's refusal to testify at an earlier trial for impeachment purposes at a second trial. At Raffel's first trial for conspiracy to violate the National Prohibition Act, a federal officer testified that Raffel had made an incriminating statement. Raffel did not testify, and the jury hung. At the second trial, the officer gave similar testimony. This time, Raffel testified and denied making the statement. The trial judge asked Raffel why he did not testify at the first trial. Raffel was convicted at the second trial, and the Court affirmed the conviction.[116] As in *Yee Hem*, the *Raffel* Court offered little analysis.

Essentially, the Court concluded that Raffel, by testifying at the second trial, waived his Fifth Amendment privilege (in part) and was required to answer any question on cross-examination that bore on the truth of his direct testimony.[117]

The correctness of *Raffel* is not obvious, yet the Court made no effort to justify its result. Of course, when the accused testifies, he or she is subject to cross-examination like any other witness. And if the defendant fails to explain incriminating circumstances, "such failure may not only be commented upon, but may be considered by the jury with all other circumstances in reaching their conclusion as to his guilt or innocence."[118] But why allow the judge or prosecutor to impeach Raffel's credibility because he invoked the privilege at an earlier trial? Certainly, Raffel waived his privilege at the second trial, but there is no obvious

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111. BERGER, *supra* note 4, at 216.

112. *Id.*

113. Comment, *Due Process, Self-Incrimination, and Statutory Presumptions in the Wake of* Leary *and* Turner, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 367, 374 (1970).

114. *Id.* (noting that the presumption "waives [the] privilege for [a defendant]").

115. 271 U.S. 494, 499 (1926).

116. *Id.* at 495–96, 499.

117. *Id.* at 497.

118. Caminetti v. United States, 242 U.S. 470, 493 (1917); *see also* Brown v. United States, 356 U.S. 148, 155–56 (1958) (noting, in context of civil denaturalization proceeding, that while the Fifth Amendment gives a witness the choice of whether to testify, decision to testify removes any "immunity from cross-examination on the matters [the witness] has himself put in dispute"). This concept is sometimes called the "distortion of truth" approach. *See* STEVEN M. SALKY, THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION 244–45 (3d ed. 2019).

inconsistency between that waiver and invoking the privilege in the first trial.[119] And if Raffel's invocation of the privilege at the first trial raises no inference of guilt as the Court assumed,[120] why allow impeachment of his credibility for the exact same thing when he takes the stand to claim his innocence? As one commentator noted shortly after *Raffel* was decided, Raffel's silence at the first trial will be seen as an implied admission of guilt; otherwise, there is no conflict with his claim of innocence at the second trial and nothing to discredit.[121] Put another way, are we supposed to accept that Raffel invoking the privilege cannot be considered by the jury on the substantive question of guilt, but is relevant to the credibility of his answers when he claims his innocence? "Surely this is asking a great deal of the average juror."[122]

While there were no dissents, the result in *Raffel* dilutes and punishes the defendant's decision to remain silent at trial. Allowing evidence of Raffel's refusal to testify at the first trial undercuts the privilege. The decision not to testify is one of the few absolute rights recognized in the Bill of Rights. Moreover, although the text of the Fifth Amendment does not require that a defendant proffer reasons for invoking the privilege, there are myriad reasons why an innocent person would plead the Fifth. A prosecutor should not be permitted to urge jurors to conclude that a defendant's testimony is dishonest because he previously asserted a privilege recognized and protected by the Constitution.[123] Second, as a practical matter, allowing impeachment by reference to the accused's assertion of the privilege risks having jurors view Raffel's prior silence as substantive evidence of his guilt.[124]

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119. BERGER, *supra* note 4, at 196 ("[I]t is questionable whether there is an inconsistency between the decision to remain silent and a subsequent change of mind. A variety of factors other than guilt or a lack of credibility might be the explanation.").

120. *Raffel*, 271 U.S. at 497 (assuming without deciding had Raffel not testified at the second trial, "evidence that he had claimed the same immunity on the first trial would be probative of no fact in issue, and would be inadmissible.").

121. E.W. Hinton, *Witnesses—Cross-Examination of a Defendant as to Failure to Testify on Former Trial*, 21 ILL. L. REV. 396, 400 (1926).

122. LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 256 n.30 (1959); *see also* Hinton, *supra* note 121, at 400 ("Certainly it is inconceivable that the average untrained jury could successfully perform such a feat of mental gymnastics.").

123. Grunewald v. United States, 353 U.S. 391, 425–26 (1957) (Black, J., concurring) ("It seems peculiarly incongruous . . . to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."). Professor Uviller agrees that attaching the cost of an adverse inference to the assertion of a constitutional right should not be allowed under Due Process norms. *See* H. Richard Uviller, *Self-Incrimination By Inference: Constitutional Restrictions on the Evidentiary Use of a Suspect's Refusal to Submit to a Search*, 81 J. CRIM. L. & CRIMINOLOGY 37, 55–56 (1990) ("A hidden cost attached to the assertion of a right of constitutional magnitude—even the cost of an otherwise fair and reasonable inference—strikes us as an ignoble part for our government to play. . . . And, reflecting these sentiments, courts customarily take it as virtually self-evident that the exercise of a right derived from the Constitution should not be burdened with an adverse consequence, however well that consequence may comport with ordinary, non-judicial common sense.").

124. BERGER, *supra* note 4, at 196–97 (explaining that "although the jury might be directed to consider the evidence only for impeachment purposes, there is always the risk that it will view the defendant's prior silence as substantive evidence of guilt").

## III. THE ROAD TO *GRIFFIN V. CALIFORNIA*

In 1939, William O. Douglas became FDR's fourth appointment to the Court. Known as "Wild Bill,"[125] Douglas has been described as "a result-oriented judge"[126] who, especially later in his career on the Court, did not take legal doctrine seriously, but "as a waste of time."[127] These comments fairly depict Justice Douglas's efforts in *Griffin v. California*, his most renowned Fifth Amendment ruling. But before he penned *Griffin*, he wrote *Johnson v. United States*.[128] Announced in 1943, *Johnson* was one of Justice Douglas's early opinions implicating Fifth Amendment concerns and his first addressing adverse comment.[129] When *Johnson* was decided, all the *Twining* Justices were gone from the Court. This was now Roosevelt's Court, and its view of comment and adverse inference based on silence was markedly different from the Taft Court.

Enoch L. Johnson, an Atlantic City politician who later was played by Steve Buscemi in the HBO series *Boardwalk Empire*,[130] was charged with evading federal taxes for the years 1935 through 1937. The prosecution submitted evidence that Johnson received money from gamblers for protection against law enforcement and did not report the cash on his tax returns. Johnson took the stand and admitted that he received payments from certain persons up to November 1937. During cross-examination, he was asked about payments he received in 1938. The prosecution argued the answer would tend to show that the gamblers made continuous payments through 1937. After the defense objected that the question was improper because it was directed at a future prosecution, the trial judge allowed Johnson to invoke the privilege regarding payments he received in 1938. Later, the prosecutor commented at length on Johnson's invocation of the Fifth. Again, the defense objected to the prosecutor's comment about Johnson invoking the Fifth. The next day, the judge heard arguments about the previous day's objections, but defense counsel remained silent and made no objection regarding the prosecutor's comment. Johnson was

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125. *See generally* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003). For a less charitable view of Douglas, see James Ryerson, *Dirty Rotten Hero*, N.Y. TIMES, Apr. 13, 2003, at 19, commenting that "it's hard to avoid the impression that Douglas was, on the court as well as off, a showboat and a troublemaker, and—as his nickname suggests—too wild for his own good."

126. Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 148 (1991).

127. Lucas A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENT. 267, 270 (1989).

128. 318 U.S. 189 (1943).

129. Three years later, Justice Douglas authored two opinions indicating that federal contractors have diminished Fifth Amendment rights regarding inspection of public documents. *See* Zap v. United States, 328 U.S. 624, 630 (1946) (writing that federal contractor "waived" his Fifth Amendment right in order to obtain government's business); Davis v. United States, 328 U.S. 582, 593 (1946) (noting that when officials seek inspection of "public documents at the place of business where they are required to be kept," the "custodian in this situation is not protected against the production of incriminating documents").

130. Boardwalk Empire Full Cast & Crew, IMDB, https://www.imdb.com/title/tt0979432/fullcredits?ref_=tt_cl_sm (last visited May 17, 2022).

convicted of evading taxes for the years 1936 and 1937; he was acquitted for 1935.[131]

The significance of *Johnson* is uncertain; it appears to have decided three different issues. First, Justice Douglas ruled that asking Johnson about the existence and sources of payments in 1938 was relevant to the charges against Johnson and a proper line of cross-examination. Accordingly, Douglas concluded that the trial judge could have denied the defendant's claim of privilege. And if, after being denied the right to invoke the privilege, Johnson refused to answer or explain payments he received in 1938, that silence "could properly be the subject of comment and inference."[132] In an earlier case, *Caminetti v. United States*,[133] the Court had ruled that the Fifth Amendment does not bar comment and adverse inferences when an accused who testifies fails to explain incriminating circumstances when it was within his power to do so. Thus, the upshot of Douglas's assumption is that once a defendant chooses to testify, he can be cross-examined about other uncharged crimes if they are deemed relevant to the current charges.[134]

But the trial judge allowed Johnson to claim the privilege, which Justice Douglas said was error. Though the trial judge mistakenly allowed Johnson to invoke the privilege on cross-examination, Justice Douglas next concluded that it was improper for the trial judge to permit the prosecutor to comment on Johnson's invoking the privilege and to permit the jury to draw any inference from silence when Johnson's decision to testify might have been different had he known that the prosecutor's comments would be used against him.[135] When the privilege is "asserted and unqualifiedly granted," the requirements of a fair trial "may" bar comment on silence. Quoting the Supreme Court of Pennsylvania, Douglas wrote:

> If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.[136]

Ultimately, Johnson's conviction was affirmed because his lawyer failed to renew his objection to the prosecutor's comments about silence when the trial judge was considering whether to charge the jury to disregard Johnson's refusal to testify about the 1938 payments.[137] The trial judge did not issue such an instruction. For

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131. *Johnson*, 318 U.S. at 190–95 (recounting facts of *Johnson*).

132. *Id.* at 196.

133. 242 U.S. 470, 494 (1917).

134. BERGER, *supra* note 4, at 94. Professor Berger describes this aspect of *Johnson* as part of its "holding." I disagree with that characterization because Justice Douglas only "assume[d]" that denying invocation of the privilege would be proper. *Johnson*, 318 U.S. at 196.

135. *Johnson*, 318 U.S. at 197 ("[No adverse comment is permissible] where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial.").

136. *Id.* at 196–97 (quoting Phelin v. Kenderdine, 20 Pa. 354, 363 (1853)).

137. *Id.* at 201.

Douglas and the rest of the Court, that amounted to a waiver of Johnson's Fifth Amendment claim and could not be relitigated on appeal.[138]

The holding in *Johnson* depends on how it is read and what a reader wants it to stand for.[139] And even if it is read broadly, references to the privilege and adverse comment are puzzling, to say the least. First, if the privilege is asserted and unqualifiedly granted, why the wishy-washy observation that fair trial norms "may" preclude comment? If the privilege is asserted and granted, then comment should be precluded. As Douglas suggested, that was the mandate of *Wilson*.[140] But, of course, the result in *Wilson* was not based on the Constitution; rather, its holding rested on the scope and meaning of the federal statute granting the accused the right to testify. Strictly speaking, *Wilson* cannot tell us what the privilege precludes if its holding was not based on the Fifth Amendment.

Eventually, Douglas used stronger language to condemn comment when a defendant is permitted to invoke the privilege. But a careful reader of *Johnson* would not conclude that Douglas's quotation from the Supreme Court of Pennsylvania was meant to reflect the meaning of the Fifth Amendment. A few pages later, Douglas made clear that *Johnson*'s condemnation of adverse comment rested upon the Court's supervisory powers over the lower federal courts, not on the Fifth Amendment.[141]

Finally, there is no denying that Johnson's conviction was affirmed because counsel waived any objection to the prosecutor's comments on Johnson's silence. This reality undermines the precedential value of Douglas's discussion on the privilege and adverse comment. In other words, his strong language condemning adverse comment when the privilege is invoked was *obiter dicta*.

On the one hand, *Johnson*'s precedential value is minimal at best. Also, prosecutors benefitted from *Johnson*. If a judge were so inclined, she could read *Johnson* as allowing comment and adverse inference when a defendant testifies at his own trial but refuses to answer questions about uncharged offenses that the judge

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138. *Id.*

139. For example, Judge Frank read *Johnson* as effectively overruling *Raffel*. United States v. Grunewald, 233 F.2d 556, 575 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). Similarly, Justice Peters of the California Supreme Court read *Johnson* as holding that comment on the defendant's refusal to testify is unconstitutional. People v. Modesto, 398 P.2d 753, 768 (Cal. 1965) (Peters, J., dissenting and concurring). And broad interpretations of *Johnson*'s holding have not been limited to lower court judges. Thirteen years after *Johnson* was decided, four Justices read it to undermine *Raffel*. Grunewald v. United States, 353 U.S. 391, 426 (1957) (Black, J., concurring).

140. *Johnson*, 318 U.S. at 196 ("[W]here the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand [Wilson v. United States, 149 U.S. 60 (1893)] is then applicable.").

141. *Id.* at 199 (Where the trial court "grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers.").

finds relevant to the charges the defendant is currently facing.[142] Allowing comment in such circumstances expands what was permitted in *Caminetti*, which did not involve questions about uncharged offenses but rather evidence related to the pending charges.

On the other hand, one can read *Johnson* as barring comment and adverse inference when the privilege is asserted at trial and allowed by the judge. Douglas explicitly embraced the view that assertion of the privilege at trial cannot be the subject of comment, and no inference can be drawn by a jury from a defendant's refusal to testify. The caveat, however, is that this conclusion was based on the Court's supervisory powers and was not adopted as a constitutional principle. But, as discussed below, future Justices and judges interpreted *Johnson* as announcing a constitutional norm barring adverse comment. *Johnson* was the start, and not the end, of the Court's evolving understanding of whether the privilege barred adverse inferences from the accused's decision not to testify. Although a wide majority of state legislatures and state courts had already decided that adverse inferences should not be allowed, by the middle of the twentieth century, the Court remained bitterly divided and undecided on the issue. *Adamson v. California*[143] confirmed the mixed thinking among the Justices.

## IV. THE COURT'S (STILL) EVOLVING VIEW ON ADVERSE INFERENCE AND THE PRIVILEGE

### A. Adamson v. California *(1947)*

Between the 1910s and 1930s, California's population tripled, felony convictions quadrupled, and crime costs quintupled.[144] In 1934, frustrated with a crime wave and an incompetent justice system, a mob broke into a San Jose jail and lynched two confessed murderers.[145] The infamous lynching, which occurred in "one of the most enlightened and orderly communities in the United States," was even approved by the governor.[146] Sensing public dissatisfaction with the criminal justice system, Alameda County District Attorney Earl Warren launched a movement to reform California's prosecutorial and judicial system.[147]

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142. *See, e.g.*, United States v. Pilcher, 672 F.2d 875, 878 (11th Cir. 1982) ("Cross-examination cannot be restricted by merely asserting that the response may be incriminating with respect to an uncharged offense.") (citing Johnson v. United States, 318 U.S. 189 (1943)); Smiley v. Evans, No. C 08-0045 RMW (PR), 2009 WL 2912514, at *8 (N.D. Cal. Sept. 8, 2009) (citing *Johnson* for the rule that a defendant waives the Fifth Amendment "at least to the extent of the scope of relevant cross-examination" about uncharged offenses, and that the jury could draw an adverse inference from the defendant's refusal to answer questions about the uncharged offenses).

143. 332 U.S. 46 (1947).

144. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 183 (2012).

145. *Id.*; A.M. Kidd, *The Work of the California State Bar Committee on Crime*, 14 OR. L. REV. 165 (1934).

146. William A. Beasly, *California Unifies Enforcement Agencies to Fight Crime*, 20 A.B.A. J. 757 (1934).

147. SHUGERMAN, *supra* note 144, at 183–84.

To push his reforms, Warren created a coalition with the California Chamber of Commerce and gained support from a variety of legal, business, and social organizations.[148] The coalition, known as the California Committee on the Better Administration of Law, was comprised of chiefs of police, the California Federation of Women's Clubs, the California League of Women Voters, the Crime Problems Advisory Committee of California, and the American Legion.[149] Although the state bar association did not join the coalition, they did support the proposed reform.[150] Warren's "crusade" sought to "Curb Crime" by improving and reforming the detection and conviction of criminals by way of constitutional amendments.[151] Newspaper articles reflected public support for the proposed reforms.[152] In one article, an attorney referenced a prosecutor's inability to comment on a defendant's refusal to testify as one of the many ways that "criminal law is too sensitive to the rights of the accused" and hampers justice.[153]

Utilizing California's initiative system,[154] Warren's coalition drafted four constitutional amendments, including Proposition No. 5, which would allow judges and prosecutors to comment on a criminal defendant's silence at trial.[155] In November 1934, Proposition 5 was passed by an overwhelming majority of California voters.[156] It amended the state constitution to provide that "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."[157] In 1935, the legislature revised the Penal Code to allow comment on a defendant's failure to testify.[158]

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On July 25, 1944, Stella Blauvelt's body was found on the floor of her Los Angeles apartment. Forensic evidence indicated she died by strangulation and was severely beaten before her death. Admiral Dewey Adamson (his given name, not a military rank) was charged with murdering the 64-year-old widow. No witnesses

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148. *Id.* at 184.

149. *Id.*

150. *See id.*; *The Work of the Board of Governors*, 9 St. Bar J. 92 (1934); *Committee on Administration of Justice*, 9 St. Bar J. 154 (1934).

151. SHUGERMAN, *supra* note 144, at 185; Beasly, *supra* note 146, at 758.

152. SHUGERMAN, *supra* note 144, at 189.

153. *Prosecution is Hampered by Criminal Law Technicalities*, MODESTO NEWS-HERALD, July 1, 1933, at 5.

154. Winston W. Crouch, *The Constitutional Initiative in Operation*, 33 AM. POL. SCI. REV. 634, 639 (1939) (noting that after California amended its system in 1911, constitutional amendments could be proposed by an initiative petition and passed by popular majority).

155. SHUGERMAN, *supra* note 144, at 185.

156. *Id.* at 191.

157. CALIFORNIA SECRETARY OF STATE, VOTER INFORMATION GUIDE FOR 1934 GENERAL ELECTION, app. at 8 (1934), http://repository.uchastings.edu/ca_ballot_props/339 [https://perma.cc/H69E-BEKZ].

158. Robert Kingsley & James B. Irsfeld, Jr., *Legislation*, 10 S. CAL. L. REV. 42, 54 (1936).

saw Adamson in the victim's apartment, but his fingerprints were found inside.[159] Adamson, a two-time felon, did not testify. Relying upon the 1934 constitutional amendment and the state penal code authorizing prosecutors to comment upon and urge jurors to draw an adverse inference from silence, the prosecutor commented repeatedly on Adamson's failure to testify.[160] Adamson was convicted and sentenced to death.

In the California Supreme Court, Adamson argued that the 1934 comment amendment violated Article I, Section 13 of the California Constitution, which provides that "[n]o person shall be . . . compelled in any criminal case, to be a witness against himself."[161] Writing for the court, Justice Traynor explained that the 1934 amendment "limited" but did not repeal the state privilege. "A person still cannot be compelled in any criminal case 'to be a witness against himself,' but the privilege no longer extends so far as to prevent comment upon or consideration of his failure to explain or deny evidence against him."[162] Tellingly, Traynor conceded that the "practical effect of the 1934 amendment may be that many defendants who otherwise would not take the stand will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the amendment."[163] But that "coercive effect," Traynor stated, was authorized by the 1934 amendment, which controls provisions of the state constitution adopted earlier.[164] Traynor did not, however, reconcile how the 1934 amendment merely limited, rather than repealed, the state constitutional right against compelled self-incrimination if the consequence of the comment law compelled some defendants to testify. Regarding the Fifth Amendment privilege in the Federal Constitution, Traynor noted that *Twining* settled that the federal privilege posed no restraint on state authorities.

Adamson's case reached the Supreme Court in 1947. Although the membership of the Court had entirely changed since *Twining*, the result remained the same. The Fifth Amendment privilege again played a minor role. *Adamson v. California* was essentially a replay of *Twining*, except this time the Justices were deeply divided over the result.

Viewed through a twenty-first-century lens, Justice Reed's opinion for five Justices offered some remarkable observations while reaffirming *Twining*'s holding that the Self-Incrimination Clause did not apply to the states. For starters, Reed made clear that a state could compel a defendant to testify in a criminal prosecution. Citing *Twining* and dicta from earlier rulings, Reed wrote, "protection against self-incrimination is not a privilege or immunity of national citizenship."[165] Nor did the Due Process Clause of the Fourteenth Amendment protect "the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment."[166] Forcing testimony from "an

159. People v. Adamson, 165 P.2d 3, 5–6 (Cal. 1946).
160. *Id.* at 7.
161. CAL. CONST. art. I, § 13.
162. *Adamson*, 165 P.2d at 8.
163. *Id.*
164. *Id.*
165. Adamson v. California, 332 U.S. 46, 53 (1947).
166. *Id.* at 54.

accused is not necessarily a breach of a state's obligation to give a fair trial."[167] If Due Process permits compelling a defendant to testify, what does it prevent in this context? Reed explained that the "due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion."[168] Reed was quick to note that California followed the Anglo-American tradition of not compelling defendants to testify, so there was no need to address the broader question of whether Due Process permitted a state to compel a defendant to take the stand. Rather, the Court only needed to focus on the constitutionality of California's comment law.

If the Self-Incrimination Clause of the Fifth Amendment did not apply to the states, there was no reason for the Court to opine on the wisdom or constitutionality of adverse comment. Nevertheless, Justice Reed gratuitously stoked the controversy over adverse comment. Reed assumed, "without any intention"[169] of deciding, that comment upon and consideration by the jury of a defendant's silence at trial violated the Fifth Amendment. But didn't the broad language in *Johnson* condemning comment and adverse inference implicitly resolve the issue against comment? Not so, according to Reed. In a footnote, he explained that the language in *Johnson* rebuking comment and adverse inference was derived from the federal statute authorizing defendants to testify, rather than the Fifth Amendment itself.[170] But Justice Douglas's opinion in *Johnson* had not cited that statute.

Reed noted that most American jurisdictions barred comment on a defendant's refusal to testify. California was one of only four states to permit comment and adverse inference.[171] Rather than view California's outlier status warily, however, Reed seemed to endorse the California rule:

> [W]e see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by comment upon defendant's failure to explain or deny it.[172]

This endorsement seemed to signal that a majority of the Court did not believe that adverse comment, even in federal cases, violated the Fifth Amendment, despite Reed's contrary assumption.

Justice Black's dissent in *Adamson* was "his 'most significant opinion written,'"[173] but it barely mentioned adverse comment laws and did not explain why

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167. *Id.*
168. *Id.*
169. *Id.* at 50.
170. *Adamson*, 332 U.S. at 50 n.6 (stating that the federal law "negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. It was this statute which is interpreted to protect the defendant against comment for his claim of privilege") (citations omitted).
171. *Id.* at 55 & n.16 (noting other states were New Jersey, Ohio, and Vermont).
172. *Id.* at 56.
173. HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 120 (1996).

such laws violate the Fifth Amendment.[174] Black's dissent is known for its argument that Due Process mandates total incorporation of the Bill of Rights against the states. Justice Murphy's dissent shouldered the task of explaining why adverse comment violated the privilege, and he homed in on the crucial constitutional issue: does adverse comment compel the accused to testify? He argued it did in two ways. First, if the accused does not testify, his silence is used to support adverse inferences against him on issues that the jury would expect him to deny or explain. "Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements."[175]

Second, if the accused testifies to prevent the consequences of adverse comment, "he is necessarily compelled to testify against himself."[176] Thus, his testimony, especially during cross-examination, is the result of the coercive pressure of the comment law "rather than his own volition."[177] Put differently, the compelled testimony materializes from the defendant's silence. As Murphy put it, the Fifth Amendment is as applicable "where the compelled testimony is in the form of silence as where it is composed of oral statements."[178] But Murphy did not explain how a judge would know that a defendant chose to testify to prevent adverse comment and inference, rather than for other reasons. Foreshadowing *Griffin*'s constitutional holding eighteen years later, Murphy told his law clerk that under an adverse comment law, "the accused suffers for exercising a right under the Constitution."[179] Though Murphy's *Adamson* dissent was viewed as "highly aberrant" at the time,[180] his understanding of the Fifth Amendment specifically and the Bill of Rights generally would soon dominate the Warren Court's thinking. His biographer called his dissent "a remarkable performance."[181]

### B. Grunewald v. United States *(1957)*

The supervisory powers doctrine allows federal judges to order procedural rules and remedies that are not specifically required by the Constitution or Congress.[182] The Supreme Court has declared itself the ultimate arbiter over the scope and meaning of the supervisory powers in the federal courts.[183] The Court has

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174. Black originally "passed" during the conference vote on whether Adamson's Fifth Amendment rights were violated. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 352 (1994).

175. *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

176. *Id.*

177. *Id.*

178. *Id.* at 125.

179. J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 440 (1968).

180. *Id.* at 441.

181. *Id.* at 440. Murphy's dissent was not enough to save Adamson from the death penalty. He was executed in San Quentin prison on December 9, 1949. *Slayer From Here Dies in Gas Chamber*, L.A. TIMES, Dec. 10, 1949, at 2.

182. United States v. Hasting, 461 U.S. 499, 505 (1983).

183. Dickerson v. United States, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."). The source of the Court's

said that federal courts' supervisory powers can be exercised "to implement a remedy for violation of recognized rights" and to provide "a remedy designed to deter illegal conduct."[184] The Court has not acknowledged, however, that it occasionally invokes the supervisory powers when it is concerned about imposing a constitutional straitjacket that it might want to remove later. Sometimes, distinguishing between a supervisory power and a constitutional mandate is difficult. That was the situation in *Johnson*, and it happened again in *Grunewald v. United States*.[185]

In *Grunewald*, Max Halperin was one of three defendants charged with various federal offenses related to tax fraud. During a grand jury proceeding, Halperin invoked the Fifth Amendment while repeatedly asserting his innocence. At trial, Halperin testified and explained why he was innocent. During cross-examination, the prosecutor asked Halperin the questions he refused to answer before the grand jury.[186] Relying on *Raffel*, the trial judge allowed the prosecutor to elicit from Halperin that he pled the Fifth when asked those questions at the grand jury.[187] When charging the jury, the judge told jurors that Halperin's claiming the Fifth could only be used to assess his credibility, and no inference as to guilt could be drawn. Halperin and his co-defendants were convicted.[188]

At the Court, Halperin (and his co-defendants) argued that the prosecutor should not have been permitted to cross-examine him about invoking the privilege before the grand jury. Although the trial judge found that *Raffel* supported the prosecutor's cross-examination, Halperin told the Justices that *Raffel* was implicitly overruled by *Johnson*.[189] Further, Halperin contended that the prosecutor should not have been permitted to impeach his credibility by referencing his invocation of the privilege and that the judge erred in refusing to charge the jury as Halperin requested: that an innocent person can claim the privilege at a judicial proceeding, such as the grand jury.

It is a basic rule of evidence that a witness's prior statements may be used to impeach his credibility. "But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent."[190] This rule provided the backdrop for Justice Harlan's holding in *Grunewald*. He explained that the threshold issue before the Justices was whether, under the facts, Halperin's invoking the Fifth before the grand jury was sufficiently in tension with his testimony at trial to justify using the invocation against him for impeachment purposes.[191]

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power is disputed. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 325, 328 (2006) (noting that the "Supreme Court has never justified its claim to power over inferior court procedure," and that the doctrine is unsupported by the "Constitution's text, structure, and history.").

184. *Hasting*, 461 U.S. at 505.
185. *See generally* 353 U.S. 391 (1957).
186. *Id.* at 415–17.
187. *Id.* at 418.
188. *Id.* at 393.
189. *Id.* at 418.
190. *Id.*
191. *Id.* at 419.

Significantly, Harlan concluded that *Raffel* did not establish as a matter of law that a prior claim of privilege for a question subsequently asked at trial constitutes a prior inconsistent statement, "irrespective of the circumstances under which the claim of privilege was made."[192] Ultimately, Harlan relied on the supervisory powers doctrine to hold that "under the circumstances of this case" it was prejudicial error to allow cross-examination of Halperin for taking the Fifth at the grand jury.[193] But before reaching that conclusion, Harlan pointedly noted that the Court need not decide whether *Raffel* had been silently overruled by *Johnson* or otherwise re-examine the validity of *Raffel*.[194] Perhaps Harlan's comments about *Raffel* were directed at the powerful dissent written by Judge Jerome Frank below who argued, among other things, that *Raffel* was wrongly decided and that the result in *Raffel* did not survive *Johnson*.[195] One curious question regarding Harlan's comment is how *Johnson*, a supervisory power case, could have overruled *Raffel*, which was a constitutional holding. Of course, it may be that Harlan and the *Grunewald* majority viewed the reasoning of *Johnson* as having constitutional implications, but Harlan never explained what constitutional norms emerged from *Johnson*. But it is telling that Harlan did not reaffirm or endorse *Raffel*.

Finding that Halperin's invocation of the privilege at the grand jury was consistent with his claim of innocence at trial would have been enough to decide the case. But Justice Harlan had more to say. A hero of conservative jurists and lawyers,[196] Harlan unambiguously stated that "no implication of guilt could be drawn from Halperin's invocation of the Fifth Amendment privilege before the grand jury," and that one of the basic functions of the privilege "is to protect *innocent* men."[197] These statements describe a constitutional principle. And if no implication of guilt could be drawn from invoking the privilege at a grand jury, the same logic

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192. *Id.* at 420.

193. In finding no inconsistency between Halperin's earlier claim of privilege and his subsequent claim of innocence at trial, Justice Harlan relied on three factors. First, Halperin repeatedly told the grand jury that he was innocent and pleaded the privilege solely on the advice of counsel. Second, Halperin was ordered to appear before the grand jury without representation of counsel, without the ability to summon witnesses, and without the opportunity to cross-examine witnesses who testified against him. Finally, "and most importantly," Halperin's taking the Fifth at the grand jury was understandable because he was clearly a target for criminal charges, and "he was being asked questions for the very purpose of providing evidence against himself." *Id.* at 422–23. These facts, Harlan remarked, presented "grave constitutional overtones." *Id.* at 423.

194. *Id.* at 421.

195. Judge Frank noted: "The sole difference between the *Raffel* and *Johnson* cases is this: In *Raffel*, the privilege had been successfully asserted in a previous trial; in *Johnson*, the successful assertion of the privilege occurred in the same trial. This difference seems to me so impalpable that we cannot reasonably say, I think, that the *Johnson* case kept the *Raffel* decision alive." United States v. Grunewald, 233 F.2d 556, 575 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).

196. *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992).

197. *Grunewald*, 353 U.S. at 421 (emphasis added).

obviously applies at trial, the forum of central concern for Fifth Amendment values.[198]

*Grunewald*, without saying so directly, strongly implied that adverse comment violated the Fifth Amendment. But that holding—announced in *Griffin*—would come eight years later. Before turning to *Griffin v. California*, two additional cases merit brief mention. First, in 1964, *Malloy v. Hogan*[199] formally overruled *Twining* and *Adamson* by holding that the Self-Incrimination Clause applies to the states. In doing so, *Malloy* explained that our system of criminal prosecution "is accusatorial, not inquisitorial," and the privilege "is its essential mainstay."[200] What the Fifth Amendment protects, according to *Malloy*, is "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 . . . for such silence."[201]

The second case, *United States v. Gainey*,[202] was decided eight days before the oral argument in *Griffin*. Jackie Gainey was convicted of violating two federal statutes: one prohibited the possession or operation of an unregistered still, and the other outlawed "carrying on" the business of a distiller without having the required bond.[203] During his instruction to the jury, the trial judge informed jurors of two statutory provisions which "authorize a jury to infer guilt of the substantive offenses from the fact of a defendant's unexplained presence at the site of an illegal still."[204] Specifically, the federal provisions stated that "such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."[205]

Justice Stewart's majority opinion in *Gainey* rejected a Due Process challenge to the instruction and noted that in the context of the entire jury instruction, the part of the instruction that authorized conviction unless the defendant explains his presence at the still to the satisfaction of the jury should not be viewed as a reference to Gainey's refusal to testify.[206] According to Stewart, "The judge's

198. Writing for three other concurring Justices, Justice Black wrote that there were "no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* at 425 (Black, J., concurring). Justice Black also stated that *Raffel* "should be explicitly overruled." *Id.*

199. 378 U.S. 1 (1964).

200. *Id.* at 7.

201. *Id.* at 8. *Malloy* is not without its critics. *See, e.g.*, JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 122 (1993) (arguing that Court was wrong to describe the privilege "as a basic principle of free government," and "a society can very well be free and yet require those under suspicion to answer questions posed in an orderly proceeding"); Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 729 (1988) (describing *Malloy* "as an extraordinarily weak opinion").

202. 380 U.S. 63 (1965).

203. *Id.* at 63–64.

204. *Id.* at 64.

205. *Id.* at 64 n.2 (quoting I.R.C. § 5601(b)).

206. *Id.* at 70–71.

overall reference was carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand."[207]

Justice Black's dissent vehemently disagreed. The obvious effect of "letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances."[208] According to Black, that legal framework constituted compulsion, which is contrary to the Fifth Amendment's purpose to forbid convictions on compelled testimony.[209]

Justice Black also argued that *Yee Hem v. United States*, which upheld a similar statutory presumption against a Fifth Amendment challenge 40 years earlier, was wrongly decided. He noted that *Yee Hem*'s constitutional analysis "was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses.'"[210] According to Black, that reasoning would also justify admitting a coerced confession. Similarly, Justice Douglas dissented in *Gainey* and contended, citing his own dissent in a case the Court chose not to review, that using the accused's "silence as evidence against him is one way of having him testify against himself."[211]

## V. *GRIFFIN V. CALIFORNIA*: A WEAK OPINION BUT THE CORRECT RESULT

Eddie Dean Griffin's case squarely presented the Court with the issue of whether comment on a defendant's failure to testify violated the Self-Incrimination Clause of the Fifth Amendment, which was newly applicable to the states.[212] Since 1893, members of the Court had spoken—sometimes directly, occasionally obliquely—on the question, and there were statements in opinions pointing in different directions. But there was no definitive holding from the Justices.

Griffin was charged with killing Essie Mae Hodson. Griffin did not testify at the guilt phase of his trial.[213] A prosecution witness testified that he had seen Griffin emerge from the location where the victim was later found. The prosecutor extensively commented on Griffin's failure to testify:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

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207. *Id.* at 71.

208. *Id.* at 87 (Black, J., dissenting).

209. *Id.*

210. *Id.*

211. *Id.* at 74 (citing Scott v. California, 364 U.S. 471, 472 (1960) (Douglas, J., dissenting)). Over a decade later, Justice Stewart, the author of *Gainey*, pointedly noted that *Gainey* "did not involve the Fifth Amendment." Lakeside v. Oregon, 435 U.S. 333, 338 n.8 (1978).

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

213. At the time, California law provided for separate trials on the issues of guilt and penalty. Griffin did testify on the issue of penalty. *Id.* at 609 n.1.

. . . .

> He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
>
> These things he has not seen fit to take the stand and deny or explain.
>
> And in the whole world, if anybody would know, this defendant would know.
>
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[214]

Relying on the California constitutional provision that Earl Warren's group had proposed in 1936, the trial judge told jurors they could draw adverse inferences from Griffin's refusal to testify. Griffin was convicted of murder and sentenced to death.[215]

Justice Douglas's opinion found that California's comment law violated the Fifth Amendment. While *Griffin*'s holding is clearly stated—"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"[216]—Douglas's constitutional analysis is, "to put it gently, sparse."[217] Douglas makes no reference to the text or history of the Fifth Amendment. Essentially, *Griffin*'s holding rests on two propositions. First, the comment rule authorizes the state to argue to the jury that the accused's failure to testify is substantive evidence of his guilt. As Douglas put it, "the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."[218] Second, commenting on the accused's failure to testify exacts a "penalty" for exercising a constitutional right. "It cuts down on the privilege by making its assertion costly."[219] Acknowledging that an adverse inference is natural and inevitable whenever a defendant remains silent about facts within his knowledge, Douglas noted that reality did not eliminate the constitutional vice of the comment law. "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."[220]

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214. *Id.* at 610–11.
215. *Id.* at 609–10.
216. *Id.* at 615.
217. Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1341 (2009).
218. *Griffin*, 380 U.S. at 613.
219. *Id.* at 614.
220. *Id.* Douglas's assumption about jurors' negative inferences from a defendant's refusal to testify appears to be supported by empirical data. See Bellin, *Silence Penalty*, *supra* note 53, at 407–10 (noting social science literature, empirical data, and anecdotal evidence suggests that jurors punish defendants who refuse to testify).

Justice Harlan concurred. He agreed that, in federal courts, comment by federal prosecutors and judges violated the Fifth Amendment, and he recognized *Malloy v. Hogan* required extending that constitutional principle to the states. But Justice Harlan regretted the decision in *Malloy*.[221]

Justice Stewart, joined by Justice White, dissented. Unlike Justice Douglas, Stewart focused on the text and history of the privilege.[222] The key inquiry was whether California's comment rule amounted to compulsion within the meaning of the Constitution. Noting that the privilege was originally intended to ban incarceration or physical punishment for individuals who remained silent when questioned by state officials in judicial proceedings, Stewart contended that Douglas's opinion "stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel."[223]

Stewart noted that because comment by counsel and court did not inform the jury of something that they did not already know and did not actually compel Griffin to testify, the comment law must involve some type of compulsion, which Douglas did not describe and was not self-evident. Finally, Stewart thought the accused was better situated under the California comment law than he or she would be in a state where comment on failure to testify was prohibited. According to Stewart, the limited and carefully worded instructions from the trial judge were more advantageous to the accused than "if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt."[224]

## VI. POST-*GRIFFIN* COURT: BUYER'S REMORSE?

After deciding *Griffin*,[225] which some jurists and lawyers consider dead wrong,[226] perhaps it was inevitable that the Court, even the Warren Court, would

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221. Harlan believed in following the precedent of *Malloy*, even when he voted the other way. Also, Justice Harlan apparently viewed the Self-Incrimination Clause as "a non-fundamental part of the Fifth Amendment" and, but for *Malloy*, would not "apply the no-comment rule to the States." *Griffin*, 380 U.S. at 616 (Harlan, J., concurring). Earlier, in his concurring opinion in *Pointer v. Texas*, Justice Harlan stated that "not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental." 380 U.S. 400, 409 (1965) (Harlan, J., concurring).

222. *Griffin*, 380 U.S. at 620–21 (Stewart, J., dissenting).

223. *Id.* at 620.

224. *Id.* at 621.

225. After the Court reversed his conviction, Griffin was retried. That trial resulted in a hung jury and ended in a mistrial. Griffin was then tried for a third time and was found guilty and given the death sentence. That conviction was automatically reviewed by the California Supreme Court and reversed. People v. Griffin, 66 Cal. 2d 459, 461 (1967). In a fourth trial, Griffin was convicted of first-degree murder and given a life sentence. That conviction was affirmed by the state appellate court. People v. Griffin, 93 Cal. Rptr. 319, 320 (Ct. App. 1971).

226. *See, e.g.*, *Report to the Attorney General*, *supra* note 32, at 1007. The State of California filed an unsuccessful petition for rehearing in *Griffin*. *Inter alia*, the petition contended the result in *Griffin* could not be reconciled with the result in *Gainey*, announced

retreat from the natural implications of its holding. In the two cases that immediately followed *Griffin*—*Tehan v. United States ex rel. Shott*[227] and *Chapman v. California*[228]—what the Court did not say about the purpose of *Griffin* revealed more about its thinking on adverse comment and the privilege than what it did say.

Less than one year after the announcement of *Griffin*, the Court had to decide whether the rule of *Griffin* should extend to defendants whose cases had become final after exhausting all direct appeals in challenging their convictions. Applying *Griffin* retroactively would require the six states that permitted comment and adverse inference before *Griffin* was decided—California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio—to retry defendants previously convicted in cases where comment was made on the accused's refusal to testify.[229] Justice Stewart's opinion for five Justices in *Shott* ruled that *Griffin* did not apply retroactively and thus spared these six states the "very grave" impact of retrying tens of thousands of previously convicted prisoners.[230]

Justice Stewart followed the framework of *Linkletter v. Walker*,[231] which had been decided the previous Term and held that the Fourth Amendment's exclusionary rule announced in *Mapp v. Ohio*[232] did not apply retroactively. Under that model, "the Constitution neither prohibits nor requires retrospective effect" of constitutional rulings.[233] Rather, the Court determines retroactive effect *vel non* by considering the purposes of the newly announced constitutional rule, the states' reliance on the rule of law that has been overturned, and the effect on the administration of justice of a retrospective application of the new constitutional holding.[234]

Applying these three factors, Stewart first explained there was no single and distinct purpose behind *Griffin*. The purpose of *Griffin* "is to be found in the whole complex of values" that the privilege reflects.[235] Interestingly, Stewart did not

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almost two months before *Griffin*. The petition argued that if Congress can authorize conviction solely on the basis of presence at the scene of a crime unless that presence is explained to the satisfaction of the jury, a state should be permitted to comment on a defendant's refusal to testify. "Any compulsion to testify inherent in the limited comment permitted by the California rule exists even more strongly in the federal statutory presumption upheld" in *Gainey*. Petition for Rehearing at 6, *Griffin*, 380 U.S. 609. And the petition asserted that if the comment rule is unconstitutional "because it 'is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify,' the federal statutory presumption at issue in *Gainey* is unconstitutional for the same reason." *Id.*

227. 382 U.S. 406 (1966).

228. 386 U.S. 18 (1967).

229. *Shott*, 382 U.S. at 418.

230. *Id.* Relying on his dissent in Linkletter v. Walker, 381 U.S. 618, 640 (1965) (Black, J. dissenting), Justice Black, joined by Justice Douglas, dissented in *Shott*, 382 U.S. at 419. Chief Justice Warren and Justice Fortas did not participate in the consideration or decision of *Shott*. *Id.* at 419.

231. 381 U.S. 618 (1965).

232. 367 U.S. 643, 655 (1961).

233. *Linkletter*, 381 U.S. at 629.

234. *Id.* at 636.

235. *Shott*, 382 U.S. at 413–14.

mention that comment on failure to testify contravenes the privilege because it makes the accused an unwilling purveyor of incriminating testimony, though he did reference that comment amounts to a "penalty" for exercising a constitutional right.[236] More significantly, if one of the purposes or values of the privilege is to protect the innocent, which the Court recognized as far as back as 1908[237] and reaffirmed in Justice Harlan's opinion in *Grunewald*,[238] this would be a powerful basis for retrospective application of *Griffin*. Without acknowledging *Grunewald* or the Court's other statements that the privilege protects the innocent, Stewart emphasized that the basic purposes of the privilege do not include "protecting the innocent from conviction,"[239] although a year earlier, the Court described the privilege as "a protection to the innocent."[240] Nor was the privilege, Stewart continued, designed to promote ascertainment of truth in judicial proceedings. Rather, the privilege, like the Fourth Amendment, reflects society's concern "for the right of each individual to be let alone."[241]

Second, it was indisputable that the states had relied in good faith upon the legality of comment and adverse inference. Stewart noted that for more than half a century, the Court repeatedly told the states that "comment upon the failure of an accused to testify in a state criminal trial in no way violated the Federal Constitution."[242] Finally, retroactive application of *Griffin* would exert enormous stress upon the criminal justice systems of the six states that permitted comment and adverse inference before *Griffin* was decided. Stewart was willing to assume that there was comment in every prosecution in the six states where the defendant did not testify. He approvingly cited California's amicus curiae brief, which argued that prisoners serving lengthy sentences would benefit the most from retrospective application. "Their cases would offer the least likelihood of a successful retrial since

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236. *Id.* at 414.

237. Twining v. New Jersey, 211 U.S. 78, 91 (1908) (stating that at the time of Framing, the privilege was regarded then, as now, "as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions").

238. Grunewald v. United States, 353 U.S. 391, 421 (1957) ("[O]ne of the basic functions of the privilege is to protect *innocent* men") (citation omitted) (emphasis added); *id.* ("'The privilege serves to protect the *innocent* who otherwise might be ensnared by ambiguous circumstances'") (emphasis added) (quoting Slochower v. Bd. of Higher Ed. 350 U.S. 551, 557–58 (1956).

239. *Shott*, 382 U.S. at 415.

240. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)). Candor requires acknowledging that the Court has never made up its mind on whether the privilege protects the innocent as well as the guilty. See Duane, *supra* note 19, at 6–7 (explaining that Court has several times stated that the privilege protects innocent as well as guilty and has "also stated in complete contradiction that a person's decision to assert the privilege logically and naturally supports the inference that he is guilty, because only guilty people have anything to fear from telling the truth.") (footnotes omitted). More recently, in Ohio v. Reiner, 532 U.S. 17, 21 (2001), the Court stated that "one of the Fifth Amendment's 'basic functions . . . is to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" (quoting *Grunewald*, 353 U.S. at 421).

241. *Shott*, 382 U.S. at 416.

242. *Id.* at 417.

in many, if not most, instances, witnesses and evidence are no longer available."[243] According to Stewart, the impact of ordering reversal of every conviction where comment occurred would be "so devasting as to need no elaboration."[244]

Thirteen months after *Shott*, the Court decided whether a violation of *Griffin* can be deemed harmless for constitutional purposes. "Up until the mid-1960s, a constitutional error automatically resulted in reversal of a conviction."[245] But after the Warren Court took an expansive view of constitutional rights, "it was no longer certain that every constitutional violation necessitated a new trial."[246] The defendants in *Chapman v. California* told the Justices that harmless error analysis is a federal, not a state, question and that infringement of a constitutional right, regardless of facts and circumstances, requires automatic reversal of a conviction.[247] A unanimous Court agreed with the former, but not with the latter, argument.[248]

Justice Black's opinion declared that some constitutional errors, depending on the circumstances, may be "so unimportant and insignificant" that they can be deemed harmless and thus not merit automatic reversal of a conviction.[249] On the other hand, in the mid-1960s, there were certain constitutional rights so essential to a fair trial that violation was never harmless. For example, the denial of the right to counsel, the admission of a coerced confession, and the sitting of a biased judge require automatic reversal because they are considered structural errors that undermine the foundation of a fair trial.[250] Ultimately, Black concluded that a constitutional error is harmless when the state proves that the error did not contribute to securing a conviction and thus was harmless beyond a reasonable doubt.[251]

While Justice Black found that, under the facts, the prosecutor's comment in *Chapman* was not harmless, he did not address why a *Griffin* violation is subject to harmless error analysis. Put another way, Black assumed that a violation of *Griffin* could be harmless, and he did not address the view that barring comment and adverse inference is essential to a fair trial and protecting the innocent.

A defendant has an absolute right not to testify. If a defendant was compelled to testify, made incriminating statements while testifying, and was eventually convicted, that scenario would not be deemed harmless and would demand automatic reversal of the conviction. That scenario is the equivalent of

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243. *Id.* at 418–19.

244. *Id.* at 419.

245. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 429 (2002).

246. *Id.*

247. Chapman v. California, 386 U.S. 18, 21–22 (1967).

248. *Id.* at 22.

249. *Id.*

250. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased judge). Subsequent to *Griffin* and *Chapman*, the Court has limited the contexts in which harmless error analysis does not apply. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986) (racial discrimination in grand jury selection); Waller v. Georgia, 467 U.S. 39, 48 (1984) (denial of a public trial); McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) (denial of self-representation).

251. *Chapman*, 386 U.S. at 24.

admitting a coerced confession.[252] Why should the result be different when comment and adverse inference occur? In both cases, the accused cannot avoid providing incriminating testimony. In the first instance, the incrimination comes from the mouth of the accused. In the latter case, the incrimination comes from the accused's silence. If the privilege is an "essential mainstay" of the accusatorial process, and the government "may not by coercion prove a charge against an accused out of his own mouth,"[253] then banning comment and adverse inference is equally essential to prevent the government from proving a charge from the accused's silence. Justice Black never grappled with this point because he assumed a *Griffin* error could be harmless in some cases—an assumption that seems at odds with the point of the Fifth Amendment. This doesn't mean that adverse comment and inference should be equated with the admission of a confession obtained by waterboarding. Of course, torture or physical assault is much worse because it is obviously more coercive. Rather, the point is that if the privilege grants an absolute right not to testify, then adverse comment defeats that right. And the Court has not yet openly embraced a sliding-scale view of compulsion under the Fifth Amendment: textually speaking, no amount of compulsion is permissible.

## VII. THE LIMITS OF *GRIFFIN*'S "PENALTY" THEORY

Of the two theories supporting *Griffin*'s holding, the "penalty" theory—that adverse comment "is a penalty imposed by courts for exercising a constitutional privilege"—is the most problematic.[254] To be fair, Justice Douglas's reliance on the penalty concept for evaluating whether comment and adverse inference infringe the privilege may have been prompted by some of the language in *Malloy v. Hogan*, decided the previous Term. *Malloy* explained that the privilege guarantees "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 . . . for such silence."[255] And the penalty rationale loomed large in both *Spevack v. Klein*[256] and *Garrity v. New Jersey*,[257] two important privilege cases decided together in 1967, both written by Justice Douglas.

On the one hand, the penalty concept is sound. Penalizing the exercise of a right violates the Constitution even when it doesn't prevent exercise of that right. If state officials jail a person for giving a speech, it is no defense to argue that because the person gave the speech no violation of the First Amendment occurred. Similarly, if a state passed a law that requires all criminal defendants to testify upon penalty of contempt, a defendant has a choice: "either he must take the witness stand and run the risk that he will incriminate himself, or he must remain silent and be punished

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252. *But see* Arizona v. Fulminate, 499 U.S. 279, 303 (1991) (ruling that the admission of an involuntary confession under the Fourteenth Amendment's Due Process Clause was subject to harmless error analysis).

253. Malloy v. Hogan, 378 U.S. 1, 7–8 (1964).

254. Griffin v. California, 380 U.S. 609, 614 (1965).

255. *Malloy*, 378 U.S. at 8.

256. 385 U.S. 511 (1967). In *Spevack*, Justice Douglas quoted *Malloy*'s penalty language to support the idea that penalty "is not restricted to fine or imprisonment." *Id.* at 514–15 (quoting *Malloy*, 378 U.S. at 8). See BERGER, *supra* note 4, at 204 ("The penalty rationale was the unmistakable source of the Court's ruling in *Spevack*.").

257. 385 U.S. 493 (1967).

for doing so."[258] If a defendant chooses silence and is jailed, do critics of *Griffin* believe no constitutional violation has occurred because the defendant has not been forced to testify?

As Professor Westen has explained, "there is a relationship of *equivalence* between penalties and compulsion."[259]And *Malloy* is the precedent that bars penalizing silence. William Malloy was ordered to testify before a county board investigating gambling and other criminal conduct. When Malloy refused to testify, he was jailed.[260] The Court held Malloy had a right to remain silent, "and, therefore, a right not to be punished for remaining silent—because his answers might have incriminated him."[261] The same logic applies to a defendant's refusal to take the stand in a criminal case.

On the other hand, and despite its origins, the penalty theory had serious flaws as a device for assessing the merits of Fifth Amendment claims. First, it has no nexus with the text of the privilege. "The Fifth Amendment does not . . . prohibit 'penalties'; it prohibits compelled testimony."[262] Second, starting in *Griffin* and then in later cases, the Court offered no standard for identifying or measuring an impermissible penalty.[263] After reviewing the Court's cases, judges and lawyers are left with the "difficult task" of "identifying precisely what differentiates the penalties upon protected silence that are sufficiently severe to be forbidden by the Fifth Amendment."[264] William Malloy obviously suffered a penalty for invoking the privilege—he was jailed. But whether Griffin suffered a penalty was a closer case. All that Justice Douglas said was that adverse comment diminishes the privilege by making its assertion costly. While this accurately describes what happened to Griffin—comment on his silence generated evidence of his guilt—the Court offered no analysis of why eliciting this evidence constituted an impermissible penalty any more so than presenting witnesses against the defendant penalized the defendant's right not to testify. And because Douglas's analysis was so sparse, *Griffin* offered no basis for evaluating future "penalties" that made invocation of the privilege harmful to the interests of the accused.

Third, the Court never bothered to reconcile the existence of an unconstitutional penalty—the apparent source of compulsion to testify—with the reality of the defendant's refusal to testify. As a perceptive scholar of the privilege observed, "[b]y hypothesis, . . . anyone who asserted the privilege despite the penalty had not been compelled to incriminate himself, and thus there [was] no Fifth Amendment violation."[265] This apparent contradiction would become (and remains) a mantra for critics of *Griffin*. As Justice Powell put it a few years later, "[a]

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258. Peter Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935, 942 (1978).

259. *Id.*

260. *Malloy*, 378 U.S. at 3.

261. Westen, *supra* note 258, at 943.

262. Caleb J. Fountain, *Silence and Remorselessness*, 81 ALB. L. REV. 267, 277 (2018).

263. BERGER, *supra* note 4, at 201 (noting that the "Court failed to define the content of the penalty standard it was using").

264. Bellin, *Reconceptualizing*, *supra* note 18, at 263.

265. BERGER, *supra* note 4, at 202.

defendant *who chooses not to testify* hardly can claim that he was *compelled to testify*."[266]

The final flaw of the penalty analysis was perhaps inevitable with the emergence of the more conservative Burger Court. The problem here is closely related to the lack of a standard for identifying an unconstitutional penalty, namely, what to make of the fact that in some cases, the Court decided the merits of a "no comment" claim without engaging in any penalty analysis. This occurred in *Lakeside v. Oregon*.[267]

### A. Lakeside v. Oregon *(1978)*

Ensio Ruben Lakeside was charged with escape from prison. He had an overnight pass that required him to return to the prison by 10:00 p.m. the following day. He did not return. Lakeside did not testify at trial; his defense was that he was not criminally responsible for his actions. A psychiatrist and other witnesses testified in support of his claim.

At the time of Lakeside's trial, Oregon law afforded the accused an absolute right to require that the jury be instructed that a refusal to testify must be disregarded.[268] Lakeside, however, wanted a twist on this rule; he argued this protective instruction violated the privilege when given over the accused's objection. The trial judge disagreed. In order to protect the defendant, the judge told the jury not to draw any adverse inference from Lakeside's refusal to testify. Lakeside was convicted. In the Court, Lakeside told the Justices that the trial judge's instruction was both a literal violation of the *Griffin* rule, which had stated that "comment on the refusal to testify"[269] violates the privilege, and a violation of the privilege generally because it focused the jury's attention on the defendant's silence without his permission. Justice Stewart's opinion for the Court rejected both arguments.

First, Stewart ruled that *Griffin*'s holding was concerned only with *adverse* comment by a prosecutor or judge. Here, the instruction given to jurors was that they draw no adverse inferences of any kind from Lakeside's silence, which was quite distinct from the comment condemned by *Griffin*. "Such an instruction cannot provide the pressure on a defendant found impermissible in *Griffin*."[270]

Regarding Lakeside's claim that the comment impermissibly called attention to his refusal to testify, Stewart saw no constitutional evil despite the defendant's objection to the protective instruction. According to Stewart, the point of the judge's comment was to eliminate any unspoken adverse inferences from the jurors' consideration. "It would be strange indeed to conclude that this cautionary

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266. Carter v. Kentucky, 450 U.S. 288, 306 (1981) (Powell, J., concurring).

267. 435 U.S. 333 (1978).

268. A few years later, *Carter* held that the Fifth Amendment requires, when properly requested, a similar instruction. 450 U.S. at 305. Defendants in federal criminal trials have been afforded this protection since 1939 when *Bruno v. United States*, 308 U.S. 287 (1939), construed the federal statute authorizing defendants to give sworn testimony as requiring this instruction.

269. Griffin v. California, 380 U.S. 609, 614 (1965).

270. *Lakeside*, 435 U.S. at 339.

instruction violates the very constitutional provision it is intended to protect."[271] Put simply, Stewart found no unconstitutional compulsion with a "no-inference" instruction. And because a "no-inference" instruction did not amount to compulsion, Lakeside did not suffer any "penalty" for refusing to testify.[272]

By contrast, Justice Stevens's dissent, relying on the penalty analysis of *Griffin*, found compulsion in the judge's instruction. For Stevens, when a prosecutor or judge focuses the jury's attention on the accused's refusal to take the stand, it "has an undeniably adverse effect on the defendant."[273] Echoing Bentham's and Appleton's nineteenth-century hypotheses, Stevens believed that the connection between silence and guilt is too hard to ignore. In the rare case where jurors may have overlooked it, "telling them to ignore the defendant's silence is like telling them not to think of a white bear."[274] As for Stewart's conclusion that barring a "no-inference" instruction would be strange in light of its purpose to protect the accused's right not to testify, Stevens warned that the Court's holding could not be cabined to judicial comment: "Unless the same words mean different things in different mouths, this holding also applies to statements made by the prosecutor in his closing argument."[275] As a practical matter, instructions on the accused's right to silence will not always benefit the accused. Sometimes the instruction will make silence costly.[276] Accordingly, Stevens concluded that *Griffin* required reversal of Lakeside's conviction.

The flaws identified above with the penalty theory, along with the Burger Court's hostility toward *Griffin* itself, ultimately caused the Court to announce a highly formalistic and unsatisfying limitation of the no-comment rule in *Baxter v. Palmigiano*.[277]

### B. Baxter v. Palmigiano *(1976)*

Nick Palmigiano was serving a life sentence for murder in a Rhode Island prison when prison officials charged him with inciting a disturbance that might have caused a riot. When he appeared at a prison disciplinary proceeding, he was told by prison officials that he might be prosecuted for a criminal offense; that he should consult with an attorney (although no attorney could represent him at the prison disciplinary proceeding); and that he had a right to remain silent at the proceeding but if he refused to talk his silence would be held against him. On the advice of counsel, Palmigiano remained silent at the proceeding, and he was adjudged guilty

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271. *Id.* Interestingly, Stewart closed his opinion with the dicta that "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." *Id.* at 340.

272. *Id.* at 340–41.

273. *Id.* at 345 (Stevens, J., dissenting).

274. *Id.*

275. *Id.*

276. *Cf.* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 89 (1990) (criticizing the logic of *Lakeside*, and noting that "psychology literature supports the defendant's objection. An admonition will not reduce the likelihood that jurors will draw adverse inferences from the defendant's silence, but will tend to aggravate its prejudicial impact.").

277. 425 U.S. 308 (1976).

of the charges, placed in punitive segregation for thirty days, and his prison classification was downgraded.[278]

By the time Palmigiano's case reached the Court, the Justices had indisputably established that the Fifth Amendment's protection extended beyond the confines of a criminal trial and applied to any other proceeding, civil or criminal, formal or informal, where the answers to official inquiries might incriminate a person in future criminal proceedings.[279] The scope of the privilege included not only testimony that might lead to a criminal conviction but any compelled testimony which would offer a link in the chain of evidence that might result in prosecution.[280] Also, in the so-called "penalty cases," the Court found that the privilege had been violated when officials used compulsion to induce an incriminating statement from state employees and state contractors, "even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated."[281] In two of these cases, the Court cited *Griffin* in support of its holdings that a police officer cannot be fired for invoking the privilege before a grand jury and that a lawyer cannot be disbarred for invoking the privilege at an attorney disciplinary hearing.[282] Thus, the fact that Palmigiano invoked the privilege at a prison disciplinary hearing, rather than a criminal trial, was irrelevant under the Court's precedents. Indeed, because Palmigiano faced the threat of a criminal prosecution and certain prison discipline in the form of punitive segregation, from an incriminatory admissions perspective, *Griffin*'s no adverse inference rule seemed just as applicable as it would be if the State of Rhode Island charged Palmigiano with a criminal offense.

Not so, according to Justice White's opinion. White explained that no use of Palmigiano's silence at the disciplinary hearing was offered in any criminal prosecution.[283] Prison officials did not ask Palmigiano to waive his privilege, and his silence did not automatically trigger a sanction, as had occurred in the "penalty cases" where state employees or contractors were immediately dismissed from their jobs or lost contracts for invoking the privilege. In the "penalty cases," silence was treated by officials as the equivalent of an admission of guilt. By contrast, Palmigiano's silence was accorded the evidentiary value it deserved considering all the facts in the case. According to White, Palmigiano was neither compelled to provide testimony without a proper grant of immunity nor penalized for invoking the privilege. This conclusion, White explained, was consistent with "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[284] The problem for Palmigiano was that this "prevailing rule" was

278. *Id.* at 312–13.

279. Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

280. Maness v. Meyers, 419 U.S. 449, 461 (1975) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

281. Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1341 (2003); *see also id.* at 1341–43 (collecting cases).

282. Gardner v. Broderick, 392 U.S. 273, 279 (1968) (police officer); Spevack v. Klein, 385 U.S. 511, 515 (1967) (attorney).

283. *Palmigiano*, 425 U.S. at 317.

284. *Id.* at 318.

newly minted in his case; the Court had not previously endorsed this position. Nevertheless, the bottom line was that the Burger Court was not going to extend *Griffin* to civil proceedings.

Even a vehement supporter of adverse comment found it hard to square *Palmigiano* with *Griffin*. "A straightforward application of *Griffin*'s reasoning prohibiting comments or instructions which 'cut down on the privilege by making it costly' would have led the Court to the opposite result in [*Palmigiano*]."[285] Tellingly, Justice White did not deny that Palmigiano, after being told that his silence would be used against him, confronted pressure to testify like that experienced by Griffin. Indeed, in terms of compulsion to testify, "the close parallel between the two cases is obvious."[286] Further, it is difficult to conclude that Palmigiano was not penalized for invoking the privilege (though White denied he was) when his silence was used against him. He was told at the outset of the hearing that his silence would be considered a negative in determining his guilt. The fact that the hearing was not a formal criminal trial where "the stakes are higher and the State's sole interest is to convict" is utterly beside the point.[287] Unless immunity is provided, the Fifth Amendment bars compulsion by the State to induce testimony, regardless of its motives.

Finally, it is hard to take seriously White's reasoning that because Palmigiano's guilt may have been supported by other evidence, there was no Fifth Amendment vice when prison officials drew an adverse inference from his silence. As Professor Duane has noted, the upshot of this stance is that in civil cases, "the Fifth Amendment requires not that the defendant's silence be excluded from consideration, but only that it be corroborated."[288] This distinction draws no support from *Griffin*, where the privilege was violated even though jurors were told both that they could consider the accused's silence on the issue of guilt, and also that silence "by itself [did not] warrant an inference of guilt."[289] There was no constitutional precedent for such strained analysis. "[N]o other provision has ever been interpreted to permit certain evidence to be used only on the condition that it not be the *only* evidence."[290]

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285. Ayer, *supra* note 14, at 866. *See also* Peter Arenella, Schmerber *and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 53 (1982) ("If one takes Justice Douglas'[s] penalty rhetoric in *Griffin* seriously, [*Palmigiano*] and *Griffin* are irreconcilable.").

286. Ayer, *supra* note 14, at 865 n.105.

287. *Palmigiano*, 425 U.S. at 318–19. One scholar has stated that this analysis in *Palmigiano* is "one of the most implausible things ever asserted in a Supreme Court opinion." Duane, *supra* note 19, at 8 n.39. "The Court had to say this nonsense in [*Palmigiano*] because there was no other imaginable way to distinguish *Griffin*, although this retrospective attempt to limit the logic of that earlier case cannot honestly be reconciled with the fact that the Court had already extended *Griffin* to numerous civil cases and proceedings before [*Palmigiano*]." *Id.*; *see also* BERGER, *supra* note 4, at 207 ("The overall procedure appeared analogous to those cases in which the Court invalidated penalties for assertion of the privilege, particularly *Griffin v. California* . . . .").

288. Duane, *supra* note 19, at 8 n.43.

289. Griffin v. California, 380 U.S. 609, 610 (1965).

290. Duane, *supra* note 19, at 8 n.43.

Because the Fifth Amendment applied to the non-criminal proceeding, as Justice White conceded,[291] and because Palmigiano encountered compulsion to testify equal to that faced by a defendant in a criminal prosecution subject to comment and adverse inference, there appeared to be no principled way to distinguish *Griffin*. Yet, Justice White would not "extend" *Griffin* to civil proceedings. And for good measure, White stated that the Court believed that in "proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause."[292] Logic compelled applying *Griffin* in *Palmigiano*. That Justice White wouldn't do so is another example of the Burger Court's *modus operandi*—"The Burger Court dramatically diminished the scope and impact of the Warren Court precedents: they survived, but only their facade was left standing."[293] Henceforth, *Griffin* would be confined to criminal cases.

While one can criticize *Palmigiano* for its outcome-driven analysis, Justice Brennan's dissent in the same case shows the intrinsic flaw of *Griffin*'s penalty analysis. Brennan argued that the constitutional basis of the "penalty cases" was not that compulsion was extant when a state employee is told that he will lose his job if he doesn't waive his privilege and provide potentially incriminating testimony. Rather, according to Brennan, "a sanction was imposed that made costly the exercise of the privilege."[294] Brennan viewed the penalty imposed on Palmigiano for refusing to testify—30 days of solitary confinement and a downgrade of his prison classification—as the equivalent to the loss of a state job.[295]

The problem here is that every burden or procedure imposed or utilized by the State that discourages silence risks becoming a "penalty" for Fifth Amendment purposes. The classic example, of course, is plea bargaining, which encourages (some would say compels) incriminating testimony from defendants in exchange for a reduced sentence. And when that potential is combined with two other facts—the Court's failure to articulate a standard for identifying and measuring what is an impermissible penalty, and the zero-sum nature of *Griffin*'s penalty rule—the result in *Palmigiano* is no surprise. As Professor Berger put it, these flaws "virtually invited the Court to develop a formalistic distinction such as that reflected in [*Palmigiano*]."[296]

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291. *Palmigiano*, 425 U.S. at 316.

292. *Id.* at 319.

293. MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 15 (2016).

294. *Palmigiano*, 425 U.S. at 331 (Brennan, J., concurring in part and dissenting in part).

295. *Id.* at 329–31.

296. BERGER, *supra* note 4, at 209. *Cf.* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 285–86 (1998) (assuming that state officials will draw adverse inferences from a prisoner's refusal to answer questions at a state clemency hearing, his testimony at a voluntary interview is not compelled within the meaning of the Fifth Amendment).

## VIII. RETREATING FROM *GRIFFIN* WITHOUT OVERRULING IT

Once the Burger Court, comprised of a majority of Justices openly (or quietly) opposed to the result in *Griffin*[297] hit its stride, the result in *Palmigiano* was inevitable; the rule of *Griffin* would be cabined to criminal cases. What was less predictable was how the Court would retreat from *Griffin*, even in criminal cases, without formally overruling it. Of course, there is more than one way to diminish a constitutional right. One way is to permit the right to be subject to harmless error analysis as the Court did in *Chapman v. California*. Indeed, *Chapman* is an example of the Court—the Warren Court no less—limiting *Griffin*.[298]

Another way of diminishing *Griffin* was to adopt exceptions to it. But announcing exceptions to *Griffin* can be awkward because, while Justice Douglas's constitutional analysis in *Griffin* was deficient, *Griffin*'s holding was airtight: "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."[299] The Court took the exceptions route in *United States v. Robinson*[300] by embracing a "fair response" exception to *Griffin*'s otherwise bright-line rule.[301]

Thomas O. Robinson, Jr. was charged with mail fraud in connection with arson-related insurance claims. Robinson did not testify at trial. During closing argument, defense counsel told the jury that the government had not allowed Robinson to explain his side of the story. In response, the prosecutor told the jury that Robinson "could have taken the stand and explained it to you, anything he

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297. By 1976, when *Palmigiano* was decided, two members of the Court, Justices Stewart and White, had dissented in *Griffin*. Another two members, Justices Powell and Rehnquist, were on the record as opposing *Griffin* before their appointment to the Court. For Lewis Powell's pre-appointment view, see PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 306 (1967) (additional views of Messrs. Jaworski, Malone, Powell, and Storey) (citing to *Griffin* and asserting that "a strong case can be made for the restoration of the right to comment on the failure of an accused to take the stand"). As the Assistant Attorney General of the Office of Legal Counsel in the Nixon Administration, in 1969, William Rehnquist sent a memo, marked "administratively confidential" to John Dean, the Associate Deputy Attorney General. The memo criticized many Warren Court constitutional criminal procedure rulings, including *Griffin*. Memorandum from William H. Rehnquist, Assistant Att'y Gen. to John W. Dean, III, Associate Deputy Att'y Gen., on Constitutional Decisions Relating to Criminal Law (April 1, 1969). Of course, the fact that some Justices opposed the result in *Griffin* did not mean that they would not follow precedent and faithfully apply *Griffin* after it was announced. *See* Carter v. Kentucky, 450 U.S. 288, 307 (1981) (Powell, J., concurring) ("I therefore would have joined Justices STEWART and WHITE in dissent in *Griffin*. But *Griffin* is now the law . . . ."). Notably, Chief Justice Burger and Justices White and Blackmun joined Justice Stewart's opinion in *Carter*, holding that a state trial judge has a constitutional obligation to give a "no adverse inference" jury instruction when properly requested. *Id.* at 305 (majority opinion).

298. *See* Craig M. Bradley, Griffin v. California*: Still Viable After All These Years*, 79 MICH. L. REV. 1290, 1291 n.14 (1981) (noting that "the Supreme Court itself limited *Griffin*" in *Chapman*).

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

300. 485 U.S. 25 (1988).

301. *Id.* at 34.

wanted to."[302] Robinson was convicted. In the Court, Robinson argued that any direct comment or reference to the accused's failure to testify violates the Fifth Amendment, as announced in *Griffin*'s holding. The Court, in an opinion by Chief Justice Rehnquist, disagreed and found, first, no violation of *Griffin* and second, no violation of the Fifth Amendment.

The prosecutor's statement was clearly a comment on Robinson's refusal to testify and thus violated *Griffin*. *Griffin*'s unmistakable holding—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"[303]—offers no wiggle room to contend otherwise. Indeed, *Griffin*'s mandate extends to comments that "suggest" the accused's silence is evidence of guilt.[304] And because this was a federal case, the prosecutor's comment also violated the statutory bar against adverse comment announced in *Wilson v. United States*. *Wilson*'s bar on prosecutorial comment is just as strict, if not stricter, than the *per se* rule announced in *Griffin*. *Wilson* barred any comment, "especially hostile comment," due to the accused's failure to testify. "The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."[305]

However, none of this fazed Chief Justice Rehnquist and the majority. Rehnquist explained: "We decline to give *Griffin* such a broad reading, because we think such a reading would be quite inconsistent with the Fifth Amendment, which protects against compulsory self-incrimination."[306] But Robinson was not asking for a "broad reading" of *Griffin*. He was merely asking that *Griffin*'s holding that the prosecutor is forbidden to comment on the accused's silence be applied to his case. Rehnquist found a difference between the comments in *Griffin* and the comments here. Yes, there was a verbal difference between the comments in *Griffin* and *Robinson*, but why does that matter considering *Griffin*'s clear ban on prosecutorial comment? Even Justice Blackmun, no liberal on constitutional criminal procedure issues, thought that *Griffin* had been violated.[307]

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302. *Id.* at 28.

303. *Griffin*, 380 U.S. at 615.

304. Portuondo v. Agard, 529 U.S. 61, 69 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of guilt.'"); *Robinson*, 485 U.S. at 32 ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.") (quoting Baxter v. Palmigiano, 425 U.S. 308, 319 (1976)). In 1983, the Burger Court found that a "prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims" was a violation of *Griffin*. United States v. Hasting, 461 U.S. 499, 510–11 (1983). *See also* Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMPLE POL. & C.R.L. REV. 45, 63 (2004).

305. Wilson v. United States, 149 U.S. 60, 65 (1893).

306. *Robinson*, 485 U.S. at 31–32.

307. *Id.* at 34 (Blackmun, J., concurring in part and dissenting in part).

Remarkably, Rehnquist characterized *Griffin*'s holding as "broad dicta" that must be considered in context.[308] Relying on the other theory supporting *Griffin*—prosecutorial comment and adverse inference instruction that urges jurors to consider the accused's silence as evidence of guilt—Rehnquist explained that *Griffin* mandates that the prosecution may not use the defendant's silence at trial "as substantive evidence of guilt."[309] It is an entirely different matter, however, when the prosecutor "fairly" responds to a claim of the accused by adverting to that silence. Rehnquist conceded Robinson incurred a "cost" from the prosecutor's comment, but he and the majority were unwilling to "expand" *Griffin* to preclude a "fair response" by the prosecution in cases like this one.

Concededly, the violation of *Griffin* approved in *Robinson* was "modest."[310] But the erosion of constitutional rights sometimes starts with modest or small exceptions, and lower courts have not been hesitant to rely on *Robinson* in similar circumstances.[311] More fundamentally, the fact that the prosecutor's comments were motivated by a desire to "fairly" respond to a defense claim has no nexus to *Griffin*'s holding or the Fifth Amendment value *Griffin* sought to protect. "A comment may well be a response to the defense and nevertheless be precisely the kind of statement that [the] holdings in *Griffin* and *Wilson* were designed to

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308. *Id.* at 33–34 (majority opinion). Rehnquist suggested there was precedent for a contextual treatment of prosecutorial comment. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court rejected a claim that a prosecutor had violated the accused's right to silence when he repeatedly remarked that the state's evidence was uncontradicted. *Lockett* did not turn on whether the comment was proper because "Lockett's own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the 'next witness.'" 438 U.S. at 595. *Lockett* concluded: "When viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand." *Id.*

309. *Robinson*, 485 U.S. at 34.

310. *Id.* at 37 (Marshall, J., dissenting).

311. *See* SALKY, *supra* note 118, at 110–11 (providing citations). For more recent rulings in the lower courts, *see also*, Caldellis v. Obenland, 772 F. App'x 434, 436 (9th Cir. 2019) (holding prosecutor's reference to a "big" reason defendant chose not to testify was not a comment on defendant's guilt and was invited by defense's closing arguments offering a number of reasons why the defendant did not testify); United States v. Martin, 612 F. App'x 449, 450 (9th Cir. 2015) (holding government's comments that jury could infer guilt from documents authored in part by defendant despite defendant not testifying were prompted by defense's comments that government was afraid to present a witness with personal knowledge of the documents); United States v. Sotomayor-Teijeiro, 499 F. App'x 151, 155 (3d Cir. 2012) (holding prosecutor's statement that there was no evidence "from the witness stand" about defendant's source of income was a fair response to defense's suggestion that the money was for legitimate purposes). *See generally*, Kendra Kumor, Note, *State Criminal Procedure Rights: How Much Should the Supreme Court Influence?*, 89 FORDHAM L. REV. 931, 942–45 (2020) (explaining that many state courts, when addressing issues under *Robinson*, are giving too much interpretative weight to the Court, even when they are free to offer greater protection under their constitutional provisions); Meredith Randall, *Criminal Procedure III: The Supreme Court Continues to Narrow Defendants' Rights*, 1989 ANN. SURV. AM. L. 475, 499–500 (arguing that two state high courts had extended *Robinson* "to allow prosecutors to intimate that a defendant's [silence] implies guilt").

eliminate"[312]—namely, the accused's silence being used as evidence of guilt. The Chief Justice and the majority obviously understood this point, which is why Rehnquist characterized *Griffin*'s holding as "broad dicta" and rewrote *Griffin* to stand for the constitutional norm that, in some cases, prosecutorial comment must be examined in context. That's how one retreats from *Griffin* without formally overruling it.

## IX. *MITCHELL V. UNITED STATES* (1999): REAFFIRMATION OR (MORE) BACKSLIDING FROM *GRIFFIN*?

At certain times during his tenure on the Court, Justice Kennedy was described as "the most powerful man in Washington."[313] Although he did not like the label, Justice Kennedy was certainly a "swing vote" for much of his time on the Court—though he swung mostly with fellow conservative Justices, especially in constitutional criminal procedure cases. In *Mitchell v. United States*,[314] however, Kennedy provided the fifth vote and wrote the opinion that appeared to provide a ringing endorsement and, most significantly, an extension of *Griffin*.

Amanda Mitchell pleaded guilty to federal narcotics charges relating to a conspiracy to distribute cocaine in Allentown, Pennsylvania, from 1989 to 1994. Before accepting her plea, the federal District Court judge put Mitchell under oath and asked whether she committed the crimes alleged by the government. Mitchell replied: "Some of it."[315] Nevertheless, Mitchell pleaded guilty to all the charges and awaited her sentencing hearing that would determine how long she would spend in prison: between one year and life, depending on the evidence the government could prove regarding Mitchell's involvement in the conspiracy. At the sentencing hearing, three co-defendants testified that Mitchell was a regular seller for the conspiracy. Mitchell did not testify. The judge eventually sentenced Mitchell to the statutory minimum ten-year sentence based on the co-defendants' testimony against

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312. *Robinson*, 485 U.S. at 40 (Marshall, J., dissenting).

313. Tom Curry, *The Most Powerful Man in Washington?*, NBC NEWS (Mar. 4, 2005), https://www.nbcnews.com/id/wbna7087983 [https://perma.cc/A3S4-WD4L]; Dylan Matthews, *America After Anthony Kennedy*, VOX (June 27, 2018), https://www.vox.com/policy-and-politics/2018/6/25/17461318/anthony-kennedy-ideology-retirement-supreme-court [https://perma.cc/3J94-849K] ("Kennedy has, since at least 2005, been the swing vote on many of the Court's most ideologically charged decisions, responsible for 5-4 rulings that legalized same-sex marriage, preserved Roe v. Wade, upheld warrantless wiretapping, blew up campaign finance restrictions, overturned DC's handgun ban, and weakened the Voting Rights Act. That position has made him one of the most powerful people in America for well over a decade now, not even counting the 18 years he shared his position as the Court's swing voter with Sandra Day O'Connor."); Adam Liptak, *In Influence if Not in Title, This Has Been the Kennedy Court*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-career.html [https://perma.cc/CV9D-VTZG] (describing period between 1988 and Kennedy's retirement in 2018 "as the Kennedy Court"); Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES (July 1, 2009), https://www.nytimes.com/2009/07/01/us/01scotus.html [https://perma.cc/V5MP-8D86] (describing Kennedy as "the most powerful jurist in America").

314. 526 U.S. 314 (1999).

315. *Id.* at 318.

Mitchell and her refusal to testify at the sentencing proceeding. The judge told Mitchell: "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. . . . I'm taking the position that you should come forward and explain your side of this issue."[316]

At the Supreme Court, Mitchell argued that she retained her Fifth Amendment privilege during the sentencing hearing despite having pled guilty. The government countered that her guilty plea waived the privilege regarding all the offenses comprehended in the plea. Mitchell also argued that the judge violated *Griffin* when he drew an adverse inference from her silence when deciding the severity of her sentence. The government argued *Griffin* did not extend to a sentencing proceeding. The Court ruled for Mitchell on both arguments.[317]

On the first point, the Court unanimously found that a waiver of the right to trial does not waive rights that exist beyond the trial. Because the Fifth Amendment privilege applies to the sentencing phase of a criminal case, Mitchell's guilty plea was not a waiver of her right to remain silent at sentencing. Here, Justice Kennedy was not making new law.

In the 1981 case, *Estelle v. Smith*,[318] Chief Justice Burger—nobody's liberal—wrote an opinion for eight Justices that reversed the death sentence imposed on Ernest Benjamin Smith because Texas had violated Smith's Fifth Amendment right when it used at the sentencing hearing evidence compelled from Smith during a pretrial psychiatric examination. Texas contended that Smith had no Fifth Amendment protection at the sentencing hearing because once his guilt was established, the privilege was terminated. The Court disagreed. "We can discern no basis to distinguish between the guilt and penalty phases of [Smith's] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."[319] For good measure, Chief Justice Burger remarked that any effort to compel Smith "to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment."[320]

Although *Smith* was a capital case, Justice Kennedy could think of no reason not to apply its reasoning in non-capital sentencing hearings. Indeed, why would the Court do otherwise? As a textual matter, there is no reason to distinguish between the guilt and penalty phases; each is a part of the "criminal case" in which a person shall not be compelled to be a witness against himself.

Putting constitutional text aside, the claim that the privilege does not apply at sentencing contained two practical realities which Kennedy viewed as fatal to the government's argument. First, during the oral argument in *Mitchell*, counsel for the government was asked whether a prosecutor could compel a defendant to testify at

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316. *Id.* at 319.
317. *Id.* at 320, 328–29.
318. 451 U.S. 454 (1981).
319. *Id.* at 462–63.
320. *Id.* at 463. For a narrower interpretation of *Smith*, see David B. Lat, Case Note, *Sentencing and the Fifth Amendment*, 107 YALE L. J. 2673, 2675 (1998) ("The *Smith* Court rejected the prosecution's argument that the Fifth Amendment can *never* apply at sentencing. But it did not hold that the privilege *always* applies at sentencing.").

a sentencing hearing. The answer was "yes."[321] Thus, under the government's position, in federal drug cases, "prosecutors could indict without specifying the quantity of drugs involved, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the drug quantity."[322] Later in the oral argument, Justice Stevens asked whether the government's logic applied in death penalty cases so that a defendant who pled guilty to capital murder but contested the existence of aggravating factors could be forced to testify at a sentencing hearing. Counsel for the government said it did.[323] These scenarios contravened an essential Fifth Amendment value; namely, "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its offers, not by the simple, cruel expedient of forcing it from his own lips."[324] Justice Kennedy wanted nothing to do with such an inquisitorial system.

Second, practically speaking, for many criminal defendants, including Mitchell, the sentencing hearing is the crucial part of the case. As Kennedy remarked: to conclude that Mitchell had "no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important."[325] In a criminal justice system where more than 90% of federal and state defendants plead guilty or *nolo contendere*,[326] the Fifth Amendment privilege would be non-existent at the time it is most needed.

The second issue in *Mitchell* concerned whether the judge was permitted, based on Mitchell's silence, to draw an adverse inference regarding the amount of drugs attributed to her.[327] Justice Kennedy, writing for five Justices, was unwilling to adopt an exception to the "normal rule" that no adverse inferences from the accused's silence are permitted in criminal cases regarding "factual determinations respecting the circumstances and details of the crime."[328] Again, Kennedy believed that existing precedent—*Griffin* and *Estelle v. Smith*—dictated the result. While *Smith* was a capital case, its reasoning was applicable to non-capital cases as well. A contrary result that permitted an adverse inference from silence at sentencing would arbitrarily limit *Griffin*'s scope by disregarding *Smith*.

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321. Counsel for the government was asked if a prosecutor, unable at the sentencing hearing to prove the quantity of drugs a defendant had been involved with, could force the defendant to take the stand after she had pled guilty to testify about the amount of drugs. Counsel answered: "Yes. That—the waiver analysis that we have put forward suggests that at least as to the facts surrounding the conspiracy to which she admitted, the Government could do that, or—and the court could ask her to testify." Transcript of Oral Argument at 45, Mitchell v. United States, 526 U.S. 314 (1999) (No. 97-7541).

322. *Mitchell*, 526 U.S. at 325.

323. Transcript of Oral Argument at 53–54, *Mitchell*, 526 U.S. 314 (No. 97-7541).

324. Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961).

325. *Mitchell*, 526 U.S. at 327.

326. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

327. *See Mitchell*, 526 U.S. at 327.

328. *Id.* at 327–28.

At the end of his opinion, Kennedy took a stab at rehabilitating *Griffin*. He opined that *Griffin*'s rule "is of proven utility."[329] He also opined that citizens and jurors no longer remained skeptical of *Griffin*'s correctness or unwilling to abide by its rule.[330] The rule against adverse inference from silence is now "an essential feature of our legal tradition."[331] Put another way, according to Kennedy, *Griffin* teaches that "the question in a criminal case is not whether the defendant committed the acts of which he is accused," but whether "the Government has carried its burden to prove its allegations while respecting the defendant's individual rights."[332] On this point, Kennedy was not the first to see a nexus between the privilege and presumption of innocence.[333]

After this attempted burnishing of *Griffin*, Justice Kennedy wrote: "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment" under the federal sentencing guidelines, was an open issue on which the Court offered no view.[334] Why Kennedy drew attention to this issue is not evident. To be sure, eight years earlier Justice White wanted the Court to address whether the Fifth Amendment permits a trial judge's refusal to reduce a defendant's sentence because he would not accept responsibility for his crimes[335]—an issue that divided the federal appellate courts.[336] But the issues left open by Justice Kennedy were not raised in the briefs or oral argument in *Mitchell*.

More importantly, suggesting that *Griffin*'s scope at the sentencing phase is limited to barring adverse inferences drawn from silence regarding "factual determinations respecting the circumstances and details of the crime,"[337] while allowing such inferences to be drawn from silence regarding a lack of remorse, acceptance of responsibility, or a host of other sentencing factors such as future dangerousness, makes no sense if the Court is interested in adopting neutral principles for its Fifth Amendment jurisprudence. Indeed, the Court had already questioned in passing whether a principled distinction could be drawn between increasing a defendant's punishment based on facts determined at a sentencing hearing and refusing to reduce a sentence due to the defendant's unwillingness to

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329. *Id.* at 329.

330. Justice Kennedy's confidence in jurors' view and understanding of *Griffin* is not supported by empirical data. *See* Bellin, *Silence Penalty*, *supra* note 53 at 407 (noting that public opinion polls show that "about half of respondents say that a defendant who does not testify 'is probably guilty' or 'has something to hide.'") (footnote omitted).

331. *Mitchell*, 526 U.S. at 330.

332. *Id.*

333. *See* Burdick v. United States, 236 U.S. 79, 94 (1915); ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 9 (1962) (stating that "the privilege against self-incrimination may well be thought of as a companion of our established rule that a man is innocent until he has been proved guilty"); *see generally* Mitchell J. Frank & Dr. Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006).

334. *Mitchell*, 526 U.S. at 330.

335. *See* Kinder v. United States, 504 U.S. 946, 951 (1992) (White, J., dissenting).

336. *Compare* United States v. Caro, 597 F.3d 608 (4th Cir. 2010), *with* Burr v. Pollard, 546 F.3d 828 (7th Cir. 2010).

337. *Mitchell*, 526 U.S. at 328.

cooperate with the government.[338] Thus, Justice Scalia's dissent in *Mitchell* was dead-on when he asserted there was "no logical basis for drawing such a line *within* the sentencing phase."[339] Put simply, *Griffin*'s no-adverse-inference ban either applies during sentencing or it doesn't. Applying *Griffin* only to adverse inferences in "determining the facts of the offense"[340] creates an arbitrary line that is neither demanded by the text of the privilege nor by the purpose served by *Griffin*. It is, in fact, another way to limit *Griffin* without overruling it.

Predictably, *Mitchell*'s suggestion that *Griffin* may have limited application at sentencing has spawned conflicting rulings in the lower courts.[341] These rulings consider *Griffin*'s applicability from several different angles, but the crux of the issue is best examined (and resolved) by considering two basic questions. First, during the sentencing hearing, could the prosecutor or court order a defendant to testify about the amount of drugs he sold or whether he has any remorse for the crime? After *Smith* and *Mitchell*, the obvious answer is "no." Holding a defendant in contempt for refusing to testify in such circumstances not only violates the privilege but also contradicts America's commitment to an accusatorial system of criminal justice.

Second, if a judge cannot order a defendant to testify at sentencing, could she nonetheless instruct the jury that they could use the defendant's silence against him in determining whether, for example, the prosecution has proven certain aggravating factors to justify a death penalty or whether the defendant has demonstrated remorse to justify a life sentence? Allowing an adverse inference from silence to help prove an aggravating factor to justify imposing a death sentence is just like using silence to prove guilt, which *Griffin* plainly bars. During the guilt phase of a trial, the prosecutor must prove the defendant's guilt beyond a reasonable doubt. *Griffin* holds that the prosecutor cannot use the accused's refusal to testify to prove his case. During the penalty phase of a capital case, the prosecutor must prove the existence of aggravating factors beyond a reasonable doubt.[342] If *Griffin* and its progeny are to have meaning, then a judge cannot instruct a jury that they can use a defendant's silence to establish an aggravating factor. This is an easy case.

But critics of *Griffin* say that allowing an adverse inference from silence on matters where the defendant has the burden of proof during sentencing—say, for example, proving remorse or having been raised as a child in an abusive home—is different. In that context, the prosecution is entitled to an instruction that silence can

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338. *See* Roberts v. United States, 445 U.S. 552, 557 n.4 (1980) ("We doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated.").

339. *Mitchell*, 526 U.S. at 340 (Scalia, J., dissenting).

340. *Id.* at 330 (majority opinion).

341. *See* White v. Woodall, 572 U.S. 415, 422 n.3 (2014) (citing division among federal appellate courts); *see generally* Paul Peterson, *A Decade Redrawn: Presentence Boundaries of the Privilege Against Compelled Self-Incrimination since* Mitchell v. U.S., 25 FED. SENT'G RPTR. 81 (2014) (citing several divisions among lower courts on issues relating to *Griffin*'s application at sentencing).

342. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the existence of aggravating factors must be found by a jury beyond a reasonable doubt in capital cases).

be the basis for an adverse inference. *Griffin*'s critics argue the difference is that the defendant has the burden of proof at sentencing to demonstrate mitigating factors. Under this view, *Griffin* is designed to protect the defendant from the prosecution shifting or lessening its burden of proof to demonstrate the accused's guilt. But when the prosecution has no burden of proof, adverse inferences from silence are permissible.

There is a kernel of truth here. As far back as 1893, the Court recognized that the federal statutory bar against adverse comment was intended to ensure "the presumption of innocence which the law gives to every one,"[343] and the history of defendant competency laws reveals a nexus between the presumption of innocence and the privilege. As Leonard Levy has explained, the privilege "harmonized with the principles that the accused was innocent until proven guilty and that the burden of proof was on the prosecution."[344] Dean Griswold has noted that one purpose of "the Fifth Amendment is to protect the innocent," and the privilege serves as "a companion of our established rule that a man is innocent until he has been proven guilty."[345]

But the Fifth Amendment generally, and *Griffin* specifically, are about more than preventing a prosecutor from lessening her burden of proof. Whether the prosecution has the burden of proof or not on a specific issue, such as remorse or mitigating evidence, *Griffin* means that judges, prosecutors, and jurors cannot "create evidence from silence."[346] And *Estelle v. Smith* confirms that using silence at sentencing to establish, for example, a guilty defendant's future dangerousness or lack of remorse triggers Fifth Amendment protection. In *Smith*, the State's psychiatrist's prognosis on Smith's future dangerousness and conclusion about his lack of remorse was based on Smith's statements "and remarks he omitted, in reciting the details of the crime" to the psychiatrist.[347] Chief Justice Burger's opinion for eight Justices unambiguously found that the privilege "is directly involved here because the State used as evidence against [Smith] the substance of his disclosures during the pretrial psychiatric examination."[348] In other words, Texas violated the Fifth Amendment when, during the sentencing phase, it used a defendant's words and silence, compelled during a pretrial examination, to justify imposition of the death penalty.[349] In this context, silence is just as damning as oral statements.

Some Justices, however, may be willing to limit *Smith*'s holding and logic, and the Fifth Amendment itself, on the issue of remorse and other sentencing factors

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343. Wilson v. United States, 149 U.S. 60, 66 (1893).

344. LEVY, ORIGINS, *supra* note 6, at 331.

345. GRISWOLD, *supra* note 333, at 9.

346. Justice Sotomayor used this phrase during the oral argument in *White v. Woodall*. Transcript of Oral Argument at 27, White v. Woodall, 572 U.S. 415 (2014) (No. 12-794).

347. Estelle v. Smith, 451 U.S. 454, 464 (1981).

348. *Id.* at 465.

349. *See* Peter Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1701 (1983) (stating that *Estelle v. Smith*'s "reliance upon 'omitted remarks' means that one can be a 'witness' within the privilege through silence, if silence reveals something of one's mind.").

where the defense has the burden of proof.[350] Justice Kennedy has suggested reading *Smith* "as saying that, on the issue of remorse, it is an open question whether or not the self-incrimination privilege is applicable."[351] Likewise, Justice Scalia once opined: "[Y]ou don't think the judge could say, ladies and gentlemen of the jury, this defendant has already pleaded guilty to a horrible crime. This is a punishment hearing. He has chosen not to—not to testify in this—in this hearing. . . . You may, if you wish, take that into account in determining—whether there is remorse. You can't say that."[352]

There is nothing in *Estelle v. Smith* to support this distinction in applying the privilege.[353] More importantly, the constitutional bar on adverse inferences from silence should apply even when the defense has the burden of proof on an issue like remorse or some other affirmative defense. Application of Fifth Amendment norms should not turn on evidentiary rules of proof, which may vary from state to state. Also, the text of the privilege offers no support for such an approach. Finally, drawing a line between banning adverse inference from silence when "determining the facts of the offense," but permitting such inferences when a factfinder is deciding issues related to remorse or future dangerousness, does not promote neutral principles of constitutional law. Put simply, when read as a neutral principle, *Griffin* bars the prosecution from using silence as evidence to help convict or punish the accused. The fact that a defendant has already pled guilty to murder, or has the burden of establishing remorse as an affirmative defense, does not justify withholding *Griffin*'s protection. Evidence is evidence; *Griffin* means the state cannot produce evidence from the accused's silence.

## X. DEFENDING *GRIFFIN V. CALIFORNIA*

Scholars have contended that "the traditional rationales for the self-incrimination privilege do not adequately explain the *Griffin* doctrine."[354] This final section offers a normative defense of *Griffin v. California*. First, let me explain what I am *not* relying upon when defending *Griffin*. The result in *Griffin* is neither required nor precluded by the text of the Fifth Amendment. Even the most ardent critics of *Griffin* concede that the text of the Fifth Amendment does not resolve the issue raised by laws allowing negative comment and adverse inference from the

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350. In *Smith*, Texas had the burden of proving Smith's future dangerousness beyond a reasonable doubt to justify imposition of the death penalty. *See* 451 U.S. at 457–58.

351. Transcript of Oral Argument, White v. Woodall, *supra* note 346, at 40.

352. *Id.* at 6.

353. In a letter to Justice Powell, Chief Justice Burger explained his opinion in *Smith* "does give a [defendant] the right not to respond to a psychiatrist if his answers can be used on the issue of future dangerousness to assist the State's case for the death penalty. In other words, he cannot be compelled to fasten a noose around his own neck." Letter from Warren Burger, on Estelle v. Smith, to Lewis Powell (Apr. 29, 1981), LEWIS F. POWELL JR. PAPERS, box 534/folder 19-23, https://scholarlycommons.law.wlu.edu/casefiles/764/ [https://perma.cc/M275-88EF]). If a defendant cannot be compelled to fasten a noose around his own neck, then neither should he be compelled to secure the noose.

354. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 490 (2000); *cf.* Bellin, *Reconceptualizing*, *supra* note 18 at 232 n.9, 234 n.12 (citing scholarship criticizing *Griffin*'s legal reasoning).

accused's failure to testify.[355] The text of the privilege states: "No person . . . shall be compelled in any criminal case to be a witness against himself."[356] Obviously, this language "does not talk about silence, it does not talk about inferences, and it does not talk about warnings. Moreover, it does not reference torture, trilemmas, or trials."[357] If the text is read literally, the privilege is triggered only when officials compel a person to testify against himself in a criminal case.[358] It is unlikely, however, the Framers intended that the privilege be construed strictly. If a literal reading of the Fifth Amendment was intended, "then their constitutional provision was a meaningless gesture because there was no need to protect the accused at his trial: he was not permitted to give testimony, whether for or against himself, at the time of the framing of the Fifth."[359] But the text should not be read literally.

The Court rejected a strict reading of the text over 100 years ago when the government argued that a grand jury hearing is not a "criminal case" within the meaning of the Fifth Amendment. The government was right; a grand jury proceeding is not, nor part of, a "criminal case." But the Court explained that the protection provided by the privilege extended beyond its literal words.[360] And a congressional hearing is not a "criminal case" either, but a person subpoenaed to

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355. *See* Ayer, *supra* note 14, at 848 ("Nothing in the language of the fifth amendment specifically addresses the problem of comment upon a defendant's failure to testify at trial.").

356. U.S. CONST. amend. V.

357. Hall, *supra* note 25, at 72 (footnote omitted).

358. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."). And as Professor Dershowitz explains, a literal, narrow reading of the text would allow the "introduction of evidence obtained prior to trial by police or judicial coercion. . . . The words of the Fifth Amendment say nothing about evidence . . . ." ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11 at 29 (2008). Of course, the text, even when read literally, can support expansive interpretations:

> [The text] protects against more than just compulsory self-incrimination or even disclosures merely tending to provide a link in a chain of circumstantial evidence that might be the basis of a prosecution. A person can also be a witness against himself in ways that do not incriminate him. He may, in a criminal case, injure his civil interests or disgrace himself in the public mind. . . . The Fifth could also be construed to apply to an ordinary witness as well as to the criminal defendant himself.

Levy, *History and Judicial History*, *supra* note 94, at 16–17.

359. Levy, *History and Judicial History*, *supra* note 94, at 18; DERSHOWITZ, *supra* note 358, at 4 (noting that at the time of the Framing, a literal interpretation of the Fifth Amendment "would have rendered the right virtually meaningless" because the accused was barred from testifying under oath).

360. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). Professor Levy has identified evidence that the common law privilege was thought to apply to grand jury proceedings and that a federal circuit court "took for granted that the [Fifth Amendment] extended to a witness before a federal grand jury." *History and Judicial History*, *supra* note 94, at 20.

appear at such a hearing can invoke the privilege when questioned by members of Congress.[361] Since the late 1880s,

> [T]he Court has reasoned that in order to protect fully the rights of the accused at trial, the privilege must be extended to certain other proceedings, for example, grand jury proceedings, police custodial interrogations, and even to activities outside the criminal process, such as civil proceedings, investigations by administrative officials, and legislative committee hearings.[362]

Indeed, most litigants who succeed with privilege claims in the Supreme Court did not testify at a criminal trial. A strict reading of the text would reverse much of the Court's Fifth Amendment doctrine.

Nor do I contend that the Framing Era history of the privilege mandates the result in *Griffin*.[363] The history of the privilege is too vague and inaccessible to provide clear answers for twenty-first-century legal issues. Several scholars have recognized that the original meaning of the privilege is obscure and cannot provide definitive answers.[364] For example, legal historian Eben Moglen has observed that "[u]nfortunately, the nature of Madison's reasoning process [on the original proposal of the privilege] is inaccessible to history—he left no document and made no recorded comment on the principles behind his draft."[365] And the "legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege."[366] Indeed, as far back as 1908, the Justices conceded that the history of the privilege in colonial times "afford[ed] light too uncertain for guidance,"[367] and

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361. Quinn v. United States, 349 U.S. 155, 1612–64 (1955). Despite the text, Professor Levy argues that several examples of persons invoking the privilege during legislative hearings, both prior to and shortly before the Framing Era, support extending the privilege to legislative investigations. *History and Judicial History*, *supra* note 94, at 24.

362. Larry J. Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 383 (1977) (footnotes omitted).

363. However, as outlined in Part I, the history and development of defendant qualification and adverse comment laws do support the result in *Griffin*.

364. *See, e.g.*, Witt, *supra* note 31, at 832–33 ("Scholars have had considerable difficulty explaining the original meaning of the American constitutional self-incrimination provisions—both state and federal. . . . The process by which the constitutional provisions were drafted, however, appears to have been remarkably haphazard. At the very least, it was accompanied by startlingly little debate."). After noting three different explanations offered for the privilege by legal scholars, Witt states, "The striking feature of the debate, no matter which view one adopts, is just how little evidence exists for the early meaning of the self-incrimination clauses." *Id.* at 833. *See* Langbein, *The Privilege and Common Law Criminal Procedure*, *supra* note 35, at 100 ("The history of the privilege against self-incrimination at common law has long been a murky topic.").

365. Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 109, 138 (R.H. Helmholz et al. eds, 1997).

366. *Id.*; see also John T. McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 139 (1960) ("There is little to explain what the drafters of the federal Constitution meant by their words.").

367. Twining v. New Jersey, 211 U.S. 78, 108 (1908).

a few modern Justices agree that searching for the original meaning of the privilege cannot solve today's legal disputes.[368]

Moreover, the issue addressed in *Griffin* was not on the Framers' constitutional radar. As explained in Part I, when the Constitution was established in 1789 and the Bill of Rights was ratified in 1791, criminal defendants were not permitted to give sworn testimony at trial. Although criminal defendants offered unsworn statements at preliminary hearings and during trials, those statements, technically speaking, were not evidence. If the accused's statements were not evidence, then neither should his silence be used as evidence. If the Framers had thought about it, they might have reasoned that the silence of the accused, like his oral statements, had no legal significance because he could not provide sworn testimony.[369] But the key point is that the Framers didn't think about it. So, modern jurists should not worry about what the Framers didn't consider when deciding the meaning of the privilege today.

Rather than relying on the text or history of the Fifth Amendment, I contend that *Griffin* reached the correct result because it recognizes and protects the accused's absolute right not to testify at trial and is consistent with a "right to silence." Concededly, neither the text nor the Framing Era history of the privilege recognizes a "right to silence." Professor Alschuler has convinced me that at the time of the Framing, the Fifth Amendment did not afford an accused a right to silence. The Fifth, according to Alschuler, "neither mandated an accusatorial system nor afforded defendants a right to remain silent. It focused upon improper methods of gaining information."[370] Eventually, however, a constitutional right of silence did emerge in the nineteenth century with the arrival of lawyers to represent criminal defendants.[371]

As noted in Part I, when criminal defendants represented themselves during the Framing Era, exercising a right of silence assured a guilty verdict: if defendants did not speak for themselves, no one else would. That is why defendants spoke

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368. *See* United States v. Balsys, 524 U.S. 666, 674 (1998) ("There is no helpful legislative history [on the Fifth Amendment] . . . ."); *id.* at 711 (Breyer, J., dissenting) (noting that the Fifth Amendment "has virtually no legislative history" (quoting Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1123 (1994)). Of course, Justice Scalia did not, and Justice Thomas does not, share this view.

369. *See* Alschuler, *Fourfold Failure*, *supra* note 37, at 853 n.18 ("Although the Framers had no objection to drawing an adverse inference from an unsworn defendant's silence before a magistrate or at trial, they might not have approved of drawing an adverse inference from a defendant's refusal to offer *sworn* testimony.").

370. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2652 (1996) [hereinafter Alschuler, *A Peculiar Privilege*]; *see also id.* at 2650–60.

371. *Id.* at 2660. For the record, Professor Alschuler is no originalist in the mode of Justice Scalia or Justice Thomas. Alschuler has written: "The history of the privilege against self-incrimination provides only limited guidance in resolving the Fifth Amendment issues that confront modern courts." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 181, 203 (R.H. Helmholz et al. eds, 1997).

(albeit, unsworn) at preliminary hearings and at trial. The advent of lawyers, however, "made it possible for the criminal defendant to decline to be a witness against himself."[372] Put simply, "lawyers were crucial in the development of the privilege."[373] *Griffin* was one of the important twentieth-century cases to secure a meaningful and operational right to silence. "When defendants, in practice, spoke only from the witness stand and when jurors were forbidden to draw an inference from their failure to take the stand, defendants had a right to remain silent at trial."[374] But the presence of lawyers defending the accused was a prerequisite for the development and invocation of a right of silence during a criminal trial.

### A. Griffin *Was Correctly Decided*

The positive case for *Griffin* starts with the text and purpose of the privilege. As explained above, the text grants the accused an absolute right not to testify at trial.[375] The purpose of the privilege is to ensure that no one is forced to supply evidence that can be used to charge, prosecute, or punish the individual. That right is hollow if a prosecutor, with reinforcement by the trial judge, can urge jurors to use a defendant's silence as substantive evidence of guilt or as a basis to impose punishment. Undeniably, forcing a defendant to testify on pain of contempt or physical abuse and then using his incriminating testimony as evidence of guilt constitutes compulsion under the Fifth Amendment. If the absolute right not to testify is to have substance, prosecutors should not be able to achieve the same result—involuntarily eliciting incriminating testimony—by urging jurors to view failure to testify as evidence of guilt. When the accused refuses to testify, his silence becomes unavoidably incriminating when the state is permitted comment and the use of an adverse inference. The absolute right not to be a witness against oneself means that the choice to remain silent should not be used as evidence. Otherwise, the right is no longer absolute. Inherent in the absolute right not to testify is an ancillary right that a prosecutor cannot create evidence from silence.

The result in *Griffin* is also supported by: (1) the logic of some of the Court's early rulings addressing adverse comment on silence, though these rulings involved application of the Court's supervisory powers; (2) the history and development of defendant qualification and adverse comment laws; and (3) the

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372. Langbein, *The Privilege and Common Law Criminal Procedure*, *supra* note 35, at 83.

373. R.H. Helmholz, *Introduction*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGIN AND DEVELOPMENT 13 (R.H. Helmholz et al. eds, 1997); *see also* Levy, *History and Judicial History*, *supra* note 94, at 28 ("[T]he development of the right to counsel originally safeguarded the right against self-incrimination at the trial stage of a prosecution. . . . The right to counsel permitted the defendant's lips to remain sealed; his 'mouthpiece' spoke for him.").

374. Alschuler, *A Peculiar Privilege*, *supra* note 370, at 2663.

375. The Self-Incrimination Clause operates like First Amendment's Free Speech Clause, which provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Although not explicitly stated in the text, the Court has interpreted this clause to grant a right not to speak. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (stating First Amendment "includes both the right to speak freely and the right to refrain from speaking at all"). The Self-Incrimination Clause likewise affords a right not to testify.

recognition by Congress that adverse comment on the accused's silence in federal proceedings should not be permitted.

There were hints in prior cases forecasting the result in *Griffin*. For example, there is the conclusion in *Johnson v. United States*[376] that it was improper for a trial judge to permit a prosecutor to comment on a defendant's invoking the privilege while testifying and to permit jurors to draw an adverse inference from that invocation. In *Johnson*, Justice Douglas stated:

> If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.[377]

While offered in a decision involving the Court's supervisory powers, the logic of *Johnson*, which involved a case where a defendant took the stand, is surely equally applicable when a defendant *refuses* to testify.

An equally notable case is Justice Harlan's opinion in *Grunewald*. There, a putative defendant, Max Halperin, took the Fifth during a grand jury hearing and claimed his innocence. At trial, Halperin testified and explained why he was innocent. During cross-examination, the prosecutor asked Halperin the same questions he refused to answer at the grand jury. The trial judge allowed the prosecutor to elicit from Halperin that he pled the Fifth when asked those questions before the grand jury. When charging the jury, the judge told jurors that Halperin's invoking the Fifth at the grand jury could be used to impeach his credibility. Halperin was convicted.[378]

At the Court, Halperin argued that the prosecutor should not have been permitted to cross-examine him about invoking the privilege before a grand jury. Justice Harlan agreed, stating that "no implication of guilt could be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury," and that one of the basic functions of the privilege "is to protect *innocent* men."[379] Though *Grunewald*'s holding ultimately rested on the Court's supervisory powers, these statements read like constitutional principle. And if no implication of guilt could be drawn from invoking the privilege at a grand jury, the same logic would obviously apply to invoking the privilege at trial, the forum of central concern for Fifth Amendment values, and thus, would bar an adverse inference for the accused who refuses to testify.[380]

A second source of support for *Griffin* comes from the history and development of criminal defendant qualification laws. Prior to the 1860s, courts generally had no reason to address whether federal or state constitutional provisions

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376. *See, e.g.*, *Johnson*, 318 U.S. 189 (1943).

377. *Id.* at 196.

378. *See* Grunewald v. United States, 353 U.S. 391, 395–96 (1957).

379. *Id.* at 421 (emphasis added).

380. Others agree. *See* Bradley, *supra* note 298, at 1295 n.29 ("The holding in *Griffin* would, it seems, follow inevitably from the reasoning, if not the holding of *Grunewald*.").

protecting the right against compelled self-incrimination barred adverse comment on the accused's refusal to testify. "This is because the accused was nowhere a competent witness before the eighteen-sixties, and the legislation which made him competent nearly always provided that his failure to testify should not create any presumption against him."[381]

By the end of the nineteenth century, however, defendants could testify in federal trials and almost every state. At the same time, Congress, state legislatures, and state courts recognized that simply offering defendants the option of testifying without a safeguard against adverse comment would not only defeat the purpose of qualifying defendants to testify, but also undermine the privilege which was enshrined in the federal and most state constitutions.

By 1965, the year *Griffin* was decided, 44 state legislatures or courts forbade comment on a defendant's silence at trial. In a footnote, Justice Douglas makes a passing reference to contemporary laws and judicial rulings forbidding comment and adverse inference, but he does not reference or discuss the history behind these laws.[382] Even a cursory examination of the state laws enacted starting in 1866, and the state judicial rulings interpreting these laws, shows that this principle was ubiquitous:

> [T]he legislatures, which "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," have almost uniformly restrained the drawing of unfavorable inferences from failure to testify; and that the courts have almost uniformly shown the same attitude toward the silent defendant.[383]

The basis for the legislative and judicial protection of the accused was state constitutional provisions against compelled self-incrimination. Regrettably, Justice Douglas's opinion makes no use of this legal history.

And though Justice Douglas acknowledges the federal law banning comment, he offers no analysis or historical context for why the federal law supports his constitutional holding. Rather, as was typical for many of his controversial constitutional rulings during this time,[384] Justice Douglas lazily wrote: "If the words

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381. Reeder, *supra* note 67, at 41 (footnote omitted); *see* LEVY, ORIGINS, *supra* note 6, at 406–07 (explaining that Virginia's constitutional right that no person can be compelled to give evidence against himself in a criminal case, if read literally, "was a superfluous guarantee, because the defendant at his trial was not even permitted to testify").

382. Griffin v. California, 380 U.S. 609, 611 n.3 (1965).

383. Reeder, *supra* note 67, at 55 (footnote omitted).

384. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating state law banning married couples from using contraceptives). Regarding Justice Douglas's judicial craft at the time *Griswold* was written, Justice Brennan "thought little of his colleague's work ethic," and stated that Douglas "was slipshod in what he did." SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 283 (2010); *id.* at 284–85 (describing Justice Douglas's analysis in *Griswold* that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance" as "evok[ing] a mixture of laughter and scorn in [some] chambers" of the Justices); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 97 (1990) (providing severe and convincing criticism of *Griswold*'s reasoning).

'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected."[385]

Justice Scalia rightly criticized Justice Douglas's slack analysis in *Griffin*, but Justice Scalia was wrong to describe the result in *Griffin* as "a breathtaking act of sorcery" that "simply transformed legislative policy into constitutional command."[386] While Justice Scalia disparaged Justice Douglas's use of "legislative policy" to inform constitutional law, other Justices have recognized the connection between the privilege and legislative bans, particularly the federal ban, on adverse inferences from a defendant's refusal to take the stand. Chief Justice Rehnquist, for one, remarked that "[c]oncomitant with the protections of the Fifth Amendment are those afforded by § 3481,"[387]—the federal statute forbidding adverse comment—and noted that the "two provisions are generally construed in a parallel fashion."[388] Seven years earlier in *Carter v. Kentucky*,[389] Justice Stewart explained that *Bruno v. United States*,[390] a 1939 ruling that interpreted the federal statutory ban on adverse comment to also require that judges give a "no adverse inference" instruction when requested by a defendant, was plainly "influenced by the absolute constitutional guarantee against compulsory self-incrimination."[391] Finally, in 1961, *Stewart v. United States*[392] bluntly stated that the purpose of the federal ban on adverse comment and inference was to protect the right against compelled self-incrimination.

I'm *not* arguing that legislation should control constitutional law. The point here is straightforward: the Fifth Amendment and legislative prohibitions on negative comment and adverse inference foster the same goal—namely, protecting the accused's absolute right not to testify against himself. Many Justices, including Chief Justice Rehnquist, no fan of *Griffin*, have acknowledged the nexus between "legislative policy" and "constitutional command." Further, although Justice Douglas's opinion in *Griffin* did not identify it, there was a strong historical basis for connecting these legislative bans to the protection afforded by the Fifth Amendment. "*Griffin*'s exegesis was not alchemy; it was established principle."[393] Put simply, it requires no legal stretch to conclude that *Griffin* "was hardly writing on a clean slate in terms of recognizing the 'no comment' rule as part of the fifth amendment right to silence."[394]

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385. *Griffin*, 380 U.S. at 613–14.
386. Mitchell v. United States, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting).
387. United States v. Robinson, 485 U.S. 25, 29 n.4 (1988).
388. *Id.* (quoting passage from *Griffin* that Justice Scalia mocks).
389. 450 U.S. 288 (1981).
390. 308 U.S. 287 (1939).
391. *Carter*, 450 U.S. at 300. In *Carter*, Justice Stewart, like Chief Justice Rehnquist in *Robinson*, approvingly cited the passage from *Griffin* that Scalia ridiculed. *See id.* at 300 n.16; *see also* Lakeside v. Oregon, 435 U.S. 333, 343 n.1 (1978) (Stevens, J., dissenting) (same).
392. 366 U.S. 1 (1961).
393. Hall, *supra* note 25, at 82.
394. Bradley, *supra* note 298, at 1292 n.17.

**B. *Where's the "Compulsion"?***

The most difficult aspect of defending *Griffin* concerns the issue of compulsion. A successful Fifth Amendment claim requires proof of three elements: a person is subject to (1) official compulsion to produce, (2) incriminating, (3) testimony. Regarding adverse comment laws, the second and third elements are easily satisfied; indeed, the reason why a prosecutor utilizes negative comment and urges jurors to draw an adverse inference is because she wants jurors to view the accused's refusal to testify as incriminating evidence of guilt—the defendant's consciousness of guilt and his awareness of incriminating evidence.

However, critics of *Griffin* ask: where is the necessary compulsion if a defendant does not testify? And those critics contend that if a defendant does not testify, there can be no claim of compulsion within the meaning of the privilege because, literally, he has not been compelled in a "criminal case to be a witness against himself." Justice Douglas's opinion in *Griffin* arrogantly ignored the point.[395] And since then, the complaints have been familiar and consistent:

Chief Justice Burger: "It is undisputed that petitioner was not in fact compelled to be a witness against himself, as he did not take the stand."[396]

Justice Rehnquist: Because the accused "never took the stand, . . . it is therefore difficult to see how his right to remain silent was in any way infringed by the State. . . . [P]etitioner cannot assert that it infringed *his* privilege against self-incrimination—a privilege which he retained inviolate throughout the trial."[397]

Justice Powell: "A defendant *who chooses not to testify* hardly can claim that he was *compelled to testify*."[398]

Justice Rehnquist: "[N]o one here claims that the defendant was forced to take the stand against his will or to testify against himself inconsistently with the provisions of the Fifth Amendment."[399]

Justice Scalia: "As an original matter . . . the threat of an adverse inference does not 'compel' anyone to testify. It is one of the natural (and not governmentally imposed) consequences of failing to testify—as is the factfinder's increased readiness to believe the incriminating testimony that the defendant chooses not to

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395. *Cf.* Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO WASH. L. REV. 191, 208 (1984) (noting that *Griffin* found a violation of the privilege without determining "that evidentiary use of silence was compulsion") (footnote omitted); Zaur D. Gajiev, *Turmoil Surrounding the Self-Incrimination Clause: Why the Constitution Does Not Forbid Your Silence From Speaking Volumes*, 6 FAULKNER L. REV. 231, 233 (2015) (stating that *Griffin* did not address "whether the prosecutor's comments actually exerted a *compelling* pressure on Griffin to testify at this trial") (footnote omitted).

396. Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (Burger, C.J., dissenting).

397. *Id.* at 617 (Rehnquist, J., dissenting) (emphasis added).

398. Carter v. Kentucky, 450 U.S. 288, 306 (1981) (Powell, J., concurring).

399. *Id.* at 309 (Rehnquist, J., dissenting).

contradict. . . . [An adverse inference] do[es] not *compel* anyone to take the stand."[400]

These arguments are "misleading" and intentionally promote a fundamentally fallacious view of the privilege.[401] These complaints assume that the privilege is violated only when official compulsion causes a person to make an incriminating statement or causes a criminal defendant to unwillingly take the witness stand.[402] Rather, as Peter Westen has put it:

> The privilege prohibits the state from putting a person to the cruel choice of either becoming a witness against himself or suffering a penalty for remaining silent. Accordingly, the constitutional interests of a defendant who has been put to such a choice are violated regardless of whether he responds to the dilemma by taking the witness stand over his objection or by suffering a penalty for remaining silent. Whichever his response, he suffers constitutional injury because he should never be put to the choice in the first place. In other words, there is a relationship of *equivalence* between penalties and compulsion.[403]

Critics of *Griffin* also ignore a practical problem: prior to and since *Griffin*'s announcement, the Court has proffered no workable definition of compulsion under the privilege.[404] And legal scholars have not helped the Justices fill the gap. Indeed, "Fifth Amendment jurisprudence and scholarship contain nothing approaching a workable conception of what constitutes compulsion within

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400. Mitchell v. United States, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting). *See also* Ayer, *supra* note 14, at 852 ("The literal language of the fifth amendment—that no one 'shall be compelled' to be a witness against himself—would not seem, at first blush, even to remotely address the situation where a defendant does not become a witness, but on that account is made to suffer remarks that he must, therefore, be guilty. He has not testified at all, and, one might argue from principles of common language usage, cannot be said to have been forced to testify against himself.").

401. Westen, *supra* note 258, at 941.

402. *Id.*

403. *Id.* at 942 (footnote omitted). Professor Westen asks how critics of *Griffin* would respond to a law

> that requires all defendants to testify as witnesses for the defense, upon penalty of contempt. The dilemma forces a defendant to respond in one of two ways, each of which causes constitutional injury: either he must take the witness stand and run the risk that he will incriminate himself, or he must remain silent and be punished for doing so. Assume that he responds by choosing to remain silent, and is held in criminal contempt and sent to jail. Do the [critics of *Griffin*] really mean to say that the defendant has no fifth amendment grievance in that case? Do they really mean that a defendant who stands on his right to remain silent, and is punished for doing so, has no grounds to complain?

*Id. See also* South Dakota v. Neville, 459 U.S. 553, 563 (1983) ("[T]he Court has long recognized that the Fifth Amendment prevents the State from forcing the choice of this 'cruel trilemma' on the defendant.").

404. Susan R. Klein, *No Time For Silence*, 81 TEX. L. REV. 1337, 1344 n.47 (2003) (noting the Court has not defined "on a philosophical [or constitutional] level, what makes a statement compelled or involuntary. Such effort has stumped the Court and philosophers for as long as they have asked the question.").

the meaning of the Fifth Amendment."[405] Sometimes, the Court will employ the term "coercion" as a substitute for compulsion, "but *without* offering any definition of coercion."[406] One scholar believed the effort to define compulsion was futile, remarking "compulsion can mean almost anything."[407]

Critics of *Griffin* like to define compulsion in historical terms. For example, in his dissent in *Griffin*, Justice Stewart referenced an era during the sixteenth and early seventeenth centuries in England when persons were summoned to appear before the Court of High Commission or the Star Chamber and ordered to testify "on pain of incarceration, banishment, or mutilation."[408] Faced with those alternatives, any decision to speak "was unquestionably coerced."[409] According to Justice Stewart, those conditions "were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry" from Griffin's complaint about negative comment and adverse inference.[410] Similarly, Justice Scalia has stated that the "longstanding common-law principle, *nemo tenetur seipsum prodere*, was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony."[411] And Justice Scalia has also observed that "[o]ur hardy forebears . . . thought of compulsion in terms of the rack and oaths forced by the power of law," and "would not have viewed the drawing of a commonsense inference as equivalent pressure."[412]

The notion that, to trigger the privilege, compulsion must be the equivalent of torture, incarceration, or the imposition of a religious oath, is a curious stance to take for a textualist. James Madison's phrasing of the common-law privilege in his proposed constitutional amendments to Congress was unique.[413] More importantly, the terms he used to constitutionalize the common-law privilege "are not couched

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405. Rosenthal, *supra* note 26, at 893; BERGER, *supra* note 4, at 217 ("[N]o consensus as to the meaning of [compulsion] exists"). Professor Huigens insists that there is an important difference between "compulsion" and "coercion" for Fifth Amendment purposes. *See* Kyron Huigens, *Custodial Compulsion*, 99 B.U. L. REV. 523, 533 (2019) ("Compulsion and coercion differ in kind because the former is a matter of circumstances, whereas the latter requires agency.").

406. Rosenthal, *supra* note 26, at 896–97 (emphasis added); *see, e.g.*, Michigan v. Tucker, 417 U.S. 433, 448 (1974) (where the Court used the terms "compulsion" and "coercion" interchangeably)

407. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 804 (1989).

408. Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

409. *Id.*

410. *Id.*

411. *Mitchell v. United States*, 526 U.S. 314, 332–33 (1999) (Scalia, J., dissenting).

412. *Id.* at 335. *See also Report to the Attorney General*, *supra* note 32, at 1021–22 ("The materials associated directly with the formulation of the Bill of Rights primarily reflect a concern with the grossest inquisitorial abuses, and particularly with the possibility that the federal government might resort to torture to obtain confessions in the absence of a constitutional prohibition of compelled self-incrimination. Nothing in these relatively sparse materials suggests that permitting adverse inferences from a defendant's silence would constitute 'compulsion' in a constitutionally offensive sense . . . .") (footnote omitted).

413. LEVY, ORIGINS, *supra* note 6, at 423 ("[N]o state, either in its own constitution or in its recommended amendments, had a self-incrimination clause phrased like that introduced by Madison.").

in terms of torture or, for that matter, any specific means of compulsion."[414] The text of the Fifth Amendment "embraces all forms of compulsion, regardless of how it is applied," which includes both formal and informal threats.[415] Writing closer to the Founding Era than today's Justices, in 1897 the Court stated the Fifth Amendment "was in its essence comprehensive enough to include all manifestations of compulsion, whether arising from torture or from moral causes."[416] More recently, the Court has found compulsion under the Fifth when state officials threaten public employees and contractors with the loss of a job for refusing to waive their Fifth Amendment rights.[417] In sum, there is no textual or precedential support to confine the meaning of compulsion to only those forms of compulsion, like physical torture or threats, known to or condemned by the Framers.[418]

Since the text does not support or require a restrictive notion of compulsion, and because the Court has not adequately defined compulsion and Justice Douglas ignored the point, defenders of *Griffin* are left on their own to address the matter. When the accused refuses to testify, and a prosecutor is permitted to argue that failing to take the stand is substantive evidence of guilt, compulsion occurs because silence—the product of exercising an absolute right—becomes unavoidably incriminating and testimonial. The "striking thing about a rule that permits a defendant's failure to testify to be used as evidence of guilt is that the defendant is left with no means to avoid becoming a 'witness' who has provided evidence."[419] No matter what choice the accused makes—testifying or silence—he is compelled to become "a witness against himself."[420] And when the accused's silence is

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414. Hall, *supra* note 25, at 75 (footnote omitted).

415. Rosenthal, *supra* note 26, at 921; LEVY, ORIGINS, *supra* note 6, at 430 (noting that in the 1780s, authors of constitutions "did not regard themselves as framers of detailed codes. To them the statement of a bare principle was sufficient, and they were content to put it spaciously, if somewhat ambiguously, in order to allow for its expansion as the need might arise").

416. Bram v. United States, 168 U.S. 532, 548 (1897).

417. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968); Lefkowitz v. Turley, 414 U.S. 70 (1973); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

418. *See* Hall, *supra* note 25, at 75 (arguing that the "unique phrasing of Madison's self-incrimination clause demonstrates that it was intended to be expounded broadly, broader than merely prohibiting judicial torture"); LEVY, ORIGINS, *supra* note 6, at 430 ("That [the Fifth Amendment] was a ban on torture and a security for the criminally accused were the most important of its functions, as had been the case historically, but these were not the whole of its functions.").

419. Rosenthal, *supra* note 26, at 965; *see also* Schulhofer, *supra* note 25, at 334–35 ("Compulsion arises directly from the trial court's willingness to use the defendant's own testimony against him, against his will. The 'testimony' is the defendant's communicative act (like a nod or shrug), his physical response to the implicit question, 'How do you explain this evidence against you?'").

420. U.S. CONST. amend. V.

converted into substantive evidence of guilt, the absolute right not to testify against oneself obviously is denied.[421]

Critics of *Griffin* are quick to note that when the government presents its evidence or offers a plea bargain, those situations place greater pressure on a defendant than does comment on the failure to testify. But those situations do not constitute compulsion under the Fifth Amendment.[422] This is a false comparison. To be sure, "[t]he mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination."[423] But unlike the absolute right not to testify against oneself, there is no right not to have the government indict a person or present criminal evidence against a person at trial. As for plea bargaining, it surely puts pressure on the defendant to accept the government's offer. But a defendant who accepts a plea bargain receives certain benefits in exchange for waiving his constitutional rights, including the right to a jury trial and the right not to be compelled to incriminate oneself. By contrast, in the *Griffin* context, if the defendant testifies, he will be impeached with prior convictions and subject to other risks that may incriminate him.[424] If he refuses to testify, he is incriminated by his silence. Thus, the accused does not "exchange a right for a benefit—no matter what he does, he suffers a detriment."[425]

## CONCLUSION

Justice Douglas wrote a terrible opinion in *Griffin v. California*. Since that opinion, many have criticized, and a few have defended, the result in *Griffin*. Instead of utilizing a "penalty" or unconstitutional conditions theory, Douglas might have written that "comment on a defendant's silence violates the Fifth Amendment, pure and simple."[426] I suspect, however, that approach would not have satisfied the critics.

*Griffin* is worth defending because it reached the right result. Prosecutorial or judicial comment that permits jurors to draw an adverse inference from the accused's refusal to testify violates the Fifth Amendment because the prosecutor has converted "a silent defendant into a source of evidence against himself."[427] Negative comment and inference makes it "easier for the prosecution to obtain a conviction at trial by enhancing the strength of the state's case" because it "adds an additional

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421. *See also* Rosenthal, *supra* note 26, at 965–66 ("When a defendant's failure to testify is treated as evidence of guilt, accordingly, the defendant is deprived of the option of declining to become a 'witness' who provides evidence."); Poulin, *supra* note 395, at 219 ("If a defendant's silence is the basis for a negative inference, the defendant becomes an involuntary witness against himself without testifying.").

422. Ayer, *supra* note 14, at 858.

423. Barnes v. United States, 412 U.S. 837, 847 (1973).

424. *See* Schulhofer, *supra* note 25, at 330 (offering many reasons why innocent persons should not testify).

425. Bradley, *supra* note 298, at 1297. Bradley contends that a truly comparable case "in the jury trial context, would be one in which the judge instructs the jury that people who choose jury trials are likely to be guilty." *Id.*

426. Alschuler, *A Peculiar Privilege*, *supra* note 370, at 2628 n.11.

427. *Id.*

item of incriminating evidence to the state's case."[428] That conduct satisfies the incrimination and testimonial prongs of a successful claim under the privilege.

Regarding the compulsion prong, if the accused had testified to avoid adverse comment, he would have been required to tell the truth. "If the defendant were guilty, and possibly even if he were not, the truth would have been incriminating."[429] Therefore, the accused was between Scylla and Charybdis: testifying or not testifying would have produced incriminating testimony. "Because the defendant lacked an alternative, he was compelled to become a witness of sorts against himself."[430] Put simply, when adverse comment is permitted, "the prosecutor is guaranteed evidence from the defendant whether he testifies or not."[431] That is compulsion under the Fifth Amendment. *Griffin* reached the correct result because it protects a person's right to remain silent at trial, which is at the heart of what the Fifth Amendment should protect in the twenty-first century.

428. Westen, *supra* note 258, at 946.
429. Alschuler, *A Peculiar Privilege*, *supra* note 370, at 2628 n.11.
430. *Id.*
431. Rosenthal, *supra* note 26, at 967 n.390.

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