Adverse Inferences from Silence

Department of Justice Office of Legal Policy

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REPORT TO THE ATTORNEY GENERAL

ON

ADVERSE INFERENCES FROM SILENCE

‘Truth in Criminal Justice’
Report No. 8

Office of Legal Policy

January 31, 1989
The Executive Summary for REPORT No. 8 begins on the next page. The full Report, including a Table of Contents, follows the Executive Summary.
EXECUTIVE SUMMARY

While the nature of the evidence available in criminal prosecutions varies widely from case to case, there is one constant among the potential sources of evidence—the defendant himself is almost invariably aware of whether he actually committed the offense with which he is charged. The criminal justice system's approach to that uniquely knowledgeable individual (the defendant) as a source of evidence has an important bearing on its effectiveness in the pursuit of truth and substantive justice. Legislative discretion concerning this important issue has, however, been limited by decisions of the Supreme Court since the mid-1960s. Under *Griffin v. California*\(^1\) adverse comment on the defendant's failure to testify is generally prohibited, and under *Carter v. Kentucky*\(^2\) the jury must be affirmatively instructed not to draw any adverse inference from the defendant's silence at trial. Other decisions—particularly *Doyle v. Ohio*\(^3\)—have imposed major restrictions on disclosure and consideration at trial of the defendant's silence before trial.

This Report, the eighth in the Truth in Criminal Justice series, assesses the rules relating to the evidentiary consideration of the defendant's silence. Its general conclusion is that the existing restrictive rules in this area are unjustified impediments to the search for truth. The notion that the fifth amendment's prohibition of compelling a person in a criminal case to be a witness against himself bars drawing adverse inferences from the defendant's silence is not well-founded. In practical effect, these rules impede the conviction of the guilty by barring consideration of an aspect of the defendant's conduct—his failure to respond to the evidence and accusations against him—that is rationally relevant to the determination of guilt and innocence. They also disserve the search for truth by artificially shielding the defendant from the normal incentives he would feel to testify, thereby making it less likely that he will be available for questioning. There is no reason to believe that these restrictions have any overall value in protecting the innocent from unjust conviction; they may well have the opposite effect.

Part I of the Report examines the historical development of the rules in this area. Part II assesses the current rules from both constitutional and policy standpoints. Part III examines

the corresponding rules in a number of foreign jurisdictions. Part IV contains recommendations for reform. The main findings and recommendations of the Report are as follows:

I. THE HISTORY OF ADVERSE INFERENCEs FROM SILENCE

Prior to the seventeenth century, the defendant in England was subject to questioning both before trial and at trial, and adverse inferences could be drawn from a failure to respond in either context. The paths of pretrial questioning and questioning at trial subsequently diverged as the result of basic changes in trial practice in the seventeenth and eighteenth centuries. The reaction to inquisitions against religious and political dissidents in England led to formal recognition of the principle that a defendant could not be compelled to answer incriminating questions, and the idea that the defendant's interest in the case made him an untrustworthy source of evidence led to the view that he should not be questioned at all at trial, even if he wanted to be questioned. The exclusion of the defendant as a source of testimonial evidence at trial essentially mooted the question whether adverse inferences should be permitted from his silence in that context. However, the pretrial questioning of defendants by magistrates at the preliminary examination proved to be a more durable institution, and it persisted in its traditional form into the nineteenth century. The defendant's silence under questioning by the magistrate, as well as any admissions on his part, were subject to disclosure at trial.

Statutory changes in the late nineteenth century authorized the defendant to testify at trial. Prior to extensive practical experience with testimony by the accused, there was widespread concern that taking the stand would typically pose grave risks even to wholly truthful and innocent defendants, and statutes in most states barred adverse inferences from the defendant's failure to testify. By the early twentieth century, however, the weight of informed opinion in the United States had turned against this position. Proposals were advanced in many states to permit adverse comment on the defendant's failure to testify, and in 1931 both the American Law Institute and the American Bar Association adopted resolutions supporting this reform. Several states did adopt rules authorizing adverse comment on the defendant's silence at trial. In most instances the state courts rejected constitutional challenges to these rules and held that they were consistent with the right against compelled self-in-
criminalization. At the time of Griffin v. California, there were six states—California, New Jersey, Ohio, Connecticut, Iowa, and New Mexico—that had such rules in effect.

The nineteenth century also brought basic changes in the system of pretrial interrogation. The interrogation function was effectively transferred from judicial officers to the newly formed police forces. Following this change, the admissibility of pretrial silence by the defendant was generally assessed under the traditional evidentiary principle that silence in the face of incriminating statements or accusations could be considered against a person if response on his part would naturally be expected (the "adoptive admissions" doctrine). The courts in some states restricted the application of this doctrine to silence in non-custodial situations, but the more common position was that post-arrest silence would also be admitted in appropriate cases.

At the federal level, the 1878 statute authorizing testimony by the defendant included a provision that there was to be no presumption against the defendant if he failed to take the stand. However, the Supreme Court was required to rule on the permissibility of considering the defendant's silence in a number of contexts falling outside the ambit of the statutory no-presumption rule. For example, the Court held that drawing adverse inferences from selective silence by a testifying defendant, and impeaching a defendant's testimony by disclosing his silence at an earlier trial, were consistent with the fifth amendment's prohibition of compelled self-incrimination. The Court also held repeatedly—in Twining v. New Jersey and Adamson v. California—that state rules permitting adverse comment on the defendant's failure to testify were consistent with the Federal Constitution.

The latitude of the states to write their own rules in this area was eliminated by the decision in Griffin v. California, which barred adverse comment on the defendant's failure to testify in both state and federal proceedings, ostensibly on the basis of the fifth amendment's prohibition of compelled self-incrimination. The Griffin rule was carried further in Carter v. Kentucky, which held that the defendant is entitled on request to an affirmative instruction that no adverse inference is to be drawn from his failure to testify. However, there have also been post-

4. 211 U.S. 78 (1908).
5. 332 U.S. 46 (1947).
Griffin decisions sanctioning adverse inferences from silence in certain contexts that sit uneasily with the rationale underlying the general rule of exclusion.

The decisions following Griffin relating to pretrial silence have also not all been in the same direction. In Doyle v. Ohio\(^8\) the Court generally barred disclosure at trial of a defendant's pretrial silence following the receipt of Miranda warnings. Other decisions, however, have held that silence by a defendant who had not been given the warnings can be admitted to impeach his trial testimony.

II. ISSUES AND ARGUMENTS

Consideration of a defendant's conduct as part of the evidence in a criminal case is generally permitted. For example, it is generally permissible to disclose and consider the fact that a defendant refused to take a sobriety test; unexpectedly left town after the offense or fled from the crime scene; concealed, destroyed, or fabricated evidence; or attempted to prevent a witness from testifying. It is also generally permissible, in both civil and criminal litigation, to draw adverse inferences from any party's failure to proffer witnesses or other evidence within his control, and to comment on the fact that there has been no rebuttal of the evidence offered against a party. The question is whether certain aspects of the defendant's conduct—his silence at trial or before trial—are among the circumstances that can properly be considered pursuant to these general principles, or whether constitutional or policy considerations warrant an exception to their application where the conduct in question is the defendant's withholding of his own testimony concerning the offense or related circumstances.

The origin and historical understanding of the right against compelled self-incrimination do not warrant the conclusion that it bars taking account of the defendant's failure to testify. The rules in a number of states that permitted adverse comment on the defendant's silence at trial prior to Griffin were in no way comparable to the historical abuses that gave rise to the self-incrimination right, and the understanding of that right in the later common law period also does not suggest that rules of this type are invalid. The prevalence of state statutes barring adverse inferences from the defendant's failure to testify resulted

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from various causes, and cannot reasonably be taken as reflecting a collective judgment that a contrary rule would violate the right against compelled self-incrimination. In pre-*Griffin* judicial decisions, there was substantial support for the view that adverse comment on the defendant’s silence is consistent with the self-incrimination right.

The argument that rules permitting adverse comment on a failure to testify would jeopardize the innocent is unconvincing. The assumptions underlying this argument are inconsistent with other settled rules, such as the rule permitting compulsory cross-examination of criminal defendants who do testify and the rule permitting adverse inferences from a defendant’s failure to testify in civil proceedings. Questioning at trial carries a very real and entirely salutary risk to the guilty defendant, who must lie on the stand and risk exposure on cross-examination, but no comparable jeopardy results to the innocent defendant, who can give a truthful account of the circumstances supporting his innocence. If the defendant does decline to testify, the notion that no inference should be drawn from his silence amounts to a banishment of common sense from criminal trials for which no adequate justification has been provided. By partially shielding the defendant from the normal incentives he would feel to testify, rules barring comment and inferences also increase the likelihood that innocent defendants who could have cleared themselves by testifying will instead remain silent and run an increased risk of conviction.

The argument that adverse comment is a “penalty” or impermissible burden on silence is also unconvincing. The prosecutor who comments adversely on the defendant’s failure to respond to the evidence against him is not going out of his way to visit retribution on the defendant for having the temerity to stay off the stand, but is simply treating the defendant’s silence as he would any other aspect of his conduct that is arguably suspicious or incriminating. While the prospect of adverse comment and inferences makes the choice of silence less attractive, this does not resolve the question whether it amounts to “compulsion” in the sense of the fifth amendment. The determination on this issue in *Griffin* is at odds with various other decisions by the Court that have upheld procedural and evidentiary rules that discourage or circumscribe the choice of silence by the defendant.

The argument that nothing should be inferred from the defendant’s failure to testify because he may have been motivated to stay off the stand by concern over disclosure of his criminal
record is also unconvincing. This argument provides no reason at all for barring adverse comment and inferences in any case in which the defendant has no criminal record, or no record that would be admitted pursuant to the jurisdiction’s impeachment rule if he testified. Various other considerations reduce the force of this argument in the class of cases in which it does potentially have some application.

There is no substance to the argument that permitting adverse comment on silence at trial would lead to abuses or reduce the overall effectiveness of the system in discovering the truth by lessening recourse to other sources of evidence. A number of other arguments are also more rhetorical than logical and do not withstand serious analysis. These include the arguments that permitting adverse comment is an oppressive “inquisitorial” practice, that it violates the presumption of innocence, and that it is inconsistent with general principles governing the waiver of rights and privileges.

In some respects, the case for disclosure and consideration of the defendant’s silence before trial is even stronger than the case for permitting the evidentiary consideration of his silence at trial. There is broad historical support for admitting pretrial silence. The desire to avoid disclosure of a criminal record pursuant to the impeachment rule cannot be the motive for pretrial silence. While testifying at trial carries a certain price to the defendant—exposure to compulsory cross-examination—no comparable consequence follows from talking in informal pretrial settings. While the exclusionary rule for silence at trial consists of ordering the jurors not to think about a fact of which they are necessarily aware—the defendant’s failure to testify—an exclusionary rule for pretrial silence produces an actual gap in the jurors’ knowledge of the course of events in the case, keeping them ignorant of the fact that the defendant did not protest his innocence or make explanations or denials prior to trial. The risk of misapprehension of the defendant’s motives for not talking before trial is guarded against by his subsequent opportunity at trial to explain the reasons for his earlier silence.

III. THE LAW OF FOREIGN JURISDICTIONS

The practice of other countries does not support the view that broad exclusionary rules in relation to the defendant’s silence are necessary to a fair or civilized system of justice. Democratic nations generally accept the principle that a person should not
be compelled to answer incriminating questions, but this is not generally understood to mean that he should be free to remain silent at no risk to himself, thereby, in effect, obstructing the investigation. Rather, the more common view is that the trier should be allowed to draw adverse inferences from a defendant’s failure to tell what he knows at some stage in the process.

In England, for example, the trial judge is permitted to comment adversely on the defendant’s failure to testify. While adverse comment is not permitted on the defendant’s pretrial silence after being cautioned by the police, the fact that he refused to talk is not concealed from the jury, and that fact may be considered against him as a practical matter. French law provides multiple opportunities for questioning of the defendant, and freely permits adverse inferences from silence. Before trial, a refusal to answer in questioning by a magistrate would result in adverse inferences being drawn by the magistrate, and later by the court at trial. The trial itself opens with the questioning of the defendant, and a failure to respond exposes him to whatever inferences the court chooses to draw. In India, the judge is not only free to question the defendant at any time during trial, but is also generally required to question the defendant about “each material circumstance which is intended to be used against him.” A refusal to answer exposes the defendant to any inference the court or jury considers to be warranted.

IV. RECOMMENDATIONS FOR REFORM

In light of the foregoing analysis, the Office of Legal Policy recommends that the Department of Justice seek reforms in the rules relating to the evidentiary consideration of the defendant’s silence. Optimally, the trier should be free to consider such silence on the same footing as other aspects of the defendant’s conduct. Given the dominant policy-making role that the Supreme Court has assumed in this area, the main implications are for the Department’s litigation program.

First, the Department should seek to persuade the Supreme Court to limit or overrule Griffin v. California. The desirable initial position in litigation would be to argue that adverse comment on the defendant’s failure to testify should be allowed in cases in which testimony by the defendant would not expose him to impeachment by prior convictions.

Second, the Department should seek to persuade the Court to authorize broader disclosure at trial of the defendant’s pretrial
silence to impeach his trial testimony. The most promising approach would be to argue that the restriction of *Doyle v. Ohio* does not apply if the defendant had been put on notice that his failure to talk could be used against him.

Third, the Department should seek to persuade the Court to authorize the use of the defendant’s pretrial silence at trial for purposes other than impeachment of his trial testimony. It could be argued that silence should be admissible as evidence in the government’s case in chief in a clear “adoptive admissions” situation, or should be admissible in a situation in which the defendant’s silence has a specific bearing on the credibility of a defense presented through other witnesses.

V. Conclusion

The existing rules generally bar questioning the defendant in the most important investigative and adjudicative contexts unless he deems it in his interest to be questioned, and provide that his failure to speak in these contexts cannot be considered against him. These rules are unjustified obstacles to the search for truth. There is no impediment in constitutional principle or sound policy to rectifying the situation by allowing the normal incentives to respond to charges of serious misconduct to operate, and by permitting natural inferences to be drawn if no response is forthcoming. Effecting this reform would produce a more rational and just criminal justice system. It would deprive “[t]he innocent defendant . . . of no essential protection and the guilty accused . . . only of a shelter to which he is in no way entitled.”
"[If] an accused person . . . [is] . . . asked any question from which evidence of his guilt may be deduced . . . he is not bound to answer it, and his silence is not to be held to furnish any legal presumption against him . . . If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence."

— Bentham

"However sound may be the . . . conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we 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 commenting upon defendant's failure to explain or deny it . . . If . . . the facts . . . are . . . in the knowledge of the accused . . . a failure to explain would point to an inability to explain."

— Adamson v. California

"The decision [Griffin v. California] that struck down the provision in California's constitution permitting comment by court and counsel on a defendant's . . . failure to [testify] . . . warrants examination . . . . Comment on the exercise of the privilege was surely not the 'mischief or defect' at which the self-incrimination clause was aimed, and most informed professional opinion approved allowing it in some fashion . . . . Mr. Justice Douglas' opinion [for the Court in Griffin] . . . consists of a few sentences of characterization, whose tone and failure to take account of the contrary views of experts are indeed reminiscent of Lochner v. New York . . . ."

— Judge Henry Friendly

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# Table of Contents

**Introduction** ............................................................ 1019

**I. The History of Adverse Inferences from Silence** 1020
   **A. The Common Law Period** ........................................ 1021
      1. The Trial Examination of the Accused and its Abatement 1022
      2. The Preliminary Examination .................................. 1025
   **B. Post-Constitutional Developments** 1027
      1. The Defendant as a Competent Witness ..................... 1027
      2. Police Interrogation and Adoptive Admissions ..............
   **C. Judicial Decisions** ............................................. 1031
      1. State Decisions ................................................ 1034
      2. Supreme Court Decisions ..................................... 1045
   **D. Developments following *Griffin v. California*** 1051
      1. Silence at Trial ............................................... 1052
      2. Silence before Trial .......................................... 1057

**II. Issues and Arguments** ........................................... 1060
   **A. Silence at Trial** .............................................. 1062
      1. Historical Considerations .................................... 1063
      2. Acquitting the Innocent and Convicting the Guilty ........ 1068
      3. Penalties and Burdens on Silence ........................... 1078
      4. Impeachment by Prior Convictions ........................... 1082
      5. The Overall Effectiveness of the Truth-Seeking Process 1086
      6. Other Arguments ................................................ 1090
   **B. Silence before Trial** ......................................... 1096
      1. The Argument in *United States v. Hale* .................. 1098
      2. The Argument in *Doyle v. Ohio* ............................. 1103

**III. The Law of Foreign Jurisdictions** ............................ 1107
   **A. England** ....................................................... 1107
   **B. France** ....................................................... 1110
   **C. India** ............................................................. 1111

**IV. Recommendations for Reform** .................................. 1111
   **A. Limiting or Overruling *Griffin v. California*** ........... 1113
   **B. Broader Use of Pretrial Silence for Impeachment** .......... 1115
   **C. Use of Pretrial Silence for Other Purposes** ............... 1116

**Conclusion** ............................................................. 1119
ADVERSE INFERENCES FROM SILENCE

INTRODUCTION

The nature of the evidence that is potentially available in a criminal case varies widely. There may or may not be eyewitnesses to the offense. There may or may not be real evidence, or documentary evidence, or forensic evidence, or circumstantial evidence. There is, however, one constant among the potential sources of evidence in criminal cases: The defendant himself is almost invariably aware of whether he actually committed the offense with which he is charged.

The criminal justice system's approach to that uniquely knowledgeable individual (the defendant) as a source of evidence has an important bearing on its effectiveness in the pursuit of truth and substantive justice. The importance is twofold. First, if a suspect or defendant refuses to disclose the truth that he knows, or fails to respond to the evidence against him, his silence may itself be considered a relevant factor in assessing the probability of guilt or innocence. Second, the decision whether to permit adverse inferences from the defendant's failure to speak affects the incentive he feels to respond to incriminating evidence or accusations, and accordingly has a practical bearing on the likelihood that he will testify and be available for questioning.

This Report, the eighth in the Truth in Criminal Justice Series, examines the issue of adverse inferences from a criminal defendant's silence at trial or before trial. The current rules in this area in the United States are primarily determined by decisions of the Supreme Court since the mid-1960s. Under Griffin v. California12 adverse comment on the defendant's failure to testify is generally prohibited, and under Carter v. Kentucky13 the jury must be affirmatively instructed not to draw any adverse inference from the defendant's silence at trial. These decisions purportedly follow from the fifth amendment's prohibition of compelling a person in a criminal case to be a witness against

himself. Decisions following Griffin—particularly Doyle v. Ohio—have also imposed major restrictions on disclosure and consideration at trial of the defendant's silence before trial.

Part I of the Report examines the historical development of the rules in this area from the medieval period to the present. Part II assesses the current rules limiting disclosure or consideration of the defendant's silence, both from constitutional and policy standpoints. Part III examines the corresponding rules in a number of foreign democracies. Part IV contains recommendations for reform.

I. The History of Adverse Inferences from Silence

The history of adverse inferences from silence may naturally be divided into three periods. The first, which we will refer to as the "common law period," extended from the sixteenth century to the early nineteenth century. This period was characterized by a development which resulted in the exclusion of testimony by the defendant at trial, mooting the question of adverse inferences or comment concerning his failure to testify. However, the pretrial questioning of defendants by magistrates continued throughout this period, and adverse inferences were drawn at trial from the defendant's pretrial silence. The development in this period is described in sub-part A.

The second period, extending from the nineteenth century to the Supreme Court's decision in Griffin v. California, presented the question of adverse inferences from the defendant's silence in novel settings as a result of the removal of the defendant's incapacity as a trial witness and the transition from pretrial interrogation by judicial officers to police interrogation. The major procedural developments in this period affecting the evidentiary consideration of the defendant's silence are reviewed in sub-part B. The principal decisions of the state courts and the federal Supreme Court in this period bearing on the same issue are reviewed in sub-part C.

The third and final period, extending from Griffin v. California to the present, has involved the assumption by the Supreme Court of broad policy-making powers in this area, relegating the legislatures and state judiciaries to a relatively minor role. Specific innovations in this period have included the creation of os-

tensibly constitutional rules embodying the most extreme possible position against adverse inferences from silence at trial and major new restrictions on disclosure and consideration of pre-trial silence. However, there have also been discordant elements in the Court's case law which sit uneasily with the rationales underlying the general rules of exclusion. These have included decisions that directly sanction adverse inferences from the defendant’s silence in certain contexts, and decisions in a variety of contexts upholding other rules that discourage or circumscribe the choice of silence. The developments in this period are covered in sub-part D.

A. The Common Law Period

Prior to the seventeenth century, the defendant in England was subject to questioning both before trial and at trial, and adverse inferences could be drawn from a failure to respond in either context. As a result of developments in the seventeenth and eighteenth centuries, however, the paths of pretrial questioning and questioning at trial diverged. The defendant came to be regarded as an untrustworthy source of evidence at trial, and efforts to elicit information from him in that context ceased, effectively mooting the question whether adverse inferences should be permitted from his silence at trial. The procedure for pretrial questioning of the defendant proved to be more durable, however, and it persisted in its traditional form into the nineteenth century. The divergent developments relating to questioning at trial and pretrial questioning are discussed separately in this section.

Beyond the intrinsic interest of this early history, it is important for its bearing on the interpretation of the fifth amendment’s prohibition of compelling a person in a criminal case to be a witness against himself—the right on which the current restrictive rules governing inferences from a defendant’s failure to testify are ostensibly based. 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.16 Nothing in these rela-

16. See III Elliot's Debates 447-52; II Elliot's Debates 111; 1 Annals of Cong. 753. See generally OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, “TRUTH IN CRIMINAL JUS-
tively sparse materials suggests that permitting adverse inferences from a defendant's silence would constitute "compulsion" in a constitutionally offensive sense, but they also do not provide a complete articulation of the common law right that was incorporated into the fifth amendment. For a fuller elaboration of the original understanding of the fifth amendment right, one must look to its common law background.

1. The Trial Examination of the Accused and its Abatement

Under the procedure of the regular criminal courts in England (the "common law courts") prior to the seventeenth century, defendants were regularly subject to questioning at trial, whether or not they wished to be questioned. If the defendant refused to respond, adverse comment was permitted and adverse inferences would be drawn. The preclusion of counsel and defense witnesses in felony cases generated additional pressures on the defendant to speak. Nevertheless, defendants in common law proceedings were not questioned under oath, and could not be punished for remaining silent.17

The development leading to the recognition of the right against compelled self-incrimination did not begin with any dissatisfaction with the procedure in regular criminal proceedings, but in the reaction to the methods of courts which followed the ecclesiastical—as opposed to the common law—mode of procedure. These included the Court of High Commission, which was active in the persecution of religious and political dissidents in the late sixteenth and early seventeenth centuries. A person brought before such a tribunal could be required to take an oath—the oath ex officio—to answer truthfully all questions that might be put to him. A refusal to take the oath could result in imprisonment or other punishment. Nevertheless, many victims of these inquisitions did resist the oath procedure, citing the maxim: "nemo tenetur prodere seipsum"—"no one is bound to accuse himself."18

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At this early stage, the right asserted was not a general right to refuse to answer incriminating questions, but only a right not to be the source of the initial accusation against oneself. In contrast to the common law courts’ reliance on grand jury indictment and charges of specific offenses made by identifiable witnesses, these inquisitorial courts could initiate proceedings against a person on the basis of information provided by anonymous accusers, or on the basis of rumor or suspicion that a person may have lapsed in some manner from orthodoxy or loyalty to the crown. Their proceedings were accordingly in many cases open-ended fishing expeditions which could elicit from defendants charges against themselves for which evidence had not previously been provided by any identifiable witness. The claimed right to refuse the oath was initially predicated on this particular feature of ecclesiastical procedure—the absence of a limitation on the scope of inquiry to specific charges supported by the evidence of identifiable witnesses.\(^\text{19}\)

The Parliament convened in 1640 acted broadly against these inquisitorial practices. Legislation was adopted that abolished the Court of High Commission and its ally in the persecution of dissidents, the Court of Star Chamber. The legislation further provided that all trials were thereafter to be determined “in the ordinary Courts of Justice and by the ordinary course of the law,” and prohibited use of the \textit{oath ex officio} by any person exercising ecclesiastical authority.\(^\text{20}\)

These reforms did not directly affect the common law courts, which had never questioned defendants under oath. Nevertheless, the general reaction to inquisitorial abuses in the seventeenth century created a psychological climate which was receptive to self-incrimination claims, and which resulted in a transformation of the earlier-asserted right against compelled self-accusation into a true right against compelled self-incrimination. Cases appeared in which defendants claimed a right not to answer incriminating questions, and judges acknowledged that they were not required to do so.\(^\text{21}\)

At the same time, the questioning of the accused at trial was being squeezed from another direction by the growing strength of the notion that the defendant’s interest in the case made him an untrustworthy source of evidence. The notion that the de-

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20. See id. at 278-82.
fendant, as an interested party, should be disqualified from testifying, did not merely imply that he should have the option of refusing to answer questions, but was thought to entail that he should not be questioned at all, even if he wished to be questioned.\textsuperscript{22}

By the early years of the eighteenth century, these trends had reached their culmination, and the trial examination of the accused abated in the English courts.\textsuperscript{23} This change was eventually emulated in American jurisdictions.\textsuperscript{24} While the defendant might still thereafter be able to convey some account of his version of the relevant events in the course of presenting a defense, the remaining opportunities to do so were informal in nature, and the defendant's remarks had no legal status as evidence.\textsuperscript{25} 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.\textsuperscript{26}


\textsuperscript{23} See \textit{supra} note 22; 8 Wigmore's Evidence § 2250 at 291 & n.108 (McNaughton rev. 1961).

\textsuperscript{24} The timing of the change on this side of the Atlantic is uncertain because there are few informative records of early American trials. See generally J. Goebel & T. Naughton, \textit{Law Enforcement in Colonial New York} 652-57 (1944) (questioning of defendant at trial continued in New York in eighteenth century); L. Levy, \textit{supra} note 17, at 374-77 (questioning adequacy of Goebel and Naughton's evidence and arguing that they confused exemption from questioning and right against compelled self-incrimination, but agreeing that defendants required to defend without counsel in many colonies were "vulnerable to comments and questions from the prosecution and the bench," and agreeing that questioning continued at preliminary examination and arraignment).

\textsuperscript{25} See generally State v. Bartlett, 55 Me. 200, 216-17 (1867) (defendant had been required to be silent at trial prior to enactment of competency statute); State v. Cameron, 40 Vt. 555, 565-66 (1868) (courts in state had usually not followed the "old English practice of calling upon the prisoner to make his statement to the jury"); 5 J. Bentham, \textit{Rationale of Judicial Evidence} 382 (1827) (defendant could say whatever he wanted in making defense but it was not considered evidence); L. Levy, \textit{supra} note 17, at 323 (defendant could make unsworn closing statement); 1 J. Stephen, \textit{supra} note 17, at 440-41 (indicating that scope of defendant's opportunity to impart factual information varied with development of historical practice, attitudes of individual judges, and presence or absence of counsel).

\textsuperscript{26} But cf. J. Stephen, \textit{supra} note 22, at 194-95 (adverse inference would be drawn as a practical matter from \textit{pro se} defendant's failure to answer the evidence against him).
2. The Preliminary Examination

While the general tendency of the development in the seventeenth and eighteenth centuries was to silence the defendant at trial, whether or not he wished to talk, he nevertheless remained an important source of evidence because of his amenability to pretrial interrogation. Pursuant to English statutes enacted in the mid-sixteenth century, defendants were questioned before trial by justices of the peace or other magistrates in a proceeding termed the preliminary examination. The use of such examinations was adopted in the American colonies.27

The applicability of the right against compelled self-incrimination was recognized at the preliminary examination.28 As a result, the defendant at the examination was not put under oath, and was not exposed to any formal punishment or penalty for refusing to answer questions. The notion of "compulsion," however, was not given any attenuated or fictitious interpretation. The magistrate was free to question the defendant concerning the suspected offense, whether or not the defendant wished to be questioned. Confessions and other admissions obtained from defendants in the preliminary examination were admitted as evi-


28. See L. Levy, supra note 17, at 375, 406. In reading the literature in this area, care should be taken to distinguish two senses of the phrase "privilege against self-incrimination" which are often confused. In the narrower sense, it refers to the prohibition of compelling a person to answer incriminating questions, a common law right of general application that has been codified in the fifth amendment's stricture against compelling a person in a criminal case to be a witness against himself, and in comparable provisions of virtually all state constitutions. The applicability of this right in the preliminary examination, as in all other proceedings, was recognized in the common law period. However, the phrase "privilege against self-incrimination" is also sometimes used in an entirely different sense to refer to rules against questioning a suspect or defendant, either absolutely or without his consent. This broader stricture is not generally entailed by the Constitution, and may or may not be found to be applicable in particular contexts. See, e.g., Minnesota v. Murphy, 465 U.S. 420 (1984). While the right against actual compulsion to respond was traditionally recognized at the preliminary examination, the exemption from questioning at this stage was a nineteenth century development. See Wilson v. United States, 162 U.S. 613, 615-16, 623-24 (1896); L. Levy, supra note 17, at 325, 375; L. Mavera, supra note 17, at 175-76, 223-24; Morgan, supra note 21, at 14, 19; 3 Wigmore's Evidence § 848 (Chadbourn rev. 1970).
The defendant's failure to answer the magistrate's questions could also be disclosed at trial.30

In contrast to the relatively early cessation of the trial examination of the accused, the statute-based preliminary examination procedure proved to be more resistant to changes in judicial attitudes, and persisted into the nineteenth century:

But though the questioning of the accused at his trial thus ceased in the eighteenth century, his pretrial interrogation by the committing magistrate continued for more than a century longer. And since his answers before the magistrate, including his failures to answer, continued to be put in evidence against him at the trial, the effect was much the same as though he were still interrogated at trial. Not till the middle of the nineteenth century did the accused achieve exemption from questioning at the preliminary examination; and in some jurisdictions ... such exemption was not recognized for decades thereafter. . . .

As to the accused, . . . his exemption from questioning at the preliminary examination . . . as we have seen, is not much more than a century old. . . . In that interrogation, the prisoner's silence, even when recognized as his right, was extremely injurious to him at his subsequent trial, where it was regularly disclosed to the jury. . . . [T]hose who in this country framed the constitutional provisions against self-incrimination made no attempt to change that procedure.31

29. See J. GOEBEL & T. NAUGHTON, supra note 24, at 339-40, 653; L. LEVY, supra note 17, at 325, 375; A. SCOTT, supra note 27, at 55-56 & n.29.

30. See E. LIVINGSTON, A System of Penal Law for the State of Louisiana 212-14 (1833) (despite modification of traditional type of examination to advise suspect that he need not respond and theoretical preclusion of adverse inference from silence, such silence was disclosed at trial and jury could infer guilt as a practical matter); Morgan, supra note 21, at 14, 16, 18 (English practice); NEW YORK STATE, FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS — CODE OF CRIMINAL PROCEDURE xxviii (1849) ("inference of guilt uniformly urged against" defendant at trial from "the mere fact of his silence" at preliminary examination).

As the foregoing review indicates, the common law's approach to the defendant as a source of evidence at the start of the nineteenth century differed fundamentally from that of contemporary procedure. There was no decision whether to "take the stand," and no "waiver" condition on pretrial custodial questioning. Rather, the defendant's preferences about being questioned were irrelevant. At trial, he could not be questioned even if he wanted to be. Before trial, at the preliminary examination, he could be questioned even if he did not want to be, and disclosure at trial of the occurrences in the examination resulted in a continued exposure to adverse inferences from a failure to respond.

Basic changes in both trial and pretrial procedure took place in the nineteenth century that redefined the issue of the evidentiary consideration of the defendant's silence. Through statutes enacted in the second half of the nineteenth century, the defendant was made a competent witness at trial, and the question arose whether adverse inferences should be permitted from his failure to take advantage of this novel opportunity to testify. The common law type of preliminary examination generally went out of existence earlier in the nineteenth century, but it was replaced by the new institution of police interrogation, and the question of disclosure of the defendant's pretrial silence arose again in that context. The changes in trial procedure and pretrial procedure between the ratification of the Constitution and the decision in *Griffin v. California* will be discussed separately in this part.

1. The Defendant as a Competent Witness

In 1864, Maine enacted a statute that permitted the defendant to testify at trial. This was evidently an idea whose time had come, and within a few decades virtually all of the states had adopted similar legislation. The federal jurisdiction did so as well, making the defendant a competent witness through an act of 1878, which is now codified as 18 U.S.C. § 3481.32

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32. See Reeder, Comment upon Failure of Accused to Testify, 31 Mich. L. Rev. 40, 41-44 (1932); Note, Failure of Accused to Testify, 37 Yale L. J. 955, 955-957 (1928). See generally 8 Wigmore's Evidence § 2272 n.2 (McNaughton rev. 1961).
The federal competency statute and a great majority of the
state competency statutes explicitly barred drawing any adverse
presumption or inference from the defendant’s failure to tes-
tify. This approach becomes more comprehensible when one
considers the attitude toward testimony by the defendant that
appears in many nineteenth century sources. Prior to extensive
practical experience with testimony by defendants, it was a con-
troversial issue whether permitting the accused to testify would
be of any real value to him at all, and concerns were expressed
that taking the stand would typically pose grave risks even to
wholly truthful and innocent defendants. Given the view of
many concerning the perilous nature of testimony to the defend-
ant, arguments that no adverse inference should be permitted
from a failure to testify would have had considerable persuasive
force.

The prevailing rule, however, was frequently criticized. Earlier
in the nineteenth century, Bentham had stated the classic criti-
cism of expansive self-incrimination restrictions, directed in part
against the traditional prohibition of questioning the defendant
in proceedings other than the preliminary examination. With
respect to the issue of protection of the innocent, Bentham
observed:

The most remarkable singularity of the law of England
is the rule which ordains, that an accused person shall
not be judicially asked any question from which evidence
of his guilt may be deduced. If such a question is put, he
is not bound to answer it, and his silence is not to be held
to furnish any legal presumption against him.

Such is the rule. I do not say that it is always scrupu-
lously observed; there are deviations and inconsistencies;

33. Statutes which barred adverse inferences or presumptions were naturally inter-
preted as barring adverse comment as well. Many statutes explicitly barred both com-
ment and inferences. See supra note 32.

34. The argument was that the defendant’s testimony, to the extent that it was ex-
culpatory, would have no credibility because of his obvious interest in the case, and that
taking the stand would expose him to prejudice and embarrassed. See, e.g., Ruloff v.
People, 45 N.Y. 213, 221-22 (1871); State v. Cameron, 40 Vt. 555, 565-66 (1868); see also


36. See J. Bentham, A TREATISE ON JUDICIAL EVIDENCE 240-45 (1825); 5 J. Bentham,
supra note 25, at 207-99, 350-58, 381-415. The alternative Bentham favored to the ex-
isting regime of restrictive rules was not compelling defendants to testify, but “permis-
sion . . . to put questions to the defendant; for the sake of the faculty which thence
results to the judge, of noting the answers or the silence (whichever is the result), and
drawing his inference from them.” Id. at 209.
but though the bad effects of the system be thus some-
what mitigated, enough remains to excite the regret of
every man who has reflected on criminal jurisprudence,
and sees in this indulgence, only a frequent source of im-
punity and encouragement of crime . . . .

Let us now consider the case of persons who are inno-
cently accused. Can it be supposed that the rule in ques-
tion has been established with the intention of protecting
them? They are the only persons to whom it can never be
useful. Take an individual of this class; by the supposi-
tion, he is innocent, but, by the same supposition, he is
suspected. What is his highest interest, and his most ar-
dent wish? To dissipate the cloud which surrounds his
conduct, and give every explanation which may set it in
its true light; to provoke questions, to answer them, and
to defy his accusers. This is his object; this is the desire
which animates him. Every detail in the examination is a
link in the chain of evidence which establishes his
innocence.

If all the criminals of every class had assembled, and
framed a system after their own wishes, is not this rule
the very first which they would have established for their
security? Innocence never takes advantage of it; inno-
cence claims the right of speaking, as guilt invokes the
privilege of silence.37

While Bentham's remarks on this issue reflected his character-
istically colorful and hyperbolic style, they did strike a chord
that has resonated through the subsequent debate concerning
self-incrimination rules. Saying nothing in the face of incrimi-
nating accusations or evidence is not what one would ordinarily
expect from an innocent person who has been falsely accused.
While rules barring questioning, or adverse inferences from a

37. A TREATISE ON JUDICIAL EVIDENCE, supra note 36, at 240-41. The rule noted by
Bentham that a defendant's silence in the face of an incriminating question "is not to be
held to furnish any legal presumption against him" might appear to be analogous to
contemporary rules barring adverse inferences from a defendant's failure to testify. How-
ever, it was an aspect of a broader system in which the basic rule was that "an accused
person shall not be judicially asked any question," and in which the accused was not
considered an admissible source of evidence at trial. A rule barring a presumption from
non-response by a defendant who was not supposed to testify to questions that he was
not supposed to be asked has no implication for the treatment of a defendant's failure to
take advantage of his contemporary right to testify. The import of common law trial
practice for contemporary self-incrimination rules is generally discussed infra at notes
172-178 and accompanying text.
failure to respond, are obviously helpful to the guilty, their utility to the innocent is a more debatable proposition.

By the early twentieth century, the weight of informed opinion in the United States had acquired a Benthamite cast, at least with respect to the propriety of adverse comment and inferences concerning the defendant’s silence at trial. Proposals were advanced by law reform bodies in various states to permit such comment. 38 At the national level, both the American Law Institute and the American Bar Association adopted resolutions in 1931 which called for permitting comment on the defendant’s failure to testify. 39 The same approach was followed in the American Law Institute’s Model Code of Evidence and in the Uniform Rules of Evidence. 40

This movement began to influence the practical course of state enactments. At the close of the nineteenth century, New Jersey was the only state that permitted adverse comment on the defendant’s silence at trial. In 1912, however, the Ohio state constitution was amended to permit comment by counsel on the defendant’s silence. In 1927, the South Dakota legislature amended the state’s competency statute to provide that the defendant’s failure to testify was “a proper subject of comment by the prosecuting attorney.” In 1929, the Iowa legislature repealed the provision of the state competency statutes barring adverse comment and inferences. Through decisions in the late 1920s and early 1930s, the Connecticut Supreme Court interpreted a nineteenth century competency statute as permitting adverse inferences from the defendant’s silence and adverse comment by the court. In 1934, the New Mexico Supreme Court adopted a rule that the defendant’s failure to testify “may be the subject of comment or argument.” In the same year, the California state constitution was amended to permit comment by court and counsel on the defendant’s failure to explain or deny by his tes-

38. See Comment on the Accused’s Failure to Testify—Proposed Amendment to the Code of Criminal Procedure, 10 St. John’s L. Rev. 66, 66-67 (1935); Comment and Inference on Accused’s Claim of Privilege Against Self-Incrimination in Louisiana, 15 Tulane L. Rev. 125, 133-34 (1940); Note, Comment on Defendant’s Failure to Take the Stand, 57 Yale L. J. 145, 145-46 & n.4 (1947); Failure of Accused to Testify, 37 Yale L. J. 955, 965 (1928).

39. See 9 A.L.I. Proc. 202-18 (1931) (“The judge, the prosecuting attorney and counsel for the defense may comment upon the fact that the defendant did not testify.”); 56 A.B.A. Rep. 137-152 (1931) (“That by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw the reasonable inferences.”); see also 59 A.B.A. Rep. 130-41 (1934) (court and defense counsel should also be allowed to comment).

40. See Model Code of Evidence, Rule 201(3) (1942); Uniform Rules of Evidence, Rule 23(4) (1953).
timony any facts or evidence in the case against him. In 1935, the Vermont legislature amended the state competency statute to provide that a defendant's failure to testify "may be a matter of comment to the jury and the jury may draw reasonable inferences therefrom."  

The impetus for reform was blunted, however, by judicial decisions in South Dakota and Massachusetts in the late 1930s which held that this type of reform would violate the right against compelled self-incrimination. While the reform continued to enjoy substantial support in judicial decisions, law reform proposals, and scholarly writing, there was little subsequent change in enacted state laws. At the time of the Supreme Court's decision in Griffin v. California, six states—California, New Jersey, Ohio, Connecticut, New Mexico, and Iowa—permitted adverse comment on the defendant's failure to testify, and the rest did not.

2. Police Interrogation and Adoptive Admissions

While the judicial questioning of the defendant at the preliminary examination proved to be a highly durable feature of common law procedure, it eventually went the way of the early trial examination of the accused. By around the mid-nineteenth century, most states had effectively abolished the traditional type of examination. The end of pretrial interrogation by judicial officers did not, however, mean the end of pretrial interrogation, or the end of drawing adverse inferences at trial from the defendant's pretrial silence. At around the same time that magistrates were being divested of their investigative functions, the earliest professional police forces were coming into existence. The questioning of the suspect was taken up by the police as part of their general investigative responsibilities.

Under the new regime of police investigation, the significance of the defendant's pretrial silence was generally assessed under the adoptive admissions doctrine. This was a traditional evidentiary doctrine according to which a person's failure to respond to

41. See Note, supra note 38, at 145-146 nn.1, 4; infra notes 58, 69-78, 80-88 and accompanying text.
42. See Note, supra note 38, at 145-46 & n.6.
43. See, e.g., State v. Baker, 53 A.2d 53 (Vt. 1947); MODEL CODE OF EVIDENCE, Rule 201(3) (1942); Note, supra note 38.
44. See 8 WIGMORE'S EVIDENCE § 2272 n.2 (McNaughton rev. 1961).
45. See L. MAYERS, supra note 17, at 86-87; 1 J. STEPHEN, supra note 17, at 228-29.
damaging accusations or statements could be considered against him, if response on his part would naturally have been expected. In such a case, both the incriminating statement and the defendant's silence in the face of it would be admissible. Occasions for applying the principle arose in criminal cases when incriminating statements or accusations were made in a suspect's presence by victims, other witnesses, accomplices, or police officers, and no denial or explanation was forthcoming. The applicability of the adoptive admissions principle in such circumstances was generally recognized.\(^\text{46}\) The courts in some states restricted the doctrine to silence in non-custodial situations, but the more common position was that the general principle remained applicable following arrest and that post-arrest silence would also be admitted in appropriate cases.\(^\text{47}\)

In addition to the actual admission of pretrial silence by the defendant in some circumstances pursuant to the adoptive admissions doctrine, proposals were advanced to make pretrial silence more consistently admissible as part of proposed reforms in the system of pretrial interrogation. At least until the 1930s, "third degree" abuses in police interrogation were widespread.\(^\text{48}\) A frequently proposed solution was a return to something like the common law preliminary examination procedure. While the details of this type of proposal varied, the basic idea would be to replace stationhouse interrogation by the police with a procedure for questioning the suspect by a judicial officer, or under direct judicial supervision. The trade-off for this enhanced protection for the suspect, from an enforcement perspective, would be the regular admission at trial of any refusal by the defendant to answer questions in the examination. For example, the National Commission on Law Observance and Enforcement, in 1931, formulated the proposal as follows:

"Probably the best remedy for [the third degree] would be the enforcement of the rule that every person arrested

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\(^{46}\) See Eisenberg, Arrest as Affecting Adoptive Admissions by Silence, 10 Intramural L. Rev. 106 (1955); McClelland, Silence as an Admission in a Criminal Trial in Pennsylvania, 53 Dickinson L. Rev. 318 (1949); Peterson, Silence to Accusation While under Arrest as Admission of Guilt, 47 Mich. L. Rev. 715 (1949); Schleuter, Silence as an Admission in a Criminal Trial in Illinois, 1951 U. Ill. L.F. 315; Admissibility of Accusatory Statements as Adoptive Admissions when Defendant is Under Arrest, 35 Calif. L. Rev. 128 (1947); Silence as Evidence of Guilt, 23 Geo. L. J. 331 (1935).

\(^{47}\) See generally the sources cited in note 46 supra; 4 Wigmore's Evidence § 1072 n.11 (Chadbourn rev. 1972); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1038 (1966).

\(^{48}\) See Nat'l Comm'n on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 153 (1931).
[and] charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he choose[s] not to answer, it should be permissible for counsel for the prosecution and for the defense, as well as for the trial judge, to comment on his refusal. The existing rule in many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished.  

Similar proposals have frequently been the subject of endorsement or favorable comment by leading jurists from early in this century to the present. However, it has not actually been tried in any jurisdiction. Contemporary writers have noted that the Supreme Court’s decision in Griffin v. California creates an impediment to the adoption of such procedures, since it raises doubts whether the use of the defendant’s silence against him would be upheld by the Court.

C. Judicial Decisions

The existence in most American jurisdictions of statutory no-inference rules limited the range of situations in which judicial decisions were required concerning the propriety of considering the defendant’s silence in determining guilt or innocence. Nevertheless, questions of this sort did arise in litigation. As discussed earlier, the evidentiary use of pretrial silence—an issue not addressed in the competency statutes—was an active subject of litigation in the state courts. There were also a number of states in which courts decided on the rules governing consideration of the defendant’s silence at trial in the absence of statutory guidance,

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49. Id. at 5-6.
or ruled on constitutional challenges to provisions that authorized adverse comment. The principal state decisions relating to consideration of silence at trial are discussed in the first part of this sub-part.

The Supreme Court also had occasion to rule on the evidentiary consideration of the defendant's silence in federal cases involving pretrial silence, in federal cases involving aspects of a defendant's silence at trial which fell outside the ambit of the no-presumption rule of 18 U.S.C. § 3481, and in state cases involving constitutional challenges to state rules permitting adverse comment. The principal Supreme Court decisions prior to Griffin v. California are reviewed in the second part of this section.

1. State Decisions

The holdings of state decisions concerning the permissibility of adverse comment on a defendant's failure to testify, where comment or inferences were not expressly barred by statute, may be summarized as follows: Decisions in Maine, New Jersey, Connecticut, Iowa, Vermont, and New Mexico upheld such comment. Decisions in Georgia, Virginia, South Carolina, and South Dakota were to the contrary, as was an advisory opinion in Massachusetts. California initially ruled against permitting comment on state statutory and constitutional grounds, but later upheld it following various changes in the surrounding legal context. Where states adopted rules authorizing adverse comment, the state courts in most instances rejected constitutional challenges to these rules and held that they were consistent with the right against compelled self-incrimination.\(^5\) The principal state decisions were as follows:

a. Maine—The earliest state decision was State v. Bartlett,\(^6\) a bank larceny case in which the trial judge's instructions stated that the jury could properly take into consideration the fact that the defendants had not testified. Maine had enacted

\(^5\) The self-incrimination clause of the fifth amendment did not apply to the states prior to Malloy v. Hogan, 378 U.S. 1 (1964). However, all of the states have historically recognized the right against compelled self-incrimination. All but two of the states—Iowa and New Jersey—had express self-incrimination provisions in their constitutions. In Iowa, the due process clause of the state constitution was interpreted as encompassing a right against compelled self-incrimination. In New Jersey, the same right was recognized as part of the common law of the state, and was protected by statute. See 8 WIGMORE'S EVIDENCE § 2252 nn.1, 3 (McNaughton rev. 1961).

\(^6\) 55 Me. 200 (1867).
the first statute making the defendant a competent witness in 1864. The statute said nothing about comment or inferences.

The Supreme Court of Maine rejected the argument that the jury charge in the case violated the state constitution's provision against compelled self-incrimination. The court reasoned that a defendant's conduct could generally be considered as part of the evidence in a criminal case. Treating his silence at trial as one relevant aspect of his conduct was not unconstitutional compulsion, but only an application of traditional evidentiary principles:

We are not aware that such a construction [barring adverse inferences from silence] has ever been given this provision in the bill of rights; on the contrary, the construction now contended for is in conflict with certain well known rules of evidence of long and frequent practice in our courts.

If a person accused remains silent when he may speak, he does so from choice, and the choice he makes upon such occasions has always been regarded competent evidence. It is the act of the party. From time immemorial the reply or the silence of the accused person, when charged, has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidence of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings and silence. He never has been, and is not now compelled to furnish the Court the evidence of the existence of these facts. If it be said, these are the voluntary acts of the prisoner, the manifest answer is, they are not more so than the refusal or neglect to testify.

When found in the possession of stolen property and inquired of concerning it, he must speak or be silent . . . . When found with the implements used in a recent burglary and interrogated in reference to them, he must answer or be silent . . . . When found with the bloody instruments of a foul murder, and he is called upon to explain his possession, he must answer or be silent . . . . Yet, in all these cases, it has been the uniform practice of the Court to admit in evidence the conduct of prisoners
upon such occasions, and it never has been held an infringement of the [self-incrimination right] . . . . The Act in question imposes no obligation upon the prisoner to testify; it only affords him an opportunity so to do, if he choose. It changes his condition only in adding one more opportunity to speak or be silent, and the same rule applies to the result which has been applied to such cases for a long time.\textsuperscript{54}

The decision in \textit{Bartlett} was followed while the pertinent statute remained unchanged.\textsuperscript{55} In 1879, however, it was overturned by legislation which provided that a defendant's failure to testify should not be taken as evidence of guilt.\textsuperscript{56}

\textit{b. California—} Following the \textit{Bartlett} decision in Maine, the next state decision was \textit{People v. Tyler},\textsuperscript{57} a rape prosecution, in which the court reached a diametrically opposite result. The California competency statute, enacted in 1866, allowed the defendant to testify at his own request, but stipulated that it was not to be construed as compelling a defendant to testify. The Court in \textit{Tyler} held that adverse comment or inferences concerning the defendant's failure to testify would violate the statutory prohibition of compulsion and the corresponding provision of the state constitution that prohibited compelling a person in a criminal case to be a witness against himself. The court reasoned that even if the defendant declined to testify, he would effectively be forced to incriminate himself if adverse comment or inferences were allowed, since his silence would be taken as evidence of guilt.

The rule of \textit{Tyler} was followed in California until 1934, when the state constitution was amended to permit comment by court and counsel on the defendant's failure to explain or deny any facts or evidence in the case against him.\textsuperscript{58} While this conclusively resolved the issue in favor of permitting comment as far as state law was concerned, the question of consistency with the federal Constitution arose after the Supreme Court made the Self-Incrimination Clause of the fifth amendment applicable to the states in \textit{Malloy v. Hogan}.\textsuperscript{59} In \textit{People v. Modesto},\textsuperscript{60} the

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54. \textit{Id.} at 217-18
56. \textit{See Reeder, supra} note 32, at 47.
57. 36 Cal. 522 (1869).
58. \textit{See 8 Wigmore's Evidence} § 2272 n.2 at 428 (McNaughton rev. 1961); \textit{Note, Comment on Defendant's Failure to Take the Stand}, 57 \textit{Yale L. J.} 145 n. 1 (1947).
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court reviewed Supreme Court precedent bearing on this issue, and held that the California comment rule was consistent with the fifth amendment.

c. Georgia— In Georgia the defendant was not allowed to testify under oath, but a statute authorized his making an unsworn statement. In Bird v. State the court disapproved an instruction that the jury could take into consideration the defendant’s failure to make such a statement along with the other evidence in the case. The court believed that the statutory procedure authorizing an unsworn statement was of little or no value to defendants, and that it would be unfair and contrary to the intent of the statute if the defendant’s unsworn statements “could not practically count much for him, certainly not as other evidence,” but his failure to make a statement could be considered against him on the same basis as other evidence. The rule barring adverse comment continued to be followed in later cases.

d. Virginia— In Price v. Commonwealth the court stated that adverse comment was improper under a facially uninformative competency statute on the ground that a contrary rule would be in conflict with the purpose of the statute and the presumption of innocence. Later Virginia statutes contained express no-comment and no-presumption language.

e. South Carolina— In State v. Howard the prosecutor had commented adversely on the fact that the defendant had not taken the stand to repudiate an earlier confession. The court in Howard held that such comment was inconsistent with the permissive nature of the competency statute and the state constitution’s prohibition of compelled self-incrimination. The decision was conclusory. The same rule was followed in later cases.

f. New Jersey— In Parker v. State the trial judge had commented as follows on the defendant’s failure to respond to testimony by prosecution witnesses that he had engaged in illegal liquor sales: “The defendant has heard this evidence, but has remained in his seat without attempting to deny or contradict the testimony given by the state’s witnesses. Neither has any

61. 50 Ga. 585 (1874).
62. See 8 WIGMORE’S EVIDENCE § 2272 n.2 at 429 (McNaughton rev. 1961).
63. 77 Va. 393 (1883).
65. 35 S.C. 197, 202-03, 14 S.E. 481, 482-83 (1892).
66. See 8 WIGMORE’S EVIDENCE § 2272 n.2 at 432-33 (McNaughton rev. 1961).
other witness been called to refute it. Under the circumstances, the court submits the case for your determination.  

The reviewing court held that comment of this type was proper under the state competency statute, which was silent on the subject of comment and inferences. The rationale was similar to that of the Supreme Court of Maine in the Bartlett case: Under traditional evidentiary principles, a defendant's silence in the face of declarations or charges of his guilt could be considered against him, if response on his part could properly be expected. Once the defendant had been made a competent witness, this principle would apply to his failure at trial to respond to evidence by the government that he would be in a position to answer or rebut.

The rule permitting adverse comment on the defendant's failure to testify continued to be applied in New Jersey, giving that state the longest historical experience with such a rule. It was eventually codified in the New Jersey rules of evidence.

g. Connecticut—The original competency statute in Connecticut had explicitly barred comment by the court or prosecutor on the defendant's failure to testify. In 1879, however, that statute was repealed and replaced by a new provision reading: "The neglect or refusal of an accused party to testify shall not be commented upon to the court or jury."

In the late 1920s, the Connecticut Supreme Court began a line of decisions construing the 1879 statute in a manner favorable to inferences and comment on silence. In State v. Colonese, State v. Guilfoyle, and State v. Ford, the court held that it was permissible for the court and jury to draw adverse inferences from the defendant's failure to testify in response to the evidence against him, despite the statutory rule limiting comment. In State v. Heno the court held that the 1879 statute was only meant to bar unfair comment by counsel to the court or jury, and that it was permissible for the trial court to comment adversely on the defendant's failure to testify.

In reaching these results, the court expressly rejected the argument that permitting adverse inferences would violate the right against compelled self-incrimination. "There is no actual

68. See 8 WIGMORE'S EVIDENCE § 2272 n.2 at 431 (McNaughton rev. 1961).
70. 109 Conn. 124, 144, 145 A. 761, 768 (1929).
compulsion upon the accused to testify, and, when he elects not to do so, he is obviously not being compelled to give evidence against himself." An inference from the defendant’s failure to testify would be no different in principle from the inference which always arises from the nonproduction of a competent witness. The court also believed that barring such inferences would make the conviction of the guilty more difficult without contributing to the protection of the innocent. 78

Following these decisions, the rule in Connecticut continued to be that the court, but not the prosecutor, could comment on the defendant’s failure to testify. 74

h. South Dakota— Prior to 1927, South Dakota had the usual sort of competency statute, which barred any presumption against a defendant based on his failure to testify. In 1927, the state legislature changed the statute to provide that a defendant’s failure to testify is “a proper subject of comment by the prosecuting attorney.”

In State v. Wolfe 78 the state supreme court held that the 1927 statute was inconsistent with the right against compelled self-incrimination in the state constitution. In reaching this conclusion, the court relied on an earlier decision, State v. Vroman, 76 which had stated that the pre-1927 statutory no-presumption rule was entailed by the constitutional self-incrimination provision. The court also drew support from its belief that judicial decisions in many other states had “adopted the same rule,” and that there was no authority to the contrary aside from the early decisions in Maine. This view, however, was incorrect. 77

Finally, the court believed that South Dakota was the only state that had adopted legislation authorizing adverse comment in the

74. 8 WIGMORE’S EVIDENCE § 2272 at 428-29 (McNaughton rev. 1961).
75. 64 S.D. 178, 266 N.W. 116 (1936).
76. 45 S.D. 465, 188 N.W. 746 (1922).
77. In support of the assertion that other judicial decisions had generally “adopted the same rule,” the court in Wolfe cited cases from ten other states. See 64 S.D. at 186, 266 N.W. at 120. However, many of these were actually cases decided under statutory no-inference rules which merely contained dictum that was critical for one reason or another of the idea of permitting adverse comment or inferences concerning the defendant’s failure to testify. See generally the textual discussion of state decisions and infra notes 89-93.

In addition to the early Maine decisions, which involved a favorable determination of the constitutional issue, the Supreme Court of Connecticut had held in decisions running from 1928 to 1934 that adverse comment and inferences concerning a defendant’s failure to testify were consistent with the right against compelled self-incrimination. See the textual discussion relating to Connecticut. The rejection of the compelled self-incrimination argument was also implicit in the New Jersey decisions, although the right was not constitutionally protected in that state. See infra note 89.
presence of a constitutional prohibition of compelled self-incrimination. However, this belief was also incorrect.\(^7\)

i. **Massachusetts**— In 1938, the Senate of Massachusetts asked the state supreme court for an advisory opinion concerning the constitutionality of a bill that would have authorized a trial court to instruct the jury that it could take into consideration the defendant’s failure to testify in response to material prosecution evidence that he would be in a position to contradict. The court answered in *In re Opinion of the Justices*\(^7\) that this would be inconsistent with the state constitution’s prohibition of compelled self-incrimination. The decision relied primarily on dicta to the same effect in earlier Massachusetts decisions.

j. **Iowa**— In 1929, the Iowa legislature repealed a statutory provision barring adverse comment and inferences concerning a defendant’s failure to testify. In *State v. Ferguson*,\(^8\) a cattle rustling prosecution, the defense argued that the prosecutor’s comment on the defendant’s failure to testify was inconsistent with the due process clause of the state constitution. The court held that the statutory change was intended to authorize such comment, and rejected the constitutional challenge. The court noted in the course of the decision that the federal Supreme Court had held that such comment was consistent with the due process clause of the fourteenth amendment to the Federal Con-

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78. In 1935, the Vermont legislature had amended the state competency statute to permit comment and inferences, in the presence of an express constitutional prohibition of compelled self-incrimination. See the textual discussion of Vermont. In 1929, the Iowa legislature had repealed a statutory prohibition of comment and inferences for the same purpose. The right against compelled self-incrimination had been held to be encompassed in the due process clause of the state constitution of Iowa. See the textual discussion relating to Iowa; *State v. Height*, 117 Iowa 650, 91 N.W. 935 (1902).

In *State v. Heno*, 119 Conn. 29, 34-35, 174 A. 181, 183 (1934), the court stated that a nineteenth century amendment of the state competency statute was intended to permit comment by the court on the defendant’s failure to testify, and held that this was consistent with the state constitution’s prohibition of compelled self-incrimination. The New Mexico Supreme Court also adopted a rule permitting comment on the defendant’s failure to testify in 1934, in the presence of a constitutional prohibition of compelled self-incrimination. See the textual discussion relating to Connecticut and New Mexico.

While the authorization of comment in Ohio and California had been effected by constitutional amendment, in 1912 and 1934 respectively, this cannot reasonably be taken as reflecting an endorsement of the judgment that the same result could not validly be achieved through ordinary legislation. Rather, given the appearance of holdings or dicta in some state judicial decisions that comment or inferences would violate the self-incrimination right, see, e.g., *People v. Tyler*, 36 Cal. 522 (1869); *Tate v. State*, 76 Ohio St. 537, 81 N.E. 973 (1907), the constitutional amendment route would have appeared prudent or practically necessary to avoid a risk of judicial invalidation.


80. 226 Iowa 361, 283 N.W. 917 (1939).
stitution in *Twining v. New Jersey*; that New Jersey practice and the early Maine decisions supported this approach; and that all state decisions to the contrary were decided under statutory or constitutional provisions differing from those of Iowa. The court also stated that due process under the Iowa state constitution included the defendant’s right not to be compelled to testify against himself, but that permitting adverse inferences from a failure to testify did not violate due process. Following the *Ferguson* decision, adverse comment on the defendant’s failure to testify continued to be allowed in Iowa.

**k. Vermont**—In 1935, the Vermont legislature changed the state competency statute to provide that a defendant’s failure to testify “may be a matter of comment to the jury and the jury may draw reasonable inferences therefrom.” The change had been proposed by the Vermont Bar Association, whose proposal was inspired by the American Bar Association resolutions supporting this reform. The question of the consistency of this provision with the state constitution’s prohibition of compelled self-incrimination came before the state supreme court in *State v. Baker.* The result was the most exhaustive state decision on this issue.

The court in *Baker* reviewed the historical origin and understanding of the self-incrimination right, and concluded that it was directed against “torture, force, and the inquisitorial practices of past centuries,” and not against the circumstantial pressures which a defendant would normally feel to respond to the evidence against him. The court reasoned that comment by the prosecutor on the defendant’s failure to testify did not make the jury aware of anything it did not already know, or create a possibility of adverse inferences that would not have existed in any event. While the defendant had been barred from testifying in the common law period, that reflected the disqualification-for-interest rationale. The long persistence of this disqualification and the prevalence of no-presumption rules in the nineteenth century competency statutes reflected apprehensions that subjecting innocent defendants to cross-examination would seriously prejudice them. Subsequent experience, however, had shown that cross-examination did not jeopardize the innocent. The court also suggested that permitting adverse inferences

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81. 211 U.S. 78 (1908).
82. See 8 Wigmore’s Evidence § 2272 n.2 at 429 (McNaughton rev. 1961).
84. 115 Vt. at 105, 53 A.2d at 59-60 (quoting from dissent to Massachusetts advisory opinion, 300 Mass. 620, 15 N.E.2d 662 (1938)).
from the defendant’s silence at trial would only be an application of the general evidentiary principles that silence in the face of incriminating facts may be considered against a defendant, and that adverse inferences may be drawn from the defense’s failure to produce a witness within its control who could elucidate the matters in issue.85

While the court in Baker upheld the statutory comment rule, this did not prove to have a lasting practical effect. In 1955, the state legislature amended the statute to bar adverse comment and inferences concerning the defendant’s failure to testify.86

1. New Mexico— The final important decision under a state constitution was State v. Sandoval.87 It was a prosecution for assault with intent to rape. The prosecutor commented on the defendant’s failure to testify. This was authorized by a rule the New Mexico Supreme Court had adopted in 1934, which provided that the defendant’s failure to testify “may be the subject of comment or argument.” This rule had also apparently been inspired by the ABA and ALI resolutions.

The court in Sandoval held that the rule was consistent with the state constitution’s prohibition of compelling a person to testify against himself in a criminal proceeding. The court relied primarily on the earlier decisions to the same effect in Maine and Vermont, and the dissenting opinions in the South Dakota decision. The rule permitting comment in New Mexico continued until Griffin v. California.88

m. Concluding Observations— As the foregoing review of state decisions indicates, there was no consensus or near-consensus among the state courts about the advisability of permitting adverse comment and inferences concerning a defendant’s failure to testify. Authority was also divided on the constitutional issue, but the courts in several states held that permitting comment was consistent with the self-incrimination right.89

85. See 115 Vt. at 98-111, 53 A.2d at 56-63.
86. See 8 WIGMORE’S EVIDENCE § 2272 n.2 at 433 (McNaughton rev. 1961).
88. See Griffin, 380 U.S. at 611-12 n.3.
89. As the textual discussion shows, the states in which the courts held that comment was consistent with the right against compelled self-incrimination included Maine, Connecticut, Iowa, Vermont, and New Mexico. In all of these states but Iowa, the state constitutions included express self-incrimination provisions, and in Iowa the right against compelled self-incrimination had been held to be encompassed in the state constitution’s due process clause. See State v. Ferguson, 226 Iowa 361, 372-73, 283 N.W. 917, 922-23 (1939); State v. Height, 117 Iowa 650, 91 N.W. 935 (1902). The rejection of the compelled self-incrimination objection was also implicit in the New Jersey decisions, though the right was not incorporated in the state constitution. See, e.g., State v. Gimbel, 107 N.J.L. 235, 239-40, 151 A. 756, 758-59 (1930) (upholding charge to jury that defendant could not
Beyond the cases discussed above, in which state courts were actually required to rule on the constitutional issue, or to make decisions concerning the rule to be followed in the absence of legislative guidance, remarks appeared in decisions in some states with no-presumption statutes concerning the wisdom or constitutionality of permitting comment. Some decisions suggested that permitting adverse comment would undermine the value of the self-incrimination right, or would actually violate

be compelled to testify under the law of the state, but that adverse inferences could be drawn from his failure to do so; State v. Miller, 71 N.J.L. 527, 531-32, 60 A. 202, 203-04 (1905) (right against compelled self-incrimination part of common law of state). See generally Twining v. New Jersey, 211 U.S. 78, 114 (1908); 8 Wigmore's Evidence § 2252 n.1 (McNaughton rev. 1961). In California, the state supreme court held that the state rule permitting comment was consistent with the self-incrimination clause of the fifth amendment to the federal Constitution in People v. Modesto, 62 Cal. 2d 436, 447-54, 398 P.2d 753, 759-64, 42 Cal. Rptr. 417, 423-28 (1965).

On the other side of the constitutional issue, the decision in South Dakota and the advisory opinion in Massachusetts held that statutory rules authorizing comment would violate the right against compelled self-incrimination. Also, the early decisions in California and South Carolina, which decided on the rule to be applied under facially uninformative statutes, invoked both constitutional and statutory grounds for barring comment.

90. A few other cases may be noted in which state courts filled out statutory rules that were incompletely specified, or resolved ambiguities. In State v. Clarke, 48 Nev. 134, 148-50, 228 P. 582, 586-87 (1924), a statutory rule which expressly barred adverse comment by the court was held to imply a like restriction on comment by the prosecutor. In Washington, the state supreme court adopted a rule deleting a provision of the state competency statute which had uniformly required the trial judge to charge the jury that no inference of guilt arises from the defendant's failure to testify. In a subsequent line of decisions, the court held that it had validly abrogated the requirement of giving such an instruction in the absence of a request by the defendant, but held that it lacked the authority to abrogate the defendant's substantive right to such an instruction on request and to protection against adverse comment by the prosecutor. The first decision in the line placed this result on constitutional (compelled self-incrimination) as well as statutory grounds, citing California decisions to the same effect. See State v. Pavelich, 150 Wash. 411, 273 P. 182 (1928); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929); State v. Mayer, 154 Wash. 667, 670-71, 283 P. 195, 197 (1929). In Anderson v. State, 27 Wyo. 345, 362-71, 196 P. 1047, 1051-55 (1921), the court was required to decide whether a statute containing a no-inference and no-comment rule barred adverse comment on the defendant's decision to make an unsworn statement instead of testifying as a witness. The court held that such comment was improper. In the course of the decision, the court noted and quoted from a number of decisions which indicated that a contrary rule would violate the right against compelled self-incrimination, but the result seemed to be based primarily on statutory construction and presumption of innocence grounds.

91. In Ruloff v. People, 45 N.Y. 213, 221-22 (1871), the court stated that the self-incrimination right would be "practically abrogated" if the defendant's failure to testify could be used against him, but acknowledged that the defendant would "not actually [be] compelled to be a witness against himself" if that were allowed. In Petite v. People, 8 Colo. 518, 519-20, 9 P. 622, 623 (1886), the court stated similarly that a failure to enforce carefully the statutory no-inference rule would result in a "practical abrogation" of the right against compelled self-incrimination, and that if silence were taken as evidence of guilt, the defendant would be "practically forced" to testify. See generally State v. Wolfe, 64 S.D. 178, 194-96, 266 N.W. 116, 124-25 (1936) (Bakewell, J., dissenting) (discussion of Ruloff and Petite). In State v. Cameron, 40 Vt. 555, 565-66 (1868), the
At the level of dictum, there were also contrary decisions which suggested that adverse comment and inferences would be consistent with that right. On either side of the issue, these remarks generally did not involve serious analysis of the constitutional question and amounted to observations concerning an

court stated in passing that adverse comment was prohibited by "the express terms of the statute as well as the fair interpretation of the constitution," but the discussion in the decision appeared to focus on policy issues and did not mention the right against compelled self-incrimination. Cf. State v. Baker, 115 Vt. 94, 102-04, 53 A. 2d 53, 58-59 (1947) (dismissing remark in Cameron as dictum).

92. Remarks which stated or suggested that permitting adverse inferences or comment would violate the right against compelled self-incrimination appeared in such decisions as Tate v. State, 76 Ohio St. 537, 81 N.E. 973 (1907); Jarman v. State, 47 P.2d 220, 222 (Okla. 1935); Staples v. State, 89 Tenn. 231, 14 S.W. 603 (1890); and State v. Taylor, 57 W. Va. 228, 234-35, 50 S.E. 247, 249 (1905). The remarks on the constitutional issue in the decisions from Tennessee, Ohio, and Oklahoma were essentially conclusory.

The case from West Virginia was unique in this group in claiming a historical justification for its interpretation of the self-incrimination right, but its view of history rested on a misreading of a treatise. The court believed that "[b]efore the assistance of counsel was allowed, prisoners were at liberty to make statements to the jury, and, upon their voluntarily doing so, they were sometimes questioned by the attorney general, but were at liberty to stop at any time and remain silent, and, in that event, their silence was not permitted to raise any inference or presumption against them." 57 W. Va. at 235, 50 S.E. at 249. COOLEY'S CONSTITUTIONAL LIMITATIONS was cited as the source on this point. However, what COOLEY's actually said was that the accused was free to make statements at trial in the early common law period, and that he was sometimes asked questions by the prosecutor or judge, which he "might answer or not at his option." In a separate passage, COOLEY's offered the opinion that unfavorable inferences should not be permitted from the defendant's failure to testify under contemporary competency statutes, and that if the defendant did decide to testify, he should be free to stop at any time, leaving it to the jury to determine what evidentiary weight should be given to such incomplete testimony. See COOLEY's CONSTITUTIONAL LIMITATIONS 447-49 (7th ed. 1903). The West Virginia court evidently hybridized these passages to produce its revisionist account of historical practice.

93. The earliest New York decision, Ruloff v. People, 45 N.Y. 213, 221-22 (1871), was strongly critical of the decision to permit the defendant to testify, but acknowledged that permitting his failure to testify to be used against him would not actually compel him to be a witness against himself. People v. Courtney, 94 N.Y. 490, 493-94 (1884), contained dicta reflecting the same view on the compelled self-incrimination issue. In People v. Reese, 258 N.Y. 89, 101-03, 179 N.E. 305, 309 (1932), the court seemed to be signalling the state legislature that it would be amenable to legislation authorizing comment on the defendant's failure to testify.

Massachusetts produced dicta on both sides of the issue. Early cases contained language indicating that the no-presumption rule was of constitutional dimensions, see Commonwealth v. Scott, 123 Mass. 239, 241 (1877); Commonwealth v. Harlow, 110 Mass. 411 (1872), but there was also dictum which indicated that adverse comment and inferences concerning a defendant's failure to testify would be permitted in the absence of a statutory rule to the contrary, see Phillips v. Chase, 201 Mass. 444, 450, 87 N.E. 755, 758 (1909). In the 1938 advisory opinion in Massachusetts, the court sided with the anti-comment dicta.

In State v. Pearce, 56 Minn. 226, 234-38, 57 N.W. 652, 654-55 (1894), the court evidently saw no conflict with the right against compelled self-incrimination in permitting the jury to draw adverse inferences from the defendant's failure to testify.
issue that was not actually presented in the presence of a statutory no-presumption rule.

2. Supreme Court Decisions

Prior to Griffin v. California the Supreme Court did not hold in any case that adverse comment or inferences concerning a defendant's silence would violate the right against compelled self-incrimination. The Court upheld the constitutionality of such comments or inferences in a number of specific contexts. In ruling on the permissibility of inferences from silence as an evidentiary matter, the Court reached divergent results in different contexts. Cases relating to silence at trial and cases relating to pretrial silence will be discussed separately.

a. Silence at trial—Prior to the late nineteenth century, defendants in federal proceedings could not testify in light of the common law doctrine of testimonial incapacity. The federal statute enacted in 1878 that made the defendant a competent witness—now 18 U.S.C. § 3481—followed the common approach of state statutes in providing that a defendant's failure to testify "shall not create any presumption against him." The Supreme Court naturally interpreted the statute as barring adverse prosecutorial comment on the defendant's failure to take the stand, and later held that the defendant was entitled under the statute to have the jury charged concerning the no-presumption rule. Despite the statutory rule in this area, however, some issues arose requiring creative resolutions by the Court.

The question of greatest general importance concerned the permissibility of adverse inferences when the defendant did take the stand, but then failed to address some of the evidence against him or refused to answer particular questions on cross-examination. Dictum in Fitzpatrick v. United States suggested that the trial court would "probably" have no power to compel response by the defendant in such circumstances, but that his refusal to answer questions on cross-examination would be a proper subject of comment to the jury. Later, in Caminetti v.

95. See Wilson v. United States, 149 U.S. 60 (1893).
97. 178 U.S. 304, 315-16 (1900).
98. The most interesting aspect of the dictum in Fitzpatrick was the Court's apparent assumption that adverse comment on the defendant's refusal to answer would be permissible because such comment would not constitute compulsion. Later cases made it
the Court held squarely that such comment was proper. In that case, a defendant charged with interstate transportation of women or girls for immoral purposes failed to explain in his testimony the nature or purpose of an interstate trip he had taken with the girls identified in the indictment. The trial court charged the jury that if a testifying defendant “has failed to deny or explain acts of an incriminating nature” established by the prosecution’s evidence, then both comment and consideration by the jury would be proper, “since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.” The Supreme Court rejected the defendant’s objection that this instruction “virtually made him a witness against himself in derogation of rights secured by the Fifth Amendment to the Federal Constitution.” The Court held that a defendant who “voluntarily relinquished his privilege of silence” should not be free to address only matters that would help his case without facing the inference that would naturally arise from his failure to “speak upon matters within his knowledge which might incriminate him.”

While Caminetti settled the general rule that adverse comment and inferences are permitted in relation to a testifying defendant’s selective silence, the Court reached a contrary result in an unusual factual setting in Johnson v. United States. In that case the trial court erroneously ruled that a testifying defendant could invoke the fifth amendment right on cross-examination with respect to matters that could expose him to other criminal charges. The Supreme Court concluded that adverse comment by the prosecutor on this invocation was improper. However, the rationale of the decision, which reflected an exercise of the Court’s supervisory power, was that the defendant could have been “entrapped” or “misled” into claiming the privilege by the trial court’s approving of his doing so, and then unpredictably permitting the prosecutor to argue that the claim was probative of guilt. The case did not present the question whether comment or inferences would be permissible in situations in which the defendant could have anticipated that ad-

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100. Id. at 492-95.
101. 318 U.S. 189 (1943).
102. Id. at 197-99.
verse comment would be permitted concerning his invocation of the privilege.\textsuperscript{108}

Beyond the few issues in federal trials that fell outside the ambit of the statutory no-presumption rule, the Court was called on to consider the constitutionality of state rules that permitted adverse comment on the defendant's failure to testify. The issue initially arose in \textit{Twining v. New Jersey},\textsuperscript{104} which involved a charge that certain bank officials had deceived a state bank examiner through the use of a forged document. The defendants did not testify themselves or call any other witnesses to rebut the government's evidence supporting the charge. Consistent with New Jersey law, the trial judge discussed the fact that the defendants had not testified and advised the jury that they could take that fact into consideration.\textsuperscript{105} The Supreme Court affirmed the conviction on the ground that the Self-Incrimination Clause of the fifth amendment did not apply of its own force to the states;\textsuperscript{106} that it had not been made applicable to the states by the Privileges and Immunities Clause of the fourteenth amendment;\textsuperscript{107} and that exemption from compulsory self-incrimination was not part of due process of law.\textsuperscript{108} At the close of the decision, the Court emphasized that it had only assumed for purposes of the discussion that the type of comment at issue infringed the privilege against self-incrimination, and that it did "not intend . . . to lend any countenance to the truth of that assumption." The Court noted that authority was divided on this question, but that it was unnecessary to address it because of the inapplicability of the self-incrimination right under the federal Constitution to the states.\textsuperscript{109}

The issue came before the Court a second time in \textit{Adamson v. California},\textsuperscript{110} in which a murder defendant challenged the California rule permitting court and counsel to comment on the defendant's failure to explain or deny by his testimony any evidence against him. The grounds of the challenge included compelled self-incrimination and alleged violation of the pre-

\begin{itemize}
  \item \textsuperscript{103} See \textit{Adamson v. California}, 332 U.S. 46, 58 n.17 (1947) (upholding comment on defendant's silence and distinguishing \textit{Johnson} on ground that it involved possible misleading of defendant).
  \item \textsuperscript{104} 211 U.S. 78 (1908).
  \item \textsuperscript{105} \textit{Id.} at 79-83.
  \item \textsuperscript{106} \textit{Id.} at 93.
  \item \textsuperscript{107} \textit{Id.} at 93-99.
  \item \textsuperscript{108} \textit{Id.} at 99-114.
  \item \textsuperscript{109} \textit{Id.} at 114.
  \item \textsuperscript{110} 332 U.S. 46 (1947).
\end{itemize}
The Court rejected the arguments, reaffirming the inapplicability of the self-incrimination right under the federal Constitution to the states and holding that the comment at issue involved no denial of due process. The opinion of the Court, subscribed to by four justices, also clearly reflected a belief that such comment did not involve compelled self-incrimination:

California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. . . . That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment. So our inquiry is directed, not at the broad question of compulsory testimony from the accused . . . but to the constitutionality of the . . . California law that permits comment upon his failure to testify . . . .

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions . . . . California, however, is one of a few states that permit limited comment upon a defendant's failure to testify . . . . [T]he court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. Compare Caminetti v. United States, 242 U.S. 470, 492-95; Raffel v. United States, 271 U.S. 494, 497 . . . . California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we 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 commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the

111. The court also considered and rejected the argument that the California procedure should be invalidated because of the possibility that a defendant would stay off the stand to avoid disclosure of his criminal record. See id. at 57-58.
knowledge of the accused. In that case a failure to explain would point to an inability to explain.119

b. Silence before trial—Prior to Griffin v. California the Supreme Court also considered in a number of cases the propriety of disclosing at trial the defendant's silence before the trial, either in earlier proceedings or in less formal settings.

The earliest case that might be thought to have some bearing on this issue was Boyd v. United States,118 in which the Court held that requiring the claimants in a forfeiture action to produce an invoice bearing on an alleged customs law violation transgressed both the fourth and fifth amendments. However, the impermissible "compulsion" perceived by the Court was a statutory rule which essentially provided that if the claimants disobeyed a production order, any allegation by the government would be conclusively taken as true, if the government stated that the requisitioned evidence would tend to prove the allegation.114 The decision did not address the propriety of considering a defendant's failure to proffer exculpatory evidence for its natural evidentiary value under the facts of a case.

Nine years later, in Sparf and Hansen v. United States,116 the Court considered the significance of a defendant's pretrial silence in an ordinary evidentiary context. The defendants were tried for murder on the high seas, and questions arose concerning the admissibility of confessions made by one of the defendants. The Court held that "[t]he declarations of Hansen after the killing . . . were also admissible in evidence against Sparf, because they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth."116 This was a straightforward application of the adoptive admissions doctrine. As discussed earlier,117 that doctrine admits incriminating statements made in a person's presence and his failure to respond to them in circumstances in which response would naturally be expected.

The third important case in this area was Raffel v. United States,118 which involved a retrial for a prohibition violation.

112. Id. at 54-56 (citations and footnotes omitted).
113. 116 U.S. 616 (1886).
114. See id. at 618-19, 621-22, 639.
115. 156 U.S. 51 (1895).
116. Id. at 56.
117. See supra notes 45-47 and accompanying text.
118. 271 U.S. 494 (1926).
The defendant Raffel had not testified at the initial trial, which resulted in a hung jury. When Raffel took the stand at the second trial and denied that he had made an incriminating admission ascribed to him by a prohibition agent testifying for the government, questioning by the trial court brought out the fact that Raffel had not testified in response to the same prosecution testimony at the earlier trial. The trial court also required Raffel to explain the reasons for his earlier silence. The Supreme Court held that this was consistent with the fifth amendment on the ground that the government may validly make the defendant's waiver of his immunity from giving testimony an all-or-nothing proposition, including exposure to impeachment by disclosure of silence at an earlier trial.

Following the constitutional decision upholding the impeachment use of silence in Raffel, the Court reached contrary results concerning impeachment by silence at earlier judicial proceedings in two cases, albeit on non-constitutional evidentiary grounds. The first of these was Grunewald v. United States,119 in which the Court held that it was error to impeach the defendant's trial testimony by disclosing the fact that he had "pleaded the fifth" when asked the same questions before a grand jury. The rationale was that, under the facts of the case, there was not sufficient inconsistency between claiming the privilege before a grand jury and later giving truthful exculpatory testimony at trial. The facts the Court identified as relevant to this determination included the defendant's protestations before the grand jury that he was innocent and that he was refusing to answer questions only on the advice of counsel; the fact that the defendant was already under suspicion at the time of his grand jury appearance, and could have expected that his statements to the grand jury might be used in putting together a case against him; and the features of grand jury proceedings which make them unfavorable for the presentation of a defense, including their secretive nature and the absence of a right to counsel and opportunity for cross-examination.

The second case of this type was Stewart v. United States,120 in which a murder defendant claiming an insanity defense was put on the stand in his second retrial, and the prosecutor asked the defendant questions indicating that the defendant had failed to testify at the two earlier trials. The purpose of the defendant's testifying was not to give information about the offense,
but to exhibit his alleged insanity directly to the jury. The Court concluded that there was no inconsistency between such "de-meanor" evidence and earlier silence comparable to that involved in the *Raffel* case, and held that its disclosure was prejudicial error.\textsuperscript{121}

**D. Developments Following Griffin v. California**

The state of the federal law regarding adverse inferences from silence, as it stood at the start of the 1960s, may be summarized as follows: The states generally had a free hand to write their own rules in this area, because the Supreme Court had repeatedly held that the self-incrimination right under the fifth amendment did not apply to the states, and that the state rules permitting comment and inferences did not offend any other provision of the federal Constitution. There was also no Supreme Court decision which had found a constitutional infirmity in the evidentiary use of a defendant's silence in federal proceedings. All decisions limiting comment on or disclosure of silence were based on statutory grounds, or involved evidentiary rulings under the Court's supervisory power.

The decision in *Griffin v. California*\textsuperscript{122} fundamentally altered this state of affairs, shifting the primary policy-making role in this area from the states and the legislatures to the Supreme Court. In the year preceding *Griffin*, the Court in *Malloy v. Hogan*\textsuperscript{123} "incorporated" the self-incrimination clause of the fifth amendment against the states, overturning various earlier precedents to the contrary.\textsuperscript{124} While all the states had previously protected the right against compelled self-incrimination through their own laws,\textsuperscript{125} the change wrought by *Malloy v. Hogan* was nevertheless of basic importance. It meant that the specific conception and elaboration of that right in the Supreme Court's decisions would henceforth be binding on the states, and would override any contrary state rules or interpretations. The potential of this enlargement of federal judicial power was promptly realized when the Court adopted a new "constitutional" rule

\textsuperscript{121} The more detailed account of the facts of the case in the dissenting opinions in *Stewart* suggest that the decision was contrived to prevent the execution of a capital sentence. See 366 U.S. at 11-27.

\textsuperscript{122} 380 U.S. 609 (1965).

\textsuperscript{123} 378 U.S. 1 (1964).

\textsuperscript{124} See *Malloy*, 378 U.S. at 17 (Harlan, J., dissenting).

\textsuperscript{125} See supra note 52.
barring adverse comment on the defendant's failure to testify in Griffin. That rule has remained in effect to the present.

The situation relating to the use of pretrial silence by the defendant following Griffin has been more complicated. Other decisions of the Court have imposed new restrictions on disclosure of a defendant's silence following arrest, but the Court has also sanctioned the use of pretrial silence in some contexts. The principal current decisions relating to silence at trial and pretrial silence will be discussed separately in this part.

1. Silence at Trial

Griffin v. California126 arose from the defendant Griffin's fatal battery of a woman in the course of a sexual assault. The state's evidence indicated that Griffin had been with the victim and her common law husband in their apartment. Griffin had assaulted the victim in the apartment and attacked her husband after he made repeated attempts to expel Griffin. The husband fled and went to get help. On the following morning, Griffin was seen walking away from a large trash box in an alley by the apartment building, buttoning his trousers. The victim was found in the box in a severely battered condition. She died shortly thereafter from the injuries.127

Following his arrest, Griffin told the police that he had engaged in consensual sex with the victim and denied any criminality.128 However, he failed to take the stand at his trial for murder. Consistent with California law, the trial court charged the jury that Griffin's failure to testify in response to evidence relating to matters within his knowledge which he could reasonably be expected to deny or explain could be considered as strengthening the probative force of that evidence. The prosecutor commented more forcefully on the defendant's failure to testify.129

In an opinion by Justice Douglas, the Supreme Court overturned the conviction,130 holding that comment on a failure to

128. See 60 Cal. 2d at 187-88, 383 P.2d at 435, 32 Cal. Rptr. at 27.
129. See Griffin, 380 U.S. at 610-11.
130. Griffin was retried three times after the Supreme Court overturned his conviction. His conviction for murder was finally upheld in People v. Griffin, 93 Cal. Rptr. 319 (1971).
testify violates the self-incrimination clause of the fifth amendment. The argumentative portion of the decision, which overturned the laws of half a dozen states and closed off a century of historic debate, occupied less than three pages. Its essential elements were as follows:

First, the opinion quoted some language from Wilson v. United States, an early case applying the no-presumption rule of 18 U.S.C. § 3481 for federal proceedings. The language indicated that the statutory rule reflected "tenderness to the weakness" of defendants who might be innocent, but nevertheless would refuse to testify out of concern that they might make a poor showing on the stand because of nervousness or timidity. Following the quotation, the opinion in Griffin declared that the policy identified in Wilson as underlying the statutory rule also reflected "the spirit of the Self-Incrimination Clause," and that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws."

Following this divination of the spirit of the self-incrimination clause, the Court reached the nub of the decision, which consisted of the following two sentences: "[C]omment on the refusal to testify . . . is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

Finally, the Court noted the argument that adverse inferences from the defendant's failure to explain facts peculiarly within his knowledge are in any event "natural and irresistible," and that judicial comment on the failure to testify does not magnify the inference into a "penalty." The Court responded that a pos-

131. 380 U.S. at 613-15.

132. Beyond the arguments noted in the text, a footnote in the opinion stated that the "legislatures or courts of 44 States have recognized that . . . comment [on the defendant's failure to testify] is, in light of the privilege against self-incrimination, 'an unwarrantable line of argument.'" Id. at 611 n.3. The number given for states with no-comment rules was correct, but the opinion did not seriously attempt to substantiate its assertion that the rules in all 44 of these states were predicated on the view that a contrary rule would violate the right against compelled self-incrimination. The issue is generally discussed infra at notes 179-88 and accompanying text.

133. 149 U.S. 60 (1893).

134. A footnote to this portion of the argument (380 U.S. at 614 n.5), citing Adamson v. California, 332 U.S. 46 (1947), stated that "[o]ur decision today that the Fifth Amendment prohibits comment on the defendant's silence is no innovation, for on a previous occasion a majority of this Court indicated their acceptance of this proposition." This assertion was incorrect. See Griffin, 380 U.S. at 619 n.3 (Stewart, J., dissenting); Adamson v. California, 332 U.S. at 54-56, 61, 68-69, 92, 124-25; Friendly, supra note 11, at 939 n.56.
sible inference by the jury is different from a court’s “solem-
nizing” the defendant’s silence into evidence against him, and
that this type of inference is not always so natural or irresistible
in light of the possibility that a defendant will stay off the stand
because of concern over impeachment by prior convictions.

The basic rule announced in Griffin has continued to be fol-
lowed, and has since been carried further in Carter v. Ken-
tucky, in which the Court held that the trial court must af-
firmatively instruct the jury that no adverse inference is to be
drawn from the defendant’s failure to testify, if the defendant so
requests. The Court purported to derive this rule as a corollary
of Griffin: Griffin held that a defendant may not be required to
bear any “court-imposed price” or “penalty” for failing to tes-
tify. However, the “penalty” for silence may be just as severe if
nothing is said about it and the jury is “left to roam at large
with only its untutored instincts to guide it, to draw from the
defendant’s silence broad inferences of guilt.” Therefore, affirma-
tive action by the trial court is required to head off possible
adverse inferences.

Notwithstanding the Court’s willingness in Carter to constitu-
tionalize the most extreme type of no-inference approach, the
Court has rejected expansive applications of Griffin in some
other contexts. Lakeside v. Oregon presented the question
whether it was error to charge the jury that it should not draw
any adverse inference from the defendant’s failure to testify,
where the defense had objected to the giving of such an instruc-
tion. The Court held that this was not in conflict with Griffin,
which only barred adverse comment. Another example is United
States v. Robinson, in which the defendant’s attorney asserted
that the government had denied the defendant an opportunity
to explain the evidence against him, and the prosecutor re-
sponded by pointing out that the defendant could have taken
the stand and provided such an explanation. The Court held
that this was proper, distinguishing Griffin on the ground that it

136. Id. at 301, 305.
137. Cf. 8 Wigmore’s Evidence § 2272 at 436 (McNaughton rev. 1961) (“Nor is it
proper, when no comment has been made, to go so far as to instruct the jury to disre-
gard the inference. It is well enough to contrive artificial fictions for use by lawyers, but
to attempt to enlist the layman in the process of nullifying his own reasoning powers is
merely futile, and tends toward confusion and a disrespect for the law’s reasonableness.”).
only barred use of the defendant’s silence as “substantive evidence of guilt.”

A more noteworthy development has been the Court’s continued acceptance of statutory presumptions and judicial instructions that effectively authorize an ultimate determination of guilt on the basis of a single unrebutted incriminating circumstance. For example, the trial court may tell the jury that guilty knowledge can be inferred from the defendant’s unexplained possession of stolen property. While an instruction or presumption of this sort may give the defendant a heightened incentive to testify, the Court has had no difficulty in upholding such charges against Fifth Amendment challenges. The underlying rationale is apparently that such an instruction only highlights a possible inference which the jury could draw even if nothing were said about it, and that the pressure on the defendant to make a response is the result of the force of the adverse evidence rather than of unconstitutional compulsion. While this point would also seem to apply to the type of comment on the defendant’s failure to respond to the evidence that Griffin condemned, the Court has not attempted to reconcile these lines of precedent.

A final example of a post-Griffin decision that sits uneasily with the Griffin rule is Baxter v. Palmigiano. The case involved a prisoner who was advised in a prison disciplinary proceeding that “he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him.” He was also informed that he might be prosecuted under state law, but was not offered immunity with respect to the use in a criminal prosecution of any testimony he might give in the disciplinary proceeding.

The Court held that this was consistent with the Fifth Amendment, apparently on the ground that advising the defendant that an adverse inference will be drawn from silence in this type of proceeding is not compulsion. The Court distinguished ear-


143. 425 U.S. at 312.

144. While the Fifth Amendment right is limited to a prohibition of compelling a person “in any criminal case” to be a witness against himself, the Court has held that the right is implicated by compulsion of testimony from the defendant in a civil proceeding.
lier cases involving the imposition of administrative sanctions for refusing to talk on the ground that they effectively involved *pro confesso* rules, which conclusively presumed guilt from silence:

[This case is very different from ... decisions ... where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of the evidence which incriminated him; and, as far as this record reveals, the silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.]

One might argue similarly, however, that the sort of comment in a criminal trial that *Griffin* condemned is just “a realistic reflection of the evidentiary significance of the choice to remain silent” in such a proceeding.

Additional perplexities arise from dictum in *Baxter*, which indicated that disclosure of Palmigiano’s silence at the disciplinary proceeding in a later criminal trial *would* be in conflict with the *Griffin* rule. In *Griffin* itself, the defendant was not literally compelled to be a witness against himself; rather, he resisted any pressure generated by the prospect of adverse comment on his silence, and declined to take the stand. Nevertheless, if one accepts the notion that this pressure constitutes “compulsion” in the sense of the fifth amendment, the *Griffin* rule has an obvious relationship to the constitutional prohibition: It bars the government from presenting the defendant with an incentive to talk that would compel him to be a witness against himself if he acceded to it. On this view, permitting adverse comment on silence would be comparable to threatening to hold a defendant in con-

 where he is not given assurance against the use of the testimony in a subsequent criminal prosecution. See id. at 316-17.

145. *Id.* at 318-19.

146. *Id.* at 317.
tempt for refusing to answer incriminating questions. Even if
the defendant resisted the coercion in a particular case and did
not talk, this action by the government would be improper
under the fifth amendment, since it involves an effort by the
government to achieve an objective—compelling the defendant
to be a witness against himself—which the fifth amendment
prohibits.

In Baxter, however, the Court was evidently of the view that
the state’s action in notifying Palmigiano that his silence would
be held against him, and in actually considering it as evidence in
the proceeding, did not constitute compulsion in the sense of the
fifth amendment. This makes it altogether unclear how there
could have been any problem in using it in a subsequent crim-
inal proceeding. If there was no fifth amendment “compulsion,”
how could Griffin—a decision ostensibly based on the Self-In-
crimination Clause—impose any constraint? And if the Griffin
rule would bar such use of silence, despite the fact that the state
did nothing “compelling,” what does that rule have to do with
the fifth amendment?

2. Silence before Trial

In the year following Griffin, the following statement appeared
in a footnote in the decision of Miranda v. Arizona:147

In accord with our decision today, it is impermissible to
penalize an individual for exercising his Fifth Amend-
ment privilege when he is under police custodial interro-
gation. The prosecution may not, therefore, use at trial
the fact that he stood mute or claimed his privilege in the
face of accusation.

This statement was dictum in Miranda; none of the cases under
review involved any question of disclosure of a defendant’s pre-
trial silence.

Several years later, in Harris v. New York,148 the Court held
that a defendant’s pretrial statements that were inadmissible as
affirmative evidence of guilt because obtained in violation of Mi-
manda could nevertheless be used to impeach his trial testimony.
In reaching this result, the Court in Harris149 discounted con-

149. Id. at 224.
trary dictum in the *Miranda* decision. This naturally raised
the question whether a defendant's pretrial silence could be used
to impeach his trial testimony, despite the *Miranda* footnote ap-
plying the *Griffin* “penalty” rationale to pretrial silence under
custodial interrogation. The Court has answered this question in
a line of decisions under which a defendant's silence before he
receives *Miranda* warnings generally may be admitted for im-
peachment, but such use of silence after the defendant has re-
ceived *Miranda* warnings is generally barred.

The initial case in the line was *United States v. Hale*. *Hale*
was a robbery prosecution in which the victim identified the de-
fendant Hale to the police as one of the robbers, and Hale fled
when the police approached him. When apprehended, Hale was
found to have a large amount of cash on his person. At trial,
Hale gave an exculpatory story, claiming that he had fled from
the police because a person with him was carrying narcotics, and
that he had received the money for his estranged wife to
purchase some money orders from her. On cross-examination,
the prosecutor brought out the fact that Hale had not offered
this explanation of the source of the money to the police follow-
ing his arrest. When asked why, Hale replied only that he did
not feel it was necessary at that time. The trial court instructed
the jury to disregard this colloquy, but the court of appeals re-
versed the conviction on the view that cross-examining the de-
fendant about his prior silence was prejudicial error.

The Supreme Court agreed that the questioning was im-
proper, basing this result on non-constitutional evidentiary
grounds. Comparing the situation to earlier cases, the Court be-
lieved that it was more like *Grunewald v. United States*, which barred disclosing that a defendant “pleaded the fifth”
before a grand jury, than *Raffel v. United States*, which had
permitted impeachment by a defendant’s failure to testify at an
earlier trial. In the course of the opinion in *Hale*, the Court sug-
gested that post-arrest silence would generally have little proba-
tive force in light of the many alternative explanations for not
talking in that situation, including the fact that an arrestee will
ordinarily have been advised through the delivery of the *Mi-
ran da* warnings “that he has a right to remain silent, and that
anything he does say can and will be used against him in

150. 384 U.S. at 476-77.
151. 422 U.S. 171 (1975).
153. 271 U.S. 494 (1926).
The Court also stated that disclosure of such silence carries a large potential for prejudice to the defendant that is unlikely to be overcome by permitting the defendant to explain the reasons for it. 154

In the year following Hale, the import of the Miranda warnings was given center stage, and was made the basis for an ostensibly constitutional rule limiting disclosure of pretrial silence for impeachment in Doyle v. Ohio. 155 The case involved defendants in a drug trafficking prosecution who testified that they had been framed, and who were impeached by cross-examination showing that they had not told this story to the police at the time of arrest. Before the Supreme Court, the state argued that "an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings." 156

The Court did not question the force of this point, but held that suppression of the defendants' silence at the time of arrest was nevertheless required by the fact that they had been given Miranda warnings:

The warnings mandated by [Miranda], as prophylactic means of safeguarding Fifth Amendment rights . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. 157

154. 422 U.S. at 176-77.
155. Id. at 180.
156. 426 U.S. 610 (1976).
157. Id. at 616-17.
158. Id. at 617-18 (citations omitted).
True to the due process rationale articulated in *Doyle*, which turned on implicit assurances the Court discerned in the *Miranda* warnings, the Court has held in later cases that pretrial silence can constitutionally be disclosed for impeachment where the defendant had not received such warnings. The issue arose in *Jenkins v. Anderson*, in which the testimony of a murder defendant was impeached by showing that he had not come forward to the police with his self-defense story until about two weeks after the offense. The Court distinguished *Doyle* on the basis of the absence of *Miranda* warnings in *Jenkins*. The Court also rejected the objection that "a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." Rather, *Raffel v. United States* had held that the possibility of impeachment by prior silence is not an impermissible burden on the exercise of fifth amendment rights. More generally, the Court indicated that permitting the defendant to testify and exposing him to "the traditional truth-testing devices of the adversary process" can validly be made a package deal, and that permitting impeachment on cross-examination advances a valid truth-seeking function.

The final important case in this line was *Fletcher v. Weir*, in which the Court applied the rule of *Jenkins v. Anderson* to silence in police custody. In that case, the defendant's self-defense claim in a homicide prosecution was impeached by showing that the defendant had not advanced his exculpatory explanation or disclosed the location of the weapon used in the killing to the police at the time of arrest. The Court held that this impeachment was constitutionally permissible so long as the defendant had not been given *Miranda* warnings prior to his silence.

II. ISSUES AND ARGUMENTS

A criminal case may be put together from many pieces of evidence and possible inferences. For example, in a murder case it may appear that the defendant had previously fought with the victim, that he left fingerprints near the victim's body, that he...
washed or destroyed his presumably bloodstained clothes immediately after the offense, then he withdrew all his money from the bank and left town on the following day, and so on. Considered in isolation, no particular fact may be strongly probative, but taken together, they may constitute proof of guilt. When a case has been brought to trial, it is the prosecutor's responsibility to disclose these facts to the trier, to point out the incriminating tendency of each, and to argue that in the aggregate they warrant conviction.

The essential question addressed in this Report is whether certain aspects of the defendant's conduct—his silence at trial or before trial—are also among the circumstances that can properly be considered in assessing the probability of guilt or innocence in light of all the facts disclosed in the case, or whether special rules are justified that bar disclosure or consideration of the defendant's silence. In assessing this question, two general points should be kept in mind.

First, consideration of a defendant's conduct as part of the evidence in a criminal case is generally permitted. For example, it is generally permissible to disclose and consider the fact that a defendant refused to take a sobriety test; unexpectedly left town after the offense or fled from the crime scene; concealed, destroyed, or fabricated evidence; or attempted to prevent a witness from testifying. It is also generally permissible, in both civil and criminal litigation, to draw adverse inferences from any party's failure to proffer a witness or other evidence within his control that could elucidate the facts of the case, and to comment on the fact that there has been no rebuttal of the evidence offered against a party. The question is whether constitutional constraints or valid policy considerations warrant a departure

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166. See 1 Wharton's Criminal Evidence §§ 88-89 (14th ed. 1985); 2 Wigmore's Evidence §§ 285-90 (Chadbourn rev. 1979). As the cited sources indicate, courts are less disposed to permit such an inference if the withheld witness is equally available to both parties, or if the witness is antagonistic toward the party against whom the inference is urged. However, these qualifications would not apply to the defendant's withholding of his own testimony. The prosecution has no power to summon the defendant to the stand, and defendants are generally favorable toward their own interests. See J. Bentham, A Treatise on Judicial Evidence, supra note 36, at 240-41.

167. The qualifications of this principle in criminal cases are based on the special rules barring adverse comment on the defendant's failure to testify. See generally 8 Wigmore's Evidence § 2273 at 446-50 (McNaughton rev. 1961); Ayer, supra note 141, at 843 & nn.11-12; Gaims, The Meaning of Defendant's Silence, 39 So. Cal. L. Rev. 120, 122-23 (1966); Failure of Accused to Testify, 37 Yale L.J. 955, 958-59 (1928).
from these general rules where the relevant conduct is the defendant's withholding of his own testimony concerning the offense or related circumstances.

Second, it basically misconceives the issue to suppose that it is resolved by simply pointing out that a defendant who is innocent may nevertheless remain silent. The general standard for admitting and considering evidence is not infallibility, but relevance. In other words, it is sufficient if it has some bearing, direct or indirect, on the probability of guilt or innocence.\textsuperscript{168}

These elementary principles are the starting point of inquiry rather than the end of it, since they may be outweighed by countervailing considerations, such as the risks of prejudice that are thought to inhere in some types of evidence. They nevertheless bear emphasizing, because they have often been lost sight of in the debate over the evidentiary consideration of the defendant's silence. Opponents of permitting such consideration may tacitly assume that it should not be allowed unless silence is in itself virtually conclusive proof of guilt. Proponents of comment and inference may similarly fall into the fallacy of arguing as if conclusiveness must be established to justify the practice. This basically misapprehends the issue and applies a standard to the defendant's silence that would not be applied in assessing the propriety of disclosing or considering any other type of evidence.

With these cautionary remarks in mind, we turn to specific arguments and issues. Sub-part A addresses comment on silence at trial and sub-part B addresses disclosure of pretrial silence.

\section*{A. Silence At Trial}

The arguments relating to adverse comment on the defendant's failure to testify may be grouped into five categories. Part one below analyzes the implications of the historical understanding of the self-incrimination right for contemporary practices in this area. Parts two, three, and four analyze the main issues that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{168} See \textit{Fed. R. Evid.} 401, 402 and Notes. The question whether inferences may properly be drawn from the defendant's silence is, in substance, the same as the question whether the defendant's silence may properly be considered as evidence. See Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923) ("Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character."); \textit{infra} note 203. In general, "evidence" refers to a factual matter offered as the basis for an inference concerning a factual issue in a case. See \textit{generally} 1 WIGMORE'S EVIDENCE § 1 at 7-11 (Tillers rev. 1983). These two modes of expression—the permissibility of considering the defendant's silence as evidence against him, and the permissibility of considering it as the basis for adverse inferences—are used interchangeably in this Report.
\end{enumerate}
\end{footnotesize}
were considered or touched on in the decision of *Griffin v. California*—the import of comment on the defendant’s silence for protecting the innocent and convicting the guilty; the idea that such comment is a “penalty” for remaining silent or an impermissible “burden” on silence; and the special problems raised by the defendant’s exposure to impeachment by prior convictions if he testifies. Part five addresses some other arguments whose force seems more rhetorical than rational—for example, the contention that comment on silence is an oppressive “inquisitorial” practice—but which nevertheless merit discussion because of their appearance in the historical debate over inferences from silence.

1. Historical Considerations

The fifth amendment to the federal Constitution, and comparable provisions in state constitutions, protect a person against being compelled to be a witness against himself in a criminal case. It is accordingly necessary to consider whether the right against compelled self-incrimination bars comment or inferences concerning a defendant’s failure to testify.

As discussed in Part I of this Report, the materials associated directly with the formulation of the Bill of Rights provide no support for an interpretation of the right against compelled self-incrimination as barring such inferences, and it would also be difficult to discern any support for such an interpretation in the historical origin of that right. The right initially arose in reaction to persecutions of religious and political dissidents in the late sixteenth and early seventeenth centuries. The practices which made these inquisitions odious to their contemporaries were of an entirely different order from simply considering a defendant’s silence as one factor in assessing the case against him. As Justice Stewart observed in his dissent in *Griffin v. California*:

> We must determine whether the petitioner has been “compelled . . . to be a witness against himself.” Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was
asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. 169

A contrary argument might be based on the fact that one of the abuses of the English inquisitorial courts was the pro confesso use of the oath procedure. 170 Under the pro confesso rule, a defendant who refused to take the oath ex officio, or to answer any question after taking the oath, could be deemed guilty of the offenses of which he was suspected. However, this produced convictions that were premised solely on the defendant's refusal to bind himself to answer any questions he might be asked, or to answer questions following such a commitment, without the need for any other evidence against him, and without any other opportunity to present a defense. Rejecting such a procedure as "compelling" and oppressive does not entail a like conclusion concerning comment rules that would only permit the evidentiary consideration of the defendant's silence on the same basis as other aspects of his conduct. 171

The understanding of the self-incrimination right in the later common law period also does not entail a rejection of comment and inferences relating to a defendant's silence under contemporary procedures. The question of adverse inferences from a defendant's failure to testify could not arise in any form comparable to the contemporary issue, since the defendant was not considered a proper source of evidence at trial and was deemed incompetent as a witness. 172

It might be objected, however, that the historical elimination of the trial examination of the accused in itself implies that comment on silence should be barred. If merely asking the de-

169. 380 U.S. at 620.
171. Similar considerations distinguish cases in which the Supreme Court has invalidated rules that it perceived as involving a pro confesso use of silence, as opposed to consideration of silence for its natural evidentiary value. See Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976); see also Boyd v. United States, 116 U.S. 616, 621-22, 639 (1886).
172. See supra notes 17-26 and accompanying text.
fendant a question was thought to be unduly compelling, then a
fortiori the pressure exerted by the prospect of adverse comment
and inferences for failing to talk should also be so considered.
Even if one assumes, however, that the trial examination had
been wholly eliminated in American jurisdictions by the time of
the framing of the fifth amendment, there are two problems
with this argument.

The first is that it overlooks the fact that there were two fac-
tors at work in the cessation of the trial questioning of the de-
fendant—not only the recognition of the self-incrimination
right, but also the growing strength of the notion that the de-
fendant should not be questioned at trial because his interest in
the case made him an untrustworthy source of evidence. An ac-
curate statement would be that the notion of defendant incom-
petency, taking hold in a context of heightened sensitivity to
self-incrimination concerns, resulted in the abatement of the
trial examination. It is open to question whether the same re-
sult would have followed from self-incrimination considerations
alone. A contrary conclusion is suggested by the fact that
questioning of the defendant at trial, even in the English courts,
did continue for several decades after the recognition of the self-
incrimination right in the mid-seventeenth century. It is also
suggested by the fact that the self-incrimination right was not
regarded as precluding questioning in non-trial contexts—even
questioning where the defendant might misapprehend that he
was required to respond. The common law’s general position on
interrogation of the defendant and self-incrimination was as
follows:

The fact must be emphasized that the right in question
was a right against compulsory self-incrimination, and, ex-
cepting rare occasions when judges intervened to pro-
tect a witness against incriminating interrogatories, the
right had to be claimed by the defendant. Historically it

173. As a result of the paucity of early records of American trials, the timing of the
American reception of the English reform in trial practice is unclear. See supra note 24.
174. See supra notes 21-23 and accompanying text.
175. See J. Stephen, supra note 22, at 191-92 (maxims against compelled self-incrim-
nation and torture protected people from being forced to answer incriminating ques-
tions, but “it has never been doubted that such questions may be asked, or that a refusal
to answer them may be used as an argument that the person so refusing was guilty of the
criminal conduct suggested by them. Hence it is quite consistent with those maxims that
a prisoner should be questioned though there may be no way of compelling him to an-
swer.”). See generally id. at 190-96.
has been a fighting right: unless invoked, it offered no protection. It vested an option to refuse answer but did not bar interrogation nor taint a voluntary confession as improper evidence. Incriminating statements made by a suspect at the preliminary examination or even at arraignment could always be used with devastating effect at his trial. That a man might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer, for the authorities were under no legal obligation to apprise him of his right. . . . Yet if the authorities in eighteenth-century Britain and in her colonies were not obliged to caution the prisoner, he in turn was not legally obliged to reply. His answers, although given in ignorance of his right, might secure his conviction. 177

A second problem with implying restrictions on contemporary comment and inference rules from common law trial practice is that it overlooks basic differences in the surrounding procedural context. Giving the defendant a choice whether to take the stand was not considered in the seventeenth and eighteenth centuries. Rather, the practical choice presented was between (1) directly attempting to question the defendant, thereby requiring an overt refusal on his part to respond in order to exercise the option of silence, and (2) simply not trying to question the defendant. The latter approach was eventually adopted, showing only that it was preferred to the stated alternative. Even if the history were taken as indicating that direct questioning of unwilling defendants in the presence of the trier came to be regarded as unduly "compelling," 178 the same conclusion would not be required concerning comment on the defendant's failure to take advantage of his contemporary right to testify.

Moving to the post-constitutional period, it might be argued that the prevalence of no-presumption rules in the statutes that abrogated the defendant's testimonial incapacity support an in-

177. L. Levy, supra note 17, at 375.
178. Cf. Brown v. Walker, 161 U.S. 591, 596-98 (1896) (suggesting origin of rule against questioning defendant, absent waiver on his part, in reaction to bullying of defendants in English state trials). But cf. L. Mayers, supra note 17, at 223-24 (arguments that defendant could regularly be questioned before trial and at trial if he were not put under oath or were otherwise protected from punishment for refusing to respond); supra notes 21-24, 27-31, 175-77 and accompanying text (continued questioning of defendants before trial and at trial following recognition of right against compelled self-incrimination).
terpretation of the right against compelled self-incrimination as barring comment and inferences from the defendant’s silence. An argument of this sort appeared in a footnote in *Griffin v. California*.179

However, there is no adequate basis for concluding that these legislative choices reflected a general view that a contrary rule would involve unconstitutional compulsion. The earliest state court decision passing on this issue had no difficulty in reconciling comment on the defendant’s failure to testify with the self-incrimination right.180 Later state decisions were divided. Prior to *Griffin*, the Supreme Court had rejected fifth amendment challenges to the evidentiary consideration of the defendant’s silence in a number of cases, and had not sustained such a challenge in any case.181

Moreover, it is not difficult to discern other reasons why statutes making the defendant a competent witness, but barring any presumption from his failure to testify, would have had broad appeal. From the defense perspective, such a statute afforded the defendant a hitherto unavailable opportunity to testify in response to the charges.182 There was, however, concern when the reform was being considered that the option of testifying would prove to be of little or no value, and would jeopardize innocent defendants. This concern would have given substantial persuasive force to the policy argument against permitting adverse inferences if the defendant did not avail himself of this option.183 From an enforcement perspective, the defendant’s competency offered hitherto unavailable opportunities for cross-examination and impeachment.184 While the no-presumption rule did limit the reform’s value to some extent from a prosecution standpoint, it did not leave the government worse off than the preexisting common law procedure, under which no adverse inference could be drawn from the defendant’s failure to testify because he was not allowed to testify. For these reasons and

179. 380 U.S. at 611-12 n.3.
181. See supra notes 95-112 and accompanying text.
182. See supra note 33-35 and accompanying text.
183. See supra notes 33-35 and accompanying text.
184. The competency statutes also would have foreclosed arguments at trial by defense counsel that the defendant would be able to clear himself if he were free to testify, but that he was unfairly barred from doing so. See 1 J. Stephen, supra note 17, at 440-41 (noting such argument by English defense attorneys); J. Stephen supra note 22, at 194 (same).
the prevalence of rules barring comment and inference in the nineteenth century competency statutes is quite comprehensible without assuming a general belief that this approach was required by the right against compelled self-incrimination.

The continuation of the no-presumption rule as the predominant approach in the twentieth century also cannot reasonably be taken as reflecting a collective judgment that this approach was constitutionally required. The general pattern of state legislation, once established, had institutional inertia working in its favor, and the proponents of reform carried the burden of going against settled practice. The policy arguments that continued to be offered against permitting comment—including the frequently stated argument that it would operate unfairly against defendants who declined to testify to conceal their criminal records—would have increased this burden. The judicial decisions in some states which did bar comment and inferences on self-incrimination grounds also impeded reform efforts, and would have tended to create a perception by legislators that attempting this reform would be futile or hazardous. Notwithstanding these obstacles, rules permitting adverse comment on the defendant's failure to testify were adopted in several states.

2. Acquitting the Innocent and Convicting the Guilty

In relation to the general subject of this series of reports, the most important question concerning rules against adverse comment and inferences from silence is whether they create an unjustified impediment to the search for truth. Proponents of such

185. Other considerations that apparently influenced the formulation of the competency statutes were concern for the situation of innocent defendants who might make a poor showing on the stand for such reasons as nervousness or timidity, and concern for the presumption of innocence. See, e.g., Wilson v. United States, 149 U.S. 60, 65-66 (1893); Price v. Commonwealth, 77 Va. 393, 395 (1883).

186. See generally infra Part II.A.4.

187. See supra notes 42-44 and accompanying text.

188. New Jersey had permitted comment since the nineteenth century. In the twentieth century, rules permitting comment were adopted at one point or another in Ohio, South Dakota, Iowa, Connecticut, New Mexico, California, and Vermont. See supra note 41 and accompanying text. In two instances—Ohio and California—the change was effected by constitutional amendment. However, for reasons noted earlier, reliance on constitutional amendment in these states could not reasonably be taken as indicating legislative endorsement of the view that comment would otherwise be barred by the right against compelled self-incrimination on an accurate interpretation of that right. See supra note 78.
restrictions have regularly denied that this is the case. The principal argument is that adverse comment and inferences would create an unacceptable risk of convicting defendants who are not guilty, but who would nevertheless choose or prefer to stay off the stand for some innocent reason. A frequently cited version of this rationale—popularly known as the "nervous defendant" argument—appeared in an early Supreme Court decision, Wilson v. United States, explaining the statutory no-presumption rule of 18 U.S.C. § 3481:

But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. 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. 189

As noted earlier, the Court in Griffin v. California 190 stated that this consideration also reflected "the spirit of the Self-Incrimination Clause."

How well does this type of argument stand up as the justification for a uniform rule against considering or commenting on a defendant's silence? When the Griffin rule is compared to comparable rules in other areas, one would have to say, not well. The same concerns for the "nervous defendant" would seem to apply in civil proceedings, but adverse comment and inferences concerning a party's silence are permitted in that context. 191 The

189. 149 U.S. 60, 66 (1893).
191. See 2 WIGMORE'S EVIDENCE § 289 (Chadbourn rev. 1979); 8 WIGMORE'S EVIDENCE § 2272 at 439 (McNaughton rev. 1961).
Supreme Court has so held in relation to proceedings concerned with such weighty civil sanctions as deportation and disciplinary action by prison authorities.\textsuperscript{192} Even in the context of criminal proceedings, other decisions by the Court barring comment or inferences have not been based on a generalized concern that innocent defendants might make a poor showing on the stand. Rather, such decisions have generally reflected the view that a defendant had been ambushed by the adverse use of his silence after the government had tacitly assured him that that would not occur,\textsuperscript{193} or concern for the situation of the defendant who remains silent in secretive proceedings lacking significant procedural safeguards.\textsuperscript{194}

By the year following Griffin, the Supreme Court in Tehan v. Shott\textsuperscript{195} had apparently taken another reading of the spirit of the Self-Incrimination Clause through a different medium,\textsuperscript{196} and had concluded that the purposes of the Griffin rule—and of the privilege against self-incrimination generally—did not include protecting the innocent from unjust conviction. The Court held in Tehan that Griffin would not be applied retroactively to invalidate pre-Griffin convictions. The decision was predicated in part on this distinction between the Griffin rule and other newly recognized rights whose importance in protecting the innocent had resulted in retroactive application.

To the extent that empirical data is available, it supports the Court's later view on this question. In 1938, an ABA committee surveyed judges in five states that permitted adverse comment on the defendant's failure to testify, and found a virtual consensus that the practice was an important and proper aid to the administration of justice.\textsuperscript{197} In contrast, the argument that such comment would jeopardize the innocent has generally been based on speculation by lawyers who have had no actual experience with the operation of such a rule.

\textsuperscript{195} 382 U.S. 406, 413-16 (1966).
\textsuperscript{196} The Court's opinion in Tehan was written by Justice Stewart. Justice Douglas, the author of Griffin, dissented.
\textsuperscript{197} 63 A.B.A. REP. 592-93 (1938) ("The replies of the judges show that 93.65 per cent regard comment as an important and proper aid in the administration of justice, while only 2.65 per cent consider it definitely unfair to the accused (the others listing it as relatively unimportant.")).
The jeopardy-to-the-innocent argument also fails the test of intrinsic plausibility. In approaching this subject, it is useful to consider first how much force this type of argument would have in other contexts. A defendant who does decide to testify is not free to limit disclosure to matters that help his case, but must also submit to cross-examination by the prosecutor. With a little fixing, the quote from *Wilson v. United States* set out above can be adapted as an argument against the cross-examination rule for testifying defendants:

But the law should be framed with a due regard also to those who might prefer to rely on the presumption of innocence which the law gives to everyone, and not wish to serve as witnesses against themselves. It is not everyone who can safely be cross-examined on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing hostile questioning and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase prejudices against him. It is not every one, however honest, who would, therefore, willingly be subjected to cross-examination. The law, in tenderness to the weakness of those who from the causes mentioned might prefer not to be cross-examined, particularly when they may have been in some degree compromised by their association with others, should declare that the failure of a testifying defendant in a criminal action to submit himself to cross-examination shall not create any presumption against him.

This parody is about as convincing as the original. The weaknesses of the argument in this setting are not difficult to spot:

First, the guilty defendant, who must lie on the stand to avoid conviction, has good reason to fear exposure on cross-examination, but no comparable jeopardy results to the innocent defendant, who can give a truthful account of the circumstances supporting his innocence. Moreover, there is no reason to believe that the specific sources of prejudice identified in the argument will generally have the claimed effect. If the defendant is nervous, why should it be assumed that the trier would be unable to understand that an innocent person who has been falsely accused might be nervous when subjected to hostile questioning at his trial? If the defendant is timid, why should it be assumed
that that will excite antagonism rather than sympathy? Such remote or speculative risks of prejudice are insufficient to justify the wholesale waiver of a normal truth-seeking device (cross-examination) in relation to testifying defendants.

Second, while avoiding conviction of the innocent is one of the fundamental objectives of the system, the other fundamental objective—securing the conviction of the guilty—must also be figured into the balance. Any slight potential risk to the innocent from cross-examination must be evaluated in the context of the large cost to the conviction of the guilty—and hence, to the public’s security from crime—that would result from its preclusion.

Very similar considerations apply to the “nervous defendant” argument against permitting comment on the defendant’s silence. To begin with, suppose that adverse comment on the defendant’s failure to testify is permitted, and that the prospect of such comment induces a defendant to testify who otherwise would not have done so. The claim that an unacceptable risk to the innocent would result in such cases is very close to the parody argument against permitting cross-examination. Indeed, presumably the main concern underlying the “nervous defendant” argument—as it applies to a defendant who testifies to avoid adverse comment on his silence—is not that he will make a poor showing under friendly questioning by his lawyer, but that he will not do well under cross-examination.

The same sort of response is appropriate here: There is a very real and entirely salutary risk in such cases to the guilty defendant who must lie on the stand and risk exposure, but any jeopardy to the innocent defendant from being exposed to questioning at trial is slight, since he can give a truthful account of the circumstances showing his innocence. Even if the innocent defendant does lack composure on the stand in some cases of this sort, one may question how frequently any resulting disadvantage outweighs the risk of conviction that would arise from remaining silent. Such remote or speculative risks of prejudice

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198. See Price, On the Right of the Prosecutor to Comment on Defendant’s Refusal to Take the Stand, 13 J. CRIM. L. & CRIMINOLOGY 292, 293-94 (1922).
200. Exceptions to this point would be limited to rare cases in which the defendant has amnesia or has no recollection of the pertinent events for some other extraordinary reason. Even in such a case, however, the defendant is free to testify that he is unable to recall what happened, and to explain the reasons why.
201. “Prejudice” would result to an innocent defendant in an overall sense only if his performance on the stand was more damaging to his case than the alternative of saying nothing would have been. The latter course, however, entails a risk of conviction resulting from the trier’s natural suspicions about a supposedly innocent defendant’s failure to
do not outweigh the truth-disclosing value of the normal trial processes of eliciting testimony from knowledgeable witnesses (including defendants) and testing its veracity. In general, enlarging the opportunities for withholding the defendant's testimony does not advance the search for truth.\textsuperscript{202}

Conversely, suppose that adverse comment on silence is allowed, but the defendant nevertheless decides not to testify. The argument must be that this will occur in some significant number of cases involving an innocent defendant, even though his silence deprives him of the opportunity to share the truth that he knows with the trier, even though it deprives him of the opportunity to respond to any specific evidence against him that relates to matters within his knowledge, and even though his failure to talk will predictably be pointed to by the prosecutor (and perhaps also the judge) as suspicious conduct that enhances the probability of guilt. The argument must assume further that in some significant sub-class of these cases, comment of this type will result in the conviction of an innocent defendant who would otherwise have been acquitted, and that this will occur with sufficient frequency to outweigh the value of such comment in securing the conviction of the guilty.

In addressing these contentions, one may note to begin with that the bare possibility of an innocent defendant's not testifying would not justify barring the consideration of silence under normal evidentiary standards. The basic standard for admitting and considering evidence is not conclusiveness, but relevance—that is, some bearing, direct or indirect, on the probability of guilt or innocence.\textsuperscript{203} Both innocent and guilty defendants may be apprehensive about testifying for the sorts of

\textsuperscript{202} See State v. Baker, 53 A.2d 53, 58-59 (Vt. 1947); L. Mayers, supra note 17, at 26 & n.27; 8 Wigmore's Evidence § 2251 at 310-11 & n.3 (McNaughton rev. 1961); Price, supra note 198, at 293-94.

\textsuperscript{203} See Fed. R. Evid. 401, 402. While the defendant's failure to testify is not formally offered in evidence, it is a directly observable aspect of the defendant's conduct which could properly be considered as evidence by the trier in the absence of special rules to the contrary. See, e.g., Griffin v. California, 380 U.S. 609, 613 (1965) ("[The California comment rule] 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. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."); Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923) ("Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character."); Baxter v. Palmigiano, 425 U.S. 308, 316-19 (1976) (upholding consideration of prisoner's silence as evidence against him in disciplinary proceeding).
reasons suggested in the "nervous defendant" argument, but the guilty defendant has an additional reason that does not apply to the innocent—his inability to give a truthful response to the evidence against him. Thus, other things being equal, guilty defendants are more likely to be unwilling to testify than the innocent, which establishes that a failure to testify is relevant to the assessment of the probability of guilt or innocence.

However, focusing on relevance in this minimal sense considerably understates the case. As a matter of common sense, a person's failure to respond to charges of serious misconduct would normally be regarded as a suspicious circumstance. The suspicion would be heightened if he remained silent when confronted with substantial evidence supporting the charges. It would be heightened still further if he made no response despite being aware that his failure to do so would be held against him in determining whether he had engaged in the misconduct, and that he would face serious adverse practical consequences if he failed to clear himself. All these conditions are present when a defendant facing possible criminal conviction declines to testify in response to the government's evidence despite the prospect of adverse comment and inferences concerning his silence. Nevertheless, the inferences that would normally be drawn in such circumstances are currently barred by law. If this wholesale banishment of common sense from criminal trials is to be accepted, a convincing showing should be required that allowing it in would create an unacceptable risk to the innocent.204

An argument to this effect has been based on the fact that a lawyer may advise his client not to testify for strategic reasons unrelated to guilt or innocence.205 For example, there may not be much value (from the defense's standpoint) in putting the defendant on the stand if the government's evidence is weak, if there is other good rebuttal evidence, or if all the defendant could say is that he was at home in bed asleep at the time of the alleged offense. In such a case, any slight value of testimony by the defendant could be outweighed if there were some risk of

204. See generally S. Hook, Common Sense and the Fifth Amendment 14-19, 30-40, 47-55, 62-63, 73-76, 81-82 (1957); Adamson v. California, 332 U.S. 46, 60 (1947) (Furter, J., concurring) ("Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.'").

resulting prejudice because, for example, the defendant is intimidated, personally obnoxious, or inarticulate, and accordingly might make a poor impression on the stand. While the reasons for failing to testify in such a case would reflect strategic considerations of this type rather than the defendant's guilt, the trier might nevertheless believe that guilt was the reason. In order to protect defendants in such cases from this type of misapprehension, it is urged, consideration of silence as evidence of guilt should be barred. There are, however, three basic problems with this argument.

First, so narrow a premise cannot sustain so broad a conclusion. The current rules barring comment on the defendant's silence are not limited to cases in which, for example, the government's evidence is weak or the defendant could be expected to have little to say in response. Rather, they apply in all cases, including those in which the government's evidence is strong and relates directly to matters that are within the defendant's knowledge. If the force of the defendant's silence as evidence of guilt is affected by other circumstances in the case—for example, how strongly the government's evidence seems to call for a specific response on his part—this point does not distinguish silence from other types of evidence, whose probative force will also vary depending on surrounding circumstances. Under the operation of a comment rule, the import of the defendant's silence under the facts of the case, like that of other evidence, would be an appropriate subject of comment and argument by the defense attorney as well as the prosecutor, and the judge's instructions would provide guidance to the jury on this issue.\textsuperscript{206}

Second, this argument fallaciously extrapolates the contemporary practice of lawyers to the very different situation that would exist if adverse comment on silence were allowed. The current system attempts to make the decision not to testify as cost-free as possible. Under the rule of \textit{Griffin v. California},\textsuperscript{207} adverse comment is barred; and under the rule of \textit{Carter v. Kentucky},\textsuperscript{208} the jury must be affirmatively instructed that no adverse inference is to be drawn. While these rules may make the

\textsuperscript{206} See, e.g., Twining v. New Jersey, 211 U.S. 78, 80-83 (1908) (trial judge's charge concerning defendants' failure to testify). While a defendant who fails to take the stand cannot personally explain to the trier his reasons for remaining silent, this point does not distinguish the defendant's silence from other evidence. A defendant who does not testify relinquishes the opportunity to explain in his own words any of the evidence against him, including any aspect of his conduct that is arguably suspicious or incriminating. \textit{See generally supra} notes 165-67 and accompanying text.

\textsuperscript{207} 380 U.S. 609 (1965).

\textsuperscript{208} 450 U.S. 288 (1981).
option of silence attractive unless a substantial advantage to the defense can be expected from testimony by the defendant, the decision not to put the defendant on the stand would be more hazardous if common sense inferences could be drawn from his failure to testify. Any risk that a factually innocent defendant would stay off the stand for strategic reasons would be diminished accordingly. Rather than supporting a rule against comment, the argument's assumptions about current defense practices highlight the toll on the search for truth that the existing anti-comment rules exact by facilitating strategic withholding of the defendant's testimony. Repealing these rules would help ensure a decision by the trier based on all the relevant information by restoring the normal incentives for responding to incriminating accusations and evidence.\(^\text{209}\)

Third, in arguing for a sweeping exclusionary rule with respect to the defendant's silence, the argument from contemporary lawyers' practice applies a standard that is not applied in relation to the withholding of other types of evidence. In deciding whether to offer a witness's testimony or any other evidence, an advocate's decision does not turn on the overall question of guilt or innocence, but on the narrower question of whether that evidence is likely to help or hurt his case. That is a fact-bound determination which takes into account considerations other than ultimate guilt or innocence. Nevertheless, the defense's failure to offer evidence is generally relevant in assessing the probability of guilt or innocence\(^\text{210}\) because it can normally be expected that evidence will be offered if its overall tendency is exculpatory, and it is more likely that the available evidence will have that character if the defendant is in fact innocent. This point applies to the defendant's own testimony as well as other evidence.\(^\text{211}\)

The argument up to this point indicates that any value of anti-comment rules in protecting the innocent does not outweigh the impediment they create to securing the conviction of the guilty. We can go further, however, and suggest that these rules may be counterproductive even if one puts aside the objective of convicting the guilty and focuses solely on acquittal of the innocent.

The jeopardy-to-the-innocent argument assumes that innocent defendants would fail to testify with some frequency—out

\begin{itemize}
\item \textbf{209}. See Price, supra note 198, at 293-95.
\item \textbf{210}. See supra notes 166-67 and accompanying text.
\item \textbf{211}. See Bradley, supra note 205, at 1294 (acknowledging that factual guilt or innocence will affect probability of factors entering into judgment whether defendant should testify, such as credibility of defendant's story and likelihood of impeachment).
\end{itemize}
of concern over nervousness, timidity, etc.—even if adverse comment were permitted, and that they would then be unfairly taxed with such comment. However, whether or not comment is permitted, it would not be implausible to suggest that an innocent defendant who fails to testify is typically engaging in a dangerous and foolish act, and substantially increasing the likelihood that he will be unjustly convicted. The potential jeopardy arises both from the fact that in not taking the stand he relinquishes the opportunity to present truthful exculpatory testimony, and from the fact that the trier may draw adverse inferences from his silence, regardless of what legal theory has to say on that point. By removing the incentive to testify that arises from the prospect of adverse comment, anti-comment rules increase the risk that some innocent defendants will not testify and that miscarriages of justice will accordingly result. If it is objected that the underlying assumption concerning the hazardousness of silence to the innocent defendant who would prefer not to testify is speculative, it is no more so than the assumption that the innocent defendant will fail to testify in some significant class of cases and be harmed by a rule permitting comment. Thus, in assessing the net impact of comment rules on protection of the innocent, any unjust convictions that result from adverse comment on the failure of defendants to testify must be offset by unjust convictions avoided through the incentive that such rules provide for innocent defendants to testify and clear themselves:

The nervous-innocent-person argument can have application only to criminal defendants; the privilege does not protect civil parties and third-party witnesses, nervous or otherwise, from being called to the witness stand. There is of course always a chance that an innocent criminal defendant, by his poor witness-stand performance, will convict himself. To take the stand with such a possibility, however slight, in mind must be a frightening experience. But does the risk of a miscarriage of justice for this reason exceed the risk of a miscarriage of justice because of the inference which will surely be drawn from the defendant’s failure to testify? Probably not. Strangely enough, then the privilege in the mass of cases of frightened innocent defendants (if it influences them
at all) probably has a net tendency to seduce them into convicting, not saving, themselves by their silence.\textsuperscript{213}

3. Penalties and Burdens on Silence

The essential rationale of \textit{Griffin v. California} was as follows: "\textit{[C]}omment on the refusal to testify . . . is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."\textsuperscript{218}

If "penalty" is understood in its most common sense as referring to a punishment or sanction, then \textit{Griffin}'s characterization on this point has no substance. The prosecutor who comments adversely on the defendant's failure to testify is not going out of his way to visit retribution on the defendant for having the temerity to stay off the stand. Rather, he is simply treating the defendant's silence as he would any other aspect of the defendant's conduct that is arguably suspicious or incriminating. If, for example, the prosecutor comments on the fact that the defendant concealed or disposed of a firearm that he allegedly used in a homicide, that is not a punishment imposed on the defendant by the state for failing to keep his gun. If the prosecutor comments on the fact that the defendant apparently fled after the offense, that is not a sanction imposed on the defendant by the state for failing to stay in town. Characterizing comment on the defendant's failure to testify as a punitive measure is equally groundless.\textsuperscript{214}

Thus, if there is any substance at all in \textit{Griffin}, it is not in the penalty metaphor, but in the statement indicating that comment is an impermissible burden on the choice of silence: "It cuts down on the privilege by making its assertion costly." However, unless the Constitution itself is to be ignored in resolving a question of constitutional interpretation, it is not enough to point out that a procedural or evidentiary rule makes silence a less attractive option for the defendant than would otherwise have been the case. Rather, it must be shown that the type of pres-

\begin{itemize}
\item 212. \textit{Wigmore's Evidence} § 2251 at 311 n.3 (McNaughton rev. 1961). The textual quote is addressed to the defendant's immunity from being compelled to testify; essentially the same point applies to the exemption from adverse comment on a failure to testify. See Price, supra note 198, at 293-94; see also Swope, \textit{Constitutionality of a Comment upon Defendant's Failure to Testify}, 37 \textit{Mich. L. Rev.} 777, 779-80 (1939).
\item 213. 380 U.S. 609, 614 (1965).
\item 214. \textit{See generally Ayer, supra} note 141, at 855-57.
\end{itemize}
sure the rule exerts constitutes *compulsion* in the sense of the fifth amendment. Neither the origin nor the historical understanding of the self-incrimination right sustains this conclusion in relation to comment on the defendant's silence.\textsuperscript{216}

Griffin's pronouncement on this issue is also at odds with other decisions by the Court which have countenanced procedures that "cut down" on the privilege by "making its assertion costly," or even by more direct constraints on the choice of silence.\textsuperscript{216} These include, for example, the numerous cases upholding statutory presumptions and judicial instructions that effectively authorize a finding of guilt on the basis of a single unrebutted incriminating circumstance,\textsuperscript{217} and the decision in Baxter v. Palmigiano,\textsuperscript{218} in which the Court upheld telling a prisoner that his failure to give non-immunized testimony would be held against him in a disciplinary proceeding.\textsuperscript{219} Other examples include the following:

First, a defendant who takes the stand is not free to limit his testimony. The Court held in Caminetti v. United States\textsuperscript{220} that adverse inferences could be drawn from the defendant's selective silence on the stand, and other decisions have made it clear that a defendant could be held in contempt for refusing to answer questions on cross-examination. As the Court explained in Brown v. United States, a contrary rule "would make . . . the Fifth Amendment . . . a positive invitation to mutilate the truth a party offers to tell." In this context, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant and prevail in the balance of

\textsuperscript{215} See supra notes 169-88 and accompanying text.

\textsuperscript{216} Cases involving informal pressures to testify arising from general procedural arrangements or evidentiary rules present the closest analogies to the situation addressed by Griffin. Cases involving efforts to impose unconditional obligations on a person to testify through the threat of formal sanctions or penalties raise different issues and have been assessed under different standards, see generally Baxter v. Palmigiano, 425 U.S. 308, 316-18 (1976); Grano, Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. Chi. L. Rev. 174, 183-86 (1988), as have cases involving efforts to induce suspects to talk through physical or psychological abuse, see generally Oregon v. Elstad, 470 U.S. 298, 304-09 (1985) (occurrence of fifth amendment violation in questioning of suspects generally depends on traditional voluntariness test).

\textsuperscript{217} E.g., instructions that guilty knowledge may be inferred from the unexplained possession of stolen goods, or a rebuttable presumption that occupants of a vehicle were in possession of an illegal firearm found in the vehicle. See generally Ayer, supra note 141, at 859-64.

\textsuperscript{218} 425 U.S. 308 (1976).

\textsuperscript{219} See generally Ayer, supra note 141, at 864-66; supra notes 142-45 and accompanying text.

\textsuperscript{220} 242 U.S. 470, 492-95 (1917).
considerations determining the scope and limits of the privilege against self-incrimination."\textsuperscript{221}

Second, in \textit{Crampton v. Ohio}\textsuperscript{222} the defendant objected to a unitary guilt-determination and sentencing trial in a capital case on the ground that this procedure "unduly encourages waiver of the defendant's privilege to remain silent on the issue of guilt, or . . . unlawfully compels the defendant to become a witness against himself on the issue of guilt by the threat of sentencing him to death without having heard from him." The Court rejected this argument on the ground that the state may validly provide that the defendant's testimony will be considered on all matters to which it is relevant, including guilt or innocence, even if he would prefer to have it considered only on the question of punishment.

Third, in \textit{Williams v. Florida} the Court upheld a discovery rule requiring pretrial disclosure of an alibi defense and alibi witnesses as a condition on the assertion of such a defense at trial. The Court noted that discovery in criminal cases serves a valid truth-promoting function. While the discovery rule required the defendant to make an earlier disclosure of his intended alibi defense than he might have liked, the choice it posed was similar in character to the normal choice at trial whether to put on a defense witness from whom the prosecutor might elicit incriminating testimony on cross-examination. "Nothing in the Fifth Amendment privilege," said the Court, "entitles a defendant . . . to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case in chief before deciding whether or not to take the stand himself."\textsuperscript{223}

Fourth, in \textit{Jenkins v. Anderson}\textsuperscript{224} the Court upheld impeachment of a defendant's trial testimony by his pretrial silence, rejecting the argument that the fifth amendment barred this practice because "a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." The Court recognized that the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of Constitutional rights," and that

\textsuperscript{221} 356 U.S. 148, 155-56 (1958).
\textsuperscript{222} \textit{Reported with} McGautha v. California, 402 U.S. 183, 213-17, 220 (1971).
\textsuperscript{223} 399 U.S. 78, 80-86 (1970).
\textsuperscript{224} 447 U.S. 231, 235-38 (1980).
All of these decisions have upheld procedural arrangements or evidentiary rules that limited or discouraged the defendant’s exercise of the option of remaining silent. While their specific rationales vary, they are obviously irreconcilable with any general assumption that nothing can validly be done which makes the choice of silence “costly.” Like the rules addressed in these decisions, the comment rule overturned in Griffin was not a capricious imposition on the defendant for remaining silent, and reflected no purpose of punishing the defendant for refusing to testify. Rather, permitting such comment is a legitimate effort by the state to facilitate the achievement of accurate verdicts and substantive justice. As such, it is comparable to truth-promoting rules that discourage or circumscribe the choice of silence which have been upheld in many other decisions. 

225. Griffin’s arguments to the contrary, based on concern for the situation of the “nervous defendant,” and the possibility that an innocent defendant might fail to testify to avoid disclosure of his criminal record, have been answered elsewhere in this report. See supra notes 189-212 and accompanying text; infra notes 227-41 and accompanying text. Griffin’s virtually conclusory overriding of a state judgment on this issue is also not consistent with the Court’s recognition in other cases of the deference owed to state decisions concerning the formulation of just evidentiary and procedural rules. See Jenkins v. Anderson, 447 U.S. 231, 238-41 (1980) (states are free to decide whether prejudicial effect of disclosing defendant’s pretrial silence for impeachment outweighs its probative value); McGautha v. California, 402 U.S. 183, 220-22 (1971) (deference to state decision to use unitary trial in capital cases).

226. See generally Ayer, supra note 141, at 858-66; supra notes 216-225 and accompanying text. Aside from cases like Carter v. Kentucky, 450 U.S. 288 (1981), that depend directly on Griffin, it is difficult to find significant parallels to Griffin elsewhere. The closest approach would seem to be Brooks v. Tennessee, 406 U.S. 605 (1972), in which the Court invalidated a state rule requiring a defendant who desired to testify to take the stand before other defense witnesses. However, the validity of the fifth amendment rationale of Brooks is certainly open to question, see generally id. at 613-15 (Burger, C.J., dissenting); Westen, Order of Proof: An Accused’s Right to Control the Timing and Sequence of Evidence in His Defense, 66 CALIF. L. REV. 935, 939-40, 947-59 (1978), and the Court in Brooks relied in part on Griffin for its fifth amendment standard, see 406 U.S. at 610-11. The specific “burden” on silence identified as impermissible in Brooks—precluding the defendant from subsequently testifying if he chooses not to speak at a certain point in the proceedings—may also be distinguishable from the “burden” at issue in Griffin. In contrast to the restriction invalidated in Brooks—in effect, an evidence exclusion sanction for remaining silent at a certain time—a rule permitting adverse comment if the defendant fails to testify in no way impedes a defendant in presenting evidence in his defense, and leaves him free to testify, if he is so inclined, at the time of his choosing.
4. Impeachment by Prior Convictions

The common law once held that a person convicted of a felony or of an offense involving dishonesty ("crimen falsi") was permanently disqualified thereafter from testifying as a witness in any proceeding. The rule was subsequently moderated so as to provide that such persons could testify, but that their convictions would be admitted to impeach their credibility. Once defendants were made competent to testify, it became possible to admit their prior convictions for impeachment, as with other witnesses. The rule has persisted to the present in most states, albeit with variations among the states in the class of offenses admissible for impeachment.

The fact that a defendant's criminal record may be disclosed when he takes the stand, but generally not otherwise, has vexed the debate over comment on silence throughout its history. The usual argument is that defendants and their lawyers will be apprehensive that the jury will consider the defendant's record as affirmative evidence of guilt, despite its theoretical restriction to impeachment, and hence will keep the defendant off the stand so that his record does not come out. However, the jury may not be aware of this possible motive for not testifying, and may accordingly misapprehend in such a case that the reason for the defendant's silence is an inability to respond to the evidence against him. To avoid this type of prejudice to an innocent defendant whose real reason for not testifying is concern about exposure of his criminal history, it is argued, the jury should not be allowed to draw adverse inferences from the defendant's silence.

One response to this argument has been to propose repealing the rule permitting impeachment of testifying defendants by prior convictions. Others have responded by arguing that requiring a choice between disclosure of a criminal record and adverse comment on silence is not more objectionable in principle than the choice that would be required in any event between disclosure of the record and bearing the adverse consequences of not testifying, or that the practical likelihood that an innocent defendant would forego the opportunity to testify in order to conceal his record is not great enough to justify a general rule.

228. See, e.g., Model Code of Evidence, Rules 106(3) and Comment, 201(3)(1942); Note, supra note 38, at 152; Swope, supra note 212, at 779-80.
against comment. In the jurisdictions that historically did permit adverse comment on silence, judges were evidently not of the view that this possibility made the procedure unfair to defendants. In Adamson v. California the Supreme Court rejected the argument that the possibility of impeachment by prior convictions made the California comment rule unconstitutional.

The issue merits a finer analysis than it has received in the historical debate. To begin with, it should be noted that the argument depends entirely on unrelated evidentiary rules—the rules that admit prior convictions if the defendant testifies but otherwise generally exclude them—which are not uniform among the states. In a state that does not admit prior convictions to impeach a defendant's testimony, the argument does not apply at all.

Moreover, even in the presence of the usual sort of impeachment rule, the argument only applies to a certain class of cases. It presupposes that the defendant does in fact have a conviction record. It also presupposes that the defendant's convictions fall within the class of offenses that are admissible under the impeachment rule. This class has traditionally been limited to felonies and crimina falsi, and contemporary rules of evidence may impose additional restrictions. For example, Fed. R. Evid. 609 imposes a general ten-year time limit on disclosable convictions. Moreover, with respect to convictions for felonies other than crimina falsi, Rule 609 conditions admission on a determination by the trial judge that the value of admission outweighs its prejudicial effect to the defendant. Finally, even where the defendant does have prior convictions that would be subject to admission under the impeachment rule, the prosecutor is not required to bring them out, and could stipulate that he would not seek their disclosure if the defendant testified. Thus, the impeachment argument is germane at most to cases in which (1) the de-

229. See, e.g., Ayer, supra note 141, at 868-69 n.121; Adamson v. California, 332 U.S. 46, 57-58 (1947); People v. Modesto, 398 P.2d 753, 763-74 (Cal. 1965); see also Adamson, supra, 332 U.S. at 60-61 (Frankfurter, J., concurring) ("Nor does it make any difference . . . that by taking the witness stand [the defendant] may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant. A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent.").


232. See Mont. R. Evid. 609 (conviction of crime not admissible to impeach any witness); Haw. R. Evid. 609 (defendant's convictions generally not admissible for impeachment).
The defendant has one or more prior convictions that fall within the general class of convictions admissible under the jurisdiction's impeachment rule, (2) the trial judge has ruled that any judgmental condition on disclosure of the defendant's convictions under the impeachment rule—such as balancing of probative value against prejudicial effect—is satisfied with respect to one or more of the convictions, and (3) the prosecutor has not stipulated that he would refrain from disclosing the convictions. The argument from the possibility of impeachment by prior convictions provides no basis at all for barring adverse comment and inferences concerning a defendant's silence in any case in which these conditions are not satisfied.

Moreover, the argument would not apply to cases in which the trier knows about the defendant's record independently of its disclosure for impeachment. This can occur under some state sentencing procedures which involve disclosing the defendant's record to the jury before it makes a determination of guilt or innocence. It can also occur in a bench trial where the judge knows independently about the defendant's record because, for example, it was disclosed at a pretrial bail hearing which the judge handled. In such cases, the defendant's motive for staying off the stand cannot be concealment of his criminal record, since the trier will know about it even if he does not testify.

More broadly, the fourth Report in this series has argued that the defendant's record of prior convictions should be uniformly admissible at trial, including cases in which the defendant does not testify. The argument from impeachment by prior convictions would not apply at all in any jurisdiction that adopted this approach. The motive for staying off the stand under such a rule could not be concealment of a conviction record, since it would be disclosed anyway.

This leaves the question of what force the impeachment argument has in the class of cases in which the defendant does have a record which would be disclosed under the impeachment rule if he testified, but which he would otherwise be able to conceal.

233. If the impeachment argument were met by permitting adverse comment only where there is not a risk of disclosure of prior convictions, the prosecutor might deem it advantageous in some cases to stipulate to the non-admission of such convictions so as to be able to comment on the defendant's failure to testify, or to increase the likelihood that the defendant will testify and be available for cross-examination.


A number of considerations limit the force of the argument in this context.

First, staying off the stand to conceal a criminal record may be a relatively attractive strategic option for the defendant under the current rules, since they bar adverse comment and attempt to prevent any adverse inference from a failure to testify. A very different strategic equation would be presented, however, if failing to testify exposed the defendant to adverse comment. Thus, any risk that an innocent defendant would stay off the stand to avoid disclosure of past convictions is at least in part a result of the current rules that shield the defendant from the normal incentives he would feel to testify. Changing the rules to permit comment would reduce any such risk.  

Second, if an innocent defendant does stay off the stand to conceal his record, it is open to question whether he typically does himself more good than harm in doing so. By encouraging the defendant’s choice of silence, the existing rules barring comment and inferences create a risk that innocent defendants with criminal records who could have cleared themselves by testifying will instead remain silent and run an increased likelihood of conviction. Any value of anti-comment rules in preventing prejudice to innocent defendants with criminal histories must be offset by this resulting jeopardy to the same class of defendants.

Third, Fed. R. Evid. 609 and many comparable state rules condition admission of a defendant’s past convictions (other than crimina falsi) on a finding by the trial judge that their evidentiary value with respect to credibility outweighs their prejudicial effect. As a practical matter, this generally creates the strongest presumption in favor of excluding convictions that are actually of the greatest probative value in establishing guilt of the currently charged offense. The fact that the conviction record admissible under this type of rule is an edited version designed to avoid a possibility of undue prejudice also reduces the likelihood that the prospect of disclosure will deter an innocent defendant from testifying. The likelihood is even more re-

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236. See Price, supra note 198, at 295.
mote under state rules that are more restrictive than the federal rule.240

Taking account of all the foregoing considerations, the impeach-ment argument would not seem adequate to justify a rule against comment and inferences from a defendant’s failure to testify, even in the class of cases in which it arguably has some application. The argument does, however, emphasize the desirability of securing the adoption of the reform proposed in the fourth Report in this series: a uniform rule of admission for the conviction records of defendants at trial, including defendants who do not testify.241 To the extent that the alleged ambiguities generated by the non-testifying defendant’s ability to conceal his record continue to be offered as the justification for an anti-comment rule, it is an example of one bad law being used to justify another.

5. The Overall Effectiveness of the Truth-Seeking Process

It has been argued that permitting comment and inferences concerning a defendant’s silence would result in a lesser overall effectiveness of the criminal justice system in discovering the truth and reaching just results. The alleged risk is that the system will generally come to rely on unreliable admissions extorted from defendants in place of better sorts of evidence or, more narrowly, that prosecutors will become less diligent in seeking other sorts of evidence (the “lazy prosecutor” argument). The source most frequently cited for this type of argument is a rationale offered by Wigmore for the defendant’s exemption at trial from being required to testify:

The real objection is that any system of administra-
tion which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and

240. For example, Rules 609 of Alaska and Iowa only admit crimina falsi for im-
peachment, and require a balancing of prejudicial effect and probative value even with respect to such offenses. Rule 609 of West Virginia limits impeachment of defendants to crimes involving perjury or false swearing.

241. See REPORT No. 4, supra note 235, Part V.
peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized. . . .

Practical experience would suggest some countervailing considerations that are not noted in this argument's generalities concerning the risk of abuse. The practical choice in many actual cases is not between getting evidence from the defendant and getting better evidence from some other source, but between getting evidence from the defendant and turning a criminal loose on society. "It is always easy to hint at mysterious means available just around the corner to catch outlaws." Moreover, there are intermediate possibilities between making a defendant's testimony compellable and barring questioning at trial without his consent. Various contemporary foreign democracies authorize the routine questioning of the defendant at trial, subject to his option of refusing to answer particular questions.

Even assuming, however, that this argument provides a valid reason for some types of self-incrimination restrictions, it does not provide any substantial objection to permitting adverse comment on the defendant's failure to testify. Comment of this type in public judicial proceedings would not create any novel risk of "bullying," much less of "physical force and torture." If the defendant did not testify, the only consequence would be comment on his silence as an incriminating circumstance. If concern over exposure to such comment resulted in a defendant's taking the stand, his examination and cross-examination would be no different in character from that of other witnesses, including defendants who decide to testify under the current rules.

242. 8 Wigmore's Evidence § 2251 n.1 at 295-96 (McNaughton rev. 1961) (quotation of Wigmore's discussion from 1940 edition). But cf. infra note 248 (sources indicating belief by Wigmore that considerations noted in argument did not apply against permitting comment on failure to testify).


244. Information about practices in foreign jurisdictions appears in Part III of this Report, and in Report No. 1, supra note 16, at Part III.

The "lazy prosecutor" aspect of the argument is also not persuasive in relation to comment on the defendant's silence. The 1938 ABA survey which found that judges in the states permitting comment believed overwhelmingly that the practice was important and beneficial also found that they believed overwhelmingly that it did not result in lesser diligence by prosecutors in investigation. 246

Considering the issue at a practical level, permitting such comment does not relieve the prosecutor of the need to seek other evidence, since he must obtain evidence sufficient to establish probable cause in order to bring the case to trial, and must produce sufficient evidence at trial to establish a prima facie case before any issue of the defendant's testifying or not testifying arises. The prosecutor also cannot go to trial with little in hand, hoping to remedy the defects in his case with the help of the defendant's testimony or silence, since he cannot anticipate with any certainty whether the defendant will testify, even if comment is permitted; cannot anticipate how helpful the defendant's testimony will be, if the defendant does testify; and cannot anticipate how probative of guilt the defendant's silence will appear to be in the context of the completed case, if the defendant does not testify. Moreover, while permitting adverse comment on silence could be expected to result in a more frequent availability of defendants for questioning at trial, this would not obviate the need for independent investigation, since "effective interrogation presupposes careful investigation." 247 An article concerning the Ohio procedure permitting adverse comment on the defendant's failure to testify had the following to say:

Under the practice of permitting an inference in Ohio, the prosecution is forced to obtain evidence sufficient to make out a case to go to the jury before it can possibly be in a position to profit by the inference. The prosecution is not tempted to go to trial without sufficient evidence with a view to the establishment of the case from defendant's own testimony. The innocent defendant is there-

246. See 63 A.B.A. REP. 570, 592-93 (1938). The survey found that 93.65% of judges regarded comment as "an important and proper aid in the administration of justice," 2.65% considered it "definitely unfair to the accused," and the rest considered it relatively unimportant. Over 85% of the judges said that it "seldom if ever causes the prosecuting attorney to be less diligent in his search for evidence of guilt." The views of the remaining judges on the diligence issue were not detailed in the report.

fore not prejudiced by reason of the fact that the prosecutor has relied upon his expected testimony and has therefore made a careless examination of other sources of proof. Without any testimony from the accused, the state must introduce sufficient evidence to cause the grand jury to return an indictment. Without the testimony of accused the state is then required to introduce sufficient admissible evidence so that a jury may find that all the essential elements of the crime charged have been proved. The prosecutor, therefore, is forced to examine others than the accused, and to make such an examination that the innocent accused has reasonable protection against being made the object of a charge in the absence of independent evidence. . . .

As far as the writer has been able to learn, the provision permitting comment upon failure of accused to testify has not led to abuse in Ohio. The prosecutor's preliminary investigation seems no less thorough and the trial no less dignified. The innocent defendant is deprived of no essential protection, and the guilty accused is deprived only of a shelter to which he is in no way entitled.248

A final point that should be noted is that permitting adverse comment would in itself increase the quantum of evidence available in criminal cases, both by increasing the proportion of defendants who testify and by permitting the defendant's silence to be considered for its natural probative value when the defendant does not testify. Even if some reduced investigation of other sources of evidence did result, the practice would be justified unless the loss of other potential evidence were so great as to outweigh the value of the evidence generated by the comment procedure in furthering the search for truth. Since there is no reason to believe that permitting adverse comment would have any significant adverse effect on the overall diligence of investigation—much less such an overriding negative effect—the "lazy prosecutor" argument simply has no force in this context.

248. Dunmore, Comment on Failure of Accused to Testify, 26 YALE L.J. 464, 469-70 (1917); see also Wigmore, Ex-Secretary Hughes on the Privilege Against Self-Incrimination, 16 J. CRIM. L. & CRIMINOLOGY 165, 166 (1925) (lazy prosecutor argument would "probably not" apply against rule permitting adverse inference from defendant's failure to testify); Heintz, Criminal Justice in Ohio, 26 J. CRIM. L. & CRIMINOLOGY 180, 180-81 (1935) (reported favorable assessment by Wigmore of Ohio rule permitting comment).
6. Other Arguments

Several other arguments have had some currency in the debate over inferences from silence. These include the contention that comment on a defendant's silence is an "inquisitorial" practice that is out of place in an "accusatorial" or "adversarial" system; that such comment violates the "presumption of innocence"; that permitting adverse inferences from the defendant's failure to testify is inconsistent with general principles governing the waiver of rights and privileges; and that considering the defendant's silence in itself compels him to be a witness against himself.

a. The "inquisitorial-accusatorial" dichotomy—Griffin v. California\textsuperscript{249} stated that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,'" which the fifth amendment outlaws. The Court cited Murphy v. Waterfront Commission\textsuperscript{250} as the source of this language. Murphy, however, involved compulsion in a straightforward and indisputable sense—contempt sanctions for refusing to answer incriminating questions—and had nothing to do with the issue in Griffin.

It has been aptly observed that this type of argument amounts to defending a restriction "by plastering a disagreeable adjective on its critics."\textsuperscript{251} The purpose is presumably to bring into play emotional reactions that go with the label. If the point of the argument is to conjure up images of the Spanish Inquisition, then it is merely inflammatory and irrational. As noted earlier, permitting adverse comment on a failure to testify is not comparable to the practices of the English inquisitions that gave rise to the self-incrimination right.\textsuperscript{252}

When the "inquisitorial-accusatorial" argument moves beyond the level of pure rhetoric, it is likely to be elaborated as the notion that the government should have to "shoulder the whole load" in a criminal case, establishing guilt without any help or cooperation from the defendant. The Constitution, however, does not say this; it only says that a person cannot be compelled to be a witness against himself. If the Constitution is taken seriously, there is a need for inquiry whether any particular incentive for cooperation by the defendant constitutes compulsion in

\textsuperscript{249} 380 U.S. 609, 614 (1965).
\textsuperscript{250} 378 U.S. 52, 55 (1964).
\textsuperscript{251} Friendly, supra note 50, at 686.
\textsuperscript{252} See supra notes 169-71 and accompanying text.
the relevant sense. Conversely, if the "compulsion" requirement is ignored, much more than comment on the defendant's silence might have to go. For example, voluntary confessions and guilty pleas also relieve the government of the need to prove guilt through evidence obtained by means independent of the defendant's cooperation.

Moreover, it is apparent that there is a broad range of contemporary practices that place pressure on the defendant to cooperate in the search for truth, or even force him to do so, in circumstances where the sought-after truth may be adverse to his personal interests. A motorist stopped by the police has a strong incentive to cooperate in a sobriety test whose results could be used against him in a criminal prosecution when the police advise him that his refusal to take the test may result in revocation of his license. A defendant or potential defendant can also be required to appear before a grand jury, to stand for an identification line-up or photograph, to give fingerprints or blood samples, to provide handwriting or voice exemplars, and to disclose before trial defenses and witnesses he intends to use at trial.253 While these particular practices may be distinguishable at a finer level of analysis from comment rules on constitutional or policy grounds, they are sufficient to show that contemporary practice rejects any general rule against encouraging or requiring the defendant to cooperate, and that adopting such a principle would invalidate many legitimate procedures and seriously impede the search for truth. If valid objections exist to comment on the defendant's silence, they must derive from some source other than slogans concerning the "accusatorial" nature of the system or the government's supposed obligation to "shoulder the whole load."

b. The presumption of innocence—It has been argued that comment on the defendant's failure to testify violates the presumption of innocence. The presumption of innocence, however, is just the principle that the defendant's guilt must be proved through evidence presented at trial.254 Nothing in the statement of the principle excludes any particular aspect of the defendant's conduct from comment and consideration at trial,255 including


255. There is no intrinsic problem in considering silence as evidence. The contrary rule for the defendant's silence at a criminal trial reflects the special restriction imposed by Griffin. See generally supra notes 172, 207; Ayer, supra note 141, at 846 n.20, 867-69.
the directly observable fact that the defendant sat in the courtroom and said nothing in response to the evidence against him. To the extent that the contrary view has gained credence among some judges and writers, it may reflect a sense that, if comment were permitted, the defendant's failure to testify would in itself create a presumption of guilt, effectively shifting the burden of proof to the defendant and obviating the need for the government to obtain or offer other proof of guilt.

This image, however, has no relationship to the realities of criminal prosecution. To initiate a prosecution and bring a case to trial, the government must establish probable cause to believe that the defendant committed the offense. At trial, the government must produce sufficient evidence to establish a prima facie case of guilt. The defense is then free to offer any competent evidence it may have in rebuttal. If the prosecutor thereafter comments on the defendant's failure to testify, that is no more in conflict with the presumption of innocence than pointing out other omissions or weaknesses in the defense's case, or pointing to other aspects of the defendant's conduct that are arguably suspicious or incriminating. This suggests that the presumption of innocence argument in this context actually masks some other type of concern, such as the rule against compelled self-incrimination or the "shoulder the whole load" notion. For reasons discussed elsewhere in this Report, these other arguments are not convincing.

Finally, it may be noted that the Supreme Court has directly addressed this issue, and has held that state rules authorizing comment on the defendant's failure to testify do not violate the presumption of innocence. The Constitution does not speak explicitly of the "presumption of innocence"; its textual berth is presumably the Constitution's general prohibition of depriving a person of life, liberty, or property without due process of law. In *Twining v. New Jersey*, however, the Court held that the New Jersey comment rule was consistent with due process. In *Adamson v. California* the Court similarly held that the California comment rule was consistent with due process, and explicitly rejected the argument that it violated the presumption of innocence. While the practical effect of *Twining* and *Adamson* has been limited by later innovations of the Court relating to the

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257. 211 U.S. 78 (1908).
258. 332 U.S. 46, 50, 58 (1947).
self-incrimination right, these aspects of their holdings have never been overruled.\textsuperscript{259}

c. \textit{Waiver of rights and privileges}— Another objection to adverse comment and inferences concerning a defendant's failure to "waive the right to remain silent" is that permitting such adverse consequences involves a departure from normal principles governing the waiver of rights or privileges. Two analogies have been suggested in this context:

First, a comparison is drawn to judicial decisions which have barred adverse inferences from a litigant's failure to waive other testimonial privileges, such as the spousal privilege or the attorney-client privilege.\textsuperscript{260} However, privileges of these sorts aim at safeguarding socially favored relationships which require trust and confidentiality for their proper operation. That protection may include avoiding the inhibition or disruption of such relationships that might result if a person could come under pressure to permit disclosure of damaging matters by the other party to the relationship, and face adverse inferences for failing to do so. In contrast, while compelled self-incrimination is prohibited, this "privilege" is not designed to safeguard any desirable social relationship, and does not otherwise set up silence by a suspect or defendant concerning the charged offense as an affirmative good. Short of compulsion, it does not bar measures that give defendants an incentive to talk, or require the state to suspend ordinary evidentiary rules to facilitate the choice of silence.

Second, a comparison is drawn to the fact that no adverse inference arises from a defendant's failure to waive other procedural rights under the Constitution, such as the right to counsel, or to a jury, or to compulsory process to obtain evidence.\textsuperscript{261} There is, however, a basic difference between most of these other procedural rights and the self-incrimination right in terms of the rationality of such an inference. For example, a defendant's decision to waive counsel and represent himself is generally good evidence of imprudence, but there is no reason to believe that exercising the right to representation by counsel indicates an enhanced probability of guilt. In contrast, the defendant's failure to explain incriminating circumstances or evi-
dence naturally raises the question of why he did not, if he was capable of doing so. Moreover, the exercise of most of the other procedural rights in the Constitution—such as the counsel right, the compulsory process right, and the right to notice of charges—plays an important role in protecting the innocent from unjust conviction, and there is accordingly a valid interest in not having comment or inference rules that would discourage their exercise. In contrast, there is no reason to believe that the option of not testifying has any net value in protecting the innocent.262

A more basic distinction lies in the textual formulation and historical understanding of these rights. The Constitution speaks of a right to the assistance of counsel and a right to a jury, for example, but does not speak of a "right to remain silent." The latter expression is only a loose and imprecise way of referring to the fifth amendment’s prohibition of compelling a person to be a witness against himself. There is no need to assess the permissibility of "burdening" the choice of silence under judicially fashioned waiver standards, because the Constitution itself specifies the relevant standard—whether the defendant was compelled to be a witness against himself. The relevant inquiry accordingly turns on the interpretation of the meaning of "compulsion" under the fifth amendment, and restrictions derived from waiver standards for other constitutional rights are inapposite. The Supreme Court has recognized this point, holding that the requirement of a "knowing and intelligent" waiver is inapplicable to the fifth amendment right, and that it cannot be violated in the absence of actual coercion or compulsion by the government.263

d. Consideration of silence as compelled self-incrimination—A final argument is that considering a defendant’s silence as evidence against him compels him to be a witness against himself. This is distinct from the argument, answered elsewhere in this Report, that the psychological pressure generated by the prospect of adverse comment on silence may "compel" the defendant to take the stand. Rather, the argument here is that taking account of the defendant’s failure to take the stand in itself amounts to compelling him to be a witness against himself:

262. See supra notes 189-212 and accompanying text.
If [the defendant] does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements.

But who has compelled whom to do what? The government does not compel the defendant to remain silent. That reflects the defendant's own choice, and permitting adverse comment on silence, far from "compelling" a choice not to testify, actually makes the option of remaining silent less attractive. The government also does not compel the defendant to inform the trier that he has failed to testify in response to the evidence against him. The trier is aware of that fact through direct observation. In the absence of compulsion, the necessary predicate for finding a fifth amendment violation is absent. In essence, the argument rests on a confusion between compelling a person to be a witness and considering certain aspects of his non-verbal conduct as evidence.

The argument is not salvaged by pointing out that, under the operation of a rule permitting comment, both courses of action open to the defendant—testifying and remaining silent—may have an incriminating effect. Comparable choices are presented under many other evidentiary rules. For example, suppose there is evidence which puts the defendant in a bad light. If he conceals or destroys it, that fact may be considered against him, but if he does not conceal or destroy it, then the evidence itself may be admitted and used against him. Similarly, if the defendant fails to testify or put on defense witnesses, then conviction may result, but if he does testify or present other witnesses, the government may elicit incriminating evidence on cross-examination.

In general, necessary choices for the defendant between potentially incriminating alternatives are a normal incident of criminal proceedings and the general rules of ev-

264. Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting); see People v. Tyler, 36 Cal. 522, 530 (1869).
267. See generally Ayer, supra note 141, at 866-69.
269. See supra note 165 and accompanying text.
idence, and do not entail any inconsistency with the fifth amendment.

B. Silence Before Trial

The case for permitting disclosure and consideration of a defendant's silence before trial is, in several respects, even stronger than the case for permitting the evidentiary consideration of the defendant's silence at trial. In historical terms, there was limited endorsement in enacted state rules of adverse comment on the defendant's failure to testify, but disclosure of pretrial silence was widely allowed.271 Depending on the case, the pretrial period may present various situations in which response or denial by the defendant could naturally be expected. While taking the stand at trial may expose the defendant to impeachment by prior convictions, talking before trial has no such effect. The desire to avoid disclosure of a criminal record through the operation of the impeachment rule accordingly cannot be the motive for pretrial silence. While the exclusionary rule for silence at trial consists of ordering the jurors not to think about a fact of which they are necessarily aware—the defendant's failure to testify—an exclusionary rule for pretrial silence produces a gap in the jurors' knowledge of the course of events in the case, actually keeping them ignorant of the fact that the defendant did not protest his innocence or make explanations or denials prior to trial. The risk of misapprehension of the defendant's motives for not talking before trial is guarded against by his subsequent opportunity at trial to explain the reasons for his earlier silence and to offer any other evidence he may have in support of that explanation. The first Report in this series argued as follows:

The case for restricting the use of . . . evidence [of pretrial silence] has been based in part on the contention that jurors are likely to overestimate the value of a defendant's silence in police custody as evidence of guilt. See United States v. Hale, 422 U.S. at 180. In assessing this contention, any resulting jeopardy to defendants who are in fact guilty may be discounted, since the guilty should be convicted. The argument accordingly must be that the admission of pretrial silence would create a substantial risk of conviction for innocent defendants, and

271. See supra notes 27-31, 45-47 and accompanying text.
that this risk is great enough to outweigh the value it would have in securing the conviction of the guilty.

No evidence has ever been offered in support of this proposition, and it would not appear to have any intrinsic plausibility to persons who are not already disposed to believe that a defendant’s silence under questioning should be concealed from the trier of fact. To the extent that it relates to a supposed propensity of jurors to error, it apparently reflects the common conceit of lawyers and judges that jurors, lacking the sagacity of lawyers and judges, are likely to go wrong if allowed to know what has actually happened in a case, and that the way to improve their thinking is to let them know less.

In concrete terms, the following occurrences would generally be required for the conviction of an innocent person to result from the admission of pretrial silence under questioning: (1) The defendant, though innocent, fails to deny the false charges or accusations against him when confronted with them by the police, or otherwise refuses to respond to the evidence against him; (2) the defendant, though innocent, does not subsequently present an exculpatory story to the prosecutor before trial, or if he does, the jury finds his later willingness to talk inadequate to mitigate the inference arising from his silence in police custody; (3) the defendant, though innocent, fails to take the stand at trial and offer some alternative explanation for his earlier silence, or offers an explanation that is sufficiently implausible that the jury discounts it, and (4) the jury finds the defendant’s silence sufficiently probative in the context of all the evidence in the case that it convicts the defendant, though he is innocent, where it would have acquitted him had his silence been concealed. Proponents of the view that this confluence of improbabilities amounts to an undue risk to the innocent would at least appear to have the burden of proof on this point.272

The general arguments that have been offered for excluding pretrial silence have usually focused on the possibility of innocent reasons for remaining silent and, as the foregoing quote indicates, alleged risks of prejudice resulting from the disclosure of silence. Arguments have also been based on special risks of un-

fairness or misapprehension that are said to arise from the *Miranda* warnings or comparable assurances to the suspect. The Supreme Court’s decision in *United States v. Hale* typifies the former approach; the decision in *Doyle v. Ohio* typifies the latter.

1. *The Argument in United States v. Hale*

*United States v. Hale* raised the question of whether a robbery suspect’s exculpatory testimony concerning the source of a large amount of cash found on his person at the time of arrest could be impeached by showing that he did not offer the same explanation to the police following his arrest. The Court, in an opinion by Justice Marshall, found the evidence inadmissible under the facts of the case. The opinion contained dicta supporting a broader presumptive inadmissibility of post-arrest silence based on the possibility of innocent explanations for silence in that context, and an alleged risk of resulting prejudice. One of these alternative reasons was reliance on the representations of the *Miranda* warnings—a special issue that will be discussed separately in the next part. Putting aside that issue for the moment, the main points made in the general discussion in *Hale* were as follows:

In most circumstances silence is so ambiguous that it is of little probative force. . . [A]n arrestee is . . . under no duty to speak. . . .

At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. . . . He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-

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custody interrogation . . . compound the difficulty of identifying the reason for silence.

In light of the many alternative explanations for [the defendant’s] pre-trial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof.

Not only is evidence of silence at the time of arrest generally not very probative of a defendant’s credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant’s previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.275

It should first be noted that the Court has not generally endorsed Hale’s sweeping dictum that in most circumstances “silence is so ambiguous that it is of little probative force.” Much depends on how the issue of exclusion or admission ultimately comes out and on which Justice happens to be writing the Court’s opinion. In the following year, for example, in Baxter v. Palmigiano,276 the Court upheld using a prisoner’s silence against him in a disciplinary proceeding, and was quite positive about the probative value of silence in that decision, including an endorsement of the assertion that “[s]ilence is often evidence of the most persuasive character.”277

Beyond the questionable nature of the general attitude toward the evidentiary use of silence that appears to underlie the opinion in Hale, questions must also be raised about its methodology of listing possible innocent reasons for silence as grounds for concealing it from the trier. Virtually any sort of suspicious circumstance or evidence may prove to be innocent when the facts of the case are fully set out. This generally does not result in its being barred in limine, so long as the normal requirement of relevance is satisfied. These points are entirely elementary, and require discussion only because they are frequently overlooked in arguments against disclosure of the defendant’s silence.

275. 422 U.S. at 176-77, 180.
277. Id. at 319. The quote was from Justice Brandeis’ opinion for the Court in Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923), relating to the use of a person’s silence against him a deportation proceeding.
For example, suppose that a defendant's identity as the perpetrator of a robbery at a store is at issue in a case, and the police find the defendant's fingerprints on a counter that the robber touched. In itself, this does not show that he is guilty. Perhaps he left prints there on some other occasion, when he came in to make a purchase, or to socialize with a cashier. Nevertheless, this fingerprint evidence is relevant and admissible because the presence of the defendant's prints on the counter makes his guilt more probable than it would be if his prints had not been found there. If an innocent explanation for this evidence is possible, the defense is free to offer it at trial, and the trier would be responsible for assessing its significance in light of the proffered explanation and the other evidence in the case.

Turning to the actual facts in Hale, Hale's failure to talk to the police was not the only arguably suspicious aspect of his conduct that was disclosed at trial. He also fled when the victim of the robbery identified him and the police approached him. Hale offered an explanation for his flight in his trial testimony, and the jury presumably took that into account in assessing its import. Nevertheless, the fact of his flight was relevant and admissible because it made his guilt more probable than it would be if he had not fled.

Returning to the issue of disclosing pretrial silence in the type of situation presented in Hale, very similar considerations apply. If the defendant had told the police when arrested the same exculpatory story he later told at trial, that fact would increase the credibility of his story and foreclose the possibility that it was concocted at a later date after the defendant had had an opportunity to think about the evidence against him, coordinate with sympathetic witnesses, and obtain the advice of counsel. Conversely, if the defendant's trial defense was not heard before trial, its credibility is not enhanced by prior consistent statements, and its novelty raises the possibility that it was a later fabrication. Silence in this context is rationally relevant to the determination of guilt or innocence because it makes the trial defense less credible than it would be if the defendant had told the same story in his initial encounters with the authorities.

Moreover, the force of this point is not limited to situations in which the defendant personally testifies and the question presented is the use of his pretrial silence to impeach his testimony. The defendant's silence can be equally relevant in assessing the credibility of defenses presented through other wit-
nesses. For example, suppose that the defendant is apprehended shortly after the commission of the offense, says nothing to the police, but later presents an alibi defense through the testimony of other witnesses at trial. Here as well, the late assertion of the defense presents a greater probability of fabrication following coordination with the witnesses supporting the defense.

Finally, while the possible motives for not talking noted in *Hale* could apply to both the guilty and the innocent, the guilty suspect generally has a reason for remaining silent that the innocent suspect does not—his inability to tell a truthful exculpatory story. Conversely, the innocent defendant generally has a motive for protesting his innocence and making explanations and denials that the guilty defendant does not—his indignation at being falsely accused of a crime he did not commit. Thus, silence in this context has a general relevance as evidence of an inability to state a truthful defense and as evidence of consciousness of guilt.

These common sense points are ignored rather than answered in the general argument in *Hale*. Perhaps an implicit response is suggested in the Court’s assertion near the end of the opinion that any probative value of silence is outweighed by the likelihood that the jury will “assign much more weight to the defendant’s previous silence than is warranted”—a risk of prejudice that is unlikely to be overcome by the defendant’s explanation of his reasons for not talking. However, the Court in *Hale* offered nothing at all in support of this assertion.

In testing the plausibility of this bare stipulation, it is useful to consider how well it plays in other contexts. Hale did have an opportunity at trial to explain why he did not tell his story to the police. All he said was that he did not think that it was necessary at that time.

Suppose the disputed evidence was not the defendant’s silence but, for example, the fact that he unexpectedly left town after the offense. Suppose further that all he offered in explanation at trial was that he did not feel that it was necessary to stay in town at that time. One could then imagine a *Hale*-minded court arguing as follows:

> In most circumstances apparent flight is so ambiguous that it is of little probative force. . . . A suspect is under no duty to stay in town. . . .

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279. *Id.* at 180.
280. See generally *supra* text accompanying note 272.
281. 422 U.S. at 174.
Faced with possible suspicion of criminality, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to flee. In general, a variety of reasons may influence the decision to go traveling. A suspect may leave out of fear or to avoid being required to incriminate another. Or a person may appear to flee when he is actually called out of town for a family emergency, or would have been leaving on a trip at that time anyway, or simply got tired of the daily grind and decided to take an unscheduled vacation. In sum, the multiplicity of motives for leaving one place and going to another compounds the difficulty of identifying the reason for apparent flight.

In light of the many alternative explanations for the defendant's departure, we do not think it sufficiently probative of an inconsistency with his innocence to warrant admission of evidence thereof.

Not only is evidence of apparent flight generally not very probative of a defendant's guilt, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's movements than is warranted. And permitting the defendant to explain the reasons for his actions is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant left town following the offense.

Or again, suppose the defendant destroyed or disposed of evidence that might have incriminated him, and at trial limited his explanation to saying that he did not think that it was necessary to preserve it. Turning again to Hale, the argument for concealing this fact from the trier is apparent:

In most circumstances the destruction of evidence is so ambiguous that it is of little probative force. . . . The defendant was under no duty to preserve evidence that might be used against him. . . .

Faced with apparently incriminating evidence, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to dispose of it. In these emotional and trying circumstances, a person may not have thought clearly about the risk of bringing suspicion on himself by destroying material that puts a false light on his actions, or
may have felt that there was no need to keep such material. He may have acted out of fear or a desire to protect another whom the material would incriminate. Or it may be that he would have disposed of the material anyway, and was not aware of its possibly incriminating character and of the suspicious nature his actions would take on with the benefit of hindsight. In sum, the many innocent reasons for destroying possibly incriminating evidence compound the difficulty of identifying the reason the defendant did so.

In light of the many alternative explanations for the defendant’s actions, we do not think it sufficiently probative of an inconsistency with his innocence to warrant admission of evidence thereof.

Not only is destruction of evidence generally not very probative of a defendant’s guilt, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant’s destruction of evidence than is warranted. And permitting the defendant to explain the reasons for his actions is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant disposed of an item that might have incriminated him.

Examples could readily be multiplied. Almost any sort of evidence, considered in the abstract, will admit alternative innocent explanations. This is surely no reason for not admitting it, subject to the defendant’s right to respond and the trier’s responsibility for assessing its import in light of all the facts disclosed in the case. Neither Hale’s laundry list of possible innocent reasons for silence, nor Hale’s unexplained and undefended assertion concerning a mysteriously irremediable prejudice resulting from the disclosure of this aspect of the defendant’s conduct, suffice to distinguish pretrial silence from other types of evidence.282 We will consider next whether the Miranda warnings provide such a distinction.

2. The Argument in Doyle v. Ohio

Under current procedures, a defendant’s statements obtained in custodial questioning are generally inadmissible unless he is

first advised that he has a right to remain silent, that anything he says can be used against him, that he has a right to consult with a lawyer before questioning and to have a lawyer with him during questioning, and that he has a right to free counsel for that purpose if he cannot retain counsel. This warning requirement is part of a broader system of procedural restrictions on police questioning that the Supreme Court created in 1966 in *Miranda v. Arizona*. The warnings requirement and the other *Miranda* restrictions are not constitutional requirements, but non-constitutional "prophylactic" measures whose purpose is to reduce the likelihood that compulsion in violation of the fifth amendment will occur in custodial questioning.

In *Doyle v. Ohio* the Court held that the *Miranda* warnings entailed a general exclusionary rule with respect to a defendant's silence in police custody following the receipt of such warnings. The use of such silence was to be barred even for purposes of impeaching the credibility of trial testimony by a defendant which presents an exculpatory story that he had not told to the police. The Court acknowledged that the *Miranda* warnings did not contain an express assurance that such adverse use of silence would not occur, but believed that "such assurance is implicit to any person who receives the warnings." In such circumstances, said the Court, the defendant's silence is "insolubly ambiguous," and it would be "fundamentally unfair and a deprivation of due process" to allow its use for impeachment.

Justice Stevens, joined in dissent by Justice Rehnquist and Justice Blackmun, sensibly pointed out that there is nothing "insoluble" about any ambiguity in a defendant's silence in this situation, since the defendant is free to explain the actual reasons why he did not talk. In *Doyle*, the dissent noted, the defendants had not in fact asserted that they remained silent in reliance on a representation they discerned in the *Miranda* warnings, but gave entirely different reasons for not talking:

[If] the *Miranda* warning . . . were the true explanation, I should think that they would have responded to the questions on cross-examination about why they had re-

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283. 384 U.S. 436.
286. Id. at 617-18.
287. Id. at 621-26
mained silent by stating that they relied on their understanding of the advice given by the arresting officers. Instead, however, they gave quite a different jumble of responses. Those responses negate the Court's presumption that their silence was induced by reliance on deceptive advice.

Since the record requires us to put to one side the Court's presumption that the defendants' silence was the product of reliance on the *Miranda* warning, the Court's due process rationale collapses. For without reliance on the [warning], the case is no different than if no warning had been given. . . .

Indeed, as a general proposition, . . . I should think that the warning would have a tendency to salvage the defendant's credibility as a witness. If the defendant is a truthful witness, and if his silence is the consequence of his understanding of the *Miranda* warning, he may explain that fact when he is on the stand. Even if he is untruthful, the availability of that explanation puts him in a better position than if he had received no warning. In my judgment, the risk that a truthful defendant will be deceived by the *Miranda* warning and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury that I cannot accept the Court's due process rationale.

There is not much to add to Justice Stevens' discussion of this issue. The *Miranda* warnings advise the suspect that he has the option of remaining silent, but do not tell him that he has to do so. If he comes forward at trial with some innocent explanation for the circumstances leading to his arrest, it remains a legitimate question why he did not offer that explanation at an earlier time. If he has an answer to this question, he is free to state it in his trial testimony.

It also bears emphasizing that the result in *Doyle* depended entirely on the Court's view that the *Miranda* warnings result in fundamental unfairness when taken in conjunction with inherently unobjectionable state rules permitting impeachment of the defendant's trial testimony by his pretrial silence. Thus, the *Miranda* warnings represent an intrinsically unrelated proce-

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dural impediment to the evidentiary use of pretrial silence, which might be compared to the effect of the rule relating to impeachment by prior convictions on the evidentiary use of silence at trial. In each case, it is argued that an intrinsically unrelated procedural or evidentiary rule clouds the significance of the defendant’s silence and makes its use unfair. In each case, modification or elimination of the unrelated rule could make the argument wholly inapplicable. One means of doing so is suggested by Justice White’s separate opinion in Hale v. United States,\(^289\) which was quoted approvingly by the Court in Doyle:

“[W]hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.”\(^290\)

The obvious implication is that Doyle’s rationale would not apply if the warnings were modified so as to make it clear to the defendant that his refusal to talk could be used against him in subsequent proceedings. Indeed, the Supreme Court was presented with this type of admonition in Baxter v. Palmigiano,\(^291\) in which a prisoner facing a disciplinary proceeding was told that “he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him.” The Court found nothing objectionable in this type of advice, and upheld the evidentiary consideration of the defendant’s silence in the proceeding.

While making it clear to the defendant that his silence could be held against him would dispel the specific concern underlying Doyle, the question would remain whether this type of notice would raise a fifth amendment (compelled self-incrimination)

289. 422 U.S. at 182-83.
290. 426 U.S. at 619 (emphasis added).
problem in a criminal prosecution. The decision in Baxter does not resolve this question, since it only addressed the use of silence as evidence in a civil proceeding, and indicated that the Griffin rule would continue to apply in criminal trials. This issue will be discussed in the recommendations part of this Report.  

III. THE LAW OF FOREIGN JURISDICTIONS

Many foreign democracies permit adverse inferences from the silence of a suspect or defendant on a broader basis than the contemporary rules in the United States. The first Report in this series examined the law relating to the questioning of the accused in several other countries, and concluded that

most of the jurisdictions surveyed clearly share the perception that society's choice not to compel a person to answer incriminating questions does not require that it also permit him to remain silent at no risk to himself, thereby—in effect—obstructing the investigation. Rather, the common view is that the trier should be allowed to draw adverse inferences from a defendant's failure to tell what he knows at some stage in the process.

The rules and practices of three jurisdictions that illustrate this point—England, France, and India—will be examined in this part.

A. England

In England, the judge, but not the prosecutor, is permitted to comment on the defendant's failure to testify at trial. As in the United States, the formulation of the basic rule in this area was part of the legislative reforms in the late nineteenth century that abrogated the defendant's testimonial incapacity:

[I]n the United States . . . when the federal statute of 1878 allowed an accused person to give evidence on his own behalf, it was provided that his failure to do so

292. See infra notes 313-19 and accompanying text.
293. REPORT No. 1, supra note 16, Part III.G; see W. SCHAEFER, supra note 50, at 70-71 (1967) ("Most nations . . . require that the silence of an accused be noted for consideration in the ultimate determination of guilt or innocence.").
should not create a presumption against him. . . . In England, those who wished to show this extreme solicitude for the acquittal of the guilty did not wholly get their way. The Act of 1898 was a compromise; it forbade counsel for the prosecution to make the damning comment upon the accused's failure to testify but permitted the judge to do so; under this compromise we live today.294

Pursuant to this authority, judges in England have been able to comment on the defendant's failure to testify for as long as he has been allowed to testify. A striking illustration is provided by the judge's charge in a well-known child abduction case from the 1930s:

Members of the jury, there is one person in this court who could tell you a great deal about the disappearance of this little child. A great deal! For it is admitted that he was with her on the evening and during the afternoon of the day on which she was last seen.

He could tell you much, and, members of the jury, he sits before you in the dock. But he has never been there [pointing to the witness-box]. Would you not think that he would be willing—nay, eager to go into the box, and on his oath tell you all he knows? But he stays where he is.

Nobody has ever seen that little girl since twelve o'clock on January 6th. Nobody knows what has become of her. . . .

There is one person in this court who knows, and he is silent. He says nothing to you at all.

The witness-box is there open and free. Why did he not come and tell you something of that strange journey beginning in the Guildhall Street, Newark, when she inquired: "How is Auntie? I should like to see Peter?"

There is one person in this world who could have made it all plain to you. There is one man in the world who knows the whole story, and when you are trying to elicit that which is true he sits there and never tells you a word.

294. G. WILLIAMS, supra note 17, at 58.
When [counsel for the defendant] says there is no evidence of what happened on January 5th and 6th I venture to ask: "Whose fault is that?"

You are not to speculate, but you are entitled to ask yourselves: "Why does he give us no information? Why is he silent when we are wondering and considering what has happened to that little girl?" 295

Under more recent English practice, the nature of the comment to be made remains largely in the discretion of the trial judge, taking account of the strength of the government's evidence and the significance of the defendant's failure to respond to it under the facts of the case. 296

In relation to pretrial silence, a distinction is drawn between pre-warning and post-warning silence. The police are generally required to inform a suspect before questioning that he does not have to talk, and that his statements may be used as evidence. 297

"If, prior to the warning a suspect and police officer are speaking on even terms, and the officer makes an accusation against the suspect which an innocent person would be expected to deny, the suspect's silence may be used as an acknowledgement that the accusation is true." In the ordinary situation, in which the suspect is not on an equal footing with the police, such an inference is not thought to be warranted, but evidence of the suspect's silence remains "part of the circumstances which the court has to take into account when assessing the evidence." 298

Adverse comment on the defendant's silence after he has received the standard warning is not permitted. However, the fact that the defendant did not talk before trial is not concealed from the jury, and it is widely assumed that that fact will be considered against him as a practical matter:

Once a suspect has been cautioned, courts hold that it is "unsafe to use his silence against him for any purpose whatever." Consequently . . . English courts hold that the judge should not, by adverse comment or otherwise, invite the jury to draw inferences from an accused's exercise of his right to silence. In fact, the judge should in-

295. Quoted in G. Williams, supra note 17, at 59-60. See generally id. at 57-63.
298. Id. at 11-12.
struct the jury that they must not draw an inference of guilt from such silence. Unlike American practice, however, English courts restrict only comments about the evidence of silence; they do not exclude the evidence itself. As a consequence, the jury is fully aware that the defendant refused to answer questions when cautioned and interrogated by the police . . . .

In summary, because the English rule against drawing adverse inferences from a defendant's post-warning silence does not affect the admissibility of evidence, but only controls what the judge and prosecutor may say to the jury, it is considered wise for English suspects to make statements when cautioned and questioned by police. In contrast, in the United States, the pressures on suspects in this context are considerably diminished by the knowledge that ordinarily the jury will remain ignorant of a refusal to talk to the police.299

B. France

French law provides multiple opportunities for questioning the defendant, and freely permits adverse inferences to be drawn from a refusal to respond. Suspects may be detained for questioning by the police. Subsequent questioning by a magistrate may also occur. The magistrate is required to advise the defendant of the charges and to inform him that he is not required to talk. The defendant is also provided with counsel at this stage. The magistrate is free to question him, however, and he may not confer with his attorney prior to answering particular questions. A refusal by the defendant to answer would result in adverse inferences being drawn by the magistrate, and later by the court at trial.

French criminal cases are tried before judges alone, or in more serious cases before a mixed tribunal comprising three judges and a lay “jury.” The judges have at their disposal a dossier containing the results of earlier investigative efforts, including the pretrial interrogation of the defendant. The trial opens with the questioning of the defendant by the presiding judge. The defendant may refuse to answer, but that option would involve remaining silent in the face of direct questioning in the presence

299. Id. at 13-15.
of the trier, and it is rarely exercised. If the defendant does fail to respond, the "French judge is free to . . . comment to the jury upon [his] reticence and evasiveness," and his silence "exposes [him] to whatever inferences the court chooses to draw." 300

C. India

In India, the trial provides the primary opportunity for eliciting testimonial evidence from the defendant. 301 Trials are usually conducted by a judge alone, but juries are used in some restricted geographic areas. The defendant is free to refrain from taking the stand and testifying under oath, and comment is not allowed on his failure to do so. However, the judge is allowed to question the unsworn defendant at any time during the trial, and is required to do so—at least if the defendant is not represented by counsel—at the end of the presentation of the prosecution's case. This procedure serves to enable the accused "to explain any circumstances appearing in the evidence against him," and the judge, to this end, is required to question the defendant "separately about each material circumstance which is intended to be used against him." Questioning by the judge operates to the detriment of guilty defendants—as well as serving as a shield to the innocent—since the code of criminal procedure specifies that the court or jury may draw any inference they consider just from a refusal to answer or from a false answer. 302

IV. RECOMMENDATIONS FOR REFORM

The import of the study and discussion in the earlier portions of this Report may be summarized as follows: The existing rules


301. The defendant's pretrial admissions to the police are generally inadmissible. However, if a confession leads to corroborating evidence, the evidence, along with the portion of the defendant's statement relating to it, is admissible. See Developments in the Law—Confessions, supra note 47, at 1106, 1108.

that bar or limit the evidentiary consideration of a defendant's silence in criminal cases are not required by the Constitution and are not warranted as a matter of policy. These rules impede the conviction of the guilty. There is no reason to believe that they have any countervailing value in protecting the innocent from unjust conviction; they may well have the opposite effect. The practice of other democracies does not support the view that such rules are necessary to a fair or civilized system of justice. In short, they are unjustified impediments to the search for truth.

We accordingly recommend that the Department of Justice seek to change these rules. Optimally, the trier should be free to consider the defendant's silence on the same footing as other aspects of his conduct which have a bearing on the probability of guilt or innocence. Given the dominant policy-making role that the Supreme Court has assumed in this area, the main implications are for the Department's litigation program.

First, the Department should seek to persuade the Supreme Court to limit or overrule *Griffin v. California.* The desirable initial position in litigation would be to argue that adverse comment on the defendant's failure to testify should be allowed in cases in which testimony by the defendant would not expose him to impeachment by prior convictions.

Second, the Department should seek to persuade the Court to authorize broader disclosure at trial of the defendant's pretrial silence to impeach his trial testimony. The most promising approach would be to argue that the restriction of *Doyle v. Ohio* does not apply if the defendant had been put on notice that his failure to talk could be used against him.

Third, the Department should seek to persuade the Court to authorize the use of the defendant's pretrial silence at trial for purposes other than impeachment of his trial testimony. It could be argued that silence should be admissible as evidence in the government's case in chief in a clear "adoptive admissions" situation, or should be admissible in a situation in which it has a specific bearing on the credibility of a defense presented through other witnesses.

The basis for these specific recommendations and the practical considerations bearing on the selection of test cases are discussed in the remainder of this part.

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A. Limiting Or Overruling Griffin v. California

Section 3481 of Title 18 of the United States Code makes the defendant a competent witness but provides that his failure to testify "shall not create any presumption against him." This limits the possibility of finding a suitable test case for limiting or overruling Griffin in federal proceedings. If a federal judge or prosecutor commented on the defendant's failure to testify, the Court could find that to be in violation of the statute, obviating the need to address the constitutional issue. The more likely avenue for raising the issue before the Court would be amicus participation in a state case in which adverse comment had occurred, but the state courts had not ruled that the comment was in conflict with any provision of state law.

The most important constraint on such a test case is that it should be a case in which it is clear that the defendant could not have been motivated to stay off the stand by a desire to avoid disclosure of his prior convictions. This condition would be satisfied in any case from a state that generally bars disclosure of the defendant's criminal record for impeachment. It would also be satisfied in any case in which the record of the trial or related sentencing proceedings showed that (1) the defendant did not have any criminal record, or (2) the defendant's convictions did not fall within the general class of offenses admissible under the state's impeachment rule, or (3) the trial judge had ruled that the defendant's prior convictions would not be admissible if he testified, or (4) the defendant's record would have been disclosed to the trier prior to a verdict even if he did not testify.\(^\text{305}\) The position that should be taken in such a case is that Griffin should be held inapplicable in cases in which the concern over impeachment by prior convictions does not exist. This approach serves several purposes:

First, in the historical debate over comment on silence, the point that has been most strongly and frequently urged against the fairness of such a procedure is that it would prejudice the defendant where he actually stayed off the stand to avoid disclosure of past convictions, but the jury might assume that his silence resulted from an inability to respond to the evidence.\(^\text{306}\) Framing an initial challenge to Griffin as suggested would avoid this complicating factor.

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305. See generally supra notes 232-35 and accompanying text.
306. See generally supra notes 227-31 and accompanying text.
Second, in addressing procedural or evidentiary rules that circumscribe or discourage the defendant's choice of silence, the Court has been disposed to uphold them against fifth amendment challenges if they appeared to serve some legitimate truth-promoting function. Such rules have generally not been regarded as "penalties" or "impermissible burdens" on the choice of silence. However, it has been argued that inferring an increased likelihood of guilt from silence is not legitimate or reasonable where the defendant may have been motivated by fear of exposure of his criminal record, and that permitting such an inference is accordingly not a valid truth-promoting mechanism. Limiting an initial challenge to Griffin to cases in which impeachment by prior convictions is not an issue would make this argument inapplicable and permit the maximum utilization of other precedents in which the Court has upheld truth-promoting rules that generate informal pressures to testify.\textsuperscript{307}

Third, exclusion of the problem of impeachment by prior convictions would provide a specific distinction from both Carter v. Kentucky\textsuperscript{308} and Griffin v. California.\textsuperscript{309} In Griffin, the defendant did have serious prior convictions and would have been exposed to impeachment if he had testified.\textsuperscript{310} The Court's opinion in that case pointed to the possibility of impeachment by prior convictions as part of its rebuttal to the argument that adverse inferences from the defendant's silence concerning matters peculiarly within his knowledge are "natural and irresistible," as opposed to being an unconstitutional penalty.\textsuperscript{311} In Carter, the Court discussed and quoted specific material from the trial record which showed that the defendant had a lengthy criminal record and suggested that concern over its disclosure influenced his decision not to testify.\textsuperscript{312} Neither case actually presented the question whether adverse comment would be constitutional in the absence of this complicating factor. Excluding this factor would accordingly make it possible to argue for a distinction or limitation of these decisions, as opposed to carrying the heavier burden of arguing that they should simply be overruled.

While the ostensibly "constitutional" nature of the Griffin rule makes litigation the only feasible means of changing it, there is a legislative reform that would be a useful adjunct to

\textsuperscript{307} See generally supra notes 216-26 and accompanying text.
\textsuperscript{308} 450 U.S. 288 (1981).
\textsuperscript{309} 380 U.S. 609 (1965).
\textsuperscript{310} See Brief for Petitioner at 1-3, 10-11, Griffin v. California, 380 U.S. 609 (1965).
\textsuperscript{311} See 380 U.S. at 614-15.
\textsuperscript{312} See 450 U.S. at 292-94 & n.4; see also id. at 300 n.15.
such an effort—repealing the final sentence of 18 U.S.C. § 3481, which bars an adverse presumption from the defendant's failure to testify. Changing the statute would not have any immediate practical effect in light of Griffin. However, since such a change would remove the statutory basis for excluding comment and inferences concerning the defendant's failure to testify, it would make it more feasible to draw on federal prosecutions for test cases in which the constitutional issue could be raised and decided. Moreover, the decisions in Griffin and Carter pointed to earlier decisions applying the statutory no-presumption rule of section 3481 as supporting the creation of those decisions' "constitutional" rules. The withdrawal of legislative support for the no-presumption rule could have the converse effect of strengthening the case for reconsidering the constitutional issue. An amendment of this sort to section 3481 might be proposed as part of a broader package of criminal justice reforms.

B. Broader Use Of Pretrial Silence For Impeachment

The decision in Doyle v. Ohio313 is the main impediment under current law to the use of a defendant's pretrial silence to impeach his testimony at trial. In that case, the Court held that disclosure of pretrial silence by a defendant following his receipt of Miranda warnings would be fundamentally unfair and a denial of due process, based on the Court's view that the warnings carry an implicit representation that no such use of silence will occur. In the absence of Miranda warnings, however, the Court has made it clear that it sees no constitutional problem in using either pre-arrest or post-arrest silence for impeachment.314

Thus, there would be no due process problem in using a defendant's pretrial silence as evidence at trial, even if he were given some type of warnings, so long as it were made clear to him that his failure to talk could be put to such use. This point is implicit in the rationales of the foregoing decisions. It also draws support from language in the Doyle opinion, and from the Court's holding in Baxter v. Palmigiano315 that there was noth-

314. See Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982). In light of these decisions, dicta in Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966), and Baxter v. Palmigiano, 425 U.S. 308, 317 (1976), stating that the Griffin rule would apply to pretrial silence, could at most be understood as relating only to the use of such silence for purposes other than impeachment.
ing wrong with telling a prisoner facing disciplinary proceedings that "he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him." Comparable situations involving suspects facing criminal charges might arise through deliberate changes in the warnings given in that context, as recommended in the first Report in this series. Situations of this type might also arise less formally where an officer gives the standard Miranda warnings, but also makes other remarks which effectively tell the suspect that his silence will be held against him, or where the standard warnings have been given, but the suspect himself makes statements which demonstrate that he expects that his silence will be used against him.

The question would remain whether there would be a problem in such cases in light of the fifth amendment's prohibition of compelled self-incrimination. In Jenkins v. Anderson, however, the Court explicitly considered and rejected the argument that pretrial silence should be inadmissible for impeachment because "a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." In other words, the Court rejected the notion that any psychological pressure which might be generated by the prospect of having one's silence used for impeachment constitutes compelled self-incrimination in the sense of the fifth amendment. Since advising a suspect that his silence may impair the credibility of a story told later on only makes this prospect explicit, Jenkins provides a strong response to objections to such an admonition on fifth amendment grounds.

C. Use Of Pretrial Silence For Other Purposes

There have been some dicta in the Court's post-Griffin decisions bearing on the applicability of the Griffin rule to the use of

316. See supra notes 288-92 and accompanying text.
317. See Report No. 1, supra note 16, Part IV.D.1 (suggesting that Doyle problem be avoided by revising warnings to advise suspect that his failure to talk would make a story or explanation offered later on less credible); see also Criminal Law Revision Committee, Eleventh Report—Evidence (General), 1972, Cmnd. No. 4991, at 25-26 (comparable admonition in English law reform proposal).
318. The Department has already noted in a brief before the Supreme Court that using the defendant's pretrial silence would be consistent with Doyle "if the defendant were told that his silence at the time of arrest could be used against him at trial." Brief for Petitioner at 26-27 n.15, United States v. Robinson, 485 U.S. 25 (1988).
319. 447 U.S. at 236-38.
pretrial silence for purposes other than impeachment of the defendant's trial testimony, but no holdings on this general question. The decisions sanctioning the use of pretrial silence for impeachment are not directly on point, since they rest in part on the rationale that the government can validly make the defendant's "waiver" of the fifth amendment right when he decides to testify an all-or-nothing proposition, including exposure to impeachment by earlier silence. They do not determine what the rule should be when the defendant has decided not to testify, and admission of his pretrial silence is sought for some other bearing it has on the probability of guilt or innocence.

The precedents that would be most strongly urged against the admissibility of silence in such a case are *Griffin v. California* and *Carter v. Kentucky*. However, even assuming that these decisions remain in effect, comment or inferences concerning silence at trial and disclosure of pretrial silence are distinguishable in several respects:

First, there is a distinction in terms of historical support for the respective practices. While the rules barring comment on the defendant's silence at trial were frequently criticized, relatively few states actually adopted a contrary rule. In contrast, consideration of pretrial silence was widely allowed, and was not limited to disclosure of such silence to impeach the defendant's trial testimony. The disclosure of pretrial silence pursuant to the common law preliminary examination procedure pre-dated the authorization of testimony at trial by the defendant. The later admission of pretrial silence pursuant to the adoptive admissions doctrine was also not limited to the use of silence for impeachment.320

Second, the Court has generally been willing to uphold rules discouraging or circumscribing the choice of silence if they were perceived as serving some legitimate truth-promoting function.321 *Griffin* and *Carter* represent a departure from the general course of decisions in this area, and might be understood as reflecting a view that permitting adverse comment on the defendant's silence at trial is not a legitimate truth-promoting measure, but carries substantial risks of prejudice and misapprehension. The most strongly and frequently urged possibility is that the defendant may actually stay off the stand to avoid disclosure of his criminal record pursuant to the impeachment rule, but the jury in such a case may misapprehend that his silence

320. See generally supra notes 27-31, 45-47 and accompanying text.
321. See generally supra notes 216-26 and accompanying text.
reflects an inability to respond to the evidence. This concern does not apply in relation to pretrial silence, since talking before trial does not result in disclosure of the defendant's criminal record at trial, and apprehension about such a disclosure accordingly cannot be the motive for pretrial silence. More generally, the risk of misapprehension of the reason for pretrial silence is minimized by the fact that the defendant is free to take the stand at trial and explain the reason for his silence at an earlier point.322

Third, the decision whether to take the stand at trial may be considered a particularly sensitive choice in relation to fifth amendment values, since it entails an exposure to compulsion at the stage of cross-examination. The testifying defendant is not free to limit his disclosure, but must answer the prosecutor's questions. In contrast, a defendant or potential defendant who talks in an informal setting before trial—for example, in questioning by the police either before or after arrest—can say as much or as little as he likes, and is not subject to compulsion to respond.

Finally, there is a strong policy argument for admitting pretrial silence for other purposes, as well as for impeachment, since a contrary rule would create a disincentive to testimony by the defendant. The first Report in this series observed:

[A] rule admitting pretrial silence when the defendant takes the stand but not otherwise would create a perverse incentive to refrain from testifying. Since the defendant—whether innocent or guilty—is normally the person who knows the most about the truth of the charges against him, it is desirable to have him available for examination at trial, and detrimental to the discovery of truth if evidentiary rules are so devised as to discourage him from taking the stand.323

Turning to practical considerations relating to the selection of test cases, an obvious constraint is that any case selected should not be one in which the defendant has received Miranda warnings prior to the relevant period of silence. The warnings would bring into play the rule of Doyle v. Ohio, which applies to bar the use of pretrial silence as evidence in the government's case in chief,324 as well as for impeachment.

322. See generally supra notes 271-82 and accompanying text.
In general, a defendant’s silence before trial may be relevant as evidence of an inability to tell a truthful exculpatory story and as evidence of consciousness of guilt.\textsuperscript{325} The issue would be presented most favorably, however, if the defendant’s silence also had some more specific probative force. Two possibilities may be noted:

First, a classic “adoptive admissions” situation would present a favorable type of test case—for example, a case in which the defendant is directly confronted by a victim or witness who identifies him as the perpetrator, or a case in which the defendant’s accomplice makes a confession in his presence which implicates the defendant, but the defendant makes no denial. The probative value of silence in such circumstances is particularly great, and excluding it would require a partial invalidation of an ancient evidentiary doctrine that the Court has applied in the past, and whose general validity the Court has continued to endorse.\textsuperscript{326}

Second, silence in some cases has a specific bearing on the credibility of a defense presented through other witnesses. Returning to an example suggested earlier,\textsuperscript{327} suppose that a defendant is arrested shortly after the occurrence of an offense and says nothing at the time of arrest, but later presents an alibi defense at trial through other witnesses. The defendant’s pretrial silence in such a case raises the possibility that the alibi defense was concocted at a later point, after the defendant had had an opportunity to line up the witnesses. In this type of case as well, the failure of the defendant to make a statement at an early point has a specific relevance to the issues in the case, in addition to its general relevance as evidence of consciousness of guilt or an inability to respond truthfully to the charges.

CONCLUSION

Few would deny that there cannot be justice without the reliable discovery of the truth on a regular basis, but many features of current criminal procedure reflect a willingness to subordinate the search for truth to other ends. Any constraints on the dis-

\textsuperscript{325} See generally supra text accompanying notes 278-80.
\textsuperscript{326} See Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (endorsing adoptive admissions doctrine and other evidentiary consideration of silence); Sparf and Hansen v. United States, 156 U.S. 51, 56 (1895) (admitting accomplice’s confession under adoptive admissions doctrine).
\textsuperscript{327} See supra text accompanying notes 278-80.
covery or use of evidence that the Constitution actually prescribes must, of course, be scrupulously observed. It is a very different matter, however, to create new "rights," based on misinterpretations of the Constitution, which limit legislative discretion in seeking to improve the processes of justice for the benefit of the whole public, and impede government in discharging its primary mission of ensuring the security of its people in their lives and liberty:

Truth here is the aim . . . . When the guilty go undetected, or, if detected, are nonetheless set free because plain evidence of guilt is suppressed, the price is exacted from what must be the first right of the individual, the right to be protected from criminal attack in his home, in his work, and in the streets. Government is constituted to provide law and order. The Bill of Rights must be understood in the light of that mission.

There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will . . . . Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself.328

In particular, the fifth amendment does not state or fairly imply that rules must be adopted to protect the defendant from the inferences which are normally drawn from silence in the face of incriminating circumstances. The rules which have been adopted to that end can accurately be described as self-inflicted wounds of the contemporary criminal justice process.

As Ernest van den Haag has observed, conducting a criminal trial without the testimony of the defendant is like playing Hamlet without the prince. Yet the existing rules are designed to facilitate the reduction of the principal actor in the courtroom drama to a mute presence. Under Griffin v. California, adverse comment on the defendant's failure to testify is barred. Carter v. Kentucky goes further and entitles the defendant to an affirmative instruction to the jury that no inference is to be drawn from his failure to say what he knows—an effort to enlist the jurors in

the "process of nullifying [their] own reasoning powers." There are comparable constraints on the consideration of pre-trial silence. Under the Miranda procedures, a suspect in custody cannot be asked questions unless he consents to questioning, and under Doyle v. Ohio, silence subsequent to the warnings must be concealed from the trier. The general principle is that the defendant is not to be questioned in the most important investigative and adjudicative contexts unless he deems it in his interest to be questioned, and that his failure to speak in these contexts cannot be considered against him.

"If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security?" There is no impediment in constitutional principle or sound policy to rectifying the situation by allowing the normal incentives to respond to charges of serious misconduct to operate, and by permitting natural inferences to be drawn if no response is forthcoming. The current system, however, does its best to eliminate both the inferences and the incentives. Correcting this anomaly would produce a more rational and just criminal justice system. It would deprive "[t]he innocent defendant . . . of no essential protection and the guilty accused . . . only of a shelter to which he is in no way entitled."

329. 8 Wigmore's Evidence § 2272, at 436 (McNaughton rev. 1961).
331. Dunmore, supra note 248, at 470.