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Commentary by Co-Defendant’s Counsel on Defendant’s Refusal To Testify: A Violation of the Privilege Against Self-Incrimination?

The fifth amendment of the United States Constitution protects the individual from being compelled in any criminal case to testify against himself.¹ Under the framework of the American criminal justice system, the state bears the full responsibility for proving the defendant’s guilt beyond a reasonable doubt. The fifth amendment ensures that in this endeavor the defendant will not be forced to aid or contribute to the state’s case. Furthermore, the defendant’s choice to remain silent at his trial should not influence the traditional presumption of innocence.² The jury is typically instructed that a defendant is presumed innocent independent of his decision to testify.³

The defendant’s decision on whether to testify is by no means an easy one. If he takes the stand he risks that his appearance or mannerisms may prejudice the jury against him and that his prior criminal convictions may be highlighted.⁴ Additionally, the defendant faces the prosecutor’s clever questioning and the associated strain, embarrassment, and confusion. On the other hand, if a defendant chooses not to testify he risks jury speculation about his motivations for remaining silent, speculation which often, and some argue justifiably, runs to a presumption of guilt.⁵

Compounding the defendant’s dilemma is the possibility that the prosecutor or a co-defendant’s counsel will comment to the jury on his decision to remain silent. The Supreme Court has held prosecutorial comments on a defendant’s courtroom silence to be a violation of a defendant’s fifth amendment rights.⁶ A similar threat to a defendant’s privileged silence arises in multiple-defendant criminal trials when the attorney for one of the testifying defendants contrasts his client’s willingness to testify with another defendant’s silence. The suggestion to

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1. The fifth amendment states, in relevant part, “nor shall [any person] be compelled in any criminal case to be a witness against himself . . . .” U.S. CONST. amend. V.
3. See Carter v. Kentucky, 450 U.S. 288 (1981) (nontestifying defendant has a constitutional right to a jury instruction that explains the invocation of the fifth amendment does not affect the presumption of innocence until proved guilty).
4. See infra notes 39-42 and accompanying text.
5. See infra note 37 and accompanying text.
the jury that the act of testifying should be rewarded while the decision to exercise a constitutional right should be penalized is deeply troubling.

Currently, the circuits are divided on whether comments by co-defendants' counsel on a defendant's silence impair that defendant's fifth amendment rights. Furthermore, among the circuits that regard such commentary as potentially prejudicial, disagreement exists over the proper test for identifying such comments. This Note asserts that the risk of prejudicing a defendant's fifth amendment rights is too great to allow counsel any comment on a defendant's decision to testify or to remain silent.

Part I of this Note examines the historical evolution of the privilege against self-incrimination and the policy goals behind the privilege. The Note argues that prohibiting comments on silence by co-defendant's counsel is consistent with the fifth amendment's historical purpose and subsequent interpretation. Part II considers the Supreme Court's decision in Griffin v. California and later decisions concerning commentary on courtroom silence and applies analytical models derived from these decisions to the issue of co-defendant's commentary. Finally, Part III examines the circuit courts' attempts to define a standard for identifying comments made by co-defendant's counsel that prejudice a defendant's privileged silence. This Part concludes by demonstrating the insufficiency of the current tests and by advocating a new standard which prohibits all commentary on the act of testifying or on the limitations imposed on some defendants by another defendant's silence.

I. HISTORICAL PURPOSES OF THE FIFTH AMENDMENT

Analysis of prejudicial comment by a co-defendant's counsel on a defendant's refusal to testify must begin with an examination of the fifth amendment's privilege against self-incrimination. A relatively brief clause, it provides: "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ." To understand

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7. The Sixth Circuit has rejected fifth amendment challenges to comments on defendant's silence made by co-defendant's counsel. See, e.g., United States v. Griffith, 756 F.2d 1244 (6th Cir.), cert. denied, 474 U.S. 837 (1985). The First, Fifth, Tenth, and Eleventh Circuits have allowed fifth amendment challenges to co-defendant's comments on silence, using a variety of standards to identify such comments. See, e.g., United States v. Mena, 863 F.2d 1522 (11th Cir.), cert. denied, 110 S. Ct. 110 (1989); United States v. McClure, 734 F.2d 484 (10th Cir. 1984); United States v. Berkowitz, 662 F.2d 1127 (5th Cir. 1981); United States v. Cain, 544 F.2d 1113 (1st Cir. 1976). See infra Part III.

8. 380 U.S. 609 (1965) (holding that a prosecutor's comments on a defendant's decision not to testify violate the defendant's fifth amendment rights).

9. See Moreland, Historical Background and Implications of the Privilege Against Self-Incrimination, 44 KY. L.J. 267, 267 (1956) ("A study of the privilege against self-incrimination, as with other issues involving the law, should begin with a history of the privilege.").

10. U.S. CONST. amend. V.
how such an opaque command could conceivably be violated by courtroom commentary on someone's refusal to testify, it is helpful to examine the evolution of the fifth amendment and its historic purpose.\(^{11}\)

This Part explores the development of the privilege against self-incrimination. First, this Part traces the historical common law development of the privilege. The discussion focuses on the language of the privilege as ultimately adopted in the fifth amendment. Next, the theoretical justifications for the privilege offered by courts and commentators are examined. Finally, this Part reviews the Supreme Court's treatment of the privilege against self-incrimination and concludes that the prohibition of courtroom commentary on a defendant's silence by his co-defendant's counsel is consistent with the privilege's historical purpose and judicial interpretation.

A. *Historical Development of the Fifth Amendment*

An examination of the origins and maturation of the privilege against self-incrimination adds insight into its scope. In this vein, Judge Wisdom of the Fifth Circuit, in a grand homage to the fifth amendment, once wrote: "The history of the development of the right of silence is a history of accretions, not of an avulsion."\(^{12}\)

The concept of an accused's privilege against self-incrimination extends as far back as the twelfth century.\(^{13}\) During this period, bishops attempted to question suspects about a range of offenses, while the king sought to limit the bishops' questioning to purely ecclesiastical subjects.\(^{14}\) In the sixteenth century the privilege arose with respect to the English Court of High Commission. That court claimed to have inherited from the ecclesiastical courts of the middle ages the right to administer the so-called "oath *ex officio.*" Persons who had fallen under suspicion regarding their faith or morals were required to take this oath, and a refusal to do so was taken as confession of the offense charged. While there is some debate over the scope of the privilege at this time, the Latin maxim "*Nemo tenetur prodere se ipsum*" — "no one should be required to accuse himself" — emerged as a frequent protest against the "oath."\(^{15}\) Despite this maxim, the period was marked by the use of torture to extract testimony and confessions from criminal suspects.\(^{16}\) By the 1700s, however, it was settled under

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11. In the words of Justice Frankfurter: "The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

12. De Luna v. United States, 308 F.2d 140, 144 (5th Cir. 1962) (footnote omitted).


14. Id.

15. See De Luna, 308 F.2d at 147 n.17; E. Griswold, supra note 13, at 2; Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 3-4 (1930).

16. See Z. Chafee, The Blessings of Liberty 188 (1954); E. Griswold, supra note 13,
the English common law that no person could be required under oath to answer questions posed to him by a court.17

The Puritans who settled America carried with them strong opposition to the inquisitorial system of justice.18 Trials conducted in Massachusetts as early as 1637 provide evidence of the privilege.19 Other groups of settlers also strove to set the new colonies on a distinct course away from forced confessions. Section 8 of the Virginia Declaration of Rights of 1776 provides that a person may not "be compelled to give evidence against himself,"20 and by 1784 six other state constitutions had granted a similar privilege against self-incrimination.21

James Madison proposed the privilege against self-incrimination at the Constitutional Convention in 1789.22 With regard to this proposal, Professor Levy has noted:

In presenting his amendments, Madison said nothing whatever that explained his intentions concerning the self-incrimination clause. Nor do his papers or correspondence illuminate his meaning. We have only the language of his proposal, and that revealed an intent to incorporate into the Constitution the whole scope of the common-law right.23

Yet, Professor Levy does note that by placing this privilege in the Bill of Rights the Framers "were once again sounding the tocsin against the dangers of government oppression of the individual . . . ."24 Professor Levy concludes:

Above all, the Fifth Amendment reflected [the Framers'] judgment that in a free society, based on respect for the individual, the determination of

at 2; L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 33-35 (1968) (torture used during preliminary examination by justice of the peace and by Privy Council and the Court of the Star Chamber). But see Ellis, Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment, 55 IOWA L. REV. 829, 835 (1970) (noting that torture was prohibited under the common law).

17. See De Luna, 308 F.2d at 148; E. GRISWOLD, supra note 13, at 3-4; L. LEVY, supra note 16, at 313; Corwin, supra note 15, at 9.


20. VA. DECL. OF RIGHTS § 8 (1776). The modern constitution of Virginia incorporated this pronouncement and now prohibits compulsion "in any criminal proceeding." See VA. CONST. art. I, § 8; see also L. LEVY, supra note 16, at 405-06; Pittman, supra note 18, at 787-88.


22. L. LEVY, supra note 16, at 422. Professor Chafee notes that in 1788 Patrick Henry opposed the ratification of the Constitution because it failed to include a privilege against self-incrimination. Henry protested that without such a protection "Congress may introduce the practice of torturing to extort a confession of the crime." Chafee concludes that one reason for including the clause against self-incrimination in the Bill of Rights was to quiet such objections. Z. CHAFEES, supra note 16, at 188.

23. L. LEVY, supra note 16, at 423; see also McKay, Self-Incrimination and the New Privacy, 1967 SUP. CT. REV. 193, 194 (noting the dearth of historical information on the fifth amendment).

guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty.25

The evolution of the fifth amendment protection against self-incrimination does little to indicate its application to the present problem. The language of the clause does, however, suggest a broad reading of the right. The amendment proposed by Madison and ultimately ratified by the states from 1789 to 1791 is "far more comprehensive than a [mere] prohibition against self-incrimination."26 By its very terms the clause proscribes compulsion to be a witness against oneself. Consequently, a criminal defendant does not need to fear criminal prosecution to invoke the right; aversion to public disgrace or fear of public speaking are sufficient reasons for choosing not to testify. With this rather empty historical record and the broad language of the amendment, one notion is clear: no evidence exists that the fifth amendment does not apply to co-defendant commentary on silence.

B. Policy Goals Behind the Privilege

Identifying the policy goals behind the privilege against self-incrimination is cumbersome, yet critical. The dozen or so words in the Bill of Rights provide little guidance, and the privilege's dyspeptic path through history is no more enlightening.27 In determining how to construe the privilege it is best to look at the policies that legal commentators and the courts have advanced as its justification.

Professor Wigmore, in his famous treatise on evidence, identifies twelve policy justifications in support of the privilege advanced by legal scholars ranging from Jeremy Bentham to Dean Erwin Griswold.28 Wigmore rejects eight of these twelve reasons as "makeweights," "platitudes," and repetitions of other policy goals, and concludes that only four merit serious consideration.29 The four justifications that truly provide support for the fifth amendment are: (1) the prevention of torture, by which Wigmore means the coercive use of inhumane force (psychological or emotional) to overcome a witness'...

25. Id. at 432; see also Pittman, supra note 18, at 789 ("The provision . . . against compulsory self-incrimination not only was an answer to numerous instances of colonial misrule but also was a shield against the evils that lurk in the shadows of a new and untried sovereignty.").


27. As one commentator has noted: "it is now generally agreed that the 'noble principle' of the privilege 'transcends its origins.' " McKay, supra note 23, at 195.


29. The eight justifications for the privilege dismissed by Prof. Wigmore are:
reluctance to disclose; (2) a means to frustrate "bad laws" and "bad procedure," especially in the area of political and religious beliefs; (3) protection against vague charges, and unprincipled inquiry into matters of dubious social concern; and (4) the assurance of a fair balance of power between the individual and the government that forces the government to leave an individual alone until it has, relying entirely on its own means, developed sufficient proof of wrongdoing.

It is from the last policy rationale that one can confidently defend the applicability of fifth amendment protection to a defendant whose silence has been remarked upon by a co-defendant's counsel. With respect to the fourth policy, Justice Fortas has commented that, "[t]he principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. . . . A sovereign state . . . has no right to compel the sovereign individual to surrender or impair his right of self-defense." To this body of policy, Professor Ayer has added: "The concept of an adversary trial, with the judge acting primarily as a referee in a struggle between equals — indeed between sovereigns — carries into practice this idea of equality in a way that the inquisitorial system of the civil-law countries does not." 35

Allowing a co-defendant to draw into question another defendant's refusal to testify produces a perception of unfairness. This visceral reaction may seem intuitively troubling since the co-defendant's coun-

(1) It protects the innocent defendant from convicting himself by a bad performance on the witness stand. . . .
(2) It avoids burdening the courts with false testimony. . . .
(3) It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves; . . .
(4) It is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try. . . .
(5) It prevents procedures of the kind used by the infamous courts of Star Chamber, High Commission and Inquisition. . . .
(6) It is justified by history, whose tests it has stood; the tradition which it has created is a satisfactory one. . . .
(7) It preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes. . . .
(8) It spurs the prosecutor to do a complete and competent independent investigation.

Id. at 310-12.
30. See id. at 315-17.
31. See id. at 313-14; But see S. Hook, COMMON SENSE AND THE FIFTH AMENDMENT 63 (1957) (arguing that "in a democracy there are more effective ways of contesting bad laws . . .").
32. Here, Wigmore views the privilege as a means to prevent purely bothersome and burden-some questioning. He contends that "[e]ach of us, after all, is a criminal more or less, [but it goes] without saying that the law does not intend that all of these crimes be prosecuted." 8 J. Wigmore, supra note 28, at 314-15.
33. Id. at 313-18.
sel cannot be clearly placed on either side of this "struggle between equals." Yet, when counsel attempts to bolster his own client's credibility by contrasting him with a silent defendant, counsel is no longer outside of the bipolar balance, but is aiding the state's case. The jump itself is not so disturbing; due to judicial reluctance to grant severance, co-defendants often try to implicate each other. The means by which co-defendants implicate each other, however, demands judicial attention. Allowing a defendant to comment on his co-defendant's silence forces the nontestifying defendant to aid the state's case against his will. If the state, by denying severance, is willing to accept the aid of a defendant in the conviction of a co-defendant, it must require the testifying defendant to operate under the same standards as the state. Therefore, if the constitution demands that the state refrain from comment on defendant's silence, the same demand must be made of a co-defendant to ensure realistic constitutional protection.

Some still question the rationality of presuming the innocence of silent defendants. A number of fifth amendment critics have argued that the privilege against self-incrimination is merely a shield for the guilty. These critics raise the basic argument that if a defendant were innocent he would gladly take the stand and proclaim it; only a guilty defendant would fear a prosecutor's questioning. This chain of reasoning, however, ignores the host of compelling reasons that might lead a defendant to refuse to testify. The defen-

36. See infra note 141.

37. See, e.g., S. Hook, supra note 31, at 62-63; Ayer, supra note 35, at 846, 855-57; McKay, supra note 23, at 208. Even Dean Griswold, who had the courage to defend the privilege against self-incrimination during its moment of peril — the McCarthy hearings — later accepted the argument that "the privilege protects the guilty more often than it does the innocent. It was a mistake, I now think, to undertake to defend the privilege on the ground that it is basically designed to protect those innocent of crime, at least in any numerical sense." Griswold, The Right to Be Let Alone, 55 NW. U. L. REV. 216, 223 (1960); cf. E. Griswold, supra note 13.

38. See Ayer, supra note 35, at 855 & n.57.


The Supreme Court also has noted on several occasions compelling reasons other than guilt that keep defendants off the stand. In Lakeside v. Oregon, 435 U.S. 333, 343 (1978) (Stevens, J., dissenting), Justice Stevens stated: "Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury — either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates." Furthermore, in Wilson v. United States, 149 U.S. 60, 66 (1893), the Court recognized:

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.
A defendant may wish not to testify because: (1) he fears that his nervousness or appearance might prejudice the jury against him despite his innocence;  

(2) he desires that his prior criminal record not be brought to the jury's attention;  

(3) he disapproves of the tribunal or of the accusations against him and does not want to participate in such proceedings; or (4) he does not want to reveal suspicious facts that might tend to incriminate his friends, family, or associates. Consequently, one invoking this constitutional protection should not necessarily be presumed guilty, and further, a co-defendant's counsel should not be allowed to encourage the prohibited inference of guilt.

C. Supreme Court's Treatment of the Fifth Amendment

A careful reading of the Supreme Court's decisions interpreting the fifth amendment provides further insight into the scope of the privilege against self-incrimination. The Court has stated that the fifth amendment privilege against self-incrimination marks "an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.' " As for the purposes of the protection, the Court has offered a host of justifications that range from the protection of innocent persons to the maintenance of an equitable justice system. In *Miranda v. Arizona* the Court noted that the privilege against self-incrimination — the essential mainstay of our adversary system — is founded on a complex of values. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. . . . [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by *its own independent labors*. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."
With these thoughts in mind, it is difficult to accept that prejudicial remarks on a defendant's silence by co-defendant's counsel amount to the state's production of evidence "by its own independent labors." Moreover, when a defendant is aware that his refusal to testify may be brought to the jury's attention, often with an implication of his guilt, his decision to enjoy his fifth amendment rights is clearly not "unfettered." In the words of Justice Black, "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." 46

Furthermore, construing the fifth amendment to prohibit such conduct is consistent with the broad construction which the Supreme Court has historically accorded the fifth amendment. As the Court has stated, "[t]o apply the privilege narrowly or begrudgingly — to treat it as an historical relic, at most merely to be tolerated — is to ignore its development and purpose." 47 The circuit courts have also adopted a broad, policy-based construction; one court, faced with remarks by co-defendant's counsel, stated: "It is more important to consider [the fifth amendment's] line of growth as indicative of an expanding right capable of encompassing new and novel situations today as in the past." 48

The protection of the privilege against self-incrimination should not be constrained by vague categorizations which portray a prosecutor or judge's comment on silence as an impermissible violation of defendant's rights 49 and a co-defendant's counsel's remark as mere colloquy. 50 The privilege has historically sought to prevent direct coercion by the state or coercion engineered by state actors. That this coercion comes to us in a new form should not deter its prevention.

While the history of the privilege against self-incrimination prior to its inclusion in the fifth amendment sheds little light on its intended purpose, legal commentators and the Supreme Court have since provided elucidation of this constitutional protection. In order to satisfy the identified goals of maintaining a fair balance of power between the individual and the state and of allowing a choice of silence that does not affect the traditional presumption of innocence, it follows that co-defendant commentary on silence must be prohibited.

47. Quinn v. United States, 349 U.S. 155, 162 (1955); see Ullmann v. United States, 350 U.S. 422, 426 (1956) ("This constitutional protection must not be interpreted in a hostile or niggardly spirit.").
48. De Luna v. United States, 308 F.2d 140, 150 (5th Cir. 1962); see also Gompers v. United States, 233 U.S. 604, 610 (1915) (The significance of constitutional provisions "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.").
Moreover, the Supreme Court’s evaluation of the fifth amendment’s purpose indicates that the Court views the protections offered as an integral element in the maintenance of an equally balanced adversary process. This ideal is compromised gravely by allowing one defendant to make statements that would be prohibited if made by the state, which have precisely the same adverse effect on the silent defendant’s constitutional rights and which are predicated on the court’s — the state’s — acquiescence. Furthermore, state involvement is readily apparent in the prosecutor’s initial decision to try two defendants together who have divergent approaches to testimony. In response to those who would argue that the fifth amendment does not prohibit co-counsel’s comment because the amendment restricts only state action, one must not overlook the state’s vital role in joining defendants and denying severance. With this understanding of the development of the privilege against self-incrimination, the next Part examines the Supreme Court’s decisions on prosecutorial commentary on a defendant’s silence.

II. THE SUPREME COURT’S TREATMENT OF COURTROOM COMMENTARY ON DEFENDANT’S REFUSAL TO TESTIFY

In considering whether comment by co-defendant’s counsel works as a violation of defendant’s fifth amendment rights, it is instructive to examine the line of Supreme Court cases regarding comment on courtroom silence. Although the Supreme Court has not spoken directly to the specific issue of a co-defendant’s comment on silence, the Court has considered how a prosecutor’s comments can impair defendant’s right to silence. This Part analyzes the theory behind the Court’s holdings in these cases, particularly *Griffin v. California* where the Court barred prosecutorial comments on defendant’s silence. This Part also examines co-defendant’s commentary on silence using analytical models provided by commentators and the Supreme Court. An

51. Judge Wisdom of the Fifth Circuit aptly captured the state’s involvement in co-defendant’s commentary on silence:

The Federal Government cannot wash its hands of responsibility for the compulsion to testify resulting from the court’s inaction. The exclusive control of the conduct of the trial is in the hands of the presiding federal judge. He is “not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.” He has the decisive role in assuring an accused a fair trial according to federal standards. “Federal judges are not referees at prize fights but functionaries of justice.” De Luna v. United States, 308 F.2d 140, 153 (5th Cir. 1962) (footnotes omitted). Furthermore, in *Griffin v. California*, where prosecutorial comment on silence was held unconstitutional, the Supreme Court noted the instrumental role of the judge in aiding this constitutional violation: “What the jury may infer [from the defendant’s silence], given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.” 380 U.S. 609, 614 (1965) (emphasis added). Crucially, the *Griffin* court’s statement applies equally to co-defendant’s comments on silence. The court’s inquiry focuses on the burdening of the defendant’s rights and on the judicial acceptance of this coercive pressure, and not on the identity of the commentator. See infra note 122 and accompanying text.

52. 380 U.S. 609 (1965).
assessment of co-defendant commentary on silence within the “impermissible burden” and “prohibited inference” models reveals that permitting co-defendants to comment on a defendant’s refusal to testify is unconstitutional.

A. The Pre-Griffin Commentary Cases

Although decided on statutory grounds, and not on fifth amendment grounds, Wilson v. United States has had tremendous impact on how the lower courts have dealt with the problem of identifying comments prejudicial to silence. In Wilson, the Supreme Court reviewed petitioner’s federal prosecution on charges of using the mails to provide information on obscene materials. During the trial, in which petitioner chose not to testify, the prosecutor stated in his closing argument: “[I]f I am ever charged with a crime . . . I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime.” In response to the defendant’s objection, the judge said: “Yes, I suppose the counsel should not comment upon the defendant not taking the stand.” The Supreme Court held this exchange violated a federal law which provides that in trials before federal courts the defendant shall be allowed, at his own request, to testify, “and his failure to make such request shall not create any presumption against him.” The Court reasoned that to insure the presumption of innocence, “comment, especially hostile comment, upon such failure [to testify] must necessarily be excluded from the jury.”

Wilson prohibited prosecutorial comment on silence in the federal court system, but did not foreclose it in the state courts. After rejecting one challenge to a California state law allowing such commentary, in 1964 the Supreme Court held in Malloy v. Hogan that the fourteenth amendment prohibits state infringement of the fifth amendment privilege against self-incrimination. Therefore, the path was

53. 149 U.S. 60 (1893).
54. See infra notes 102-06 and accompanying text.
55. 149 U.S. at 62.
56. 149 U.S. at 62.
57. 149 U.S. at 63 (referring to 62 Stat. 833 (1948) as codified at 18 U.S.C. § 3481 (1988) which was drafted to allow a defendant to be a competent witness at his own trial).
58. 149 U.S. at 65.
59. In 1947, the Court rejected a fourteenth amendment challenge to a California law allowing comment on silence by “counsel” in Adamson v. California, holding that the due process clause of the fourteenth amendment does not incorporate all of the Bill of Rights guarantees. 332 U.S. 46, 54 (1947). At this time both the Constitution of California, art. I, § 13 and the Penal Code of California § 1323 permitted commentary on defendant's silence by “counsel.” Neither provision indicated whether “counsel” was meant to encompass a co-defendant's attorney. 332 U.S. at 48 n.3.
60. 378 U.S. 1 (1964) (the Court found that a state court's contempt judgment against petitioner for refusing to testify violated petitioner's fifth amendment rights).
clear for a challenge to state laws permitting prosecutorial commentary on a defendant's silence.

B. Prosecutorial Comment on Silence and the Fifth Amendment: Griffin v. California

The Griffin v. California decision is tremendously important for understanding the Supreme Court's application of the fifth amendment to commentary on silence. In Griffin, the Court used an "impermissible burden" analysis to hold that it was unconstitutional for a prosecutor to refer to the defendant's invocation of his fifth amendment privilege against self-incrimination. Co-defendant commentary on silence is similarly unconstitutional under impermissible burden analysis.

In Griffin, petitioner sought review of his murder conviction in the Superior Court of Los Angeles County. During the trial, in which petitioner chose not to testify, counsel for the prosecution drew the jury's attention to the defendant's silence, remarking that the defendant "has not seen fit to take the stand and deny or explain" the state's evidence. The prosecution further commented that "in the whole world, if anybody would know [who committed the murder], this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't." Furthermore, the judge's instruction to the jury on the issue of guilt, while noting defendant's right to refuse to testify, indicated that the jury was permitted to draw adverse inferences from defendant's silence. Such remarks by the court and prosecutor were consistent at that time with the California Constitution.

61. Although Griffin has not been overruled, the Office of Legal Policy of the Department of Justice has taken the position that Griffin was wrongly decided and provides an unnecessary impediment to effective criminal prosecution. See Report to the Attorney General on Adverse Inferences from Silence, 22 Mich. J.L. Reform 1005 (1989).

62. See infra notes 73-93 and accompanying text.


64. 380 U.S. at 611.

65. 380 U.S. at 611.

66. Specifically, the judge told the jury: "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

67. Before it was repealed in 1974, Cal. Const. art. I, § 13 provided that defendant's "failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Griffin, 380 U.S. at 610 n.2.
The *Griffin* Court found the California law permitting the prosecutor and judge to comment on a defendant's refusal to testify a violation of the fifth amendment. In so holding, the Court implicitly recognized that a defendant could be "compelled" to testify when the prosecutor suggests, but does not directly state, that the defendant's silence masks guilt. The Court based its decision on the impermissible degree to which such prosecutorial comments place a cost on silence. According to the Court, such commentary amounts to "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

Importantly, the Court treated this cost as a "penalty imposed by courts," not one imposed by the state. This language suggests that the identity of the commentator is not as important as the effect of such commentary on the jury. Consequently, a court that acquiesces to a similar comment by a defendant's attorney in a multiple defendant trial would also be imposing an unconstitutional penalty on silence. The principles underlying *Griffin* can be fairly applied to co-defendant commentary to show its abridgement of the fifth amendment.

**C. Analytical Models for Assessing Fifth Amendment Violations**

The reduction of the Supreme Court's analysis in *Griffin* to analytical models is helpful when considering whether the Court's reasoning can be faithfully applied to the issue of comment by co-defendant's counsel. *Griffin* and the later Supreme Court decision in *Lakeside v. Oregon*, yield two analytical models — the "impermissible burden"...
approach and the "prohibited inference" approach. These models, when applied to the present issue, demonstrate that co-defendant's comment on silence is unconstitutional.

1. "Impermissible Burden" Analysis

As the Griffin decision suggests, practices which pose an impermissible burden on the exercise of fifth amendment guarantees are unconstitutional.73 A number of commentators have noted that the Supreme Court, in employing its impermissible-burden analysis, traditionally bases its conclusion on a three-prong test: (1) whether the particular practice burdens exercise of the involved right; (2) whether the practice impairs the policies underlying the right; and (3) whether a sufficient government interest warrants such impairment.74 Comments made by co-defendant's counsel on defendant's silence are unconstitutional under impermissible-burden analysis. Such comments satisfy the first prong of the test. According to the Court, "the Griffin case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify."75 The Court, by limiting unconstitutional burdens to those that are "court-imposed," suggests that only practices over which the court has control demand judicial concern. Certainly, there are prices on silence that a court can not affect other than with a preemptive

73. Subsequent cases provide additional examples of burdens held by the Court to be impermissible. In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that a judge's refusal, despite defendant's request, to instruct the jury on defendant's right to silence and the impermissibility of inferences of guilt therefrom violated defendant's fifth amendment rights. Comparing this situation to prosecutorial comment on silence, the Court noted that "the penalty [on silence] may be just as severe when there is no adverse comment, but when 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." 450 U.S. at 301.

In Brooks v. Tennessee, 406 U.S. 605 (1972), the Court held that a Tennessee statute which forced defendant to testify prior to any of the other defense witness violated the fifth amendment. The Court stated that this statute was unconstitutional because it "exacts a price for [defendant's] silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand." 450 U.S. at 610-11 (footnote omitted).

One other post-Griffin decision suggests that impermissible burden analysis has not been entirely embraced by the court. In Baxter v. Palmigiano, 425 U.S. 308 (1976), a Rhode Island prison inmate was informed that his silence at a prison disciplinary hearing would be held against him. The Supreme Court upheld the Rhode Island law's presumption of guilt from silence. The Baxter court maintained that since no criminal proceedings were pending against the prisoner, Rhode Island's practice conformed with the fifth amendment. 425 U.S. at 317. The Court's reasoning is curious since the fifth amendment privilege against self-incrimination applies to proceedings such as a prison disciplinary hearing. See Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Essentially, Baxter "cannot be reconciled with the numerous cases holding that the government is barred from penalizing an individual for exercising the privilege [against self-incrimination]. . . ." 425 U.S. at 325 (Brennan, J., dissenting).

74. See Ayer, supra note 35, at 855; Poulin, supra note 39, at 205-06 ("The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."") (quoting McGautha v. California, 402 U.S. 183, 213 (1971))).

cautionary instruction — for example, the jury’s possible equation of silence with guilt. A comment from a co-defendant’s counsel, however, is certainly one practice the court can control. A cautionary instruction to the jury and admonishment of the attorney are well within a judge’s capacity. Yet, when a judge acquiesces in the defense’s prejudicial comments, the silent defendant must be said to have suffered a “court-imposed” penalty on silence.

Moreover, the evidentiary value of such comments is dubious. Since these comments can easily result in an improper jury inference and cause a potentially prejudicial error, the court may appropriately control such commentary upon objection of defendant’s counsel. One commentator has noted a qualitative difference between a factual presumption arising out of defendant’s actions and an irrational presumption penalizing a defendant’s exercise of a constitutional right. An example of this distinction can be seen in *Barnes v. United States*, where the Court upheld the traditional common law inference of guilt from the unexplained possession of stolen property. The Court stated that “[t]he introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant [, however,] cannot be regarded as a violation of the privilege against self-incrimination.”

This factual presumption stands in sharp contrast to the presumption created by allowing a co-defendant to comment on a defendant’s silence. In no respect is it rational to infer guilt from silence. The Court and various commentators have indicated numerous alternative rationales for a defendant’s silence. Furthermore, since the defendant’s decision not to testify is a personal one, it cannot be empirically proved that the defendant was motivated by any one reason. At least one Justice has indicated that, with regard to drawing inferences of guilt or innocence from silence, “[t]here is simply no basis for declaring a generalized probability one way or the other.”

A co-defendant’s comment on silence satisfies the second prong of the impermissible burden test. Such comments run directly counter to the policies behind the fifth amendment as identified by the Court. While a defendant is not faced with the “cruel trilemma” of self accusation, perjury or contempt that existed prior to fifth amendment protection, he faces a “new trilemma . . . perhaps more cruel than the one

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76. See Bradley, *supra* note 39, at 1296 n.35.
78. 412 U.S. at 847.
79. See *supra* notes 39-41 and accompanying text.
81. *See Murphy v. Waterfront Commn.*, 378 U.S. 52, 55-56 (1964); *supra* note 45 and accompanying text.
it replaces": self-accusation by affirmative statement, self-accusation by silence, or perjury.\(^\text{82}\) Permitting co-defendant's adverse comment also destroys the "fair state-individual balance" fortified by the fifth amendment.\(^\text{83}\) The government's role in the criminal justice system is to produce sufficient evidence to prove defendant's guilt beyond a reasonable doubt without relying on the defendant's aid. When courts allow a co-defendant to represent defendant's silence as guilt, the state's burden has been lightened against the will of the defendant.\(^\text{84}\) The defendant, in this situation, is forced through his decision not to testify to aid the case against him. If the government cannot compel defendant's testimony, courts should not allow the defense to compel it for the state's benefit.

Allowing co-defendant commentary on silence negates the policy of protecting the "inviolability of the human personality."\(^\text{85}\) Once a defendant has chosen not to testify, the reasons for his choice and his thoughts remain his, out of the jury's reach. Treating silence as testimonial evidence, however, destroys this privacy and opens a "window to the defendant's private, unexpressed thoughts."\(^\text{86}\)

Lastly, the privilege against self-incrimination has historically been viewed as an institutional protection for the innocent.\(^\text{87}\) Allowing a co-defendant to lead the jury to question the motive behind a defendant's privileged silence imputes guilt to defendant and thus impairs this function. A defendant may have a number of reasons for refusing to testify aside from guilt.\(^\text{88}\) A court that allows the co-defendant's suggestion that silence equals guilt to aid the prosecution's case vitiates any protection for the innocent that the fifth amendment purports to provide.

Under the last prong of the impermissible burden test, the impairment of fifth amendment policies must be balanced against the government's interest in permitting co-defendant commentary on another defendant's silence. Often, a co-defendant who testifies finds that his

\(^{82}\) Poulin, supra note 39, at 211 (referring to the ramifications of *Griffin*-type comment, but applicable here as well).


\(^{84}\) The state's burden will also be lightened against the will of the defendant whenever a co-defendant testifies to facts tending to implicate the defendant. However, when this occurs defendant's fifth amendment protection is not impinged since the co-defendant's testimony constitutes relevant factual evidence bearing on defendant's guilt. In contrast, comments by co-defendant's counsel as to defendant's silence do not constitute relevant evidence. The state's burden of proving defendant's guilt has been lightened by the fact that the jury is likely to reason improperly that silence masks guilt, thereby reducing the state's burden of proof.

\(^{85}\) Murphy, 378 U.S. at 55.

\(^{86}\) Poulin, *supra* note 39, at 211.

\(^{87}\) 378 U.S. at 55 (the privilege against self-incrimination, "while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent' " (quoting Quinn v. United States, 349 U.S. 155, 162 (1955))).

\(^{88}\) See *supra* notes 39-41 and accompanying text.
testimony lacks corroboration due to another defendant's silence. 89
On occasion, co-defendant's counsel may, during her closing state-
mant, attempt to explain why her client's story is incomplete by
pressuring another defendant's failure to testify and to corroborate.
Although the jury is supposed to base its decision solely on the facts
before it, such explanations ask the jury to assume facts not in evi-
dence. Therefore, not only does this practice demand that the jury
make a highly questionable assumption, but it severely prejudices the
constitutional assertion of privilege by the silent defendant. The legiti-
macy of counsel's comments on her inability to corroborate her cli-
ent's story cannot outweigh the damage done to the other defendant's
fifth amendment rights. In essence there is a trade-off. As a matter of
policy and constitutional law, the commentary of the testifying defen-
dant's counsel must be limited.

It is often claimed, or at least suggested by the court, that most
comments on a defendant's silence are only meant to accentuate the
testifying defendant's willingness to testify. 90 The American justice
system, however, provides that a defendant does not have to testify
and therefore should accrue no additional benefit (aside from the con-
tent of his testimony) for doing so. The jury should not be encouraged
to reward testimony and penalize silence — doing so is contrary to the
very purpose of the fifth amendment. Furthermore, there is no need to
remind the jury of a co-defendant's failure to testify. Justice Stewart's
dissent in Griffin 91 informs us that "the jury will, of course, realize
this quite evident fact, even though the choice goes unmentioned. . . .
[It is] a fact inescapably impressed on the jury's consciousness." 92 A
testifying co-defendant does not have a sufficient interest in drawing
the jury's attention to a defendant's silence or his own decision to tes-
tify to overcome the damage done thereby to the silent defendant's
constitutional rights. 93

89. See, e.g., United States v. Mena, 863 F.2d 1522 (11th Cir.), cert. denied, 110 S. Ct. 110
90. See, e.g., United States v. Berkowitz, 662 F.2d 1127, 1136 (5th Cir. 1981) (counsel for
one of the testifying defendants stated "[s]o I ask you to evaluate and weigh in [my client's] favor
the fact that he took the stand in his own defense and he did not have to"); see generally text
accompanying notes 126-30.
92. 380 U.S. at 621, 622 (Stewart, J., dissenting).
93. Although no testifying defendant in any reported decision has raised the "missing witness
rule" in support of his decision to comment on a co-defendant's silence, this argument merits
some attention. The missing or uncalled witness rule owes its origin to Graves v. United States,
150 U.S. 118 (1893), where the Supreme Court, in dictum, explained: "The rule even in criminal
cases is that if a party has it peculiarly within his power to produce witnesses whose testimony
would elucidate the transaction, the fact that he does not do it creates the presumption that the
testimony, if produced, would be unfavorable." 150 U.S. at 121. Application of this rule to the
multi-defendant criminal trial in which one or some defendants choose not to testify is dubious at
best. The rule is meant to prevent parties from withholding evidence and witnesses from the
court. Therefore, for an inference to be drawn from a party's failure to present a witness, the
witness must have been within that party's power to call. Clearly, this is not the case when the
2. "Prohibited Inference" Analysis

Another model for examining potential violations of constitutional rights is the "prohibited inference model." Under this framework of analysis, any inference of guilt drawn from the exercise of the fifth amendment right to unqualified silence is constitutionally prohibited. As one commentator suggests, "[t]he appropriate inference to be drawn from the failure to deny is simply this: a person, guilty or innocent, will deny guilt unless he perceives that the denial will be more costly than silence."95

The Court used this model in Lakeside v. Oregon, where the petitioner argued that a nontestifying defendant’s objections to a jury instruction cautioning the jury not to draw adverse inferences from the defendant’s silence should bar the judge from giving this instruction. The prosecution reasoned that Griffin prohibited any comment by the state or the court on defendant’s silence. The Supreme Court stated that “[i]t is clear from even a cursory review of the facts and the square holding of the Griffin case that the Court was there concerned only with adverse comment . . . .”97 In making this delineation between adverse and instructive comment, the Court suggests that some comments will not encourage the jury to draw negative inferences. The Griffin holding itself has been characterized by one member of the Court as based on a prohibited-inference analysis. Distinguishing Brooks v. Tennessee from Griffin, Justice Burger stated that "the jury [was not] authorized or encouraged to draw perhaps unwarranted inferences from [defendant’s] silence, as in Griffin v. California.”99

Examining the present debate under the prohibited inference model, it is clear that the practice of co-defendant commentary on silence urges the jury to infer guilt from defendant’s privileged silence. Even comments that “merely highlight” a co-defendant’s willingness to testify encourage a prohibited inference. By reaffirming a co-defendant’s cooperativeness, counsel necessarily creates a contrast between the testifying co-defendant(s) and the silent defendant(s). Asking the jury to draw the inference that a co-defendant should be rewarded for testimony of the “missing witness” is privileged. See Wheatley v. State, 465 A.2d 1110, 1111-12 (Del. 1983) (inferences not proper because witness, an informer, was privileged and did not waive the privilege, nor did the defendant invoke discovery provisions to compel the informer’s testimony); 2 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 286, at 201-02 (Chadbourn rev. 1979).

94. See Bradley, supra note 39, at 1293; Poulin, supra note 39, at 222-28; Ratner, supra note 39, at 491-92.
95. Bradley, supra note 39, at 1293 (emphasis omitted).
97. 435 U.S. at 338.
98. 406 U.S. 605 (1972) (the Court held that a Tennessee statute which forced defendant to testify prior to any of the other defense witness violated the fifth amendment).
testifying simultaneously and unavoidably asks the jury to draw the prohibited inference that silence should be penalized — i.e., that the nontestifying defendant should be found guilty. This unwarranted and irrational inference directly violates the fifth amendment.

Under the impermissible burden and prohibited inference models, co-defendant commentary on silence violates a defendant’s fifth amendment rights. Recognizing such comments as unconstitutional, however, does not bring the inquiry to an end. A further challenge arises in identifying which comments by co-defendant’s counsel are, in fact, comments on a defendant’s silence. Currently, the circuit courts which hold a co-defendant’s commentary on silence unconstitutional are struggling to formulate a standard which effectively distinguishes colloquy from prejudicial remarks. The next Part examines this pursuit and recommends a standard which promises to guard a defendant’s fifth amendment rights more effectively.

III. THE EVOLVING STANDARD FOR IDENTIFYING COMMENTS MADE BY CO-DEFENDANT’S COUNSEL THAT VIOLATE DEFENDANT’S FIFTH AMENDMENT RIGHTS

This Part explores the ways that the federal courts have dealt with the issue of co-defendant’s commentary on a defendant’s silence. This Part first explains how the courts have applied the *Griffin* decision to instances of prosecutorial comment on silence and identifies which circuits have applied this same standard of impermissibility to comments by a co-defendant’s counsel. This Part next demonstrates the failure of the courts to apply this test faithfully and adequately to protect fifth amendment rights, and further criticizes the new test that has emerged from the Eleventh Circuit. This Part concludes by advocating a new test that promises to guard the fifth amendment rights more closely. Under this proposed test, counsel could not refer to the act of testifying or the decision not to testify. In proposing this test, this Note hopes to discourage courts from promoting form over substance by allowing glib counsel to draw a defendant’s silence into question indirectly.

A. Identifying Commentary on Silence: Application of *Griffin*

After the *Griffin* decision, the duty fell upon the lower courts to proffer a test to identify “comment by the prosecution on the accused’s silence.” The test that emerged, however, was not predicated on *Griffin*, but instead on *Wilson v. United States*, a decision which

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102. 149 U.S. 60 (1893); see supra text accompanying notes 53-60.
held prosecutorial comments on silence invalid on statutory grounds. In *Morrison v. United States*, the Eighth Circuit became the first of the circuit courts to apply the *Wilson* holding. The *Morrison* court found the prosecution’s comment impermissible since “the language used [was] manifestly intended to be, or was ... of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.”

Almost every court of appeals to judge prosecutorial comment since has adopted the *Morrison* test.

Since the *Griffin* decision did not foreclose the argument that comments made by co-defendant’s counsel may violate another defendant’s fifth amendment rights, this challenge has been raised on appeal in a number of multiple defendant trials. The judicial response has varied from complete rejection to treatment identical to that for prosecutorial comment and, most recently, to calls for a separate standard for judging co-defendant’s comments on silence. This Part next explores the three approaches in turn and attempts to arrive at a new approach which most effectively protects fifth amendment rights.

**B. The Sixth Circuit’s Rejection of Challenges to Co-Defendant’s Comments on Silence**

The Sixth Circuit is the only circuit which refuses to consider fifth amendment challenges to a co-defendant’s comments on silence. This refusal, however, is built upon flawed reasoning. Beginning with *United States v. Griffith*, the Sixth Circuit has shown its reluctance to look beyond institutional roles within the adversary process to the deleterious effects of a co-defendant’s counsel’s commentary on silence. In *Griffith*, defendant Reynolds argued that the following ex-

103. 149 U.S. at 65-70. Although both the *Griffin* and *Wilson* decisions prohibit prosecutorial comment on defendant’s silence, *Griffin* was based on constitutional grounds while *Wilson* relied on statutory grounds. See *Griffin*, 380 U.S. at 613; *Wilson*, 419 U.S. at 65. The lower courts devised a test to apply *Wilson*, and appear to have extended this test to determine *Griffin* violations. Compare *Morrison* v. United States, 6 F.2d 809, 811 (8th Cir. 1925) (devising a test to apply *Wilson*) with *United States ex rel. D’Ambrosio v. Fay*, 349 F.2d 957, 961 (2d Cir.) (adopting the same test to identify *Griffin* violations), cert. denied, 382 U.S. 921 (1965).

104. 6 F.2d 809 (8th Cir. 1925).

105. 6 F.2d at 811 (the “Morrison test”).


change between co-defendant's counsel and a government witness impermissibly burdened his right to silence:

Q. So that — now, you know that Mr. Reynolds can testify in these proceedings don't you?
A. He sure can. 108

The court held that a defendant's fifth amendment rights were "not impaired when the comment on his silence was made by a codefendant's counsel, not by the prosecutor." 109 In so holding, the court relied chiefly on its previous decision in United States v. Whitley. 110

In Whitley, defendant alleged that the testimony of a government witness under cross-examination by a co-defendant's counsel prejudiced defendant's right to post-arrest/pre-trial silence. 111 The Whitley court refused to extend the protections offered by Doyle v. Ohio, 112 which prohibited such comments by the prosecution. 113 The Whitley court stated:

The aspect of the condemned inquiry [in Doyle] that makes it reversible error is the prosecution's emphasis on the defendant's post-arrest silence in an effort to imply a consciousness of guilt. . . .

. . . Here, the question posed was not posed by the government, but rather by counsel for co-defendant. There also was no allegation that the government in any manner attempted to emphasize, highlight, refer to, or utilize the testimony elicited by co-defendant's counsel. 114

Arguably, the Griffith court's reliance on Whitley is misplaced since the former dealt with the fifth amendment implications of court-room commentary on defendant's refusal to testify while the latter concerned the fourteenth amendment ramifications of such commentary on defendant's post-arrest silence. Whitley does, however, indicate that the prejudicial effects of such comments turn on the commentator's identity. The central flaw with the Sixth Circuit's reasoning is the court's failure to recognize the coercive pressure these comments place on a silent defendant. 115 When faced with the choice of either testifying or not testifying and consequently running the risk

108. 756 F.2d at 1253.
109. 756 F.2d at 1253.
110. 734 F.2d 1129 (6th Cir. 1984).
111. 734 F.2d at 1135-36 (the government agent stated that his investigation was limited by the defendant's refusal after arrest to disclose any information).
112. 426 U.S. 610 (1976). The Doyle court held that the State's attempt to impeach a defendant with his post-arrest (and post-Miranda instruction) silence constituted a due process violation under the fourteenth amendment. 426 U.S. at 619. The fifth amendment implications of the State's action were not evaluated.
113. 734 F.2d at 1136-37.
114. 734 F.2d at 1137.
115. Furthermore, the Sixth Circuit's outlook on state action does not adequately address the state's role in joining defendants with antagonistic defenses and in denying severance. See supra note 51 and accompanying text; infra note 141.
of having the choice of silence portrayed as a likely indication of guilt, the fifth amendment is reduced to a hollow promise.

The *Griffith* court focuses on the fifth amendment's promotion of an accusatorial justice system in which the government bears the full burden of establishing guilt.\(^{116}\) This explains the court's concern over whether the comments on defendant's silence were directly used by the government in proving its case. The court, however, neglects to consider the equally integral purposes of the fifth amendment in protecting individual dignity and minimizing erroneous convictions.\(^{117}\) In light of these purposes, the fifth amendment guarantee prevents the jury from considering defendant's failure to testify as evidence and from drawing prohibited inferences from silence.\(^{118}\) The fifth amendment is supposed to offer the protection of a "'private enclave where [a defendant] may lead a private life.'"\(^{119}\) Allowing co-defendant's counsel to comment adversely on a defendant's silence clearly puts these fifth amendment policy goals in jeopardy. Moreover, encouraging a jury to equate silence with guilt and thereby ignore or give cursory attention to the facts in evidence is likely to lead to erroneous convictions. The crucial issue therefore becomes not whether, but how, to identify when a co-defendant's comment impermissibly burdens another defendant's fifth amendment rights.

**C. Application of the Morrison Test**

In contrast to the Sixth Circuit, a number of circuit courts have recognized the potential constitutional infringement of co-defendant commentary on silence, but have failed to devise a test for identifying such comments which can be faithfully applied to secure fifth amendment protection. Before examining these attempts at exacting judicial definition of prejudice, it is instructive to turn to *De Luna v. United States*,\(^{120}\) perhaps the premier case to hold co-defendant's comments on silence impermissible.

Decided prior to *Griffin*, this Fifth Circuit case vigorously and exhaustively explores the contours of the fifth amendment. There, in an attempt to contrast defendant Gomez's willingness to testify with defendant de Luna's silence, Gomez's attorney said: "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination and tell you the whole story . . . .

\(^{116}\) United States v. Griffith, 756 F.2d 1244 (6th Cir.), cert. denied, 474 U.S. 837 (1985). As already indicated, ensuring a fair individual-state balance within the criminal justice system is an important goal of the fifth amendment. See *supra* notes 34-37 and accompanying text.

\(^{117}\) See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6 (1985).

\(^{118}\) See *supra* text accompanying notes 76-78, 94-99.


\(^{120}\) 308 F.2d 140 (5th Cir. 1962).
You haven't heard a word from [de Luna]." 121 Finding a violation of defendant's fifth amendment rights, Judge Wisdom, writing for the court, insightfully noted:

If comment on an accused's silence is improper for judge and prosecutor, it is because of the effect on the jury, not just because the comment comes from representatives of the State. . . .

. . . .

...[T]he trial judge's approval of an improper comment or refusal to disapprove the comment and do whatever is necessary to protect a defendant from being penalized by relying on his constitutional right amounts . . . to sufficient participation in the comment or sanction of the comment so that it may be properly characterized as a violation of the Fifth Amendment . . . . 122

While De Luna offers a powerful argument for prohibiting co-defendant's comment on silence, it does not adequately provide a test for determining which types of commentary impair fifth amendment rights. 123 Some guidance in this pursuit appears to have been provided by the Morrison test, 124 which a number of circuits have applied to fifth amendment challenges to co-defendant's counsel's comment on silence. 125

A careful analysis of these circuit court cases reveals that either the Morrison test is not applied strictly or that it is insufficient to protect nontestifying defendants from their co-defendants' indirect forays at silence. In most of these cases, co-defendant's counsel seeks to accentuate her client's willingness to testify; however, in doing so, counsel often implies that silence amounts to guilt or that testimony should be rewarded.

For instance, in United States v. Zielie 126 counsel for one of the defendants stated in his closing: "And [my client], the evidence we've proven, he's an honest and trustworthy man. He's one of the few who's testified. He stood up there and the prosecution worked him over. He was on that stand for a whole afternoon to defend his

121. 308 F.2d at 143.
122. 308 F.2d at 152, 154 (footnote omitted).
123. De Luna commands that "[i]n a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney." 308 F.2d at 141 (emphasis added). Yet, the court failed to provide any guidelines on how to distinguish "prejudicial" comments.
124. Under the Morrison test, the court must consider whether the comment was "manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Morrison v. United States, 6 F.2d 809, 811 (8th Cir. 1925). See supra note 105 and accompanying text.
125. See, e.g., United States v. Zielie, 734 F.2d 1447, 1461 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. McClure, 734 F.2d 484, 491 (10th Cir. 1984); United States v. Vera, 701 F.2d 1349, 1362 (11th Cir. 1983); United States v. Berkowitz, 662 F.2d 1127, 1136 (5th Cir. 1981); United States v. Aguilar, 610 F.2d 1296, 1302 (5th Cir. 1979), cert. denied, 449 U.S. 827 (1981); United States v. Cain, 544 F.2d 1113, 1117 (1st Cir. 1976).
126. 734 F.2d 1447 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).
name." Another more blatant example is provided in United States v. Berkowitz,\(^\text{128}\) where counsel for one of the defendants pleaded to the jury: "So I ask you to evaluate and weigh in [my client's] favor the fact that he took the stand in his own defense and he did not have to. He did not have to present any evidence whatsoever."\(^\text{129}\) In neither of these cases did the court find, as required by the Morrison test, that the comments were "manifestly intended or ... would naturally and necessarily [be taken as] a comment on" another defendant's silence.\(^\text{130}\)

As an initial matter, it seems highly plausible, if not probable, that such commentary is intended to draw into question the nontestifying defendant's silence and thereby subtly incriminating that defendant. Moreover, when counsel asks the jury to reward her client for testifying, it is hard to believe that a juror would not "naturally and necessarily" take this also to be an implicit invitation to penalize the silent defendants. Therefore, if the Morrison test were applied strictly it would hold such comments made by co-defendant's counsel as impermissible commentary on a defendant's silence.

Furthermore, if the courts refuse to apply the Morrison test to instances of "mere favorable comment upon the fact that one of several co-defendants testified" then the test is not adequate.\(^\text{131}\) The comments made by co-defendant's counsel in Zielie suggest that, first, the testifying co-defendant is an honest and trustworthy man since he testified, and second, that only honest and trustworthy men could withstand an afternoon of cross-examination. Implicit here is the idea that the silent defendant would have testified were he an honest and trustworthy man, and because he didn't testify he must be dishonest — *i.e.*, guilty.\(^\text{132}\)

\(^\text{127}\) 734 F.2d at 1461.
\(^\text{128}\) 662 F.2d 1127 (5th Cir. 1981).
\(^\text{129}\) 662 F.2d at 1136.
\(^\text{130}\) 734 F.2d at 1461 (quoting United States v. Dearden, 546 F.2d 622, 625 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977)); accord, 662 F.2d at 1136.
\(^\text{131}\) 662 F.2d at 1136-37 (quoting United States v. Hodges, 502 F.2d 586, 587 (5th Cir. 1974)). A number of courts have held that a statement by counsel urging the jury to draw favorable inferences from his client's willingness to testify is not prejudicial to the silent defendant. See, *e.g.*, United States v. Petullo, 709 F.2d 1178, 1182 (7th Cir. 1983); United States v. Hines, 455 F.2d 1317, 1334-35 (D.C. Cir.), *cert. denied*, 406 U.S. 975 (1972); United States v. Blue, 440 F.2d 300, 302-03 (7th Cir.), *cert. denied*, 404 U.S. 836 (1971); United States v. Hutul, 416 F.2d 607, 621-22 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

\(^\text{132}\) In United States v. Hines, 455 F.2d at 1334-35, the D.C. Circuit addressed similar co-defendant's comments and based its decision on a comparison to the comments found impermissible in *De Luna*. In *Hines*, defendant Ware's counsel emphasizing his client's willingness to testify, remarked: "[Y]ou and I, if we were innocent, we would take the stand to try to exonerate ourselves. . . ." 455 F.2d at 1334. The court held that "the *De Luna* case involved a more serious trespass on the accused's Fifth Amendment rights." 455 F.2d at 1334.

Chief Judge Bazelon, in dissent, noted "the comments made by [co-defendant] Ware's counsel were not 'innocuous' and served to point out not that [defendant] Hines had a right to remain silent but that the innocent would not exercise that right." 455 F.2d at 1335 (footnote omitted).
Moreover, asking the jury to draw a favorable inference from the act of testifying, as in Berkowitz, drastically undermines the purposes of the fifth amendment. It is obviously fair and necessary for the jury to consider a defendant's testimony and his demeanor on the stand from the standpoint both of determining facts and witness credibility. However, if the very act of testifying is rewarded, the silent defendant will suffer from the negative presumption that silence will create. It is not merely the damage done to a nontestifying defendant by this implicit deprecation of silence, but the perversion of a criminal justice system designed to treat testimony and silence as equal, nonpresumptive choices and to place the entire burden of proof on the state's shoulders.

D. *The Eleventh Circuit's Mena Test*

The most recent and troubling judicial response to the issue of codefendant comment on silence has come from the Eleventh Circuit. Dissatisfied with the application of the *Morrison* test — with its origins in prosecutorial comment on silence — to co-defendant's counsel's comments on silence, the Eleventh Circuit has proposed a test which promises to allow more damaging and constitutionally suspect commentary by co-defendant’s counsel. This section discusses this test and demonstrates its inadequacy when viewed in light of fifth amendment goals.

In *United States v. Mena*, the Eleventh Circuit reviewed the criminal narcotics conviction of eight defendants, six of whom challenged certain comments made by one testifying defendant's counsel in his closing argument. Counsel was attempting to explain his inability to corroborate his client's story beyond the corroboration offered by the other testifying defendant, Mr. Zuniga. Counsel stated:

> Now, this is difficult to be in this situation where you have — where all these defendants are here together. I can't call witnesses. . . .

> Again, I can't call any of these other people to say the same thing [as Zuniga said] . . . .

> . . . Mr. Zuniga got up on the stand . . . . He got up on the stand and the others didn't get up on the stand, and that's a right to get up on the stand. That's an absolute right. There is nothing wrong with that. He got up on the stand. 134

appropriately, the court recognized that were it to apply the *Morrison* test, it would have to conclude that such comments would "'naturally and necessarily' be interpreted by the jury as a comment on

 Bazelon emphasized that "[i]f a co-defendant in a criminal trial chooses to remain silent, *all* commentary which invites an inference of guilt must be avoided." 455 F.2d at 1335-36.
133. 863 F.2d 1522 (11th Cir.), *cert. denied*, 110 S. Ct. 110 (1989).
134. 863 F.2d at 1533.
defendant's silence.¹³⁵ The court, however, distinguished this case from those Eleventh Circuit cases in which this standard had been used because those cases involved mere favorable comment on a defendant's willingness to testify, while in Mena "we are presented with an actual reference to the silence of the six defendants."¹³⁶ In effect, the court suggested that when a clearer violation of defendant's fifth amendment rights occurs, the Morrison test is too easily satisfied and a test promising reduced protection for silent defendants should be used.

In addition, the Mena court noted that the Morrison test is derived from cases of improper prosecutorial comment on silence. With respect to this genesis the court posited:

Given the prosecutor's institutional role, when the prosecutor merely "comments" on the failure of an accused to testify, the reference is in all likelihood calculated to encourage the jury to equate silence with guilt; reasonable judicial economy thus permits a finding of reversible error. When the "comment" comes from an actor (such as counsel for a codefendant) without an institutional interest in the defendant's guilt, however, it would be inappropriate to find reversible error as a matter of course.¹³⁷

The court proposed a new test for assessing co-defendant comment on silence: "whether the comment actually or implicitly invited the jury to infer guilt from silence."¹³⁸ Consequently and counter-intuitively, the court concluded that direct comment on defendant's silence exposes the Morrison test as overly protective of defendant's rights and propounded a test designed to enable greater latitude in co-defendant's counsel's comments on defendant's silence.

First, to say that the Morrison test results in a finding of reversible error as a "matter of course" is to distort gravely the truth. The only case where co-defendant comments have been found to impair silence unconstitutionally is De Luna, and in that decision the Morrison test was not even invoked. Moreover, the Eleventh Circuit cases, United States v. Zielie and United States v. Vera, to which the Mena court refers, both held that the Morrison test had not been violated.¹³⁹ Lastly, even if the Morrison test does result in a more frequent finding of fifth amendment infringement than does the new Mena test, this should be recognized as the necessary price paid to secure constitutional protections.

¹³⁵ 863 F.2d at 1533 (quoting United States v. Zielie, 734 F.2d 1447, 1461 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1989); United States v. Vera, 701 F.2d 1349, 1362 (11th Cir. 1983)).
¹³⁶ 863 F.2d at 1534 (contrasting Zielie, 734 F.2d 1447 and Vera; 701 F.2d 1349 with the present case).
¹³⁷ 863 F.2d at 1534 (emphasis added).
¹³⁸ 863 F.2d at 1534. The court went on to find that under this test that the comments at issue did not prejudice the silent defendants' fifth amendment rights. 863 F.2d at 1535.
¹³⁹ United States v. Zielie, 734 F.2d 1447, 1461-62 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Vera, 701 F.2d 1349, 1363 (11th Cir. 1983). Although these cases do not explicitly mention Morrison, the test they use is, in fact, that used in Morrison.
The *Mena* court also raises a curious argument with respect to the role of the speaker and the intent of his comment. The court suggests that a co-defendant’s counsel lacks the institutional intent to lead the jury to infer guilt from silence. The court overlooks the considerable benefits to be gained from throwing the blame on one’s co-defendant. By subtly leading the jury to conclude that silence masks guilt, defense counsel can implicate his co-defendant without triggering the need for a severance.

Furthermore, the *Mena* test focuses too closely on the intent of the comment, rather than its effects. A test relying on whether the jury was “invited” to infer guilt from silence neglects to consider the deleterious effects flowing from an objectively unintended comment. While malicious intent to impair constitutional rights should be deterred, the primary purpose of such a test should be to guard against the infringement of rights. The *Morrison* test speaks more clearly to this primary purpose by holding impermissible comments “naturally and necessarily” taken to be inferences of guilt by silence. It would be little consolation to a defendant if the jury inferred a defendant’s guilt because of a comment not intended to cause this effect.

In the final analysis, the *Mena* test affords inadequate protection of fifth amendment rights and encourages co-defendant forays at defendant’s privileged silence. This standard for impermissibility leaves the defendant’s constitutional right to unfettered silence at the mercy of a co-defendant’s intention. While the *Morrison* test offers firmer protection for silence, as applied by the courts it does not adequately prevent

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140. See Dunmore, *Comment on Failure of Accused to Testify*, 26 YALE L.J. 464, 467 (1917).

141. In federal court, “[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction . . . .” FED. R. CRIM. P. 8(b). A shrewd co-defendant might recognize that his innocence is more likely to be recognized by a jury when the jury has another defendant available to convict. Plainly, there are certain strategic advantages that accrue to jointly-tried defendants with antagonistic defenses. This in no way implies that joinder would always benefit defendants with antagonistic defenses. For instance, one defendant may not wish to appear before a jury in the presence of another defendant who is unlikely, for whatever reason, to provoke jury sympathy.

Because the judiciary has embraced having joint trials, severance, even in cases of truly antagonistic defenses, is difficult to obtain. Actually, the “mere fact that there is hostility between defendants or that one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials.” United States v. Hutul, 416 F.2d 607 (7th Cir. 1969) (quoting Dauer v. United States, 189 F.2d 343, 344 (10th Cir.), cert. denied, 342 U.S. 898 (1951)). Nonetheless, creating the implication that one defendant’s decision not to testify reflects his guilt, aids the testifying defendant’s case and offers less fodder for severance than direct accusation.

142. To understand the *Mena* test’s failures, consider whether the court should allow a co-defendant’s attorney to say in her closing: “You will notice, of course, that defendant X testified today while defendant Y did not.” Strictly applying the *Mena* test, it is arguable that this comment does not “invite” a prohibited inference. However, it poses a great enough risk to defendant Y’s fifth amendment rights compared to its minimal legitimate purpose that it should be impermissible. It is simply unnecessary and of dubious benevolent intent to point out, however indirectly, another defendant’s decision not to testify.
indirect adverse commentary on silence.\textsuperscript{143}

E. \textit{A Proposal for a Standard of Impermissible Co-Defendant Commentary on Defendant's Courtroom Silence}

Because of the insufficient protections for silence currently afforded by the \textit{Morrison} and \textit{Mena} tests a new rule is in order: a defendant's counsel should not be permitted to refer to the fact that either his client or another defendant testified or chose not to testify. Counsel should be permitted to comment on the content of testimony before the court and the witnesses' credibility since this constitutes evidence upon which the jury can legitimately base its verdict. The act of testifying or the willingness to do so, however, does not and should not constitute probative evidence if the fifth amendment is to be accorded proper respect. A closing argument that accentuates a defendant's willingness to testify and the link between his innocence or honesty and his decision to testify necessarily draws jury speculation on other defendants' silence. For the fifth amendment to operate effectively, the justice system cannot allow silence to be manipulated by defense counsel for evidentiary purposes.

The \textit{Morrison} test is inadequate not because of its wording or structure, but because of the court's inability to apply it faithfully. The \textit{Mena} test does not offer any greater guidance to the courts. As indicated, this new test may, in fact, place effective fifth amendment protection in greater jeopardy than the \textit{Morrison} test. Despite these two tests, numerous decisions indicate that counsel for a testifying co-defendant is consistently permitted to refer indirectly to another defendant's refusal to testify.\textsuperscript{144} Whether such commentary comes in the form of a remark on the co-defendant's "exemplary" willingness to testify\textsuperscript{145} or counsel's inability to corroborate his client's story,\textsuperscript{146} the jury is unavoidably sent a second message. Underlying such seemingly benign comments is the implicit invitation to the jury to speculate on the motives for the nontestifying defendant's silence. Faithful application of the \textit{Morrison} and \textit{Mena} tests would indicate the specious nature of such remarks. Yet, because of the judiciary's reluctance to pursue the implications of this commentary on silence, allegiance to the principles of fifth amendment protection can only be secured by prohibiting \textit{all} commentary on the act of testifying or on the limitations imposed on some defendants by another defendant's silence.

\textsuperscript{143} See supra text accompanying notes 124-32.
\textsuperscript{144} See supra notes 107-10, 126-30, 133-38 and accompanying text.
The ideal solution to this problem would be to eliminate multiple defendant trials. The conventional wisdom, however, is that "[u]nquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial." Nevertheless, the prejudice and confusion inherent in joint trials is manifold. Among the commonly recognized problems are complexity leading to jury confusion, guilt by association, prejudice emanating from co-defendants' confessions implicating defendants, antagonistic defenses, conflicts in trial strategy, and co-defendants' criminal records. Yet, as long as multiple defendant trials continue to be perceived as "cost effective" this practice undoubtedly will continue. In the alternative, therefore, comments by co-defendant's counsel on defendant's silence must be proscribed.

Some may argue that denying a defendant the opportunity to point out his decision to testify prevents counsel from zealously representing the client and hurts that defendant. In this instance, a defendant suffers minimal detriment. The jury will, of course, recognize the fact that a defendant testified without a reminder from counsel. Furthermore, any advantage that defendant might accrue from testifying comes at the price of prejudicing another defendant's constitutional choice.

Under the proposed test, to prevent such prejudice, counsel would not be permitted to say: "Remember, only my client was secure enough in his innocence to testify today" or "Unfortunately the other defendants' constitutionally protected decision not to testify prevents me from further corroborating my client's story." Applying this Note's proposed standard, these remarks clearly refer to the act of testifying and not to the content of the testimony or the defendant's credibility. If a timely objection is made, the judge should instruct the jury to disregard this comment and should reiterate the nonpresumptive nature of the decision not to testify. If the silent defendants are convicted and challenge on appeal the remarks made on their silence, the appeals court should, using the proposed test, recognize these comments as pertaining to the act of testifying and then determine whether these actions constituted prejudicial or harmless error in this case.


148. See Calo, Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction, 9 AM. J. TRIAL ADVOC. 21, 35 (1985) ("joint trials result in prejudices that burden a defendant's right to a fair trial."); see generally Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 MICH. L. REV. 1379 (1979). Professor Dawson concludes that "[t]he uncertain benefits of joint trials and the mischief they so frequently work justify a statute or rule of court giving defendants rights to separate trials." Id. at 1452.

149. See Chapman v. California, 386 U.S. 18 (1967) (holding that a Griffin error does not
CONCLUSION

This Note addresses the undermining of constitutional protections by attorneys who choose to exploit the joining of testifying and nontestifying defendants. Because of the perceived efficiency of joint trials, however, greater judicial grants of severance are unlikely. Therefore, judges have a duty to administer a judicial system in which the Constitution affords realistic protection against compulsion to testify. The tests created thus far to identify co-defendant’s commentary on a defendant’s privileged silence have proved ineffective and unfair to the silent defendant. Under the current standards, courts run the great risk of encouraging the jury to reward testimony and penalize silence. Consequently, in order to uphold the promise that the fifth amendment holds forth to all criminal defendants, co-defendant’s counsel should not be permitted to comment on any defendant’s decision either to testify or remain silent.

Subtle attempts to suggest that the refusal to testify signifies guilt subvert the constitutional framework upon which the American criminal justice systems rests. Statements by co-defendant’s attorneys on their client’s willingness to testify or on the problems of corroborating the testifying defendant’s story due to another defendant’s silence serve a minimal legitimate purpose while potentially putting into jeopardy the nonpresumptive quality of a constitutionally protected choice. Such a practice runs counter to the fifth amendment’s historical purpose and subsequent interpretation by the Supreme Court.

— Martin D. Litt

require automatic reversal and that the reviewing court should affirm a conviction if it finds the error to be harmless beyond a reasonable doubt).