Article

Making Defendants Speak

Ted Sampsell-Jones†

INTRODUCTION

Criminal defendants have a right to testify in their own defense.¹ They also have a right to remain silent at trial.² Under the Constitution, the choice is theirs.³

But while the abstract constitutional ideal of free choice is appealing, the complicated and messy reality of modern criminal trials makes it impossible to grant a defendant a truly free choice. A defendant’s decision is not made in a legal vacuum. Myriad legal rules—rules of evidence, rules of procedure, and rules of substantive criminal law—affect his choice. Some legal rules burden testimony and encourage silence. Other legal rules burden silence and encourage testimony.

State neutrality between testimony and silence is neither possible nor desirable.⁴ Any legal rule that affects testifying and non-testifying defendants differently will burden one right

† Assistant Professor of Law, William Mitchell College of Law. Thanks to George Fisher, John Langbein, and Brad Colbert for their helpful comments. Copyright © 2009 by Ted Sampsell-Jones.


² U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).

³ See Harris v. New York, 401 U.S. 222, 225 (1971) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.”); see also Rock, 483 U.S. at 51 (stating that the Constitution ensures the “right of a criminal defendant to choose between silence and testifying in his own behalf” (quoting Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring))).

⁴ See Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973) (stating that the Constitution does not forbid “every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights”).
or the other. Such rules pervade the criminal process, and removing them all would be impossible, or at least unwise.

When a defendant takes the stand, for example, the prosecutor may cross-examine him. The prosecutor’s ability to cross-examine a defendant chills the latter’s right to testify—it makes the exercise of that right costly. In the interest of eliminating the cost, we could reform evidence law to prohibit prosecutorial cross-examination of criminal defendants. But such a reform would be senseless. Even if it would promote “neutrality” by unburdening the right to testify, it would be anomalous in evidence law, and it would impede the truth-seeking function of trial.5

In any event, a debit on one side of the ledger is a credit on the other. Under the current regime, one benefit of remaining silent is the ability to avoid cross-examination. Removing the cost imposed on testimony would also remove the benefit associated with silence. That dynamic applies generally for a simple reason: exercising the constitutional right to testify necessarily involves waiving the constitutional right to remain silent, and vice versa. To the extent that a legal rule creates incentives to exercise one right, it inevitably creates disincentives to exercise the other. It is a zero-sum game.

Thus, the question is not whether the current set of rules burdens the exercise of either right—of course it does, as would any reasonable set of rules. The question is not whether the current set of rules is neutral between the two options—it is not neutral, and no reasonable set of rules could be neutral. Instead, the question is simply whether the current set of rules creates the proper mix of incentives and disincentives. In my view, it does not. The legal system punishes defendants too much for taking the stand, and rewards defendants too much for remaining silent. Courts should adjust the mix by rewarding defendants more for testifying and punishing them more for declining to testify.

There are two main reasons why we should encourage more defendants to testify. First and foremost, it would give the jury access to important additional information, and thereby

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5. See United States v. Grayson, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting) (“A defendant’s decision to testify may be inhibited by . . . the possibility that damaging evidence not otherwise admissible will be admitted to impeach his credibility. These constraints arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial.”).
help the jury reach accurate results. Second, it would increase defendants’ own participation in the criminal process, which would improve perceptions of legitimacy, thereby aiding rehabilitation and reintegration. Increasing lay participation would also reduce dependence on lawyers, which could reduce systematic disparities between rich and poor defendants.

Toward those ends, I propose three reforms. First, as a matter of constitutional criminal procedure, the Supreme Court should overrule Griffin v. California,6 and should thus allow prosecutors to argue adverse inferences from a defendant’s silence. Second, as a matter of evidence law, courts should alter or abandon the Gordon v. United States7 test for Rule 609,8 and admit fewer prior convictions for impeachment. Third, as a matter of sentencing law, courts should not impose perjury enhancements based on a defendant’s trial testimony.9

Of the countless possible reforms that could make more defendants speak, these three are proposed in large part because each has independent legal merit. Each is justifiable at the doctrinal level—as a matter of evidence law, as a matter of criminal procedure, and as a matter of substantive criminal law. In addition to furthering the goals sketched above, each stands independently on a solid doctrinal footing.

Taken individually, the first proposal would benefit the prosecution, while the second and third proposals would benefit defendants. Taken together, however, the goal of the proposed reforms is not to tip the scales in either direction. The goal, rather, is to encourage more defendants to speak at trial, and thus to increase the accuracy, legitimacy, and fairness of criminal adjudication.

I. RATIONALE

Our current legal system encourages criminal defendants to remain silent. We should change the system in a way that


8. FED. R. EVID. 609(a)(1) (allowing the admission of prior felonies for impeachment subject to a probative-prejudice balancing test).

9. See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(b) (2008) (allowing for a two-level sentencing enhancement for obstruction of justice, including trial perjury).
encourages more defendants to testify. Doing so would have several benefits. It would improve accuracy, participation, legitimacy, and equity.

A. ACCURACY

Criminal proceedings have some intrinsic value, but for the most part, their value is instrumental. The primary goal of a criminal proceeding is to determine whether a defendant committed a crime and, if so, what crime. Criminal proceedings have instrumental value insofar as they lead to accurate determinations of those issues.

Criminal adjudication is a sorting process—the judicial system attempts to determine which defendants are guilty and which are not. It is a human system, and errors are inevitable. There are two types of errors: false positives, where an innocent person is found guilty; and false negatives, where a guilty person is set free. Criminal law reform proposals often falter because they decrease one type of error only at the cost of increasing the other. Proposals aimed at providing greater protections to defendants may reduce false positives, but they almost invariably increase false negatives.

10. Donald A. Dripps, Delegation and Due Process, 1988 DUKE L.J. 657, 674–75 (describing the theory that constitutional "liberty" demands fair judicial proceedings); Frank Easterbrook, Substance and Due Process, 1982 SUP. CT. REV. 85, 109–15 (discussing the Court's instrumental justification for specifying process once a statute has specified substance).

11. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence . . . .").

12. See Roger C. Park & Michael J. Saks, Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn, 47 B.C. L. REV. 949, 1030 (2006) ("[T]he main, though certainly not the only, goal for evidence law is to promote accuracy in fact finding.").


Historically, Anglo-American jurisprudence took the normative position that false positives are worse than false negatives. As Blackstone famously said, “it is better that ten guilty persons escape, than that one innocent suffer.” Courts and academics tirelessly repeat the maxim. But Blackstone’s ten-to-one ratio is not self-evidently true. Perhaps two-to-one is the correct ratio, or perhaps one hundred-to-one is best. Underlying normative disagreement about the proper ratio, though it rarely rises to the surface of explicit argument, may well drive debates about specific reform proposals.

Regardless of the proper ratio, both errors are costly. To the extent that the judicial system can reduce both types of error, it should do so. If there are legal reforms that will increase the accuracy of the sorting mechanism—helping to convict more of the guilty and free more of the innocent—courts and legislatures should embrace them. Encouraging more defendants to speak would increase the accuracy of the fact-finding.

16. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.
17.  Id.
process. It would help to reduce both false negatives and false positives.

Criminal defendants themselves are often a critical source of information about what happened. In some cases, such as homicide cases with no witnesses other than the defendant and the victim, the defendant is often one of the only good sources of information. Depriving the jury of defendant testimony deprives the jury of key information.

Paradoxically, the value of defendants as an informational resource was recognized at common law more than it is today. Defendants were not allowed to take an oath or formally testify, but they were expected to present their own defense, answering and explaining away the prosecution’s evidence. In fact, as Hawkins explained in the early eighteenth century, the common law denied the assistance of counsel in order to make defendants speak.

[El]ever one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defence, which in Cases of this Kind is always the best, the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own. . . . [T]he Innocent, for whose Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counsel. Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth, which


25. See 5 Jeremy Bentham, Rationale of Judicial Evidence 229–41 (1827) (describing the reasons behind the rule against self-incrimination and the value of self-provided testimony); Tom Stacy, The Search for the Truth in Constitutional Criminal Procedure, 91 Colum. L. Rev. 1369, 1376–77 (1991) (describing the privilege against self-incrimination as a truth-impairing right); John H. Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71, 86 (1891) (“[I]f an accused person is innocent, he should be [able] to explain the facts of his conduct and vindicate himself . . . .”).


27. See Langbein, supra note 24, at 14, 35–36 (describing the lawyer-free “accused speaks” criminal trial that prevailed in England from the sixteenth century into the eighteenth century).
probably would not so well be discovered from the artificial Defence of others speaking for them.28

Hawkins was overly sanguine about the value of defendants’ testimony. Some guilty defendants are slick liars, and their testimony may produce false negatives. Some innocent defendants are bad witnesses, ineloquent, contradictory or nervous, and their testimony may produce false positives.29 On the whole, however, encouraging more defendants to testify would enhance the accuracy of the sorting process.

Admittedly, there is no way to prove empirically that more defendant testimony would lead to more accurate results. There is no good way to study the effect of a defendant’s testimony in a real trial without conducting the trial twice, once with the defendant’s testimony and once without.30 Mock trial studies, though they allow for a control group, have inherent limitations due in part to their inability to replicate real trials.31

Nonetheless, the common sense argument that more defendant testimony would increase trial accuracy has some empirical support. There is a body of research suggesting that while jurors do not have much ability to assess truthfulness based on a witness’s demeanor, they do have some ability to assess truthfulness based on the content of a witness’s statement.32 Moreover, the most recent empirical research provides more reason for optimism about jurors’ ability to detect lies, especially when jurors are provided with sufficient information to

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29. See Wilson v. United States, 149 U.S. 60, 66 (1893) (explaining that innocent defendants may fear testifying because nervousness may increase rather than remove prejudice against them).

30. Even if such an experiment were possible, it would be worthless without knowing in advance the truth of the defendant’s guilt or innocence. Conducting a trial twice could demonstrate whether the presence of a defendant’s testimony affects the outcome. Without knowing actual guilt or innocence, however, there would be no way to know whether the presence of a defendant’s testimony led to the right outcome.


32. See Olin Guy Wellborn III, Demeanor, 76 CORNELL L. REV. 1075, 1100–01 (1991) (reviewing the empirical research and concluding that while jurors are not effective at detecting lies by viewing witness demeanor, they are at least somewhat effective at detecting lies by assessing the content of witness testimony).
provide context to any witness’s testimony.\(^3\) The research suggests, in other words, that jurors with more information are more likely to reach correct results.\(^3\) Juries are not perfect lie detectors,\(^3\) to be sure, but they are decent.

A defendant’s value as a resource of information does not mean, as Hawkins argued, that she should be denied counsel. Nor does it necessarily mean, as modern commentators since Bentham have argued, that the right against self-incrimination should be scrapped altogether.\(^3\) The more moderate point is simply that a defendant’s silence is truth-impairing, and that we should not enact or maintain legal rules that create a preference for silence over testimony without a very good reason to do so.

B. PARTICIPATION, LEGITIMACY, AND EQUITY

Aside from the instrumental values of accuracy in sorting, criminal proceedings have intrinsic value as well\(^4\) because


\(^4\) Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2568 (2008) (reviewing recent research and concluding that “[o]bservers not only use context, they also use it effectively”).


they create an opportunity for participation—a day in court.\textsuperscript{38}
For a criminal defendant, “a participatory opportunity may also be psychologically important” simply “to have played a part in” the process that decides his fate.\textsuperscript{39} Regardless of the result, criminal defendants view the process as more legitimate if they have the opportunity to tell their side of the story.\textsuperscript{40}

For defendants, the lack of any opportunity to participate in the process can be frustrating and alienating.\textsuperscript{41} The inability to participate causes negative perceptions of legitimacy and fairness.\textsuperscript{42} Those perceptions, in turn, can inhibit reintegration and foster recidivism.\textsuperscript{43} In short, “procedural justice shapes legitimacy,” and “legitimacy shapes recidivism.”\textsuperscript{44}

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\item \textsuperscript{40} See Jonathan D. Casper et al., Procedural Justice in Felony Cases, 22 LAW & SOC’Y REV. 483 (1988) (demonstrating the importance of procedural justice to convicted criminals’ perceptions of fairness and legitimacy); see also Erica J. Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. REV. 423, 463–67 (2007) (examining the reasons given by criminal defendants who decline appointed counsel).
\item \textsuperscript{41} See Alexandra Natapoff, Speechless: The Silencing of Criminal Defendants, 80 N.Y.U. L. REV. 1449, 1494–96 (2005) (discussing how defendants’ silence decreases their understanding of and engagement with the criminal process, thus inhibiting remorse and rehabilitation); Michael M. O’Hear, Faith, Justice, and the Teaching of Criminal Procedure, 90 MARQ. L. REV. 87, 90–91 (discussing a noninstrumental approach to criminal procedure).
\item \textsuperscript{42} Barton Poulson, A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice, 2003 UTAH L. REV. 167, 167–68; see also United States v. Adams, 252 F.3d 276, 288 (3d Cir. 2001) (arguing that allocution “helps assure the fairness, and hence legitimacy, of the sentencing process”); United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994) (“[A]llocution ‘has value in terms of maximizing the perceived equity of the process.’” (quoting United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991))); Kimberly A. Thomas, Beyond Mitigation: Towards a Theory of Allocu-
\item \textsuperscript{43} See Gordon Bazemore & Mark Umbreit, Balanced and Restorative Justice: Prospects for Juvenile Justice in the 21st Century, in JUVENILE JUS-
Many criminal defendants who would prefer to testify are dissuaded from doing so. Their attorneys advise them—quite correctly—that given the current set of legal rules, the relative costs of taking the stand are high, and that remaining silent is a far safer option. That dynamic has systematic costs, not just in the deprivation of information to the jury, but also in the deprivation of the defendant’s opportunity to participate in a profoundly important event in his life.

A beneficial side effect of increasing lay participation in the criminal process would be reducing dependence on lawyers. When a criminal defendant does not testify, he must defend himself by proxy. He must rely on other defense witnesses, and, most importantly, on his attorney. Thus, when fewer defendants testify, attorneys necessarily take a more important role in the criminal process.


45. See Natapoff, *supra* note 41, at 1471.

46. See id. at 1470.


49. See LANGBEIN, *supra* note 24, at 310 (“Adversary trial put in place a new conception of the trial, oriented on the lawyers. Criminal trial became an opportunity for defense counsel to test the prosecution case.”).

50. See Natapoff, *supra* note 41, at 1409 (“The most immediate engine of a defendant’s silence is his lawyer.”).
In a lawyer-dominated criminal process, the results can be skewed by the quality of legal representation. Defendants with lower quality representation are more likely to receive adverse results. On the whole, poor defendants are more likely to receive lower quality representation. A very wealthy criminal defendant can afford to hire a private attorney who, if paid hourly, has a substantial incentive to spend the time necessary to mount a vigorous defense. Wealthy defendants can also afford to hire investigators, experts, and other witnesses. In short, for a wealthy defendant, defending herself by proxy is relatively easy and often beneficial.

A poor defendant, by contrast, must rely on whatever system of indigent defense the state provides—typically a public defender. While many public defenders are excellent attorneys, financial constraints on the system of public defense—especially at the state level—often preclude the sort of aggressive, thorough defense that defendants desire. Public defenders often have large caseloads that make it impossible to devote significant time to any individual case. Because they are mostly salaried, they lack financial incentives to spend extra

51. See Langbein, supra note 24, at 318.
52. See id. at 315 (discussing the “wealth effect” of the lawyer-dominated adversary criminal trial).
53. See Herbert M. Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Soc'y Rev. 251, 252–53 (1985) (discussing the incentives created by hourly pay); see also Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 17 (1991) (“The standard hourly fee eliminates an incentive the lawyer might have under other fee arrangements to work insufficient hours on the case.”).
time on any given case. They also lack resources needed to conduct full investigations, to hire experts, and to locate and prepare other witnesses. In short, poor defendants frequently receive less assistance from their attorneys than wealthy defendants do. To the extent that legal rules increase the importance of attorneys in the criminal process, they increase disparities between rich and poor defendants.

The current legal system encourages defendants to remain silent and thus encourages defense by proxy. The defense-by-proxy system hurts poor defendants more than wealthy defendants. Adjusting the incentives that shape the decision to testify would increase lay participation in the criminal process and reduce dependence on lawyers.

II. PROPOSALS

For reasons of accuracy, legitimacy, and equity, it is worth considering measures that would encourage more criminal defendants to testify. Of course, the value of testimony is not infinite, and there are important countervailing considerations. Thus, it would not make sense to torture non-testifying defendants, nor would it make sense to free testifying defendants from all manner of impeachment and cross-examination. But courts should pursue reasonable reforms to encourage more testimony. To the extent that courts depart from generally applicable rules of evidence and procedure, they should depart in a way that will result in more testimony, not less.

Unfortunately, the criminal justice system currently departs from generally applicable rules of law in ways that encourage silence. In several areas of law, courts have created doctrines that are internally unsound and create perverse incentives that dissuade defendants from testifying. These doctrines, in other words, are both dubious in their own rights and unwise as policy matters because they punish defendants too much for testifying and reward them too much for remaining silent and thus encourages defense by proxy. The defense-by-proxy system hurts poor defendants more than wealthy defendants. Adjusting the incentives that shape the decision to testify would increase lay participation in the criminal process and reduce dependence on lawyers.

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silent. Courts should reconsider these unsound and unwise judicial practices.

Three such doctrines are targeted here.\(^\text{59}\) The first is the “no adverse inference” rule of *Griffin v. California*, which forbids prosecutorial comment on a defendant’s silence.\(^\text{60}\) The *Griffin* rule makes little sense as a matter of constitutional law, forbids a reasonable evidentiary inference, and is unduly solicitous of silence. The second is the *Gordon v. United States* test for Federal Rule of Evidence 609, which governs the admission of prior convictions for the purpose of impeachment.\(^\text{61}\) The *Gordon* test fails to respect the text of Rule 609 or normal principles of evidence law, and by admitting too many convictions, it severely punishes defendants who testify. The third is the judicial practice of enhancing sentences based on a defendant’s perjured trial testimony.\(^\text{62}\) Such sentence enhancements do little to deter perjury, and they add another unnecessary disincentive to testifying.

These three doctrines should be reformed. Legislatures could, of course, add additional and even stronger pro-testimony reforms, but no such legislative reforms are considered here. The best first move is one that should be made by courts: they should clear their case law of the ill-advised, judge-made doctrines that promote silence.

A. PROPOSAL ONE: MOVING BEYOND *GRIFFIN*

*Griffin v. California* is part of the Warren Court’s criminal procedure canon. In *Griffin*, the Court held that prosecutors and trial judges may not suggest that any adverse inference be drawn from a defendant’s decision to remain silent at trial. The Court later extended *Griffin* to cover even indirect comments on silence,\(^\text{63}\) and to require a jury instruction prohibiting adverse inferences.\(^\text{64}\)

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59. For a recent article arguing for a similar set of proposed reforms, see Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851 (2008).
60. 380 U.S. 609, 615 (1965).
The Court has since lauded the Griffin rule as “an essential feature of our legal tradition.” But such breathless praise does little to hide the fact that the Griffin rule is dubious both as a matter of evidence law and as a matter of constitutional law.

1. Evidence and Inference in Griffin

The facts of Griffin are worth recounting briefly, in part because they appear nowhere in the Supreme Court’s opinion. Early on the morning of December 3, 1961, a man named Alfredo Villasenor was walking down an alley when he saw Eddie Griffin emerge from a large trash box. Griffin zipped up his pants. Villasenor asked Griffin what he was doing and Griffin responded “Nothing” and walked away. Villasenor then discovered Essie Mae Hodson in the trash box, badly beaten, bleeding and barely conscious. She died the next afternoon from head injuries.

Griffin stayed overnight with Essie Mae and her partner after drinking with them at a local bar. According to the prosecution, Griffin fought Essie Mae’s partner in their apartment, then dragged her to the alley and brutally raped her. When he was arrested in Mexico, Griffin told police that Essie Mae’s injuries were sustained during the earlier fight in the apartment, and that following that fight, Essie Mae had consented to sex in the trash box.

Griffin did not testify at trial (no doubt in part because the story he had told police was so wholly implausible). The trial judge instructed the jury that “among the inferences that may be reasonably drawn” from the defendant’s silence, “those

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67. Id.
68. Id.
69. Id. at 434–35.
70. Id.
71. Id. at 434.
72. Id. at 434–35.
73. Id. at 435.
The prosecutor made the following argument to the jury:

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.76

2. Griffin’s Shaky Underpinnings

The Supreme Court ruled that the adverse inference instruction and the prosecutor’s argument violated the Self-Incrimination Clause.77 The Court’s opinion was, to put it gently, sparse. Its legal analysis essentially consisted of two sentences: “It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”78

The problem with the adverse inference, in the Court’s view, was that it imposed a condition on the exercise of the right.79 Griffin was, in other words, an application of the “unconstitutional conditions” doctrine.80

75. Id. at 610.
76. Id. at 610–11.
77. Id. at 612–15.
78. Id. The Court also noted that many state statutes prohibited adverse inferences from silence. Id. at 611 n.3. And the Court noted that “comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice.” Id. at 614.
79. Id. at 614 (describing that if a defendant chooses to not testify, the prosecution is not allowed to use his silence as evidence against him).
however, like much of its unconstitutional conditions doctrine in other areas, lacked cogency and analytical rigor.

At a minimum, the Griffin Court’s analysis moved much too quickly. The Supreme Court has occasionally made statements to the effect that the state may not in any way punish the exercise of constitutional rights. But as the Court has recognized elsewhere, state actors routinely impose costs on constitutional rights in various ways.

In fact, in the very context of a defendant’s decision to testify, the Court has recognized that a defendant’s decision may be limited and conditioned in various ways. Rule 609 impeachment may penalize a defendant’s decision to testify—it makes the assertion of the right to testify costly. The rule has nonetheless been upheld against constitutional challenges. Sentencing enhancements for perjury also make the assertion of a right costly, but they too have been upheld. Likewise, rules of evidence and procedure will occasionally preclude a defendant from presenting a certain defense if he fails to testify.

81. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . .”).

82. See, e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973) (stating that the Constitution does not forbid “every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights”).

83. Fed. R. Evid. 609.

84. See Ohler v. United States, 529 U.S. 753, 759–60 (2000); see also Spencer v. Texas, 385 U.S. 554, 562 (1967) (“To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence.”); United States v. Belt, 514 F.2d 837, 846–48 (D.C. Cir. 1975) (rejecting constitutional challenge to a statute that admitted prior convictions without regard to any balancing test).


86. Attorneys may only present arguments based on evidence in the record. See United States v. Roach, 502 F.3d 425, 434 (6th Cir. 2007); United States v. Earle, 375 F.3d 1159, 1163 (D.C. Cir. 2004). Trial courts may impose limitations on defense attorney’s arguments when an argument strays beyond evidence in the record. See United States v. Ortiz, 857 F.2d 900, 905 (2d Cir. 1988); United States v. Brown, 688 F.2d 1112, 1119 (7th Cir. 1982). Thus, for example, when a defendant fails to present any evidence supporting a theory of self-defense, the trial court may refuse to present a self-defense instruction and may forbid argument on the issue. See United States v. Perry, 223 F.3d 431, 433 (7th Cir. 2000); United States v. Scout, 112 F.3d 955, 960–62 (8th Cir. 1997).
Such rules make the assertion of the right to remain silent more costly, but they are nonetheless constitutional.

Griffin notwithstanding, the Supreme Court has repeatedly held that such conditions are constitutional because “it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.”87 There is, in other words, no “categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights.”88 To strike down every law that imposes some cost on the right to testify or the right to remain silent would “would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence.”89

Griffin’s stated rationale is grotesquely naïve. If there is a constitutional basis for the Griffin no adverse inference rule, it must be found elsewhere. What is needed is some theory to explain which conditions are constitutionally acceptable and which are not.

a. Defining “Penalties”—The Baseline Problem

As an initial matter, a sensible evaluation of the Griffin rule must incorporate the lessons learned from other applications of the unconstitutional conditions doctrine. One of the first critical lessons is that without defining some baseline, there is no neutral, determinate way to classify what counts as a “penalty.”90 As constitutional law scholars have recognized in other contexts, what counts as a “penalty” or “benefit,” a “tax” or “subsidy,” depends on positing some legal or moral baseline from which departures can be measured.91

88. Dunnigan, 507 U.S. at 96.
89. Spencer, 385 U.S. at 562.
90. See Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech and Abortion), 70 B.U. L. REV. 593, 602 (1990) (“[T]he distinction between ‘subsidy’ and ‘penalty’... relies on a baseline defining the ordinary or desirable state of affairs. The courts must rely on some status quo to decide what people would ‘otherwise’ receive.”).
Imagine two sentencing regimes. The first punishes criminal convictions with a sentence of ten years, but gives a credit of one year if the defendant testifies. The second punishes criminal convictions with a sentence of nine years, but adds an additional year if the defendant remains silent. The two regimes are equivalent. To distinguish the two on the ground that the first merely “rewards” testimony while the latter impermissibly “punishes” silence is a meaningless semantic game.

The Supreme Court has at times played similar semantic games. In the American system of plea bargaining, for example, defendants receive lesser sentences if they accept a plea rather than going to trial.92 Some have argued that plea discounts are unconstitutional because they penalize a defendant for exercising his trial rights.93 The Supreme Court rejected that argument by recharacterizing the imposition of a penalty as an optional benefit: “we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State” by waiving his trial rights.94 That characterization might make sense, but only if there is some baseline from which to measure departures.

Recharacterization could have worked equally well in the Griffin context. Rather than characterizing an adverse inference as a penalty on the right to remain silent, the Court could have said that an adverse inference rule extends a benefit to defendants in exchange for their waiver of the right to remain

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silent. Once again, the only way to settle which characterization is correct is by reference to some established baseline.

The Griffin Court only hinted about its baseline. It noted in a footnote that forty-four states banned adverse inferences by statute—that California’s rule stood in opposition to the “overwhelming consensus of the States.”95 Certainly, against the backdrop of an overwhelming legislative consensus to bar adverse inferences, an outlier jurisdiction’s decision to depart might look like a penalty. More bluntly, the legal status quo frequently supplies a hidden but intuitive baseline condition.

But as a matter of constitutional law, there is no reason that the legislative consensus in 1963 provides a permanent baseline, and that any departure from there is unconstitutional. The Fifth Amendment does not mandate that all states must do forever what most states did in 1963. Griffin’s apparent baseline, defined solely by the then-status quo, is untenable.

b. Neutrality

Griffin failed to define or justify any baseline to support its result. It also failed to recognize an important related dynamic: that in this context, there are not one but two rights necessarily implicated. A defendant must either testify or remain silent; he cannot do both. A legal rule that raises the relative price of one right necessarily lowers the relative price of the other. If it is a zero-sum game, and there is no net loss, then the constitutional difficulty dissolves.

Recognizing that there are two rights at issue, however, suggests a different approach to the Griffin problem: an approach based on state neutrality.96 Some language in other Supreme Court cases, including Miranda, supports such a view.97 An approach using neutrality as the touchstone might provide a sturdier foundation for the Griffin rule than the oversimplified unconstitutional conditions rationale offered in the opinion itself.

96. See Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2625 (1996) (“Although officials need not encourage a suspect to remain silent, they must remain at least neutral toward her decision not to speak.”).
97. See Miranda v. Arizona, 384 U.S. 436, 460 (1966) (requiring state governments to respect their citizens’ rights to remain silent until they choose to speak); see also Garner v. United States, 424 U.S. 648, 657 (1976) (stating that a defendant must have “free choice to admit, to deny, or to refuse to answer”).
The difficulty with this approach lies in fashioning a workable definition of neutrality. It cannot be the case that any law that affects testifying and non-testifying defendants differently violates the principle of neutrality. It cannot be the case, in other words, that any rule that has the incidental effect of raising the relative cost of one right or the other is void as nonneutral.

Neutrality is not a novel concept in constitutional law, and a definition of neutrality for the Griffin context could be borrowed from elsewhere. In the First Amendment context, for example, the Supreme Court has held that where a “generally applicable” law has the “incidental effect” of burdening the exercise of a constitutional right, the Constitution is not offended. Such laws are “valid and neutral” because their object is not to burden the right; rather, they apply generally and only burden the right incidentally.

Such an approach could help to explain the Supreme Court’s treatment of various laws affecting the decision to testify. Rules allowing impeachment of a defendant’s testimony, by prior convictions or other means, are valid because they are generally applicable rules that only incidentally burden the right to testify. Sentencing enhancements for perjury are valid because they punish lying on the stand, not the decision to testify itself. Because these rules (and myriad others) only incidentally burden constitutional rights, they are neutral, and therefore valid.

It could be argued that an adverse inference from silence, by contrast, violates the neutrality principle. It could be ar-


99. Smith, 494 U.S. at 879–80; see also Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring) (arguing that a “generally applicable” photo-identification law for voters was constitutional even though it burdened the rights of certain voters).
gued, in other words, that an adverse inference from silence is invalid because it punishes the exercise of the right itself. This argument—an argument from neutrality—is probably the best possible justification for *Griffin*.

The difficulty with the argument from neutrality, however, is that adverse inferences are themselves justified by generally applicable rules of evidence. As I will explain more fully below, generally applicable laws of evidence allow one party to argue an adverse inference from her opponent’s failure to produce relevant evidence, and generally applicable laws of evidence allow consciousness of guilt to be inferred from silence.100 These generally applicable rules, when applied to a non-testifying defendant, burden the right to remain silent, but they do so only incidentally.

Thus, just as it can be said that a perjury enhancement punishes a defendant’s decision to lie rather than his decision to testify, it can be said that an adverse inference punishes a defendant’s decision to withhold evidence rather than his decision to remain silent. Both laws are, in that sense, neutral. Even if the Constitution mandates state neutrality between testimony and silence, an adverse inference from silence is at least arguably consistent with neutrality. Efforts to re-ground the *Griffin* rule on a principle of neutrality might have no better prospects than the usual efforts to ground the rule in the unconstitutional conditions doctrine.

c. Compulsion: Text, History, and Policy

In the end, however, there should be no need to engage in difficult debates about the nature of neutrality, for the Constitution simply does not mandate neutrality. The Constitution does not say “Congress shall make no law respecting a criminal defendant’s decision to testify.” Rather, it simply says that no person “shall be compelled in any criminal case to be a witness against himself.”101 The relevant touchstone is compulsion. The text leaves open the possibility of some state regulation of a defendant’s decision so long as the regulation does not rise to the level of compulsion. The threat of an adverse inference, which is after all a relatively trivial penalty compared to torture or contempt, does not constitute compulsion.102

100. See infra Part II.A.3.b.
102. See Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 51–61 (1997) (comparing different definitions of compulsion from torture to the
Of course, as in contract law, there is no easy way to draw the line between valid consent and invalid coercion, between permissible offers and impermissible threats. Threats involve departures from “the normal or natural or expected course of events.” In other words, just as we can only differentiate between penalties and rewards by positing some baseline condition, we can only differentiate from offers and threats by positing some baseline condition.

If we appeal to history to supply the baseline, then Griffin fails, for adverse inferences from silence were long approved at common law, and “compulsion” was equated with sanctions akin to torture and contempt. Similarly, if we appeal to gen-

Court’s “trivial” application of the “no worse off” standard including no adverse inferences); see also Stephen J. Schulhofer, Reconsidering Miranda, 54 U. CHI. L. REV. 435, 439 (1987) (noting that Griffin endorses a view that even "pressure that is wholly informal and psychological" can constitute “compulsion”).

103. See Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 COLOM. L. REV. 603, 615–26 (1943); Anthony T. Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472, 478–83 (1980); Peter Westen, “Freedom” and “Coercion”—Virtue Words and Vice Words, 1885 DUKES L.J. 541, 571–73 (1985); see also Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 CAL. L. REV. 465, 468 (2005) (“Basic questions concerning voluntariness and free will—e.g., whether they exist, and if so, when they exist—have puzzled philosophers for centuries and represent one of history’s Gordian knots.”). In criminal law, the debate arises in contexts such as blackmail and rape. See, e.g., Donald A. Dripps, More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West, 93 COLUM. L. REV. 1460, 1463–68 (1993); Richard A. Epstein, Blackmail, Inc., 50 U. CHI. L. REV. 553, 554 (1983); Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOK. L. REV. 39, 172–77 (1998); James Lindgren, Unraveling the Paradox of Blackmail, 84 COLOM. L. REV. 670, 671 (1984).

104. Robert Nozick, Coercion, in PHILOSOPHY, SCIENCE, AND METHOD 440, 447 (Sidney Morgenbesser et al. eds., 1969) (contrasting threats from offers based on whether the action’s consequences are worse or better than the original course of events).

105. See Kreimer, supra note 80, at 1352; Sullivan, supra note 80, at 1436, 1448 & n.142.

eraly applicable rules of evidence to supply the baseline, then *Griffin* also probably fails, for adverse inferences from a party’s refusal to submit evidence in his possession are typically allowed.\textsuperscript{107} For these reasons and others, the European Court of Human Rights has rejected claims that adverse inferences from silence necessarily constitute “improper compulsion.”\textsuperscript{108}

The only way to maintain *Griffin* is to supply some other baseline—that is, some policy argument about why adverse inferences from silence are so abnormal or unnatural that we should treat them as a type of compulsion.\textsuperscript{109} The implicit baseline policy argument of *Griffin* and related cases is that silence is preferable to testimony. In *Griffin*, the Court struck down a relatively minor penalty imposed on the right to silence, but in other cases, the Court has upheld major penalties imposed on the right to testify. For the reasons stated in Part II above, the Supreme Court’s implicit policy preference for silence over testimony is wrong-headed.

*Griffin* cannot be justified as an application of the unconstitutional conditions doctrine. It cannot be justified by reference to a principle of neutrality. And most centrally, it cannot be justified in terms of the text or history of the Self-Incrimination Clause. Given its unfounded preference for silence over testimony, it cannot be justified as a matter of policy. It ought to be abandoned.

3. Imagining a Post-*Griffin* World

Overruling *Griffin* would throw the matter back to individual jurisdictions. Some would allow adverse inferences and some would not.\textsuperscript{110} Some amount of national variation and experimentation would be both inevitable and beneficial.\textsuperscript{111} For

\textsuperscript{107} See *infra* notes 113–22 and accompanying text.


\textsuperscript{109} But see Godsey, *supra* note 103, at 492–95 (discussing the test for "compulsion" in formal settings as "objective" and prohibiting "objective penalties" for choosing to remain silent such as adverse inferences, termination, and refusal of future state contracts).

\textsuperscript{110} Prior to *Griffin*, most American jurisdictions had passed statutes prescribing adverse inference instructions and argument. See *Griffin* v. California, 380 U.S. 609, 611 n.3 (1965).

\textsuperscript{111} See *New State Ice Co.* v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that..."
the first time in decades, state courts and legislators would have the opportunity to reconsider their rules regarding adverse inferences from a defendant’s silence. In deciding what course to choose, they should be guided by general principles of evidence law.

a. Adverse Inferences and Privileges

Two well-established principles of evidence law provide support for the idea that a prosecutor should be able to argue adverse inferences from a defendant’s silence. The first principle is that when a party fails to produce evidence in its control, it is reasonable for the opposing party to argue an adverse inference.\(^{112}\) This principle dates at least to the early eighteenth century and the chimney sweep’s jewel case.\(^{113}\) As the Supreme Court put it in *Graves v. United States*:

> The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.\(^{114}\)

The *Graves* “missing witness” rule retains vitality today.\(^{115}\) The related law of spoliation allows an adverse inference to be drawn from a party’s destruction of physical evidence.\(^{116}\) Courts
have thus recognized that a party’s destruction of evidence or refusal to produce evidence has evidentiary significance.

The second principle is that a party’s silence, like other forms of conduct, may constitute an admission. “When a statement is made in the presence of a party containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, failure to speak has traditionally been received as an admission.”

Indeed, “[s]ilence is often evidence of the most persuasive character.” Thus, for the purposes of the hearsay rule, silence can constitute an admission in some circumstances. Silence can also count as a prior inconsistent statement, both for hearsay and impeachment purposes, when a party refuses to answer questions prior to trial but then testifies at trial. Consistent with these general principles, it is reasonable in at least some circumstances to treat a defendant’s silence at trial as a type of admission from which an adverse inference can be drawn.

The application of those two principles is admittedly more complicated, however, when it comes to privileged materials. There is substantial evidence-law authority for the proposition that an adverse inference may be drawn from a party’s failure
to produce privileged material, so long as the exercise of the privilege is within the party’s control.121 There is also some authority, however, for the contrary principle that an adverse inference may never be drawn from a party’s failure to produce evidence protected by a privilege.122 Jurisdictions that maintain the latter rule might keep the Griffin rule as a matter of evidence law even if it were abandoned as a matter of constitutional law.

But there is good reason for treating the privilege against self-incrimination differently from statutory privileges such as the attorney-client privilege. Statutory privileges, for the most part, operate to protect communication in important personal or professional relationships such as the attorney-client relationship, the physician-patient relationship, or the marital relationship. Courts establishing a “no adverse inference” rule for statutory privileges have done so on the basis that adverse inferences could chill communication and thus undermine those important confidential relationships.123

The same rationale does not apply to the privilege against self-incrimination, which does not protect confidential communications. Its purpose (though disputed and never clearly understood) is to prevent coercion and unreliable confessions, and perhaps to promote some measure of individual autonomy and dignity.124 Allowing adverse inferences to be drawn from a defendant’s failure to testify would not significantly undermine those goals. Adverse inferences would create an additional disincentive for exercising the right to silence, but that would simply mean that more defendants would exercise the right to testify, which is also autonomy-enhancing.

123. See Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1344–45 (Fed. Cir. 2004) (en banc); United States v. Sanchez, 176 F.3d 1214, 1223 (9th Cir. 1999).
124. See Murphy v. Waterfront Comm’n, 378 U.S. 52, 56 n.5 (1964) (discussing the various values served by the self-incrimination clause); Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 922–25 (1995) (arguing that the primary purpose of the clause is ensuring reliable trial evidence); see also Steven Penney, Theories of Confession Admissibility: A Historical View, 25 AM. J. CRIM. L. 309, 313 (1998) (arguing that the Supreme Court has employed three theories to justify excluding confessions: ensuring reliability of confessions, preventing abuse by police, and protecting defendants’ autonomy).
In short, even those jurisdictions that do not allow adverse inferences based on the exercise of a statutory privilege should consider allowing adverse inferences based on the exercise of the self-incrimination privilege. As a few states have already recognized, the policy arguments for the former do not apply to the latter. The importance of defendants’ testimony at trial justifies incentives for testifying and disincentives for remaining silent. Adverse inferences from silence make sense as a matter of policy and as a matter of evidence law.

b. Argument and Instruction

There is a common-sense inference from silence to guilt. As Justice Scalia argued in Mitchell, “If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear.” But it is important to remember that silence does not always raise an inference of guilt. Silence is ambiguous, and in some situations, defendants have entirely innocent reasons for remaining silent. In fact, in some situations silence might raise a positively exculpatory inference, as where a defendant declines to take the stand simply because the prosecution’s case is so weak that there is no need to respond.

For that reason, the significance of silence is a matter that both parties should be allowed argue to the jury (subject to important caveats outlined below). The prosecution should be allowed to argue that the defendant’s silence constitutes a tacit admission, while the defense should be allowed to argue a contrary inference. The strength of the opposing arguments will vary depending on the circumstances of the case, and the jury can decide which is more persuasive.

A more difficult question is whether, in addition to allowing argument by the parties, trial courts should give an in-

125. See, e.g., Wis. R. Evid. 905.13 (forbidding adverse inferences based on statutory privileges, but allowing adverse inferences based on the exercise of the self-incrimination privilege in civil cases).
128. See infra Part II.A.3.c.
struction informing the jury that an adverse inference is allowed. An adverse inference instruction would stamp the court’s imprimatur on the prosecution’s argument. That would have the beneficial effect of encouraging more defendants to testify. But any instruction that captured the truth—that silence sometimes suggests guilt but sometimes does not—might be so watered down that it would have little effect. It would also add more bulk to jury instructions that are already too long.

Moreover, as a general matter, permissive-inference instructions are unnecessary where the significance of evidence can be appropriately assessed by the jury without any extra assistance. The law of evidence regarding flight provides a good analogy. Like silence, flight is a type of conduct that in some

129. See Julie E. McDonald, Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations, 61 CAL. L. REV. 1422, 1430 (1973) (“[T]here is a difference between what the jury might infer on its own, which can never be completely controlled, and what the jury might think when the absence of certain evidence is highlighted by . . . the judge’s instructions.”).

130. United States v. Moran, 503 F.3d 1135, 1146 (10th Cir. 2007) (noting how particular jury instructions can have the unwanted result of putting the court’s imprimatur on one party’s theory of the case); Hous. 21, L.L.C. v. Atl. Home Builders Co., 289 F.3d 1050, 1055 (8th Cir. 2002) (same); Bird v. Ferry, 497 F.2d 112, 119 (5th Cir. 1974) (same); see Carter v. Kentucky, 450 U.S. 288, 302 n.20 (1981) (“[T]he influence of the trial judge on the jury is necessarily and properly of great weight. . . .” (quoting Starr v. United States, 155 U.S. 614, 626 (1894))).

131. Arguably, if a jurisdiction decides to give an adverse inference instruction when defendants refuse to testify, it also should give a positive inference instruction when defendants do take the stand. But see United States v. McQuarry, 726 F.2d 401, 402 (8th Cir. 1984) (refusing to give a consciousness of innocence instruction based on lack of flight); United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (same); United States v. Scott, 446 F.2d 509, 510 (9th Cir. 1971) (same).

132. Permissive-inference instructions regarding flight or missing witnesses typically take pains to point out that an adverse inference is not the only inference that may be drawn. See KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.08, at 300, § 14.15, at 337 (5th ed. 2000).

133. See Walter W. Steele, Jr. & Elizabeth G. Thorburn, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77, 77–78 (1988) (arguing that jury instructions are “lengthy and confusing”).

134. See State v. Litzau, 650 N.W.2d 177, 186 n.7 (Minn. 2002) (“Permissive-inference instructions are also unnecessary in that ‘[i]f the rational connection between facts presented and facts inferred is derived from common sense and experience, the matter can normally be left to the jury’s judgment upon general instructions.’” (alteration in original) (citation omitted)).
circumstances suggests consciousness of guilt. Of course, flight does not always suggest guilt—in some cases a defendant flees for innocent reasons. In part for that reason, a number of appellate courts have sensibly held that permissive-inference instructions on flight are disfavored, and that the matter should be left to the arguments of counsel.

Courts should apply the same approach to evidence of a defendant’s silence. With such evidence, as with evidence of a defendant’s flight, “[t]he interest of justice is perhaps best served if this matter is reserved for counsel’s argument, with little if any comment by the bench.”

c. Fair Response and Unfair Prejudice

As discussed above, a defendant will sometimes decline to testify for entirely innocent reasons, and the defense should have an opportunity to argue against any adverse inference that may be drawn from this silence. The matter should be argued by both sides, and the jury should decide which argument is more persuasive. This approach, however, can only work where both sides have a fair opportunity to present an argument on the subject. In some cases, a defendant will not be
able to explain his decision to remain silent without revealing unfairly prejudicial information to the jury. In such cases, the entire matter should be removed from consideration, and no argument should be allowed on either side.140

Once again, cases involving flight evidence provide a good source of guidance. Ordinarily, both sides may argue that the jury should draw contrary inferences from flight.141 But in some cases, a defendant’s explanation for his flight will reveal unfairly prejudicial information—for example, if the defendant fled based on fear of apprehension for a separate offense.142 In such cases, the court may not instruct the jury to consider the defendant’s flight as evidence of his guilt, and the prosecution is not allowed to argue as much.143

The same general rules should apply to evidence of a defendant’s silence at trial. Thus, for example, if a defendant declines to take the stand in order to avoid the prosecution’s use of other crimes for impeachment,144 the prosecution should not be able to argue that the defendant’s silence constitutes an admission. In that situation, the defendant would not have an opportunity to explain his silence without revealing unfairly prejudicial information.145 Prosecutors should therefore be forced

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Motors Corp. v. Seay, 879 A.2d 1049, 1062 & n.19 (Md. 2005); see also MUeller & KIRKPATRICK, supra note 119, § 4.9, at 173 (“[S]urprise may sometimes be a factor in a finding that evidence will result in unfair prejudice . . . .”).

140. See Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent’s Expert Testimony Due to the Opponent’s Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317, 320–21 (2007) (asserting that the risk of a jury overvaluing certain evidence is “obviously magnified when the opponent cannot afford a rebuttal”); *c.f.* United States v. Sblendorio, 830 F.2d 1382, 1394 (7th Cir. 1987) (“Unless the jury knows exactly why a party did not call a witness, it cannot fully evaluate the meaning of the witness’s absence.”).

141. *Cf.* United States v. Obi, 239 F.3d 662, 666 (4th Cir. 2001) (noting that evidence was presented as to what inferences the jury could draw).

142. See United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976); 2 MCCORMICK ON EVIDENCE, supra note 112, § 263, at 218 (“Particularly troublesome are the cases where defendant flees when sought to be arrested for another crime, is wanted for another crime, or is not shown to know that he or she is suspected of the particular crime.” (footnotes omitted)).


144. See FED. R. EVID. 609 (allowing the admission of evidence of other crimes for impeachment purposes); *infra* Part II.B.

145. *Cf.* Richard Friedman, *Character Impeachment Evidence: Psycho-
to decide between introducing evidence of other crimes for impeachment purposes and arguing an adverse inference from a defendant’s failure to testify; they should not be allowed to do both, and a judge should address the matter efficiently, before or during trial.\footnote{146} Consistent with general principles of evidence law,\footnote{147} a prosecutor should only be allowed to argue an adverse inference if the defendant has a fair opportunity to respond.

d. A Return to the Baseline

Griffin’s “no adverse inference rule”\footnote{148} marks a departure from generally applicable rules of evidence. Measured from that baseline, Griffin offers criminal defendants an extra subsidy for remaining silent.\footnote{149} Griffin is dubious as a matter of constitutional interpretation, and as a policy matter it is unwise to subsidize silence. Griffin should be abandoned.

In the absence of a constitutional command, states could experiment with different approaches to silence. General principles of evidence law, such as those adopted in cases of a defendant’s flight,\footnote{150} provide a good rough guide. The best result would be the following simple rule: “Unless the defense would not have a fair opportunity to respond, the prosecution may ar-

\begin{quote}
Bayesian [!] Analysis and a Proposed Overhaul, 38 UCLA L. REV. 637, 678–80 (1991) (discussing the relationship between Rule 609 evidence and the Griffin rule, and arguing that character evidence of the accused should not be allowed and that Griffin may require a reexamination).
\footnote{146} Courts endorse a similar approach when a party seeks to draw an adverse inference from the opponent’s failure to call a witness:

The better practice . . . is for the party seeking to obtain a charge encompassing such an inference to advise the trial judge and counsel out of the presence of the jury, at the close of his opponent’s case, of his intent to so request and demonstrating the names or classes of available persons not called and the reasons for the conclusion that they have superior knowledge of the facts. This would accord the party accused of nonproduction the opportunity of either calling the designated witness or demonstrating to the court by argument or proof the reason for the failure to call. Depending upon the particular circumstances thus disclosed, the trial court may determine that the failure to call the witness raised no inference, or an unfavorable one, and hence whether any reference in the summation or a charge is warranted.

People v. Ford, 754 P.2d 168, 178 n.8 (Cal. 1988) (quoting State v. Clawans, 183 A.2d 77, 82 (N.J. 1962)).
\footnote{147} See supra note 139 and accompanying text.
\footnote{149} Cf. id. at 613–14 (prohibiting prosecution from commenting on silence, thereby encouraging a defendant’s avoidance of the witness stand).
\footnote{150} See supra notes 135–37 and accompanying text.}
gue that the defendant’s silence raises an inference of guilt, but the court should not endorse the inference.” That rule would conform to the larger landscape of evidence law, and it would encourage more defendants to testify.

B. PROPOSAL TWO: ABANDONING THE GORDON TEST FOR RULE 609

Like Griffin’s “no adverse inference” rule,151 many other rules raise the relative cost of testimony. Of these, one of the most powerful is Federal Rule of Evidence 609. American law generally excludes evidence of a defendant’s bad character, including evidence of his prior criminal convictions.152 Rule 609 is an exception to the character evidence rule—it allows the admission of some convictions as impeachment evidence if the defendant takes the stand.153 The accepted theory of the Rule 609 exception is that when a defendant takes the stand, his prior convictions can be used to demonstrate his character for untruthfulness as a witness but not his character for criminality as a defendant.154

Thus, under the accepted theory of the rule, if a defendant testifies, the prosecutor may use his prior rape conviction to show that he is a liar, but not that he is a rapist. That any human fact finder could so limit the evidence is dubious,155 and a substantial body of empirical literature questions the Rule’s premise.156 Several commentators, characterizing the theory of

151. See Griffin, 380 U.S. at 613–14.
152. See Fed. R. Evid. 404; Old Chief v. United States, 519 U.S. 172, 180–82 (1997); 1 McCormick on Evidence, supra note 112, § 188.
153. See Fed. R. Evid. 404(a)(3); Fed. R. Evid. 609(a); 1 McCormick on Evidence, supra note 112, § 194.
154. See United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.).
Rule 609 as a rank fiction, even call for its repeal. Whatever the merits of that argument, for my purposes it is enough to say that courts expand this arguably unwise exception to the character rule beyond all sense of proportion.

Much of the fault for this situation lies at the feet of Gordon v. United States. In Gordon, then-Judge Warren Burger set forth a five-factor test governing the admission of prior convictions for impeachment. The five factors are: (1) the nature of the prior offense; (2) the staleness of the prior offense; (3) the similarity of the prior offense to the charged offense; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. The Gordon test is very influential; most federal circuits and many state courts have adopted the test, in whole or in part, to interpret Rule 609 or the corresponding state version of that Rule.
The widespread adoption of Gordon, however, does a disservice to Rule 609 and to evidence law. The five-factor Gordon test is both overinclusive and underinclusive. In structure, it has obscured the balancing test prescribed by the Rule. On the whole, it has prevented courts from recognizing simple propositions that should guide—and limit—application of Rule 609.

1. Overinclusiveness

The Gordon test is overinclusive. It sets forth five factors that courts applying Rule 609 should consider, but four of those five factors should bear little or no weight in a proper Rule 609 analysis.

The first Gordon factor is the nature of the prior conviction.163 The principle suggested in Gordon is that certain crimes reflect strongly on credibility while other crimes reflect on credibility only weakly.164 But the application of this factor has often befuddled courts. It is often difficult to classify crimes as one or the other.

For example, which crime reflects more on credibility, theft or rape? On one hand, theft might be more sneaky, more suggestive of mendacity, and thus more probative of credibility. On the other hand, rape is a more serious crime and a more serious transgression of social norms. Compared to a defendant who has only committed a relatively minor felony theft, a defendant who has committed a crime as serious as rape might be more likely to commit perjury. Courts scatter on these issues in part because the question itself is muddled by substantial incoherence.165


For variations on the Gordon test, see, for example, People v. Castro, 696 P.2d 111, 114 (Cal. 1985); Label Sys. Corp. v. Aghamohammadi, 852 A.2d 703, 720–21 (Conn. 2004); People v. Cox, 748 N.E.2d 166, 169 (Ill. 2001); State v. Axiotes, 569 N.W.2d 813, 816 (Iowa 1997); State v. Smith, 553 N.W.2d 824, 827 (Wis. Ct. App. 1996).

163. Gordon, 383 F.2d at 940.


165. Some courts, for example, hold that rape convictions are “not highly
Admittedly, there are good arguments that some crimes do, in fact, have more probative value than others. For example, because perjury involves intentional wrongdoing, prior crimes involving intentional wrongdoing may reflect more on character for truthfulness than prior crimes involving mere recklessness or negligence. It could be thus be argued under the first Gordon factor that intentional murder is more probative of truthfulness than vehicular manslaughter. But even if there is some real difference in the probative value of various non-crimen falsi felonies, it is questionable whether there is very much. When it comes to the first Gordon factor, the game probably is not worth the candle. The first Gordon factor receives more attention than it deserves.

The second Gordon factor is the remoteness of the prior conviction. Gordon suggests the principle that a nine-year-old offense is less probative than a one-year-old offense, and thus that the latter should be admitted more readily than the former. But prejudicial impact can decline along with probative value. A nine-year-old offense is less probative than a one-year-old offense, but it also creates less potential for unfair prejudice. The second Gordon factor also receives more attention than it deserves; arguably, it should be excluded altogether.

166. Gordon, 383 F.2d at 940.
167. See United States v. Brito, 427 F.3d 53, 64 (1st Cir. 2005); Lipscomb, 702 F.2d at 1062; United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980); Gordon, 383 F.2d at 940; State v. Gardner, 433 A.2d 249, 252 (Vt. 1981); MUELLER & KIRKPATRICK, supra note 119, § 4.16, at 202 ("Ironically, the risk of unfair prejudice sometimes increases even as probative worth increases.").
168. See MUELLER & KIRKPATRICK, supra note 119, § 4.16, at 202 ("Ironically, the risk of unfair prejudice sometimes increases even as probative worth increases.").
169. United States v. Rodriguez, 215 F.3d 110, 120 n.11 (1st Cir. 2000) ("The older the evidence that a defendant was a bad character, the weaker the force of inference about his present character or propensity.").
170. Of course, Rule 609(b) creates a general rule of exclusion for crimes older than ten years. Some courts have read that provision as expressing a
The fourth and fifth Gordon factors are the most puzzling of all. The fourth factor is the importance of the defendant’s testimony.\textsuperscript{171} Gordon suggests that if a defendant’s testimony is important, then impeachment might deter him from taking the stand and should not be allowed.\textsuperscript{172} The fifth factor—the centrality of the defendant’s credibility\textsuperscript{173}—suggests that if a defendant’s credibility is important, then impeachment is also important and should be allowed.\textsuperscript{174}

The fourth and fifth factors do not really address probative value or potential for unfair prejudice, at least as those terms are usually conceived in evidence law. Rather, they simply reflect the competing policy arguments of the Rule’s internal compromise.\textsuperscript{175} It is sometimes useful to consider an evidence rule’s rationale when applying the rule, but in this case, the competing policy considerations simply cancel one another out. As a defendant’s testimony becomes more important, his credibility also becomes more important.\textsuperscript{176} So as the fifth factor pulls more strongly for exclusion of prior convictions, the fourth factor pulls more strongly for admission.\textsuperscript{177} At best, the fourth and fifth factors are mostly meaningless. At worst, they confuse courts and distract from the real issues that should be considered.

In sum, these four Gordon factors have little or no value in assessing the probative value or prejudicial effect of a prior conviction admitted for impeachment. The Gordon test is thus conclusion that probative value fades more quickly than prejudicial effect. See, e.g., Lipscomb, 702 F.2d at 1062 (discussing Federal Rule of Evidence 609(b) and reviewing its legislative history). By that logic, however, courts should also consider the punishment authorized for the prior offense, as well as the age of the offender at the time of the prior offense. See \textit{Fed. R. Evid.} 609(a)(1), 609(d).

\textsuperscript{171} Gordon v. United States, 383 F.2d 936, 940–41 (D.C. Cir. 1967).

\textsuperscript{172} \textit{Id.}; see also United States v. Oakes, 565 F.2d 170, 173 (1st Cir. 1977); State v. Gentry, 747 P.2d 1032, 1037 (Utah 1987); \textit{Mueller & Kirkpatrick, supra} note 119, § 6.31, at 499; 4 \textit{Weinstein’s Federal Evidence, supra} note 164, § 609.05[3][e].

\textsuperscript{173} \textit{Gordon}, 383 F.2d at 941 n.11.

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} Surratt, \textit{supra} note 159, at 943.


overinclusive—it focuses courts’ attention on factors that have little or no evidentiary salience.

2. Underinclusiveness

The Gordon test is also underinclusive. The five-factor test ignores two critical factors that should be considered by courts weighing the admission of prior convictions. 178

First, the Gordon test ignores the availability of other means of impeachment. A central principle of evidence law is that the probative value of a given piece of evidence depends on the availability of other evidence to prove the same point. 179 As the Supreme Court put it, no piece of evidence is an island—when we measure probative value, we must measure “discounted probative value.” 180

That principle should be recognized in the Rule 609 weighing process just as it is in the Rule 403 weighing process. 181 If the prosecution has other means to impeach a defendant, then the discounted probative value of proffered 609 convictions decreases. 182 If the prosecution can, for example, call a witness

178. To be fair to Gordon, it must be noted that Judge Burger explicitly cautioned that “there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case.” Gordon, 383 F.2d at 940. Courts since then, however, have largely ignored that note of caution, settling instead for the relative security of the five-factor test derived from Gordon. But see State v. Trejo, 825 P.2d 1252, 1255–56 (N.M. Ct. App. 1991) (noting that these factors “are not to be considered mechanically or in isolation”); MUELLER & KIRKPATRICK, supra note 119, § 6.31, at 500 (“No thoughtful person is likely to be satisfied with any list of factors.”).

179. See Fed. R. Evid. 403 advisory committee’s note (stating that the “availability of other means of proof may also be an appropriate factor” to consider in a 403 balancing test); 22 WRIGHT & GRAHAM, supra note 143, § 5250, at 546–47 (“The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point.”).

For examples of this principle in court opinions, see United States v. Stout, 509 F.3d 796, 800 (6th Cir. 2007); United States v. Ali, 493 F.3d 387, 391 n.2 (3d Cir. 2007); United States v. Curtin, 489 F.3d 935, 945 (9th Cir. 2007); United States v. Scott, 270 F.3d 30, 51 (1st Cir. 2001); People v. Walker, 812 N.E.2d 339, 347–48 (Ill. 2004); State v. Humphrey, 412 So. 2d 397, 521 n.2 (La. 1982); People v. Hine, 650 N.W.2d 659, 662–63 (Mich. 2002).


181. See 2 SALTZBURG ET AL., supra note 161, at 1033 (discussing a proposed amendment to Rule 609 that would have required consideration of other evidence offered to impeach).

182. This principle has been suggested by a few judges. See United States v. Johnson, 388 F.3d 96, 104 (3d Cir. 2004) (McKee, J., concurring); United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985); People v. Rist, 545 P.2d 833, 839 (Cal. 1976); State v. Martin, 794 N.W.2d 674, 676 (Iowa 2005); State v. Gardner, 438 A.2d 249, 252 (Vt. 1981).
who will offer opinion testimony that the defendant has character for untruthfulness, then the prosecution need not admit the defendant’s prior rape for impeachment. Likewise, if the prosecution has admitted one conviction for impeachment, then it need not admit a second and third.

Second, the Gordon test ignores the relative severity of the prior conviction. It correctly recognizes under the third factor that if a prior conviction is similar to the charged offense, there is a greater potential for unfair prejudice. But the Gordon test fails to recognize that if a prior conviction is particularly lurid or inflammatory, there is also a greater potential for unfair prejudice. When analyzing the evidence of other acts covered by Rule 404(b), courts have consistently held that the inflammatory or lurid nature of the evidence weighs against admission. Moreover, as California state courts have recognized with unusual clarity, relative severity is particularly important.

A defendant charged with murder will not be much prejudiced by the admission of a prior burglary conviction. Few jurors would convict a man of murder simply because they knew him to be a burglar. The potential for prejudice is much higher when the crimes are reversed—a defendant charged with burglary will be greatly prejudiced by the admission of a prior murder conviction. In that scenario, the potential for preven-

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183. See FED. R. EVID. 608(a) (“The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . .”).
185. See, e.g., United States v. Stout, 509 F.3d 796, 801 (6th Cir. 2007); United States v. Blue Bird, 372 F.3d 989, 994–95 (8th Cir. 2004); United States v. Givan, 320 F.3d 452, 470 n.5 (3d Cir. 2003) (quoting Virgin Islands v. Pinney, 967 F.2d 912, 917 (3d Cir. 1992)); United States v. Aramony, 88 F.3d 1369, 1378 (4th Cir. 1996); United States v. Harvey, 991 F.2d 981, 996–97 (2d Cir. 1993); 1 MCCORMICK ON EVIDENCE, supra note 112, § 190, at 768 (discussing, in the 404(b) context, how the heinousness of the previous crime is an important factor to consider); MUELLER & KIRKPATRICK, supra note 119, § 4.16, at 201–02 (same).
186. See People v. Ewoldt, 867 P.2d 757, 772 (Cal. 1994) (“The testimony describing defendant’s uncharged acts, however, was no stronger and no more inflammatory than the testimony concerning the charged offenses.”); People v. Branch, 109 Cal. Rptr. 2d 870, 876 (Cal. Ct. App. 2001) (“The first factor we must consider is whether the uncharged offenses were more inflammatory than the charged offenses.”); see also State v. Beck, 745 S.W.2d 205, 209 (Mo. Ct. App. 1987); Marc v. State, 166 S.W.3d 767, 776 (Tex. App. 2005).
tative conviction (a type of pro-prosecution nullification) is much higher.

These principles comport with common sense and with the larger landscape of evidence law. Courts applying Gordon, however, have largely ignored them. Having enthusiastically adopted the five-factor test, they stopped looking for considerations beyond those five mentioned in one case decided forty years ago by Judge Burger.

3. Lost Balance

Aside from any individual factor, the Gordon test also distorts the underlying mechanics of Rule 609. Rule 609 is, by its terms, a balancing test: courts are instructed to admit prior crimes if and only if they determine “that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Those words sound familiar, and for good reason—they are borrowed from Rule 403, the all-encompassing fallback rule that allows for discretionary exclusion of relevant evidence. In their eagerness to run through the five-box checklist of the Gordon test, courts forget that their ultimate task is to balance probative value against the potential for prejudice. They forget that their task is simply to perform a version of the 403 balancing test.

Courts have also forgotten that the 609 balancing test is a modified version of the 403 balancing test—and modified in a

where the state admitted evidence of a prior crime involving sexual torture and mutilation).

188. FED. R. EVID. 609(a)(1).


190. See, e.g., State v. Gary M.B., 676 N.W.2d 475, 483 n.9 (Wis. 2004) (discussing state law analogues to Rules 403 and 609 and explaining that Gordon-like factors “are merely elements to be considered” when balancing probative value against potential prejudice (citing Wis. STAT. ANN. §§ 904.03, 906.09(2) (West 2000))).
way that is tilted more in favor of exclusion. While Rule 403 only allows exclusion if the potential for prejudice substantially outweighs the probative value, Rule 609 only allows admission if the probative value outweighs the potential for prejudice. That difference cannot be reduced to any bright-line rules of application, but it should not be forgotten.

The proper metaphoric framework for applying Rule 609 is not any checklist of factors, whether numbered five or otherwise. The proper metaphoric framework is a scale with two sides. On one side is the probative value, which will vary somewhat depending on the overall evidentiary posture of the case. On the other side is the potential for unfair prejudice, which will vary substantially depending on the overall evidentiary posture of the case. Courts should simply do what the text of the Rule demands: compare one side of the scale to the other.

In practice, especially as its application has calcified over the decades, the Gordon test has resulted in the admission of too many prior convictions for impeachment.
4. Replacing Gordon

The five-factor Gordon test should be abandoned in favor of a two-sided balancing test consistent with the text and purpose of Rule 609. That balancing test should be guided by general principles of evidence law and common sense, both of which have been lacking in courts' application of Gordon.

a. Assessing Probative Value

On the probative side of the scale, two key points should be remembered. First, in every criminal case, the defendant's testimony is important, and therefore any evidence impeaching his testimony will have significant probative value. Defendants take the stand to deny guilt. If that denial is believed, the jury will acquit. If some evidence can show that the defendant is not believable, either in this instance or in general, it will substantially affect the result. Evidence impeaching a defendant-witness has an inherently high probative value.

But that point must be recognized along with a second countervailing point: in every criminal case, a defendant's interest in the outcome is obvious, therefore lessening the need for other impeachment evidence. Criminal defendants have a huge incentive to lie, and jurors are well aware of that huge incentive. Prosecutors may impeach defendants by pointing out their bias and self-interest.

Because that means of impeachment is so readily available, the marginal value of additional impeachment evidence is diminished. The "discounted probative value" of a defendant's prior conviction is inherently low.

Beyond those two points, there may not be much else to say about the probative value of Rule 609 evidence in any given case. It is doubtful whether much turns on the nature of the prior conviction. It is reasonable to argue that a rape conviction

197. 1 McCORMICK ON EVIDENCE, supra note 112, § 39, at 173 ("The witness's self-interest is evident when he is himself a party . . . .").

198. See 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6094 (2d ed. 2007) (discussing showings of bias as one of the prototypical forms of impeachment).

199. See Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1527 (1999) ("There is no basis for supposing that recidivists are more likely than first-time offenders to lie; both are criminals, and the incentive of a criminal to lie is unrelated to whether he has committed one crime or more than one.").
shows more about a person’s truthfulness than a theft conviction, and it is reasonable to argue the opposite. In either case, the fit between the fact of the prior conviction and the current assessment of credibility is somewhat loose. At bottom, the most sensible conclusion is that all (non-crimen falsi)\textsuperscript{200} crimes reflect somewhat on truthfulness. Nevertheless, they do not reflect a great deal, and no one type of crime reflects a great deal more than another.

In short, all 609(a)(1) crimes have some probative value, but their probative value is inherently somewhat limited.

b. Assessing Prejudice

On the prejudice side of the scale, there are again two key points to bear in mind. First, if a prior conviction is similar to the charged offense, the potential for unfair prejudice is inherently high. \textit{Gordon} correctly recognized that point,\textsuperscript{201} but it has been too often forgotten by courts since.\textsuperscript{202}

Second, if a prior conviction is much more serious than the charged offense, the potential for unfair prejudice is also high. Where a prior conviction is more inflammatory and frightening than the present offense, there is a greater danger that the jury will be distracted by the former and lose focus of the latter.\textsuperscript{203}

The risk of preventative conviction increases with the severity of the prior conviction.

In short, all 609(a)(1) crimes have some potential for prejudice, but some crimes are much more prejudicial than others.

c. Overall Balance and Results

Within the universe of 609(a)(1) crimes, both probative value and potential for prejudice may vary depending on the circumstances, but the potential for prejudice varies more. Put differently, the strength of the proper inference—regarding character for truthfulness—varies a little from case to case,\textsuperscript{200} See FED. R. EVID. 609(a)(2) (making crimen falsi crimes admissible per se).

\textsuperscript{201} Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) ("As a general guide, those convictions which are for the same crime should be admitted sparingly . . . .")

\textsuperscript{202} See, e.g., State v. Inhot, 575 N.W.2d 581, 587 (Minn. 1998) (admitting a prior rape conviction as impeachment evidence against a defendant-witness charged with rape).

while the strength of the improper inference—regarding character for criminality—varies a great deal. With that in mind, courts can implement a post-*Gordon* version of Rule 609 that is more in keeping with general principles of evidence law and more in keeping with the text of the Rule itself.

To some extent, the test must remain case-specific, committed to a trial judge’s discretion. But while bright-line analytic rules are probably impossible, we can settle on some general rules of application. In general, where a prior conviction is similar to the charged offense, it should not be admitted for impeachment. Similarly, where a prior conviction is much more serious than the charged offense, it should not be admitted for impeachment. Finally, where a prior conviction is dissimilar to the charged offense and less serious than the charged offense, it should be admitted.

Results along those lines would be consistent with the text and rationale of Rule 609. They would be consistent with principles of evidence law borrowed from Rule 403 jurisprudence and elsewhere. They would be consistent with both common sense and empirical evidence regarding jurors’ use of Rule 609 impeachment evidence.

Results along those lines would, on the whole, lead to the admission of fewer prior convictions for impeachment. In so doing, they would substantially reduce the cost of testifying and would eliminate a barrier that prevents many defendants from taking the stand.

C. PROPOSAL THREE: FORGOING PERJURY ENHANCEMENTS FOR TRIAL TESTIMONY

In addition to replacing the *Gordon* test for Rule 609 and abandoning *Griffin’s “no adverse inference” rule*, American courts should stop imposing sentencing enhancements for defendants’ trial testimony. While such enhancements are constitutionally valid, they are not sensible as a matter of sentencing policy. They also deter defendants from testifying, thus depriving the jury of important evidence and depriving the system of greater legitimacy. Sentencing courts should thus decline to impose perjury enhancements.

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1. Creation and Validation of Perjury Enhancements

Like any other witness, a defendant who testifies falsely under oath may be prosecuted for perjury. But perjury prosecutions are time-consuming and difficult; they are therefore rare. In order to deter perjury, most American jurisdictions allow judges to enhance a defendant’s sentence based on his trial testimony. Thus, if a defendant testifies at trial and denies guilt, but the jury finds him guilty, the judge may impose a sentence based not only on the underlying crime but also on the perjured testimony.

In the federal system, Section 3C1.1 of the United States Sentencing Guidelines creates the sentence enhancement for perjury. It states that if the defendant “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice,” the judge should increase the offense level by two levels. The application notes make clear that Section 3C1.1 covers false testimony at trial. Most states similarly allow some enhancement for a defendant’s perjured trial testimony, either under state sentencing guidelines or as a part of a judge’s more general sentencing discretion.

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206. See Peter J. Henning, Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and a Defendant’s Right to Testify, 29 AM. CRIM. L. REV. 933, 934 (1992).

207. Id.


209. See id. § 3C1.1 cmt. n.4(b) (stating that the enhancement applies to conduct including “committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction”).

At both the state and federal level, perjury enhancements have been attacked on the ground that they impermissibly burden a defendant’s constitutional right to testify. The attacks, in other words, echo Griffin’s oversimplified suggestion that it is impermissible to “cut down” on the exercise of a constitutional right by “making its assertion costly.”

In United States v. Dunnigan, the Supreme Court faced such a constitutional challenges to section 3C1.1. The Court responded by stated that “a defendant’s right to testify does not include a right to commit perjury.” That response, widely parroted by state courts upholding their own perjury enhancements, has a “beguiling simplicity” which is to say that it is both facile and a bit fatuous. In Griffin, the Court might just as well have said that “a defendant’s right to remain silent does not include the right to conceal and withhold relevant evidence.” Indeed, a court can almost always evade an unconstitutional conditions challenge by redefining the scope of the right.

In any event, the Dunnigan Court went on to argue (more sensibly) that not every rule that burdens a constitutional right is unconstitutional.

Nor can respondent contend § 3C1.1 is unconstitutional on the simple basis that it distorts her decision whether to testify or remain silent. Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights.

That portion of Dunnigan’s rationale, while inconsistent with Griffin, is surely correct. Many legal rules burden either the right to testify or the right to remain silent, and perjury


213. Id. at 96; see also United States v. Grayson, 438 U.S. 41, 54 (1978) (“The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath . . . .”).


216. Dunnigan, 507 U.S. at 96.
enhancements are not unconstitutional on the simple ground that they chill testimony. The question remains, however, whether perjury enhancements are sensible as a matter of sentencing policy.

2. The Flawed Rationale of Perjury Enhancements

In approving perjury enhancements, courts have relied on traditional sentencing goals including deterrence, retribution, incapacitation, and rehabilitation. They argue that perjury is wrong and ought to be deterred, that a defendant’s perjury suggests the need for incapacitation and retribution, and that a perjuring defendant demonstrates a lack of remorse and thus less hope of rehabilitation.

Those arguments are faulty because they ask and answer the wrong question. The question is not whether a defendant who lies on the stand is culpable—surely he is. The question, rather, is whether a guilty defendant who takes the stand is more culpable than a guilty defendant who remains silent. The answer to that question is far from clear for two reasons.

First, while a testifying guilty defendant is culpable for lying to the jury, a non-testifying guilty defendant is culpable for concealing evidence. There are two kinds of deliberate deceit: suggestio falsi and suppressio veri. The testifying guilty defendant commits the former sin while the non-testifying guilty defendant commits the latter. In many contexts, the law has recognized that deception “may consist in silence as well as in actual outspoken misrepresentation, and there are circumstances when the suppressio veri may be reprehensible as the suggestio falsi.”

Under federal mail and wire fraud statutes,

221. The Kalfarli, 277 F. 391, 400 (2d Cir. 1921). The law of conveyances in property, for example, has long treated the two concepts as equivalent. See, e.g., N.Y. Life Ins. Co. v. Miller, 73 F.2d 350, 352 (8th Cir. 1934); Eppes v.
for example, affirmative misstatements of fact prove unnecessary for conviction—deceitful concealment suffices.222

Indeed, even Section 3C1.1 recognizes that concealing material evidence constitutes obstruction of justice.223 A guilty defendant who refuses to testify may not affirmatively lie, but he does conceal evidence. Operating under Griffin’s shadow, courts have not considered imposing the Section 3C1.1 obstruction enhancement based on a defendant’s failure to testify. Once again, the difference between punishments based on testimony and punishments based on silence creates an unexplained and unjustified constitutional asymmetry.

Second, a non-testifying guilty defendant often simply has someone else lie on his behalf. He presents a false defense by proxy, using other witnesses and his attorney. In general, an attorney acts as an agent of the client, and a principal can be held responsible for the acts of his agent.224 In criminal cases as elsewhere, because an attorney acts as “speaking agent” for her client, the statements of the defense attorney can be held against the defendant.225 “A defendant cannot stand idly by while he hears his attorney provide false information to the court . . . and then claim that he was exercising his Fifth Amendment right.”226 If a defendant can be held accountable

Thompson, 79 So. 611, 613 (Ala. 1918); Jacobs v. George, 20 P. 183, 187 (Ariz. 1889); Ambrose v. Barrett, 54 P. 264, 265 (Cal. 1898); Dunlap & Co. v. Cody, 31 Iowa 260, 262 (Iowa 1871); see also Smith v. Babcock, 22 F. Cas. 432, 441 (D. Mass. 1846) ("In such cases there is little if any difference between suppressio veri and suggestio falsi.").

222. See, e.g., Neder v. United States, 527 U. S. 1, 22 (1997); United States v. Stephens, 421 F.3d 503, 507 (7th Cir. 2005); United States v. Hasson, 333 F.3d 1264, 1270–71 (11th Cir. 2003); United States v. Bohonus, 628 F.2d 1167, 1173 (9th Cir. 1980); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996) (“[A]ctual fraud requires a material misrepresentation or omission.” (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977))).

223. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(d) (2008).

224. Hayes v. Nat’l Serv. Indus., 196 F.3d 1252, 1254 (11th Cir. 1999); Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984); LeBlanc v. INS, 715 F.2d 685, 694 (1st Cir. 1983); Ampex Credit Corp. v. Bateman, 554 F.2d 750, 753 (5th Cir. 1977).

225. See United States v. McKeon, 738 F.2d 26, 31–34 (2d Cir. 1984); see also FED. R. EVID. 801(d)(2)(C) (admitting statements authorized by the party’s speaking agents, including attorneys); MUELLER & KIRKPATRICK, supra note 119, § 8.31 (discussing the role of attorneys as “speaking agents”).

for lies that he utters with his own mouth, he should also be held accountable for lies that others utter for him.\textsuperscript{227}

Thus, while it is true that testifying guilty defendants are culpable for lying, it is also true that many non-testifying guilty defendants are culpable for concealing evidence and for having others lie on their behalf. It is hard to see why the former are more culpable than the latter. If both are equally culpable, perjury enhancements are unjustified. Surprisingly, many courts have endorsed perjury enhancements without even considering whether testifying guilty defendants are more culpable than non-testifying guilty defendants. In this area as in others, the law reflects an unstated and unjustified preference for silence over testimony.

3. Perjury Enhancements After Booker

In the federal system after Dunnigan, several circuits held that Section 3C1.1 enhancements were mandatory if a judge determined that the defendant lied on the stand.\textsuperscript{228} Other circuits suggested that enhancements were discretionary.\textsuperscript{229} Mandatory or not, perjury enhancements have since Dunnigan been imposed routinely, almost mechanically, across the federal criminal justice system.\textsuperscript{230}

In the wake of Booker,\textsuperscript{231} however, courts have both renewed reason and renewed ability to reconsider the imposition of perjury enhancements. The Guidelines are now advisory—district courts must consult them, but they are not bound to apply them.\textsuperscript{232} In addition to considering the Guidelines, district courts must consider the broader array of factors listed in 18 U.S.C. § 3553(a), including "the need to avoid unwarranted

\textsuperscript{227} See Fuller v. State, 860 A.2d 324, 333 (Del. 2004) (imposing a sentencing enhancement where defendant remained silent but encouraged another witness to commit perjury).

\textsuperscript{228} See, e.g., United States v. Austin, 948 F.2d 783, 788–89 (1st Cir. 1991); United States v. Alvarez, 927 F.2d 300, 303 (6th Cir. 1991).

\textsuperscript{229} See, e.g., United States v. Dillard, 43 F.3d 299, 311 (7th Cir. 1994); United States v. Cabral-Castillo, 35 F.3d 182, 186 (5th Cir. 1994); United States v. Yost, 24 F.3d 99, 106 (10th Cir. 1994); see also United States v. Shonubi, 895 F. Supp. 460, 468–70 (E.D.N.Y. 1995) (Weinstein, J.) (discussing the split of authority); Barbara Allen Babcock, \textit{Introduction: Taking the Stand}, 35 WM. & MARY L. REV. 1, 19 (1993) ("There is still interpretive room, in other words, for restoring equilibrium to the criminal process . . . .").


\textsuperscript{232} \textit{Id.} at 264.
sentence disparities” among similarly situated defendants. In short, district courts have greater freedom “to reject (after due consideration) the advice of the Guidelines,” particularly when a particular provision of the Guidelines makes no sense.

Post-Booker, district courts have greater freedom to decline Section 3C1.1 enhancements for trial testimony. District courts should ask themselves: “Is this defendant, who testified at trial and was found guilty, truly more culpable than another guilty defendant who remained silent and pressed a false defense by proxy?” If not, then no enhancement should be imposed. State court judges, many of whom have even greater sentencing freedom than federal judges, should ask themselves the same question.

Perjurious defendants are culpable, and perjury enhancements are constitutional, but such enhancements are still unwise.

CONCLUSION

The right to remain silent and the right to testify are inextricably intertwined. The extent to which defendants exercise one right depends on its cost relative to the other. Any penalty on the right to remain silent raises its relative cost, but also lowers the relative cost of the right to testify. Any subsidy has the converse offsetting effect.

Courts and commentators have too often analyzed the rights separately and have therefore missed the dynamic of offsetting effects. More generally, they have failed to see that labels like “penalty” and “subsidy” are relative terms that can only be measured by reference to some baseline condition. American courts have unjustifiably struck down rules that raise the relative cost of silence while upholding rules that raise the relative cost of testimony. Taken together, these rul-

233. 18 U.S.C. § 3553(a)(6) (2006); see Gall v. United States, 128 S. Ct. 586, 596–97 (2007) (“[T]he Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.”).

234. Kimbrough v. United States, 128 S. Ct. 558, 577 (2007) (Scalia, J., concurring); see also United States v. Rodriguez, 523 F.3d 319, 523 (5th Cir. 2008) (“Rita and Kimbrough allow a district court to impose a non-Guideline sentence based on disagreement with Guideline policy that results in a sentence greater [and presumably less] than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a).”).
ings can only be explained by positing silence as the desired normative baseline from which all departures are measured.

American law, in other words, currently reflects an implicit policy preference for silence over testimony. That preference has never been explained, and it cannot be justified. More testimony by criminal defendants would improve the accuracy, legitimacy, and fairness of the criminal justice system. Legal rules that raise the relative cost of testimony undermine these critically important goals.

Our baseline condition ought to be defined by generally applicable rules of law. To the extent that we depart from such rules, we should depart in a way that encourages more testimony. At a minimum, we should not depart in a way that encourages silence. For the last half century, American law has departed in the wrong direction, and it is time to reverse course.