Michigan Law Review

Volume 78 | Issue 6

1980

The Fifth Amendment and the Inference of Guilt from Silence: *Griffin v. California* After Fifteen Years

Donald B. Ayer

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

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

Available at: <https://repository.law.umich.edu/mlr/vol78/iss6/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE FIFTH AMENDMENT AND THE INFERENCE OF GUILT FROM SILENCE: *GRIFFIN V. CALIFORNIA* AFTER FIFTEEN YEARS

Donald B. Ayer*†

INTRODUCTION

In 1965, at the peak of its enthusiasm to expand the constitutional protections of criminal defendants,¹ the United States Supreme Court struck down the conviction of Eddie Dean Griffin. Griffin had been convicted of murder after failing to take the stand in his own defense. Pursuant to a provision of the California Constitution,² both the judge and the prosecutor had remarked to the jury that it could draw inferences unfavorable to the defendant from his failure to testify.³ After noting that the United States Congress⁴ and

* Member, California and District of Columbia Bars. B.A. 1971, Stanford University; M.A. 1973, J.D. 1975, Harvard University. Former Assistant United States Attorney, Northern District of California.—Ed.

† The author is grateful for the many helpful thoughts and suggestions of Professors Thomas H. Jackson, John Calvin Jeffries, Theodore M. Norton, and Lloyd L. Weinreb, of Assistant U.S. Attorneys Robert P. Feldman, John W. Spiegel, and Sanford Svetcov, and the practical training in the workings of the *Griffin* rule under the supervision of United States District Judge William A. Ingram. I am also grateful to my present employer, Gibson, Dunn & Crutcher, for allowing the time and providing the resources necessary to complete this article.

1. Many of the major constitutional criminal procedure decisions of the Warren Court were handed down during the years immediately preceding and following *Griffin v. California*, 380 U.S. 609 (1965). See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963) (excluded statements as "fruits" of illegal search); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent's sixth amendment right to appointed counsel); *Massiah v. United States*, 377 U.S. 201 (1964) (right to counsel at post-indictment interrogations); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right to silence applies in state proceedings); *Aguilar v. Texas*, 378 U.S. 108 (1964) (no probable cause for search warrant when basis for informant's conclusions not provided to magistrate); *Jackson v. Denno*, 378 U.S. 368 (1964) (jury may only hear confessions previously found to be voluntary); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (right to counsel immediately upon arrest); *Miranda v. Arizona*, 384 U.S. 436 (1966) (explicit notice of rights constitutionally required prior to custodial interrogation); *Chapman v. California*, 386 U.S. 18 (1967) (constitutional errors harmless only if "harmless beyond a reasonable doubt"); *In re Gault*, 387 U.S. 1 (1967) (expanded due process rights of juvenile defendants); *Berger v. New York*, 388 U.S. 41 (1967) (invalidated as too permissive state provisions warranting electronic surveillance); *United States v. Wade*, 388 U.S. 218 (1967) (right to counsel at post-arrest line-ups); *Katz v. United States*, 389 U.S. 347 (1967) (non-trespassory electronic eavesdropping brought within protection of fourth amendment).

2. CAL. CONST. art. I, § 13 (1934, repealed 1974).

3. See *Griffin v. California*, 380 U.S. 609, 610-11 (1965). The judge commented:

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,

the legislatures of forty-four states⁵ had taken action to prohibit such comment, the Supreme Court, in *Griffin v. California*,⁶ declared the comments improper, not as a matter of legislative policy, but as a violation of the fifth amendment protection against compulsory self-incrimination.⁷

During the last fifteen years, the *Griffin* rule has seriously restricted state flexibility in trial procedure and has impaired the effective operation of the criminal system. Most obviously, the Court's decision overrode the legislative judgments of California and the handful of states which then approved of comment on a defendant's silence. More than that, it cast the no-comment rule in a form not subject to legislative reconsideration.⁸ Further, the constitutional dimension of *Griffin* made more drastic and inflexible the consequences of an acknowledged violation of the rule. Whatever approach a state might wish to take in implementing the rule, *Griffin* made the standard for mandatory reversal a matter of federal constitutional law; within two years, the Court's decision in *Chapman v. California*⁹ had ostensibly required reversal whenever there had

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.

380 U.S. at 610.

The prosecutor commented:

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

What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

And in the whole world, if anybody would know, this defendant would know.

Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

380 U.S. at 610-11.

4. 380 U.S. at 612 & n.4. See 18 U.S.C. § 3481 (1969).

5. 380 U.S. at 611 n.3.

6. 380 U.S. 609 (1965).

7. 380 U.S. at 613. Notwithstanding the Court's reference, 380 U.S. at 614 n.5, to *Adamson v. California*, 332 U.S. 46 (1947), in which one concurring and four dissenting justices arguably favored prohibiting this type of comment on fifth amendment grounds, *Griffin* was the first Supreme Court decision to hold comment on a defendant's failure to testify offensive to the constitutional right to silence. 380 U.S. at 619 n.3 (Stewart, J., dissenting).

8. In the years preceding *Griffin* there was significant sentiment in informed circles for allowing such comment. See, e.g., UNIFORM RULE OF EVIDENCE 23(4) (1953, superseded 1974); MODEL CODE OF EVIDENCE rule 201(e) (1942).

9. 386 U.S. 18 (1967).

been comment not harmless beyond a reasonable doubt.¹⁰

Nor can the impact of the constitutional no-comment rule on the operation of the criminal system be lightly put aside. For prosecutors, the decision not only announced an explicit constitutional prohibition against certain comments, but also created a penumbral danger zone which restricts in broad and surprising ways the kinds of arguments that can sensibly be hazarded in interpreting for the jury the evidence in the case.¹¹ For the judges at both the trial and appellate levels who must interpret and apply *Griffin*, the decision poses the problem of how to divine the likely thoughts of jurors in the light of prosecutorial statements which, on their face and in context, can be heard to carry a variety of permissible and impermissible meanings.¹²

In light of these consequences, this Article argues that the *Griffin*

10. 386 U.S. at 24. Although this is the import of the decision's language, in reality courts apply a more lenient standard. See notes 22 & 23 *infra* and accompanying text.

The constitutionalization of the rule is also a matter of consequence for the federal courts in that it modifies the harmless error standard of statute, 28 U.S.C. § 2111 (1959), and rule, FED. R. CRIM. P. 52(a), that allow reversal only for errors affecting the "substantial rights" of the parties. The Court in *Chapman* clearly believed it was promulgating a special harmless error rule for constitutional errors, 386 U.S. at 22-23, with the purpose that it be more stringent than the rule otherwise applicable under statute. As a result of this higher constitutional standard of error, reversal is more likely in any given case simply because *Griffin* is a rule of constitutional proportions.

11. For example, some authority indicates that the prosecutor may not comment upon the "unimpeached" or "uncontradicted" nature of the proof on a particular point, except where the record clearly discloses that there are other witnesses whom the defendant could have called apart from himself. See *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965). The weight of authority is contrary, and indicates that such general comments on the evidence are permissible, barring special facts which demonstrate that they would likely be understood as referring to the defendant's silence. *United States v. Castillo*, 549 F.2d 583, 584 (9th Cir. 1976); *United States v. Arredo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977). This conflict between the circuits is suggestive of the uncertainty facing prosecutors in determining the kinds of arguments which they should make. Arguing to a jury that guilt has been proven beyond a reasonable doubt necessarily involves establishing both that certain key facts have been shown, and that certain possible defenses have not been made out. In both of these undertakings it can be highly relevant and useful to note the *absence* of evidence of a certain type or on a certain point. The rule in *Griffin* gives one pause in making such an argument at all, and certainly demands extreme care in the precise words which one uses. Fortunately, reviewing courts are often forgiving of inadvertent errors even when the slip of the tongue refers to a defendant's silence. See notes 22 & 23 *infra*.

12. To determine whether there has been improper comment, a court generally inquires first whether "the language used was manifestly intended 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." *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955). The judge may thus find error based on his perception of either the prosecutor's intentions or the natural meaning perceived by the jury. The cases do not clearly delineate how unavoidable the prejudicial meaning must be before it becomes error, nor do they deal coherently with the problem of multiple possible meanings, no one of which is compelling. It is at least clear that the questionable statement is to be read in its context rather than in isolation, *United States v. Rochan*, 563 F.2d 1246, 1249-50 (5th Cir. 1977); *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), and that a court will not strain to find a possible improper meaning in a comment innocent on its face. See *United States v. Noah*, 475 F.2d 688, 695-96 (9th Cir.), *cert. denied*, 414 U.S. 1095

rule is an ill-adapted response to the issues posed by a judge's or prosecutor's comment on the failure of an accused to take the stand in his own defense. The Court reasoned that such comment imposes a "penalty" on the defendant who elects to exercise that constitutional right, and therefore "cuts down on the privilege [to remain silent] by making its assertion costly."¹³ The Court acted to minimize the penalty and protect the free exercise of the privilege. But the rule it announced deals with the problem both too broadly and too narrowly.¹⁴ The rule is over-inclusive in apparently indicating virtually automatic reversal where there are any remarks explicitly focused on the defendant's silence and the inference of guilt to be drawn from it. Such explicit comment has sometimes been held to mandate reversal without regard to the weight of the evidence otherwise admitted — and with no consideration given to the probability that the comment made no difference because the defendant's guilt was otherwise obvious.¹⁵

(1973); *United States ex rel. Leak v. Follete*, 418 F.2d 1266, 1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).

Once a court concludes that error has been committed, it must determine whether the error was prejudicial or harmless. *Chapman v. California*, 386 U.S. 18 (1967), provides the standard, which looks to whether the error was harmless beyond a reasonable doubt. The approach to this issue varies widely from case to case, and depends, in part, upon the nature of the comment at issue. *See* notes 15 & 23 *infra*.

13. 380 U.S. at 614-15. The Court seems to acknowledge that this is something that juries will do to a greater or lesser degree, quite apart from any instruction or argument they might hear addressed to the issue. *See* text accompanying notes 16-18 *infra*.

14. One commentator has suggested that, in reviewing legislation challenged under the equal protection clause of the fourteenth amendment, we should identify statutory goals and analyze how precisely the adopted "means" are tailored to meet these "ends." Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Under this approach, which has met some measure of judicial approval, *see, e.g., Trimble v. Gordon*, 430 U.S. 762, 768-69 (1977), a statute's constitutionality becomes a function of the over- or under-inclusiveness of its sorting criteria as a means of achieving the statutory objective.

While this "means-ends" analysis may have serious drawbacks in the equal protection context for which it was developed, *see Trimble v. Gordon*, 430 U.S. at 777-86 (Rehnquist, J., dissenting), it may be useful in another area of constitutional interpretation. Where the Supreme Court contemplates the creation or expansion of a constitutional guarantee or prohibition, such "means-ends" scrutiny of the contemplated rule would help screen out formulations that do not merit constitutional status. If legislative enactments poorly tailored to serve their purposes create a public perception of arbitrariness and injustice, and thereby contribute to disrespect for law, the same response at a greater magnitude may greet a constitutional (and therefore legislatively unreachable) rule that suffers the same defect. In this regard, the federal judiciary's response to the *Griffin* rule is instructive. *See* text at notes 21-24 *infra*. Although the "means-ends" test is no substitute for a sound assessment of the core values at issue, it might serve as a useful check on extreme instances of constitutional expansionism. *See* text at note 123 *infra*.

15. *See, e.g., O'Connor v. Ohio*, 385 U.S. 92 (1966); *United States ex rel. Mitchell v. Pinto*, 438 F.2d 814, 818 (3d Cir.), *cert. denied*, 402 U.S. 961 (1971). These cases reversed convictions because of direct and explicit comment on the defendants' failure to testify. However, they failed to acknowledge the possibility of harmless error or to balance the evidence in the case.

While courts do not usually take this approach, *see* notes 22 & 23 *infra*, virtually automatic

At the same time, the rule is under-inclusive in its complete failure to address the much more common situation where there is no comment by the judge or prosecution but the jury nonetheless concludes that the defendant is guilty because he has nothing to offer in his own defense. Since this natural inference of guilt, like comment on the defendant's silence, "cuts down on the privilege [to remain silent] by making its assertion costly,"¹⁶ it raises the same kind of constitutional problem as did the comment in *Griffin*. However, perhaps in deference to the longstanding reluctance to inquire into the jury's thought processes,¹⁷ the Court in *Griffin*, and since, has implicitly concluded that the burden on the right to silence imposed by this natural inference is both unavoidable and tolerable.¹⁸

The inefficiency of the *Griffin* rule in advancing its purpose suggests the utility of re-evaluating the rule from the ground up. So, too, does *Griffin*'s status as one of a limited body of exceptions to the rule that attorneys, in summing up, may draw any reasonable inference from the facts legitimately within the jury's knowledge.¹⁹ The exceptions to this rule rest largely on the conclusion that the prohibited remark or chain of reasoning is more prejudicial than it is probative of any issue in the case.²⁰ The *Griffin* rule is justifiably within

reversal is arguably required by straightforward application of the constitutional harmless error rule announced in *Chapman v. California*, 386 U.S. 18 (1967), wherever the comment was unambiguous. *Chapman* itself involved "a reasonably strong 'circumstantial web of evidence'" in which an explicit comment was found to be reversible error. 386 U.S. at 25.

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

17. A long-standing rule of Anglo-American jurisprudence holds that a juror shall not be heard to impeach his own verdict. *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915); *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), 8 J. WIGMORE, EVIDENCE § 2342 (McNaughton rev. ed. 1961). This prohibition has been relaxed somewhat in recent years. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam); *Kilmes v. United States*, 263 F.2d 273 (D.C. Cir. 1959).

The federal courts now allow impeachment of jury verdicts by proof of influences "extraneous" to the jury deliberation process, but not by proof of events occurring solely within the jury room. FED. R. EVID. 606(b); 3 J. WEINSTEIN, WEINSTEIN'S EVIDENCE § 606[04] (1978). Under this formulation, juror allegations that the inference of guilt from silence was discussed and relied on in the course of the jury's deliberations cannot be considered. Of course, the Supreme Court could require consideration of such allegations, if it deemed it necessary to secure a constitutional right.

18. *See* note 62 *infra*.

19. *See United States v. Sawyer*, 443 F.2d 712, 713-14 (D.C. Cir. 1971); Note, *The Permissible Scope of Summation*, 36 COLUM. L. REV. 931 (1936).

There is, of course, a social interest served by the conviction and imprisonment of guilty persons, and it is therefore thought desirable that in closing the prosecutor "'strike hard blows,' but not 'foul,'" *Taylor v. United States*, 413 F.2d 1095, 1096 (D.C. Cir. 1969), and that he argue the Government's cause as persuasively as possible within the limits of fairness. *See United States v. Craig*, 573 F.2d 455, 493-95 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

20. *See* FED. R. EVID. 403. For example, extreme appeals to emotion may be found to be error, presumably because they tend to cloud the jury's thought processes and may lead to a verdict based on sentiment rather than reason. *See, e.g.*, *United States v. Barker*, 553 F.2d

this limited class of exceptions only if the prohibited comments would effect some identifiable prejudice that outweighs the probative value of the comments. Such undue prejudice cannot be assumed. This Article will show that, whatever prejudice may exist, the inference of guilt from a defendant's failure to testify, drawn by the jury with or without comment by the prosecutor or the judge, is highly rational. Indeed, the wide acknowledgement of its rationality is one reason for judicial reluctance to find violations of the *Griffin* rule.

This reluctance to find violations offers another, empirical ground for re-evaluation. If the members of the federal bench are to be accorded any significant respect, the mixed, even grudging reception they have given the *Griffin* rule must be viewed as a matter of some consequence. While *Chapman* mandates reversal unless the error is harmless beyond a reasonable doubt, and a handful of convictions have been overturned on account of *Griffin* error in the past several years,²¹ judges much more commonly conclude that the comment on the defendant's silence does not justify reversal. Courts have often struggled to reach this conclusion by finding either a total absence of prejudice,²² or harmless error.²³ At the least, such treat-

1013, 1025 (6th Cir. 1977); *United States v. Phillips*, 476 F.2d 538, 539 (D.C. Cir. 1973) (per curiam).

Where evidence is admitted for a limited purpose, such as to prove motive, intent or plan under Federal Rule of Evidence 404(b), or for the purpose of impeachment under rules 608 and 609, it is impermissible to draw inferences going beyond the limited admissibility of the evidence. The balance of relevance versus prejudice is struck in the rules governing these subjects, and by the initial ruling of limited admissibility, and to allow such argument would all but nullify that ruling.

It is, of course, impermissible to argue inferences based on facts not properly before the jury. *United States v. Warren*, 550 F.2d 219, 229 (5th Cir. 1977). This does not mean that counsel may only discuss what will be apparent from the four corners of the trial transcript, since such matters as witness demeanor and the in-court appearance and conduct of the defendant are within the jury's observation and generally proper subjects of comment. See *United States v. Hill*, 508 F.2d 345, 347 (5th Cir.), cert. denied, 422 U.S. 1009 (1975).

21. See, e.g., *Berryman v. Colbert*, 538 F.2d 1247, 1250 (6th Cir. 1976); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (per curiam); *United States v. Bates*, 512 F.2d 56, 58 (5th Cir. 1975); *United States v. Smith*, 500 F.2d 293, 296-98 (6th Cir. 1974); *United States v. Flannery*, 451 F.2d 880, 882 (1st Cir. 1971).

22. For example, the United States Court of Appeals for the Fifth Circuit has twice found no error, notwithstanding prosecutorial statements that the defendant, referred to by name, was unable or unwilling to explain certain facts. *United States v. Chandler*, 586 F.2d 593, 604 (5th Cir. 1978), cert. denied, 440 U.S. 927 (1979); *Samuels v. United States*, 398 F.2d 964, 967-68 (5th Cir. 1968), cert. denied, 393 U.S. 1021 (1969). These statements were found to be inadvertent and likely to be construed as a reference to defendant's counsel. Other courts have found no necessary reference to the failure to testify in remarks to the effect that "only one person could tell us" how or where the crime occurred. *Lussier v. Gunter*, 552 F.2d 385, 389 (1st Cir.), cert. denied, 434 U.S. 854 (1977); *Sanchez v. Heggie*, 531 F.2d 964, 966 (10th Cir.), cert. denied, 429 U.S. 849 (1976); *United States v. Reicin*, 497 F.2d 563, 572 (7th Cir.), cert. denied, 419 U.S. 996 (1974).

A comment that the defendant "at no time . . . denied" the criminal acts charged has been held to be proper comment on the uncontradicted state of the evidence. *United States v. Toler*, 440 F.2d 1241, 1243 (5th Cir. 1971) (per curiam).

23. In determining whether an improper comment is harmless beyond a reasonable doubt,

ment indicates the need to thoroughly re-examine the *Griffin* rule.²⁴

This Article will begin with an examination of the historic (and present) purposes underlying the fifth amendment privilege against self-incrimination, upon which any justification of the no-comment rule must ultimately rest. It will explore the danger that these purposes may be thwarted not only when defendants are actually compelled to be witnesses against themselves, but also when significant burdens are placed on defendants who choose not to testify. In *Griffin*, the Court reasoned that comment on the defendant's silence amounted to such an impermissible burden. But the Court failed to examine the weight of this burden. This failure makes *Griffin* an aberration, since the Court permits imposition of other burdens on defendants' privilege to remain silent that are as great or greater than the burden imposed in *Griffin*.

Finally, as an alternative justification for *Griffin*, this Article will re-examine one major purpose of the privilege against self-incrimination: the preservation of a proper relation between government and the individual by prohibiting the government from enlisting a defendant's involuntary efforts to build a case against him. *Griffin* may seem superficially consistent with this fairness justification since it prohibits use of the defendant's silence by the prosecution. It will be shown, however, that the privilege against self-incrimination has never been, nor realistically ever could be, given the full scope which the fairness justification implies, and that in view of existing case law, the *Griffin* rule cannot therefore be justified as preventing violations of the fifth amendment.

it is generally held that the reviewing court must consider whether "such comment is extensive, [whether] an inference of guilt from silence is stressed to the jury as a basis of conviction, and [whether] there is evidence that could have supported acquittal." *Anderson v. Nelson*, 390 U.S. 523, 524 (1968) (per curiam); *United States v. Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978). Employing this analysis, and taking into account corrective instructions given by the judge, *United States v. Haynes*, 573 F.2d 236, 239 (5th Cir. 1978); *Holden v. United States*, 388 F.2d 240, 243 (1st Cir. 1968), courts have had no difficulty in holding harmless beyond a reasonable doubt a whole range of comments by the prosecutor. *United States v. Passaro*, No. 79-1354 (9th Cir. Aug. 4, 1980), *United States v. Sigal*, 572 F.2d at 1323; *United States v. Parker*, 549 F.2d 1217, 1221 (9th Cir. 1977); *United States v. Sanders*, 547 F.2d 1037, 1041-42 (8th Cir. 1976); *United States v. Hawk*, 497 F.2d 365, 370 (9th Cir. 1974); *Haberstroh v. Montanye*, 493 F.2d 483, 485 (2d Cir. 1974); *United States v. Noah*, 475 F.2d 688, 696 (9th Cir. 1973), and by the judge, *United States v. Schultz*, 482 F.2d 1179, 1183 (6th Cir. 1973).

24. The unhappily haphazard pattern of decisions in this area is apparent from any random sampling, and does little to assure one that any court has a clear understanding of the purpose of the *Griffin*-mandated endeavor. Compare cases cited at notes 15 & 21 *supra* with cases cited at notes 22 & 23 *supra*.

I. HISTORIC PURPOSES OF THE FIFTH AMENDMENT

Nothing in the language of the fifth amendment specifically addresses the problem of comment upon a defendant's failure to testify at trial. The amendment says only that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." In its brevity, the amendment left many unanswered questions²⁵ that the courts have sought to deal with by reference to the purposes that induced its adoption and that it is presently believed to serve. Unfortunately, there is also a significant measure of uncertainty surrounding both the reasons for the privilege's initial enactment,²⁶ and the present-day functions which justify its continued application.²⁷

Despite this uncertainty, careful examination reveals that the privilege may advance four more or less distinct purposes: (1) the deterrence of torture and other forms of outright coercion, be they

25. The following questions, among a great many others, have been confronted in a variety of forms. Who is protected? *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (natural persons only). What is protected against? *Raffel v. United States*, 271 U.S. 494, 497 (1926) (any compelled testimony by a criminal defendant); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (compelled incriminating statements in any other context, judicial or otherwise). What form of "statements" are protected? *Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976) (testimonial statements, either oral or written); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (not physical characteristics such as appearance, fingerprints, or blood type). What does "incriminating" mean? *Zicarelli v. New Jersey Investigation Commn.*, 406 U.S. 472, 478-81 (1972) (statements contributing to a real and appreciable danger of criminal prosecution); *Ullmann v. United States*, 350 U.S. 422, 430-31 (1956) (public opprobrium and loss of employment is not "incrimination").

26. The English antecedents of the privilege against self-incrimination are discussed at length in L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968), and 8 J. WIGMORE, *supra* note 17, § 2250, at 267-92. The reception of the privilege in America is dealt with in L. LEVY, *supra*; in Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); and in Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

27. Some commentators have questioned justifications for applying the privilege against self-incrimination in specific contexts. *E.g.*, Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 547 (1956); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L.C. & P.S. 1014, 1017 (1934). Other commentators have attacked the privilege in more general terms. *E.g.*, Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671 (1968); McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L.C. & P.S. 138, 154 (1960); McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 221-22 (1956). Others have acknowledged that the privilege, while desirable in general, may have gotten out of hand. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 519 (1941).

Prior to *Malloy v. Hogan*, 378 U.S. 1 (1964), the privilege against self-incrimination was among a distinctly second-class group of constitutional safeguards, deemed not essential to our scheme of justice and ordered liberty:

[The immunity from compulsory self-incrimination] might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (Cardozo, J.) (footnotes and citations omitted).

physical or mental; (2) the enhancement of human dignity by sparing *guilty* defendants the unhappy choice between harmful disclosure, contempt, or perjury;²⁸ (3) the assurance of fairness in criminal procedure by cultivating a proper relationship between citizens and their government — or more precisely, by requiring the prosecution to develop and prove a criminal case without help from the defendant, and by leaving citizens free from interference until a significant measure of independent proof has been collected; and (4) the protection of free expression and association by placing a potent weapon against vaguely directed, roving inquiries into the hands of dissident citizens.²⁹

The prevention of torture and other coercion is perhaps closer to what motivated the enactment of the privilege against compulsory self-incrimination,³⁰ and more widely acknowledged as a purpose of the privilege,³¹ than any of the other three purposes. The fear is not that a defendant will be beaten or harassed in court should he testify other than according to the wishes of his prosecutors, but rather that he might be influenced in indeterminable ways by words or actions taking place in private.³² By guaranteeing all persons an absolute right to remain silent, the fifth amendment discourages coercion and increases the chances of its detection. An innocent defendant who knows that he is not legally required to say anything is less likely to accept a choice between stories that are either unacceptable to his prosecutors or untrue. And law enforcement officers, even assuming the worst natural inclinations, may be loath to attempt coercion, knowing that success is unlikely and that the attempt itself is a

28. Professor McNaughton referred to this choice as one "among the three horns of the triceratops." McNaughton, *supra* note 27, at 147.

29. This list of policy justifications is more or less exhaustive, notwithstanding that elsewhere as many as twelve ostensible justifications have been identified. 8 J. WIGMORE, *supra* note 17, § 2252, at 310-18. Wigmore rejected eight of the twelve as "makeweights," "platitudes," and repetitions of other policy goals, and decided that only four deserved serious consideration. Those four policies, while conceptualized somewhat differently, are essentially identical to those set forth here.

These policies are not really as distinct as they appear when briefly stated, but actually overlap and interrelate in a variety of ways. For example, the concern with torture is, in one sense, primarily a concern with human dignity; the desires to spare a guilty defendant from making an impossible choice, and to protect free expression, are two aspects of the problem of how citizens relate to their government; and the concept of fairness, amorphous as it is, might arguably embody all of the other concerns. The formulations set forth here are not necessary or inevitable, but they do provide a useful analytical tool in this context.

30. See Pittman, *supra* note 26, at 783-88.

31. See *Palko v. Connecticut*, 302 U.S. 319, 326 (1937); Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 188 (1956); E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7-8 (1955); 8 J. WIGMORE, *supra* note 17, § 2251, at 315-16.

32. See Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267, 275-76 (1956).

violation of the defendant's constitutional rights.³³ In this sense, the privilege is a prophylactic that deters not only the commission of inhumane acts, but also the manufacture of and reliance on unreliable testimony. Thus, freedom from testimony compelled under duress not only strikes a blow against thumb-screws and the rack, but arguably improves the fact-finding process.³⁴

Second, the fifth amendment privilege is often said to embody a concern for human dignity that would be offended by trying to compel guilty defendants to say the words which lead to their own conviction.³⁵ This affront occurs quite apart from the possibility of extraneous abuse aimed at shaping the testimony to be given. It results from the simple fact that any testimony at all is required. The notion is that it is a denial of a person's dignity and integrity to place him in the position of having to convict himself, lie, or face contempt of court for remaining silent. Once one accepts the validity and weight of this notion,³⁶ there can be no doubt that the privilege against self-incrimination allows the guilty party to avoid the Hobson's choice between becoming his own accuser or risking imprisonment on the alternative grounds of perjury or contempt of court.³⁷

The third policy advanced to support the privilege against self-incrimination will, for simplicity, be labeled the "fairness" justification. This policy embodies ideas about the nature of our government and its proper relationship to the citizenry. Out of the social com-

33. See text at notes 44-46 *infra*.

34. The privilege also detracts from the search for truth by rendering unavailable to the prosecution the one person whose testimony might be the most enlightening of all. On the other hand, the unreliable evidence thus excluded, however little there may be, is likely to be in the nature of confessions by innocent people.

35. *E.g.*, Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 692-93 (1951).

36. The privilege is necessary to preclude such a difficult choice only where the defendant is guilty — that is, where he has no truthful, exculpatory story to tell. The cause of the dilemma, and of whatever personal degradation results, is therefore as much the defendant's own prior decision to commit the crime, as it is any compulsion to answer questions about the incident involved. The imponderable question nonetheless worth asking is how much weight should be given to the defendant's possible loss of dignity from having to answer questions which give him no pleasing alternative, in view of the more substantial degradation that the defendant has brought upon himself and society by committing the crime in the first place.

37. By the terms of the fifth amendment and by the dictates of common sense, the privilege justified on this basis must be confined to freedom from actual compulsion to testify — that is, from being required to testify in spite of a considered personal decision not to do so. It is, presumably, something of a personal affront and a setback to one's dignity to be called before the bar in a criminal case. It is even more unsettling, indeed demeaning, to sit through voluminous and overwhelming evidence of one's guilt. If something more subtle than actual compulsion — for example, the accumulated psychological pressure of the evidence calling out for an answer — were found so disconcerting as to constitute a violation of the privilege, the amendment would have become a protection of personal dignity, not against self-incrimination, but against well-founded accusation.

pact theory of government comes an idea that the individual is the source of his government's sovereignty, and thus that in relations with that government he should be treated with the respect due an equal.³⁸ 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. Compelling the accused to speak against himself, even if only to tell the truth, does not set well with this view of the adversary trial; nor does the suggestion that the government should be able to trouble an individual before it has collected sufficient evidence to establish a case against him — or worse, that it should be able to enlist his involuntary assistance to build that case.³⁹

The fourth and final function often said to be served by the privilege is the protection of first amendment values by giving dissidents a weapon against roving inquisitions possessing neither probable

38. See Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91, 98-99 (1954).

39. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). An imprecise and unconvincing sort of a "fairness" justification for the fifth amendment has been phrased in terms unrelated to our form of government or its proper relation to the people. Under this formulation, the privilege against self-incrimination, and particularly the privilege to remain silent at one's own trial, are seen as intuitively justified by their tendency to make the criminal proceeding more of a "fair-fight." Such arguments seldom go much beyond the bold assertion that the privilege enhances fairness, and seem to rely on an unspoken analogy to a sporting event.

For example, the following argument has been offered as demonstrating the unfairness of calling the defendant as the first prosecution witness:

A person accused of a crime may become confused and frightened under cross-examination. His memory may be faulty with respect to unanticipated collateral matters. He may be subject to impeachment for prior conviction of felony. Other aspects of his behavior may be unfavorable if revealed.

Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 487 (1957) (footnotes omitted). The author fails to note that *any* witness faces these pitfalls. Whereas no one would suggest that these reasons would justify a non-defendant's refusal to testify, the author simply assumes without discussion that they become compelling when the potential witness is a criminal defendant whose freedom is at issue. Nor is any reason offered why the very same consequences do not work an impermissible unfairness when they are suffered by a defendant who, later in the trial, voluntarily (but unwisely, it turns out) takes the stand in his own defense.

As Jeremy Bentham pointed out, the analogy between a criminal trial and a sporting event is somewhat less than perfect:

The fox-hunter's reason [for the privilege against self-incrimination]. This consists in introducing upon the carpet of legal procedure the idea of "fairness," in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called "law" — leave to run a certain length of the way for the express purpose of giving him a chance to escape. . . . In the sporting code, these laws are rational, being conducive to the professed end [of amusement] . . .

[T]o different persons, both a fox and a criminal have their use; the use of the fox is to be hunted; the use of a criminal is to be tried . . .

Bentham, *Rationale of Judicial Evidence* (1822), in 7 THE WORKS OF JEREMY BENTHAM 454 (Bowring ed. 1843), quoted in 8 J. WIGMORE, *supra* note 17, § 2251, at 297 n.2.

cause for prosecution nor often a clear focus of inquiry.⁴⁰ Although the privilege has never been regarded as justifying refusals to answer questions before a grand jury or legislative committee for the reason that the answer might humiliate or defame the speaker,⁴¹ the privilege has afforded a substantial shelter from government inquiries which might have chilled the exercise of first amendment freedoms. Part of the reason is that the reviewing court cannot demand to be informed of the incriminating facts without violating the privilege, and thus must uphold assertion of the privilege where it is "evident" that a responsive answer "might" be incriminating.⁴²

Without denying the role that the fifth amendment has played in this respect, it is a role which "has no application in normal day-to-day criminal investigation,"⁴³ where there is no question of unpopular or controversial beliefs or associations coming to light. Even more clearly, this role is completely irrelevant to the issues raised in *Griffin* concerning inferences of guilt from a defendant's decision to remain silent. Accordingly, it will not be discussed further in the course of this analysis. Instead, this Article will ask whether the first three policy justifications for the privilege against self-incrimination — preventing coercion, enhancing human dignity, and assuring fairness — are significantly offended when the prosecutor suggests to the jury that it infer guilt from the defendant's decision to remain silent.

II. DOES COMMENT UPON A DEFENDANT'S SILENCE AMOUNT TO "COMPULSION"?

The literal language of the fifth amendment — that no one "shall be compelled" to be a witness against himself — would not seem, at first blush, even to remotely address the situation where a defendant does not become a witness, but on that account is made to suffer remarks that he must, therefore, be guilty. He has not testified at all, and, one might argue from principles of common language usage, cannot be said to have been forced to testify against himself.

However, by informing us more fully of the functions the privilege is expected to perform, the policy justifications set forth above provide a basis for recognition of the privilege in contexts not seemingly reached by its literal language. As a means of preventing tor-

40. Z. CHAFEE, *supra* note 27, at 189; 8 J. WIGMORE, *supra* note 17, § 2251, at 314-15; Ratner, *supra* note 39, at 484.

41. See *Ullman v. United States*, 350 U.S. 422, 430-31 (1956).

42. See *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

43. 8 J. WIGMORE, *supra* note 17, § 2251, at 314.

ture and physical coercion,⁴⁴ for example, the privilege should properly be found to be violated wherever such means of inducing testimony are employed, even if not successful in making a person "a witness against himself." So, too, if the guilty defendant's freedom from the "impossible" three-way choice of perjury, incrimination, or contempt is to be kept meaningfully intact,⁴⁵ the violation must be acknowledged not only where he accedes and announces his own guilt, but wherever substantial pressure is brought to compel him to do so. And if the proper relationship of government and citizen, as prosecutor and defendant, is truly to be maintained,⁴⁶ the principle barring the government from compelling affirmative assistance from an unwilling suspect or defendant must be enforced wherever its violation is attempted, not merely where that attempt meets with success. In sum, these considerations suggest that the fifth amendment is offended whenever an attempt is made to coerce statements by a criminal suspect or defendant.

The purposes of the privilege against self-incrimination may also be impaired by imposition of burdens on the exercise of the privilege, quite apart from whether the burdens are part of a deliberate attempt to violate the privilege. But how far beyond outright attempted or actual coercion, if at all, should the fifth amendment's concept of "compulsion" be extended, in order to further its underlying policies? That is, in part, the issue posed by *Griffin*, and it is one that is illuminated by a host of cases involving conduct or rules that make the assertion of particular constitutional rights — to a trial, to remain silent, to appeal — onerous and costly. As where an attempt is made to coerce testimony, these cases do not involve outright denials of rights. Instead, they undertake to determine when the burdening of a constitutional right should be treated in the same way as a complete denial of that right.

In *United States v. Jackson*,⁴⁷ for example, the Supreme Court struck down the capital punishment provision of the federal kidnapping statute because the death penalty could only be imposed by a jury — that is, when the defendant had exercised his right to a jury trial. Although the statute did not deny outright the defendant's sixth amendment right to a jury trial, it was found to be invalid as attaching a "needless" penalty — the risk of a death sentence —

44. See text at notes 30-34 *supra*.

45. See text at notes 35-37 *supra*.

46. See text at notes 38-39 *supra*.

47. 390 U.S. 570 (1968).

upon the assertion of that right.⁴⁸

While some cases have followed the reasoning of *Jackson* and found various practices or procedures to impose an impermissible burden on other constitutional rights,⁴⁹ a far greater number of cases have reached an opposite conclusion.⁵⁰ Taken together, these cases reveal that no simple rule exists to sort permissible from impermissible burdens on constitutional rights. "*Jackson* did not hold . . . that the Constitution forbids every government imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."⁵¹ On the other hand, burdens that are very severe,⁵² or that appear to be motivated by no rational purpose other than a desire to punish the exercise of a constitutional right,⁵³ are likely to be found impermissible.

48. The penalty was needless because both the death sentence and the use of the jury to impose it could be preserved in a statute calling for a jury to be empanelled for the sentencing phase of the proceedings, even where the conviction resulted from a guilty plea. 390 U.S. at 582-83.

49. *E.g.*, *Blackledge v. Perry*, 417 U.S. 21 (1974) (reindictment on felony charge after successful appeal of misdemeanor conviction held an impermissible burden on right to appeal); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (upon reconviction after appeal, sentence in excess of that given after first conviction impermissibly burdens right to appeal, unless the record sets forth reasons unknown at the time of first sentencing to justify increased punishment).

50. *E.g.*, *Corbitt v. New Jersey*, 439 U.S. 212 (1978) (statute calling for mandatory life term on conviction by jury trial, and for life terms or less on conviction by plea, does not impermissibly burden fifth, sixth, or fourteenth amendment rights); *United States v. Grayson*, 438 U.S. 41 (1978) (reliance at sentencing on believed perjury by defendant in the course of the trial does not impermissibly burden defendant's right to testify in his own defense); *Lakeside v. Oregon*, 435 U.S. 333 (1978) (instruction, over defendant's objection, to disregard his failure to testify, does not impermissibly burden his right to remain silent); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (threat to reindict on more serious charges unless defendant enters guilty plea does not impermissibly burden defendant's right to a trial, when made in the context of plea negotiations); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (heavier sentence by jury upon reconviction after appeal does not impermissibly burden right to appeal, where no reason appears to indicate that second sentence is the product of vindictiveness); *McGautha v. California*, 402 U.S. 183 (1971) *vacated on other grounds sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972) (combined trial and sentencing proceeding, which forces defendant to testify at trial or forego opportunity to address sentencing authority, does not impermissibly burden right to remain silent at trial); *Brady v. United States*, 397 U.S. 742 (1970) (guilty plea offered under statute invalidated in *United States v. Jackson*, 390 U.S. 570 (1968), is not necessarily invalid as the product of an impermissible burden on the rights to a trial and to remain silent).

51. *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973).

52. The severity of the burden — the possibility of bringing on one's own death sentence — and the ease with which it could be avoided consistent with the apparent policies behind the statute, appear to have been controlling in *Jackson*. Interestingly, the Court there held only that death sentences could not be imposed pursuant to such a statute. It did not hold, and has since denied, that guilty pleas offered under the pressure of that statute, are necessarily the product of an unconstitutional burden on the privilege against self-incrimination. *Brady v. United States*, 397 U.S. 742, 757-58 (1970). Such pleas have been allowed to stand when otherwise voluntary and offered in conformance with Rule 11 of the Federal Rules of Criminal Procedure.

53. A vindictive purpose on the part of the prosecutor or legislature — that is, an identifiable intention to punish the defendant for his decision to invoke a right — is the surest and

Justice Douglas's opinion in *Griffin* rested on the observation that comments by the prosecutor or judge on the defendant's decision to remain silent impose some measure of burden on that constitutional privilege.⁵⁴ The more recent cases on the burdening of constitutional rights make clear, however, that this is where the analysis begins, and not where it ends. In order to determine whether such comment amounts to an impermissible burden — violative of the fifth amendment right — two other issues should have been dealt with. The Court should have at least considered the severity of the resulting burden on the right to remain silent, as compared with other burdens on that right that have been held permissible, and it should have inquired as to the existence of a rational, non-vindictive purpose for the comment.⁵⁵

On the latter point, the obvious non-vindictive purpose of prosecutorial comment on a defendant's silence is to reach a proper verdict, based on sound inferences, from the evidence before the jury. Whether the prosecutor personally likes the defendant or snarls and foams at the mouth at the sight of him is irrelevant, given this proper, non-vindictive fact-finding purpose for the prosecutor's suggestion that the defendant's silence implies guilt.⁵⁶ The rationality of the inference thus suggested, and its usefulness in deciding the ultimate question of a defendant's guilt or innocence, rests on the notion that a wrongfully accused person will want to speak up and present his story, and, consequently, that such a person will usually seize an opportunity to do so at the proceeding officially designated to determine his guilt or innocence.⁵⁷ The present Supreme Court,

most common path to reversal. *See, e.g.,* Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

54. 380 U.S. 609, 614 (1965).

55. There is some authority which seems to suggest that absent a vindictive purpose, no burden on the right to a trial or the privilege against self-incrimination can amount to a violation of due process. *See* Bordenkircher v. Hayes, 434 U.S. 357, 362-63 (1977). For the purposes of this analysis it will be assumed that a non-vindictive burden could become so severe as to itself amount to a constitutional violation.

56. Evidence of an alternative, proper justification for the seemingly punitive conduct or rule in issue negates the inference of vindictiveness and, seemingly, the basis for a finding of an impermissible burden. *See* North Carolina v. Pearce, 395 U.S. 711, 726 (1969). Examples of state policies which have been found to justify imposition of significant burdens on the privilege against self-incrimination are the desire to induce guilty pleas, Corbett v. New Jersey, 439 U.S. 212 (1978), and the preference for a unitary trial and sentencing proceeding, McGautha v. California, 402 U.S. 183 (1971).

57. While the Court in *Griffin* did not assert that the inference of guilt from silence lacks rationality to a degree raising a due process question, it made much of possible explanations, other than guilt, for a defendant's silence. Excessive timidity or nervousness, 380 U.S. at 613, or the fear that impeaching prior convictions will be put before the jury, 380 U.S. at 615, were said to be reasons that even an innocent person would decline to take the stand.

Common sense would indicate that neither of these concerns would deter an innocent de-

as well as a number of commentators, have acknowledged the force of this reasoning.⁵⁸ Accordingly, a decision to permit such comment

defendant from having his say in court, except in the most extraordinary of circumstances. Even conceding, *arguendo*, such concerns to be decisive a significant fraction of the time, they certainly do not render the inference of guilt from silence other than highly rational. For the rationality of a permissive inference required by due process is only that the inferred fact (guilt) be "more likely than not to flow from" the established fact (silence). *County Court of Ulster County v. Allen*, 442 U.S. 140, 165 (1979); *Leary v. United States*, 395 U.S. 6, 36 (1969); *Tot v. United States*, 319 U.S. 463, 467-68 (1943). The inferred fact need not *always or almost always* accompany the proven fact for the inference to be rational. Were that true, circumstantial evidence would be rendered virtually useless.

The assertion that timidity, nervousness, or any personal inability to communicate may explain a person's silence is inadequate as an argument against allowing the inference to be drawn. Unlike the fear of impeaching prior convictions, these reasons for silence may be explained to the jury by evidence and argument, thus refuting or weakening the inference of guilt, while not incurring a risk of accompanying prejudice. Furthermore, the fear of impeaching prior convictions is also an inadequate reason for prohibiting the inference. *See* note 121 *infra*.

A lesser measure of rationality — though probably not one rendering the inference a violation of due process — appears to accompany an inference of guilt from a defendant's silence at the time of arrest. *See Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Hale*, 422 U.S. 171 (1975). Such silence generally follows explicit warnings that no statement need be made, and that any made will be used in court. Any person, guilty or not, with any exposure (even via television) to the criminal law, should be aware that delay and consultation with an attorney before answering will not hurt, and can only help, the chances of a favorable resolution of one's case. In short (leaving aside the reaction of a jury that is told about it), there is almost never a sound reason why any defendant should wish to talk at the time of his arrest, and several reasons why he should not. *See Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting). Nevertheless, the Supreme Court has recently explicitly recognized that a defendant's silence even *prior* to the time of arrest may be sufficiently probative of facts in issue as to be admissible. *Jenkins v. Anderson*, 48 U.S.L.W. 4693, 4696 (U.S. June 10, 1980).

By contrast, the rational relationship is much stronger between guilt and the defendant's decision to remain silent *at his trial*. There, the defendant has had an opportunity to consult with counsel, and faces his one and only chance to persuade the jury that he is innocent. Silence then much more directly supports an inference that the defendant has nothing to say for himself.

58. *See Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976); *Adamson v. California*, 332 U.S. 46, 56 (1947); *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). As the Court commented in *Adamson*:

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 knowledge of the accused. In that case a failure to explain would point to an inability to explain.

332 U.S. at 56. In addition *see* note 89 *infra*.

The most recent revision of Wigmore acknowledges that the failure to take the witness stand and assert a fact, when it would have been natural to do so, is (if admissible) *prima facie* evidence against the existence of that fact. 3A J. WIGMORE, EVIDENCE § 1042, at 1056-58 (Chadbourn rev. ed. 1970). Elsewhere, in commenting on the wisdom of instruction to disregard the inference of guilt from silence where no comment has been made, the previous revision notes: "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." 8 J. WIGMORE, *supra* note 17, § 2272, at 436.

In commenting on the *Griffin* decision shortly after its issuance, the *Harvard Law Review* remarked: "[T]he inference of guilt arising from [the] failure [to testify] may be so natural that

can be justified on grounds other than an impermissible purpose of punishing the defendant who exercises his right to silence: the comment enhances the fact-finding process by highlighting for the jury a highly rational inference that it may draw.⁵⁹

The first question, concerning the severity of the burden imposed, demands a much lengthier discussion. At issue is the tendency of impending prosecutorial comment to induce defendants who would otherwise remain silent to give up that right — the tendency to “cut[] down on the privilege by making its assertion costly.”⁶⁰ This tendency depends on the degree of psychological pressure to testify that the possibility of such comment places upon defendants. Of course, the nature and extent of this pressure may vary greatly from case to case, and there would appear no feasible way to quantify it, even crudely. It is feasible, however, to compare the pressures created by such prosecutorial comment with the range of psychological pressures to speak in one’s own defense that have been found permissible.⁶¹

in most cases it will still adversely affect the defendant in the minds of the jury.” *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 161 (1965).

59. This non-vindictive justification for comment on the failure to testify looks rather well by comparison with other justifications that have been found sufficient to justify burdens on the right to silence. See note 56 *supra*.

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

61. To facilitate meaningful comparison with the pressures effected by prosecutorial comment on the failure to testify, the discussion in text will be confined to tolerable burdens on the defendant’s right to remain silent at a criminal or quasi-criminal judicial proceeding. This should not be taken to suggest that comparable burdens on the privilege do not arise in other contexts as well. One example was highlighted by the Supreme Court’s recent decision in *Jenkins v. Anderson*, 48 U.S.L.W. 4693 (U.S. June 10, 1980). In that case the Court upheld, against fifth amendment and due process challenges, the prosecutor’s use of the defendant’s pre-arrest failure to come forward to the police, to impeach his testimonial claim of self-defense. The Court attached great significance to the fact that the pre-arrest silence was invoked for the purpose of impeaching the defendant’s own testimony. However, as is suggested by both Justice Stevens, concurring, 48 U.S.L.W. at 4696-97 & n.7, and Justice Marshall, dissenting, 48 U.S.L.W. at 4699, the fact that it was used to impeach rather than as evidence in its own right would not appear to diminish appreciably the burden that is being imposed on the unarrested defendant’s right to remain silent.

Another example is the pre- or post-arrest confession, upon which basis a substantial proportion of criminal cases are resolved. If made in the course of custodial interrogation, such confessions must be preceded by an advisement of constitutional rights, *Miranda v. Arizona*, 384 U.S. 436 (1966), and in any event, the confession must be the voluntary act of the defendant and not the result of coercive pressures having the effect of overbearing the defendant’s free will. See *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964). There is, however, no suggestion in any of the decisions that a suspect’s statement may be invalidated solely on the basis of the self-generated pressure to speak. Assuming that a defendant’s right to counsel has not been violated, see *Brewer v. Williams*, 430 U.S. 387, 405-06 (1977), and that he has not asserted a right to remain silent, it is not part of the fifth amendment’s protection that he further be free from the natural inclination to respond when questioned in order to avoid the inference in the eyes of his interrogators that he must have something to hide. This pressure to respond to the facts confronting one is essentially the same pressure that a defendant feels at trial (albeit in a different context) and that the inference prohibited by *Griffin* is said to aggravate impermissi-

The most obvious comparison is with the situation where neither the prosecutor nor the judge makes any comment, and the pressure to testify arises from the evidence in the case and the defendant's fear that the jury will draw the adverse inference on its own. Such a fear seems well justified, given the rationality of this inference, and the great likelihood that it will be drawn and relied on whether the prosecutor comments or not.⁶² Indeed, the Supreme Court has acknowledged that the evidence alone may generate "severe" pressures to testify.⁶³ And yet, the Court has held without qualification that pressures based on the evidence alone can never amount to compulsion under the fifth amendment.⁶⁴

The same result holds where the pressures generated by evidence are aggravated in certain particular respects. A judge's decision to override the wishes of the defendant and instruct on the impermissibility of drawing any inference from a defendant's silence does not offend the fifth amendment right. In *Lakeside v. Oregon*,⁶⁵ the Court found that such a practice did not impermissibly burden the right to silence, relying in part on the likelihood that the jurors would have

bly. However one wishes to characterize its strength, it is the source of a substantial number of admissible confessions.

Moving closer to the trial, various pressures to plead guilty have also been found not to constitute fifth amendment violations. Where a plea is otherwise voluntary, that is, the product of the defendant's free will, it is not invalid because its offering was the only sure way to avoid a possible death penalty. *Brady v. United States*, 397 U.S. 742, 758 (1970); *Parker v. North Carolina*, 397 U.S. 790, 795 (1970). Nor is a guilty plea the invalid product of fifth amendment compulsion when offered following a threat, in the plea bargaining context, to increase the charges if a plea is not entered. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1968). Such threats as these, which can be slaked only by outright self-incrimination and foregoing the right to trial, would seem to produce a category of psychological pressure both more blatant and more severe than that posed by comment on the failure to testify.

62. "It has often been noted that such inferences may be inevitable," *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978), and it is widely believed that even absent comment, "a defendant who does not take the stand will probably fatally prejudice his chances of acquittal." Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentencing*, 66 *YALE L.J.* 204, 212 n.36 (1956), quoted in *United States v. Grayson*, 438 U.S. 41, 58 n.5 (1978) (Stewart, J., joined by Brennan and Marshall, JJ., dissenting).

63. *Williams v. Florida*, 399 U.S. 78, 84 (1970). The pressure on the defendant to testify varies greatly depending on the nature of the government's proof and the availability of other witnesses whom the defendant might call to contradict portions of it. The pressure is the greatest where the government has presented a fairly strong but circumstantial case, and the defendant has available no witnesses to aid in his defense. In that instance, the defendant can reasonably expect conviction if no plausible competing interpretation or version of the facts is presented, and he has no one to turn to for that version but himself and his lawyer. At the same time, given the circumstantial nature of the proof, the defendant may reasonably feel that his own testimony has the potential to put certain key facts in doubt, or to cast an innocent light on established facts that previously appeared highly incriminating. The pressure to take the stand in such a situation may be overwhelming.

64. *McGautha v. California*, 402 U.S. 183, 213 (1971); *Williams v. Florida*, 399 U.S. 78, 83-85 (1970).

65. 435 U.S. 333 (1978).

drawn the inference even if the judge had not called it to their attention.⁶⁶ The six-member majority reached its conclusion despite the certainty that a defendant who prefers not to have the instruction given (because he believes that the jury may not notice or give weight to his silence) will feel greater pressure to testify if he knows that the instruction is going to be given.

The Supreme Court has also permitted a unitary system of trial and sentencing, which forces the defendant to testify at trial or, by not doing so, to forego his right to address the sentencing authority. In *McGautha v. California*,⁶⁷ the Court noted that the choice to testify or remain silent at the unitary proceeding did not involve pressure which can be characterized as "compulsion," but was rather just one of the "difficult judgments" frequently confronting criminal defendants.⁶⁸

Cases involving inferences drawn from certain unexplained facts provide perhaps the strongest authority for allowing imposition of burdens similar to the comments prohibited in *Griffin*. In *County Court of Ulster County v. Allen*⁶⁹ and a series of cases going back a half century,⁷⁰ the Court has employed an analysis that systematically approves jury instructions that put great pressure on the defendant to take the stand. Indeed, because these cases involve authoritative instructions on the law by the judge, rather than comments by the prosecutor which the jury can freely ignore, they may involve greater pressure than the comment prohibited in *Griffin*.

66. 435 U.S. at 340-41.

67. 402 U.S. 183 (1971), *vacated on other grounds sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972).

68. 402 U.S. at 211-13. Candor requires mention of the Court's decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), which invalidated, on self-incrimination and due process grounds, a state court procedure requiring the defendant to testify at the outset of the defense case or not at all. A commonsense reading of the two cases suggests that *Brooks* and *McGautha* cannot be reconciled without a great deal of sophistry and mental gymnastics. The statutes in both cases confront defendants with difficult choices of whether to speak at a certain time or forfeit the right to do so later, and both statutes impose the choice in the process of implementing rational state procedural policies. Rather than attempt to distinguish them, it seems more prudent simply to acknowledge *Brooks* as a precedent somewhat at odds with the bulk of authority and with the spirit of the argument being presented here. Cf. *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (testimony given by defendant at suppression hearing may not be introduced at trial, even though it was not compelled in violation of the fifth amendment).

69. 442 U.S. 140 (1979).

70. The cases in this line of authority reach varying conclusions on the propriety of particular inferences or presumptions described in jury instructions. They are, however, uniform in their failure to find that the inference or presumption offends the privilege against self-incrimination. See *Barnes v. United States*, 412 U.S. 837 (1973); *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *Tod v. United States*, 319 U.S. 463 (1943); *Yee Hem v. United States*, 268 U.S. 178 (1925).

In *Ulster County*, which involved a prosecution for unlawful possession of firearms, the trial court had instructed the jury that it could infer possession of firearms from the fact, if proven, that the defendants were found in an automobile where such firearms were also present.⁷¹ The court also instructed fully on the presumption of innocence and the government's burden of proving guilt beyond a reasonable doubt.⁷² As to the inference at issue, the jury was told that it was "effective only so long as there is no substantial evidence contradicting the conclusion flowing from [it], and [it] is said to disappear when such contradictory evidence is adduced."⁷³ Finding that the permissive chain of reasoning which the instruction authorized — inferring possession from unexplained physical presence — was "more likely than not" to be correct, the Supreme Court upheld the instruction as consistent with the requirements of due process.⁷⁴

Notably, neither the majority nor the dissenters made any mention of a possible *Griffin*-type problem posed by the Court's instructions.⁷⁵ Since the offense in the case was the unlawful possession of firearms, the challenged instruction involved a virtual inference of guilt.⁷⁶ That instruction can be fairly said to authorize this inference of guilt, where "there is no substantial evidence contradicting" that conclusion. This reference to the presence or absence of contradictory evidence may not be a direct comment on the failure of the defendants to testify. But in this context, where guilt or innocence may appear to turn on the jury's acceptance of a single inference,⁷⁷

71. 442 U.S. at 145.

72. 442 U.S. at 162 n.22.

73. 442 U.S. at 161 n.20. The trial court used the language of the statute in referring to the conclusion of possession as a "presumption." Justice Stevens, in his opinion for the Court, states that the instruction was in fact that of a permissive inference. 442 U.S. at 160-61.

74. Previous decisions avoided the issue of whether an instruction on a permissive, as opposed to mandatory, chain of reasoning is valid if it is more likely than not to be correct, but not correct beyond a reasonable doubt. For example, in *Barnes v. United States*, 412 U.S. 837, 846 (1973), the Court declined to define the applicable standard, and found the inference at issue valid under the most stringent reasonable-doubt test. In *Turner v. United States*, 396 U.S. 398 (1970), the Court dealt with two inferences that the defendant knew the drugs he possessed were imported, simply because he possessed them. Apparently based on horticultural realities known to the Court, the inference concerning cocaine was struck down as failing to meet the easiest, more-likely-than-not test, 396 U.S. at 419, while the inference concerning heroin was upheld as correct beyond a reasonable doubt. 396 U.S. at 416.

75. One possible explanation — that the defendants testified — cannot be verified from the published opinions in the case.

76. Possession, which could be established by inference, was rendered unlawful because the guns were loaded when found. 442 U.S. at 161 n.20.

77. The argument has been made that statutory inferences, either of guilt or of essential elements of the crime, do indeed allow everything to turn on the proof of a limited set of predicate facts (*e.g.*, presence in the car with the guns). It is therefore said that the inference can only properly be allowed where the inferred fact (*e.g.*, possession) follows from the predicate facts beyond a reasonable doubt — otherwise the government will be able to secure a

the pressure on the defendant to come forward with arguably contradictory evidence cannot be meaningfully distinguished from the pressure created by a direct comment on silence.⁷⁸

The Court in *Ulster County* may have neglected the fifth amendment issue because the Court had dealt with it emphatically several times before. Most recently in *United States v. Barnes*,⁷⁹ where the Court upheld an inference of knowledgeable possession from the unexplained actual possession of recently stolen property,⁸⁰ it had decisively rejected a similar assertion of compelled self-incrimination arising from the inference instruction.⁸¹ The Court earlier reached the same conclusion in *Turner v. United States*,⁸² a case involving

conviction on proof of guilt less than beyond a reasonable doubt. See Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1190 (1979).

The defect in this argument is its failure to acknowledge that any instructions concerning particular inferences are invariably submerged in a great bath of instructions on the way the jury is to approach the case, including instructions on the general assumption of innocence and burden of proof beyond a reasonable doubt, see, e.g., 1 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 11.14 (3d ed. 1977), the burden of proving each element of the offense beyond a reasonable doubt, *id.* § 11.15, the duty to weigh all of the evidence in the case, *id.* § 15.02, and the general permissibility of drawing commonsense inferences from the facts that are directly proven. *Id.* §§ 11.11, 15.02. When heard in such a context, specific inference instructions do nothing more than highlight a possible chain of reasoning — they do not countermand the duty to convict only when every element is proven beyond a reasonable doubt. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 160-62 (1979).

Whether such specific inference instructions are desirable and enhance the jury's thought process is debatable. But to suggest that due process disallows them unless they are reliable beyond a reasonable doubt is contrary to a commonsense understanding of how verdicts are reached in the face of complex evidence. It also raises the obvious question whether lawyers, too, may argue no inferences which are not indubitably valid. Such an absurd result would seem logically to follow, though it would eliminate virtually all arguments based on circumstantial evidence.

78. This is not an original observation. Appearing in the same volume of the *United States Reports* as *Griffin*, and preceding it by less than two months, is the Court's decision in *United States v. Gainey*, 380 U.S. 63 (1965), wherein the defendant's "unexplained presence" at an operating still was held constitutionally to support an inference of involvement in the illegal operations, 380 U.S. at 68. It has been observed that:

While there is no direct mention in *Gainey* of the failure to testify, the trial judge's use of the phrase "unexplained presence" in his instructions would seem to emphasize the defendant's silence almost as much as the comment forbidden in *Griffin*. The instructions to the jury in the two cases may differ in the degree of potential injury they can do to the defendant, for when no explicit mention is made of his failure to testify, there is less likelihood of prejudice. But the difference is at best slight and if *Gainey* is taken as a correct decision, it is worth asking whether the *Griffin* rule's small benefit to the accused justifies such another disruption of state criminal proceedings by the Supreme Court.

The Supreme Court, 1964 Term, 79 HARV. L. REV. 56, 162 (1965).

79. 412 U.S. 837 (1973).

80. See 412 U.S. at 839-40 (the district court instruction upheld by the Court said that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen").

81. 412 U.S. at 846-47.

82. 396 U.S. 398, 417-18 (1970).

inferences of knowledge of importation from the unexplained possession of certain drugs.⁸³ Both of these decisions quickly disposed of the asserted burden on the right to remain silent, relying without fanfare on the language and reasoning of the Court's 1925 decision in *Yee Hem v. United States*,⁸⁴ which had found no compulsion effected by a similar statutory inference from certain unexplained facts:

The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.⁸⁵

In *Yee Hem*, and in the later decisions which rely on it, the Court seems to say that pressures to testify arising from instructions on permissible inferences are among the realities inherent in criminal fact-finding proceedings which a defendant must accept. The presentation of a strong prosecution case will naturally generate significant pressure on the defendant to respond — both to balance the evidence and to meet the juror's expectation that an innocent man will have something to say for himself. The instruction or argument of a rational inference drawn from unexplained facts may well intensify this pressure both by giving new meanings to the facts in evidence, and by highlighting the defendant's failure to come forward with his own innocent version of the facts. But such pressures are tolerated and accepted because they fall within no conventional concept of fifth amendment compulsion, and because any serious attempt to eliminate them would greatly impair the fact-finding capability of the criminal system.

The same reasoning would have been an appropriate response to the defendant's claim in *Griffin*. Like the inferences to be drawn from unexplained facts, the inference of guilt from silence is not most basically a way of punishing the defendant — it is, on account of its rationality,⁸⁶ a way of making more likely the correct factual resolution of the case. The pressure to testify which it generates gains its strength at the same time and in the same way that the

83. 396 U.S. at 402. See note 74 *supra*.

84. 268 U.S. 178 (1925).

85. 268 U.S. at 185. This case involved the inference of knowledge of importation of opium from the unexplained possession of the drug.

86. See notes 57-58 *supra* and accompanying text.

rational inference of guilt develops.⁸⁷ That pressure amounts to no more and no less than the defendant's perception of the growing weight of incriminating evidence.

The severity of the pressure to testify is not reduced in a constitutionally significant way by barring prosecutors from making explicit reference to the single inference of guilt by silence. If the Supreme Court is to be believed, most juries draw the inference whether there is any comment or not.⁸⁸ In those instances where the inference would not otherwise have been drawn, the comment must be counted an enlightenment and its message an enhancement of the fact-finding process.⁸⁹ The pressure to testify that it exerts on a defendant is more or less proportionate to the rationality, and thus the appeal, of the inference on any particular set of facts. It is thus apparent that the pressure to testify that the *Griffin* Court termed a "penalty" is really an incidental product of "the force of circumstances" and the weight of the evidence.⁹⁰

Viewed through the other end of the telescope, constitutional toleration of significant pressures to testify that arise in the course of the fact-finding process — from the weight of the evidence, from instructions "innocently" calling attention to defendant's silence, from the peculiar structure of the proceeding, and from statutory inferences from unexplained facts — marks the failure to deliver on the promise held out in *Griffin*.⁹¹ That decision held comment on a defendant's silence improper because "[i]t cuts down on the privilege by making its assertion costly."⁹² If that is indeed the *ratio* of the case, other practices that "cut down" on the privilege by means of comparable psychological pressure should also constitute violations.

87. See note 63 *supra*.

88. See note 62 *supra*.

89. In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), the Court refused to apply *Griffin* retroactively. It emphasized that the no-comment rule was not intended to improve the ascertainment of truth, thus demonstrating its own belief in the rationality of the inference of guilt when the prosecutor comments on the defendant's failure to testify. 382 U.S. at 416.

90. Because the potential pressure to testify exerted by possible comment is directly related to the rationality of a particular inference of guilt from silence, it is inherently limited in a way that burdens inflicted solely out of vindictiveness are not. Had they not been ruled unconstitutional burdens on the right of appeal, the prosecutor's discretion to increase the charges on retrial, *Blackledge v. Perry*, 417 U.S. 21 (1974), and the judge's discretion to increase the sentence on reconviction, *North Carolina v. Pearce*, 395 U.S. 711 (1969), would have no limit save the availability of more serious alternative charges, the legality of heavier sentences, and the arbitrary vindictiveness of the official in question. The inference of guilt from silence, like the inference of guilt from unexplained facts, on the contrary, can only bring such pressure to bear as the rationality of the inference will support.

91. The toleration of these pressures in the non-adjudicatory context also marks this failure. See note 61 *supra*.

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

Indeed, such psychological pressure, at least when it rises to a certain level, should likewise amount to compulsion under the fifth amendment. Yet in virtually⁹³ every context save that of *Griffin*-comment, where such pressure has been acknowledged to exist, the Court has rejected out of hand the possibility that such pressure might constitute compulsion.

The integrity of the *Griffin* rule can no longer be maintained on the theory that comment-generated pressures to testify amount to compulsion. Such reasoning never made much sense as a means of implementing the fifth amendment's underlying purposes of preventing torture and protecting the defendant from the impossible choice of incrimination, perjury, or contempt. Unlike physical coercion, pressures generated by impending comment do not involve violation of free will or the risk of generating false evidence.⁹⁴ And if such pressures really created an affront to human dignity within the amendment's purview the protection would be expanded to include not merely "impossible" choices, but also the difficult decisions that face all criminal defendants.⁹⁵

The Supreme Court, perhaps after consideration of the many areas where such difficult choices are tolerated, has apparently decided that the *Griffin* rule must be justified on grounds other than the equation of psychological pressure with compulsion. In *Baxter v. Palmigiano*,⁹⁶ the Court confronted a prison disciplinary proceeding in which prison authorities relied upon the defendant's decision to remain silent in finding him guilty of inciting a disturbance and in ordering him to undergo thirty days of "punitive segregation."⁹⁷ Prior to the hearing, the authorities had informed the defendant both that he had a right to remain silent, and that such silence would be used against him.⁹⁸ When he chose to exercise his right, his silence was considered along with other evidence of guilt to support the disciplinary decision.⁹⁹

Upon review of a court of appeals decision invalidating this practice on fifth amendment grounds,¹⁰⁰ the Supreme Court reversed and held the practice permissible. It did not question that the privilege

93. See note 68 *supra*.

94. See text at note 34 *supra*.

95. See note 37 *supra*.

96. 425 U.S. 308 (1976).

97. 425 U.S. at 313.

98. 425 U.S. at 312.

99. 425 U.S. at 317-18.

100. *Palmigiano v. Baxter*, 510 F.2d 534, 536-37 (1st Cir. 1974).

against self-incrimination applies in the prison context¹⁰¹ nor did it attempt to make light of the psychological pressures on the defendant, which were no doubt enhanced by the warning of the disciplinary board that his silence would be held against him. Rather, the Court dealt with the compulsion issue by contrasting the case with a line of authority that prohibits an administrative tribunal from compelling testimony on pain of losing employment or some other benefit.¹⁰² The Court concluded that there had been no compulsion in *Baxter*, since no undesirable consequence occurred "automatically" as a result of the defendant's silence:¹⁰³

[A]s far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding the 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.¹⁰⁴

Inexplicably, though the Court borrowed language from *Griffin* and found it inapposite, the case was not referred to in this discussion of whether the particular pressure here imposed rose to the level of compulsion.¹⁰⁵ Instead, *Griffin* was discussed as if it were unrelated to the issues of psychological pressure and of when that pressure amounts to an impermissible "penalty." Most significantly, *Baxter* held *Griffin* to apply only in formal criminal proceedings. The Court did no more than announce the rule in its thus narrowed form, and conclude that it was inapplicable:

[I]t is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case. *Griffin v. California*, 380 U.S. 609 (1965). . . .

. . . No criminal proceedings are or were pending against Palmigiano. The State has not, contrary to *Griffin*, sought to make evidentiary use of his silence at the disciplinary hearing in any criminal proceeding.¹⁰⁶

101. See *Mathis v. United States*, 391 U.S. 1 (1968).

102. *Baxter v. Palmigiano*, 425 U.S. 308, 316-17 (1976). These cases include *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

103. 425 U.S. at 317.

104. 425 U.S. at 318.

105. *Griffin*, of course, involved a judge's instruction to the jury that it might consider the defendant's silence in determining guilt or innocence. See note 3 *supra*. At issue was the defendant's initial conviction and incarceration. In *Baxter*, the fact-finding authority in a disciplinary proceeding informed the defendant that his silence would be held against him. At issue there was a term of "punitive segregation." In terms of the pressures placed on the defendants, the close parallel between the two cases is obvious. It seems far closer than the parallel between *Baxter* and either of the situations in the *Garrity-Lefkowitz* line of cases.

106. 425 U.S. at 317.

A straightforward application of *Griffin's* reasoning prohibiting comments or instructions which "cut down on the privilege by making its assertion costly" would have led the Court to the opposite result in *Baxter*. While rejecting this reasoning — as had many previous courts¹⁰⁷ — despite the close factual similarity to the case before it, *Baxter* did not deny *Griffin's* continuing validity within the narrow purview of the criminal proceeding. The hint, at least, is there that *Griffin* may find its justification in factors which are present only in the context of a criminal trial.

III. DOES COMMENT UPON A DEFENDANT'S SILENCE IN THE COURSE OF HIS TRIAL OTHERWISE OFFEND FIFTH AMENDMENT CONCEPTS OF FAIRNESS?

The conclusion that comment on a defendant's silence does not involve identifiable "compulsion" of the sort prohibited by the fifth amendment might be taken to signal the end of the inquiry. After all, if the constitutional language is not to be made "a roving commission"¹⁰⁸ to right all wrongs, it must mean something close to what it says, and the concept of compulsion is at the very core of the amendment's prohibition. A finding of no compulsion is certainly *prima facie* evidence that the privilege against compulsory self-incrimination has not been violated.

Nevertheless, the Supreme Court's approach in *Baxter* suggests that we should be on the lookout for an alternative rationale for the *Griffin* rule. And the concept of fairness, which was earlier identified as the third justification for the privilege against self-incrimination, presents a possibility.¹⁰⁹ The notion that the prosecution must approach the defendant as an equal because he is an equal in the scheme of our government has ramifications for the burdens that the prosecution must carry in any criminal action. In particular, the idea that the government must prove its case without any help from the defendant has been given substantial lip service, and bears some relationship to the issue of comment on a defendant's silence. As the Supreme Court stated in *Miranda v. Arizona*:

To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evi-

107. See text at notes 62-84 *supra*.

108. *Spencer v. Texas*, 385 U.S. 554, 569 (1967) (Stewart, J., concurring).

109. See note 38 *supra* and accompanying text.

dence against him by its own independent labors. . . .¹¹⁰

A serious effort to implement this ambitious generality would require that the prosecution use neither the defendant nor any of his statements, works, or personal characteristics as evidentiary tools in pursuit of conviction. In effect, introduction of such evidence at trial — quite apart from whether its original production was compelled or not — uses the defendant as a means of incriminating himself. Since the defendant would no doubt choose to prevent this usage if he could, it might be said with only moderate distortion of the language that such usage amounts to the defendant's incrimination of himself against his will. In the context of prosecutorial comment on the defendant's silence, the argument would be that the government is attempting to avoid its full burden of proving guilt by relying upon the in-court acts of the defendant. Instead of relying on evidence it has independently collected, the government enlists the untendered assistance of the defendant by drawing inferences from the way he conducts himself in court.

For reasons which are obvious upon reflection, "the privilege has never been given the full scope which [the fairness justification might be taken to] suggest."¹¹¹ Complete realization of the ideal that defendants cannot be used to help convict themselves would require prohibiting the use of confessions, in-court and out-of-court identifications, fingerprints, photographs, bodily fluid samples, and handwriting and voice exemplars. In its most extreme form, it might be taken to prohibit proof of the crime at all, since the evidence will necessarily relate to acts of the defendant that he would no doubt prefer not to have introduced in court.

Both common sense and an unequivocal line of decisions teach that the fifth amendment generally does not exclude real or physical evidence, or the conclusions that may be drawn from it,¹¹² including evidence of the defendant's physical behavior, appearance, or characteristics, even when that evidence is secured by compulsion.¹¹³ It prohibits only "communications" or "testimony," which includes only the defendant's spoken words and, in some cases, his written

110. 384 U.S. 436, 460 (1966).

111. *Schmerber v. California*, 384 U.S. 757, 762 (1966).

112. *Bellis v. United States*, 417 U.S. 85, 88-90 (1974); *Schmerber v. California*, 384 U.S. 757, 764 (1966).

113. *E.g.*, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting exemplars); *United States v. Wade*, 388 U.S. 218, 221-23 (1967) (line-up); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (blood sample); *Holt v. United States*, 218 U.S. 245, 252-53 (1911) (clothing).

communications¹¹⁴ and acts having a clear communicative content.¹¹⁵

The defendant's decision to remain silent is not a testimonial or communicative act to which the fifth amendment applies. It is simply a physical reality of the trial, akin to the fact, likewise obvious to the jury, that he fits a certain physical description or behaves in a manner indicative of guilt. If the government does not breach its duty to prove the case unaided by the defendant when it seeks to prove guilt by use of fingerprints, blood type, or a line-up identification, neither does it do so when it relies upon a defendant's decision not to take the stand.

Even were the act of sitting mute somehow testimonial or communicative in the fifth amendment sense — which it most certainly is not ¹¹⁶— the privilege is only available when the person asserting it has been the object of identifiable compulsion.¹¹⁷ The defendant's competence to testify is now generally recognized,¹¹⁸ and is probably a right of constitutional proportions.¹¹⁹ That right is not denied, and the defendant's silence thus compelled, by the fact that unhappy circumstances may befall him should he choose to exercise it. Neither the threat of wilting cross-examination¹²⁰ nor of impeachment by prior conviction¹²¹ constitutes a denial of the right to testify. Such

114. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

115. For example, a subpoena for the production of evidence may offend the fifth amendment because it forces a person, by his act of production, to communicate that "this is the evidence requested and it has been in my possession." If such a communication might be incriminating, the subpoena is objectionable on fifth amendment grounds. See *Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976); *Couch v. United States*, 409 U.S. 322, 330 (1973); *Johnson v. United States*, 228 U.S. 457, 458 (1913).

116. While such conduct is informative in that it tells us something about the defendant's state of mind, it is no more testimonial than is the defendant's act of fleeing the scene of the crime or exhibiting a guilty demeanor in court. Like such other evidence that raises no fifth amendment issue, the defendant's silence embodies no explicit or implicit statement by him. Its significance is not in any statement that it makes, but in the inferences to be drawn from it.

117. In *Couch v. United States*, 409 U.S. 322, 329 (1973), the Court held that business records prepared by the defendant could be procured by summons from an accountant to whom the defendant voluntarily surrendered them. While the records might in fact have incriminated the defendant, and were seized by compulsory process, the defendant suffered no compulsion. She voluntarily prepared them for her own use, and voluntarily turned them over to her accountant. See *Fisher v. United States*, 425 U.S. 391 (1976). The same conclusion was reached in *Andresen v. Maryland*, 427 U.S. 463 (1976), where prepared records were secured from the defendant's office by means of a search warrant.

118. *E.g.*, 18 U.S.C. § 3481 (1969).

119. See *United States v. Grayson*, 438 U.S. 41, 54 (1978); *Harris v. New York*, 401 U.S. 222, 225 (1971).

120. See *McGautha v. California*, 402 U.S. 183, 215 (1971), *vacated on other grounds sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972); *Fitzpatrick v. United States*, 178 U.S. 304, 314-16 (1900).

121. See *McGautha v. California*, 402 U.S. 183, 215 (1971); *FED. R. EVID.* 609. The only justification for *Griffin* which I have heard advanced with any degree of conviction involves

circumstances no more compel his silence in the fifth amendment sense than the threat of comment upon his silence compels his testimony.¹²² Notwithstanding the high-blown rhetoric to which it gives breath, the fairness rationale thus offers no hidden reservoir of strength for the *Griffin* rule.

CONCLUSION

The preceding analysis indicates that *Griffin v. California* is untenable as an article of fifth amendment jurisprudence. To be justified under the fifth amendment, *Griffin* must find sustenance in the acknowledged policies served by that amendment, and must coexist with the case law interpreting and applying it. The *Griffin* rule finds no sustenance in those policies as they have been shaped and molded in the context of decided cases. It is a rule in search of a reason, and that search cannot but fail, barring a major turnabout by the Supreme Court.

If we view comment on a defendant's silence as a form of penalty and inducement to forego the privilege against compulsory self-incrimination, *Griffin* might be thought to outlaw a type of compulsion that is subtle but nonetheless within the purview of the fifth amendment. Analysis reveals, however, that the criminal system is rife with psychological pressures encouraging the defendant to take the stand in his own defense — indeed, to incriminate himself outright. Apart from the *Griffin* context, such pressures are almost routinely approved, assuming some basis in policy more laudable than the desire

the admissibility (for impeachment only) of prior convictions, which threatens a defendant who takes the stand. The argument made is that the inference of guilt from silence may not be as rational as supposed, since an innocent defendant with a bad criminal record might remain silent to avoid putting his record before the jury in the form of impeachment evidence. See FED. R. EVID. 609. There are two responses to this argument.

First, it is contrary to human nature. Without denying the extraordinary case of a man whose record is so bad, and whose honest, exculpating story so implausible, that he elects to remain silent, in the majority of cases, even a hardened criminal, when wrongly accused, would want to have his say. See notes 57-58 *supra* and accompanying text.

Second, whatever weight one attaches to this argument, it has nothing to do with either compulsion or self-incrimination. In the very worst imaginable case, the government benefits from an inference which does not hold true in a particular factual setting. That is, the jury accepts a factually incorrect inference of guilt from silence as a result of the defendant's conclusion that he has less to fear from that inference than from taking the stand to present evidence to refute it. The fact that the inference of guilt from silence is highly rational, and that certain prior convictions are believed (according to the rules of evidence) to be more probative than prejudicial when admitted for impeachment, does not suggest that the two together will always lead juries to the correct result. A measure of imperfection is implicit in the fact-finding process. That imperfection does not support the *ipse dixit* conclusion that the privilege against self-incrimination has been violated. Nor will it provide an adequate ex post facto rationale for the rule announced in *Griffin*.

122. See notes 44-107 *supra* and accompanying text.

to punish the exercise of constitutional rights. These pressures are neither less compelling than the pressure at issue in *Griffin*, nor are they justified on sounder bases than the enhancement of fact-finding contributed by comment on a defendant's silence.

If it does not tend impermissibly to coerce testimony, comment on a defendant's silence might be thought objectionable as an invocation of the defendant's own conduct in order to incriminate him. However noble and sporting such a theory may sound, it has been flatly rejected in practice, except where the conduct at issue is at once both testimonial and the product of identifiable compulsion. The defendant's failure to take the witness stand is neither testimonial nor in any sense compelled, and thus reference to that failure in closing argument is not offensive to the fifth amendment.

Some may suggest that the approach taken here has been too rigidly analytical and insufficiently attentive to the nuances of symbolic meaning that ultimately underlie the *Griffin* rule. They might submit that, even if that rule does not protect specific and cognizable fifth amendment interests, it is proper as a highly visible token of the government's burden of proving guilt without the aid of the defendant. Arguments from symbolism, like those from religion, are difficult to contend with, because the meaning and therefore the validity of the gestures involved are so greatly to be found in the eyes of the observer. For precisely this reason, whatever may be its proper place in the realm of art and literature, symbolism disembodied from analysis is a peculiarly inappropriate foundation upon which to build constitutional rules. Its supreme subjectivity means that the judicial adoption of legal rules solely to accomplish symbolic ends has more in common with poetry than with any accepted concept of law.

In the present case, the supposed symbolic value of the *Griffin* rule is worse than no justification for the rule at all; it is a lie. However one tries to describe the symbolism involved — as involving the government's burden of proving guilt, its obligation of fairness, or the defendant's right not to aid in his own conviction — one is left with a symbolic statement that overstates the rights and obligations that the system is willing or able to protect. Such symbolic misrepresentation surely cannot justify the rule.

To this observer, the gesture that is *Griffin v. California* is indeed symbolic, but not of any salutary motive or social trend. As a rule without any reasoned justification that has nonetheless stood as a restraint on criminal prosecution for fifteen years, *Griffin* is a monument to our seemingly limitless capacity to doubt our own good faith and to question the values that we have institutionalized in the crim-

inal law. However we resolve this underlying identity crisis, the symbol and symptom which is *Griffin* should be rejected as without basis in the fifth amendment.¹²³ Judicial honesty and the integrity of the Constitution demand no less.

123. In its most recent confrontation with the *Griffin* rule, the Supreme Court majority again failed to come to grips with the basic incompatibility between that rule and the dominant principles of fifth amendment jurisprudence. In *Jenkins v. Anderson*, 100 S. Ct. 2124 (1980), the Court appears to have relied on an illogical distinction, based on the way the evidence of silence was used, to hold that *Griffin* had not been offended. See note 61 *supra*.