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## Response

### Speaking of Silence: A Reply to *Making Defendants Speak*

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In an article recently appearing in the *Minnesota Law Review*, Ted Sampsell-Jones argues that defendants should be “made” to testify at criminal trials.<sup>1</sup> The article’s primary rationale is that defendants are an informational resource whose testimony is necessary to the fact-finding process.<sup>2</sup> The article also proposes that defendants actually will benefit from the resulting diminution in defense counsel’s role at trial.<sup>3</sup>

The key move in Sampsell-Jones’s article is not directly to challenge the norms underlying defendants’ rights, to which it gives scant attention and minimal content. Rather, it is to argue that, because government “neutrality between testimony and silence” is not possible, desirable, or constitutionally required,<sup>4</sup> the question becomes “whether the current set of rules

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1. Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1329 (2009). For a similar analysis, see Jeffery Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 853 (2008).

2. Sampsell-Jones, *supra* note 1, at 1330–34.

3. *Id.* at 1336.

4. *Id.* at 1327. *Chaffin v. Stynchcombe*, the case cited in support of this proposition, involved a habeas challenge to a higher sentence imposed by a jury after a successful appeal. 412 U.S. 17 (1973). There the Court explicitly reaffirmed “the underlying rationale” of *North Carolina v. Pearce*, that due process prohibits the imposition of a harsher sentence on retrial “as punishment” for the exercise of the right of appeal or collateral review. See *Chaffin*, 412 U.S. at 18 (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). *Chaffin*

creates the proper mix of incentives and disincentives” in a “zero-sum game” between the constitutional right to testify on one side of the ledger and the constitutional right to remain silent on the other.<sup>5</sup> The article proposes two sets of reforms to “make defendants speak.” To “punish” defendants more for refusing to testify, it would overrule the prohibition, set out in *Griffin v. California*,<sup>6</sup> on adverse inferences from a defendant’s silence in a criminal proceeding.<sup>7</sup> To “reward” them for testifying, it proposes two measures. The first would abandon the five-factor balancing test of *Gordon v. United States*,<sup>8</sup> which has guided admissibility under Rule 609(a)(1)<sup>9</sup> of prior felony convictions as impeachment evidence against defendants who testify in their own criminal trials.<sup>10</sup> The second would abolish perjury enhancements under the Sentencing Guidelines<sup>11</sup> obstruction-of-justice provision for defendants who testify falsely under oath.<sup>12</sup>

*Making Defendants Speak* takes immediate aim at *Griffin*, which it finds flawed as a matter of theory, constitutional text, history, and policy; but its ultimate target is the right to remain silent at trial.<sup>13</sup> We therefore concentrate most of our at-

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distinguishes between judicial and jury sentencing in addressing the risk of vindictiveness because the Court saw the jury as presenting less risk, in part because the jury is unlikely to be in a position to seek or to desire to punish a defendant for the exercise of the right. *See id.* at 26–27. The Court did not endorse but instead explicitly *rejected* (once again) the proposition that the state may deliberately seek to punish a defendant for exercising a constitutional right. *See id.* at 35.

5. Sampsell-Jones, *supra* note 1, at 1328.

6. 380 U.S. 609, 615 (1965).

7. Sampsell-Jones, *supra* note 1, at 1339–58. *Griffin* held that the Fifth Amendment “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” 380 U.S. at 615. Most sources, including the Supreme Court, refer to the *Griffin* principle as a prohibition on adverse or negative inference from the defendant’s silence. *E.g.*, *Mitchell v. United States*, 526 U.S. 314, 327–30 (1999). It would be more correct grammatically to state the *Griffin* rule as a prohibition on adverse *implication* rather than on adverse *inference*. Prosecutors and judges imply (or are explicit), juries infer. The term “no-adverse-inference instruction to the jury” thus reflects correct usage. *See Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (using the term). For the sake of convenience, however, we simply adopt the more common terminology in referring broadly to *Griffin*.

8. 383 F.2d 936, 939–41 (D.C. Cir. 1967).

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

10. Sampsell-Jones, *supra* note 1, at 1358–67.

11. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. N.4(b) (2008).

12. Sampsell-Jones, *supra* note 1, at 1369–75.

13. *Id.* at 1347–49.

tention on a robust right to remain silent at trial. In Part I we argue that the right to remain silent at trial has emerged as part of a cluster of rights effectuating the modern “test the prosecution” approach to criminal procedure. The adverse inference, prohibited by *Griffin*, is inconsistent with that right. We suggest in Part II that more may be said on behalf of a robust right to silence, including a prohibition on adverse inferences, than its critics recognize. Finally, we briefly respond in Part III to several specific aspects of *Making Defendants Speak*. We suggest that its “zero-sum-game” perspective reflects flawed premises and reasoning and is more usefully regarded as a form of “exchange abolitionism,” the notion underlying the movement in England and Wales to permit adverse inferences from the accused’s silence. We also point out some problems in that article’s “accuracy,” “participation,” and “equity” arguments.

#### I. MAKING DEFENDANTS SPEAK AS HISTORICAL CRITIQUE

*Making Defendants Speak*’s historical critique of *Griffin* travels a well-worn path; and its challenge to *Griffin*’s reliance on unconstitutional conditions doctrine is both dependent on and undermined by its incentivization rationale. The article recites familiar originalist arguments about the historical meaning of “compulsion”—that adverse inference does not rise to the level of “the racks and oaths forced by the power of law.”<sup>14</sup> *Griffin* is wrong, this critique runs, because the adverse inference was not a harm the Framers’ generation would have taken seriously.<sup>15</sup> The implication of this position goes beyond *Griffin* to embrace a minimalist interpretation of the Fifth Amendment which largely excludes the right to remain silent. Albert Alschuler, for example, in proposing that the United States more or less “follow England’s lead” and abandon both *Griffin* and *Miranda*, has argued on both policy and historical grounds that the United States Supreme Court went astray when it recognized a right to remain silent in the Fifth Amendment at all, as opposed only to “a safeguard against torture and other forms of

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14. *Id.* at 1347 n.106 (invoking the image of “[o]ur hardy forebears” (quoting *Mitchell v. United States*, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting))).

15. *Id.*

coercive interrogation.”<sup>16</sup> And it was only a matter of time before someone invoked the threat of terrorism alongside the historical critique in contending for a narrow interpretation of the Fifth Amendment which would exclude *Griffin*.<sup>17</sup>

To us, the central problem is not situating *Griffin* in the modern right to remain silent at trial. *Griffin*'s no-adverse-inference rule is woven neatly into the fabric of that right. Rather, the problem is finding a robust right to remain silent in the Fifth Amendment. In the absence of such a right, *Griffin* is of course moot. If there is such a right, the adverse inference prohibited by *Griffin* violates it directly—quite apart from the “penalty” construct that opinion invokes and to which *Making Defendants Speak* devotes so much energy attempting to refute—because through it the prosecution and judge in effect will have transformed the defendant's silence into evidence against him.<sup>18</sup> *Griffin*'s rule thus effectuates the Fifth Amendment not only because the adverse inference seeks to induce forfeiture of the right to remain silent at trial, but also because it seeks to employ the exercise of that right as implicit testimonial evidence against the accused. If the Fifth Amendment contains a right to silence at trial, allowing an adverse inference is incompatible with that right.

Moreover, *Making Defendants Speak* is at odds with itself even with respect to its incentivization paradigm. It criticizes *Griffin*'s inference-as-penalty reasoning on the grounds that

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16. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2667–68 (1996). Alschuler collects a sample of citations to the literature debating, and mostly criticizing, the “right to remain silent” interpretation of the Fifth Amendment. See *id.* at 2647–60. For discussion of “England's lead” in abandoning *Griffin* and *Miranda*, and its application to the present problem, see *infra* notes 144–48 and accompanying text.

17. See Lissa Griffin, *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 WM. & MARY BILL RTS. J. 927, 929 (2007) (“[T]his disfavored status is particularly dangerous in light of the modern threat of domestic terrorism.”).

18. Alschuler, *supra* note 16, at 2628 n.11 (noting this point while ultimately rejecting *Griffin* and this rationale); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 503 (2005); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 334–35 (1991); see also *Johnson v. United States*, 318 U.S. 189, 196 (1943) (“The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.” (quoting *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853))).

“there is no neutral, determinate way to classify what counts as a ‘penalty.’”<sup>19</sup> Yet its entire project is explicitly centered around “punishing” the defendant for remaining silent. The article seems to want it both ways; it attempts to refute the theoretical implications of the result it seeks to accomplish in fact. If, as the article both assumes and advocates, abolition of *Griffin* does “punish” the defendant in fact for exercising the right to remain silent, then it is difficult to follow the logic by which the doctrinal consequences of that result may be denied.<sup>20</sup>

In any event, the underlying problem is that an interpretation of the Fifth Amendment that includes a robust right to remain silent presents a constitutional conundrum. Its central role in today’s criminal justice system is to provide some actual protection for a defendant’s choice not to serve as a testimonial resource in prosecution against him; but making defendants serve as testimonial resources (including through adverse inference) is what prevailing Anglo-American criminal practice in the seventeenth and eighteenth centuries was largely about.<sup>21</sup> The difficulty is that the criminal justice systems in both America and England have changed dramatically in this fundamental respect, from effectively requiring defendants to speak to preventing them from being required to do so.<sup>22</sup> The strict ori-

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19. Sampsell-Jones, *supra* note 1, at 1343.

20. *Making Defendants Speak*’s emphasis on refuting the unconstitutional conditions doctrine is something of a strawman. That doctrine, according to the source cited by *Making Defendants Speak*, “serves to mediate the boundary between constitutional rights and government prerogatives in the areas of spending, licensing, and employment.” 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, 593 (1990). The Court has explicitly applied unconstitutional conditions doctrine, for example, in the area of land-use regulation. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The nontestifying defendant, unlike the landowner in *Dolan*, is not being asked to give up one right in exchange for a discretionary concession, such as relief from otherwise applicable regulations, conferred by the government. Instead, the government is seeking to use the fact of the defendant’s assertion of the right for the very purpose the right itself otherwise would prohibit: as evidence of guilt. The problem here is not identifying whether the regulatory state has or has not actually intruded on an individual in a constitutionally sensitive area. Such an inquiry does not seem coherent in the context of a criminal prosecution. The problem is defining the limitations on the ways in which the government may deploy its prosecutorial resources as it does intrude powerfully and unmistakably on a particular individual.

21. *See infra* Part I.A.

22. As noted below, there has been a partial retrogression in England and Wales (and Northern Ireland), which never constitutionalized these protections. *See infra* notes 144–49 and accompanying text.

ginalist interpretation of the Fifth Amendment rejects the constitutional relevance of the law's development since its adoption, while the modern interpretation finds scant support in the practices and understandings prevailing in the very different system of its adoption.

This Essay, rather than choosing between the Fifth Amendment as palimpsest or as tabula rasa, suggests instead that it is especially appropriate in the case of the Fifth Amendment's protection against self-incrimination to take deliberate account of this sea change in criminal procedure and thereby to give meaningful content to that protection beyond founding-era practice. We begin by summarizing now-familiar scholarship concerning the origins of the modern right to remain silent at trial and explaining how we believe a robust conception of the right, which includes *Griffin's* no-adverse-inference rule, can be reconciled with that historical account.

Our proposed reconciliation also suggests why *Making Defendant Speak's* focus on the defendant's right to testify is misplaced. It is true that in a literal sense the right to remain silent and the right to speak at trial are antipodal in that exercise of one displaces the other. As a practical matter, however, the important corollary of the right to remain silent is generally not the defendant's right to speak for himself at trial but the right to have someone else speak for him. It was the emergence of an active and potent role for defense counsel in putting the prosecution to its burden of proof through a real adversarial process to which more recent scholarship attributes the origins of the modern right to remain silent. Today, a robust right to remain silent assumes a central role in conjunction with the right to counsel and the prosecution's burden of proof beyond a reasonable doubt in an adversarial system. *Griffin*, so far as it goes, reinforces that constellation of protections.

#### A. THAT WAS THEN

If relatively recent scholarship concerning the origins of the right to remain silent is valid, the problem with *Griffin* is not *Griffin*, it is the Fifth Amendment. That work has challenged the traditional view that the modern right originates in opposition to the oath *ex officio* and the Ecclesiastical courts or more generally to resistance to encroachment by the European

inquisitorial model.<sup>23</sup> John Langbein shows that the well-established common law practice in ordinary criminal trials in England—which practice the colonists brought and adapted to British North America and which largely persisted as a practical matter both before and immediately after the adoption of the Fifth Amendment<sup>24</sup>—was dominated by what he has characterized as the “accused speaks” approach to criminal trials.<sup>25</sup> As Langbein put it, “[t]he logic of the early modern criminal trial was to pressure the accused into serving as a testimonial resource.”<sup>26</sup> He has argued that the modern right to remain silent at trial emerged not from the constitutional struggles in seventeenth-century England and John Lilburne’s invocation of the principle reflected in the maxim *nemo tenetur seipsum prodere*<sup>27</sup> before the Star Chamber, but from a “profound reordering” of the criminal trial process in the late eighteenth and early nineteenth centuries away from the “accused speaks” model and toward the “testing the prosecution” model.<sup>28</sup> The central figure in this reordering, whose emerging role was both required and made possible by it, was defense counsel.

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23. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 43–82 (1968); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 269 (John T. McNaughton ed., rev. ed. 1961).

24. See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1122–23 (1994).

25. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1049 (1994). Langbein’s work complements that of other scholars who trace *nemo tenetur seipsum prodere* not to opposition by common law courts to inquisitorial processes but instead to the *ius commune*, and who have sought to unpack the jurisdictional struggles between the Star Chamber and common law courts. See generally Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries*, in THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 47, 47–81 (R.H. Helmholz ed., 1997); Richard H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, in THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT, *supra*, at 17, 17–46. Levy’s spirited rebuttal of these works, which spends a considerable number of its pages on Langbein, does not effectively controvert his conclusion that the “accused speaks” model characterized pre-nineteenth century English criminal practice. See Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821, 833–49 (1997) (responding to Langbein).

26. Langbein, *supra* note 25, at 1058–59.

27. Translated, the maxim means “no one is bound to inform against himself.” Helen Silving, *The Oath: Part I*, 68 YALE L.J. 1329, 1366–67 (1959). See generally John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1891) (discussing the origin of the maxim).

28. Langbein, *supra* note 25, at 1047.

Langbein has argued that foreclosure of an effective role for defense counsel formed the “bedrock principle” of the “accused speaks” trial, the primary justifications for which find a modern echo in works such as *Making Defendants Speak*: (1) that innocent defendants are their own best advocates, and (2) that guilty defendants’ self-incrimination is a needed testimonial resource.<sup>29</sup> Other aspects of the system—including pre-trial confinement, limitations on defendants’ ability to compel witnesses to testify for the defense and on even voluntary defense witnesses’ testimony, a poorly formulated and weakly realized prosecutorial burden and standard of proof, and constraints on defendants’ pretrial preparation—all combined to leave defendants little choice but to speak at trial:

Thus, the defendant was not only locked up, denied the assistance of counsel in preparing and presenting his defense, and restricted in obtaining defense witnesses, he was also given no precise statement of the charges against him until he stood before the court at the moment of his trial. The total drift of these measures was greatly to restrict defensive opportunity of any sort other than responding personally at trial to the incriminating evidence.<sup>30</sup>

The pressure to speak obtained routinely in pretrial examination of defendants by magistrates under the Marian Committal Statute of 1555,<sup>31</sup> the purpose of which was “to collect only prosecution evidence;” the defendant was “expected to answer” the magistrate’s questions and any refusal to do so would be reported by the magistrate at trial.<sup>32</sup> The pressure to speak continued at trial, which as a practical matter usually was more about whether the defendant would be convicted of a capital crime or some lesser offense (or would obtain a judicial recommendation to the crown for clemency) than it was about ultimate guilt or innocence.<sup>33</sup> The “accused speaks” model apparently was effective: assertion of a privilege against self-incrimination by defendants in ordinary criminal trials in England appears to have been virtually nonexistent.<sup>34</sup>

Eben Moglen’s study has found that the “accused speaks” model described by Langbein “represented the common core of

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29. *See id.* at 1053–54. Langbein has pointed out that, even after defense counsel were permitted to examine and cross-examine witnesses, the continuing prohibition on defense counsel addressing the jury as a practical matter forced defendants to speak for themselves. *Id.* at 1055.

30. *Id.* at 1058.

31. 2 & 3 Phil. & M., ch. 10 (Eng.).

32. *Id.* at 1059–61 (internal quotation marks omitted).

33. *Id.* at 1064–65.

34. *Id.* at 1066.

English criminal procedure in America during the first century of settlement.”<sup>35</sup> If anything, for a number of reasons (including scarcity of lawyers and ideological antipathy towards them) defense counsel’s role in early American criminal trials was even more circumscribed.<sup>36</sup> Also, as a practical matter, “sworn or unsworn, defense witnesses at trial generally were scarce commodities.”<sup>37</sup> And pretrial examination before magistrates, following the Marian Committal Statute process, drove toward self-incrimination.<sup>38</sup> “Colonial American criminal justice depended upon self-incrimination in practice precisely because the basic design of the system assumed it would.”<sup>39</sup> The doctrine of *nemo tenetur prodere seipsum* did have some traction in attitudes about examination of witnesses and the accused by the authorities and on the use of violence (including threat of spiritual violence through the oath *ex officio*)—although physical violence apparently was not completely prohibited but instead calibrated by the doctrine.<sup>40</sup> And the abhorrence of oaths was circumvented by the simple expedient of examining the accused unsworn.<sup>41</sup> Nevertheless, Moglen concluded, as a practical matter:

[A]t the center of that system stood the defendant, friendless and alone, confronting the evidence and his fate. So long as he remained in that condition, and it was the fixed purpose of the system to keep him there, any notion of the defendant’s privilege against self-incrimination was but a phantom of the law.<sup>42</sup>

This state of affairs, he found, reflected social conditions at the time—a geographically dispersed population, scant prosecutorial and judicial resources, social and economic stratification disadvantaging the itinerant and the indigent, a minimal or nonexistent defense bar, and increasing social disorder in the decades immediately preceding the Revolution—which combined to increase reliance on summary jurisdiction of lay magistrates and further promote the “accused speaks” model.<sup>43</sup>

This recital raises the question of how to reconcile the facially broad state and federal constitutional provisions related

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35. Moglen, *supra* note 24, at 1091–92.

36. *See id.* at 1092–93.

37. *Id.* at 1094.

38. *Id.* at 1098.

39. *Id.* at 1104.

40. *Id.*

41. *See id.* at 1100–01.

42. *Id.* at 1104.

43. *See id.* at 1105–11.

to criminal procedure (including *nemo tenetur*) embraced by Revolutionary Americans with the apparently conflicting practices then prevailing.<sup>44</sup> Moglen's account is two-fold. First, those provisions were seen as protecting not against current criminal practices but against rhetorically powerful but even then-dated images such as the Star Chamber and the potential future adoption of "innovative" or "foreign" practices; they were measures conservatory rather than reformatory of extant legal structures.<sup>45</sup> Second, he argued that those constitutional provisions converged on the lay jury as the ultimate protection against government overreaching: "these procedural guarantees, including the privilege against self-incrimination, were part of a cluster of legal rules, conceived not primarily as independent, free-standing rights, but rather as part of the constitutional system for protecting *all rights* by ensuring that government activity met the fundamental check of juries subject to law."<sup>46</sup>

#### B. THIS IS NOW

The foregoing account has been recited, along with criticism of the conceptual and moral underpinnings of the right to silence, in support of a more historically faithful interpretation of the Fifth Amendment that would allow a return to those earlier practices, including adverse inferences from the accused's silence in pretrial examinations and at trial.<sup>47</sup> We think, however, that it can also point the other way. It provides a benchmark against which to gauge just how profoundly our criminal justice system—and our understanding of the Fifth Amend-

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44. Alschuler parts company with Moglen at this juncture, contending that the Framers would not have seen an inconsistency between prevailing practices and constitutional protections, largely because criminal defendants were not placed under oath and therefore not subject to that peculiar form of compulsion. Alschuler, *supra* note 16, at 2657–58. For an argument that the right to counsel and the formal adversary system were well-established by the time of the Revolution, see Randolph Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 95–96 (1995); Randolph Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327–28 (2008). For the argument that the privilege was well-established both in post-revolutionary England and pre-revolutionary British North America, see R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 775 (1935).

45. Moglen, *supra* note 24, at 1116–22.

46. *Id.* at 1118.

47. See, e.g., Alschuler, *supra* note 16, at 2669–72.

ment—has changed, and that transformation itself suggests that the intuitions underlying the right to silence may be larger than the sum of its many critics.

While neither yesterday's nor today's systems completely fit Langbein's respective labels, it is clear that we have moved quite far from an "accused speaks" toward a "test the prosecution" model largely in the ways Langbein and Moglen identify. If the extent to which historical practice reflected the "accused speaks" model is taken as a measure of founding-era acceptance of its normative precepts, then it would seem that the pervasiveness of today's "test the prosecution" approach indicates the contemporary dominance of the latter approach's premises. And if the central figure in that transformation is defense counsel, then that figure's ubiquity and recognition as foundational to the modern adversary system marks the extent of the transformation. Although the Court has vacillated, sometimes importantly so, on the particulars of the right to counsel,<sup>48</sup> that right nevertheless receives both rhetorical recognition and substantial protection, and the unrepresented criminal defendant in all but the most minor of cases is a rare exception.

The right to counsel is a fundamental fair-trial right,<sup>49</sup> the denial of which is per se harmful error,<sup>50</sup> for without a lawyer to assist him, the confrontation between defendant and accusers can hardly be called fair. "[L]awyers in criminal courts are necessities, not luxuries."<sup>51</sup> The right appertains whenever the

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48. In *Montejo v. Louisiana*, Justice Stevens (joined by Justices Ginsburg, Souter and Breyer) dissented from the Court's overruling of *Michigan v. Jackson*. *Montejo*, 129 S. Ct. 2079, 2094 (2009) (citing *Jackson*, 475 U.S. 623 (1986)) (Stevens, J., dissenting). The majority found *Jackson* unnecessary, given that its purpose was to prevent police from badgering defendants in the custodial interrogation setting. *Id.* at 2089 (majority opinion). Thus, *Jackson* overlapped with the protections already provided by the *Miranda-Edwards-Minnick* line of cases. *Id.* at 2089–90. The dissenters disagreed, noting that the right to counsel attaches when adversarial judicial proceedings begin and guarantees the assistance of counsel at all critical stages of a prosecution whether in or out of court. *Id.* at 2094 (Stevens, J., dissenting). The Sixth Amendment right protects the accused (usually an unaided layman) at critical stages of adversarial confrontation. Its protections are not limited to the *Miranda* custodial interrogation setting; it is much broader. *See id.* at 2100. It protects "the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State. That interest lies at the heart of the Sixth Amendment's guarantee." *Id.* at 2098.

49. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

50. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)).

51. *Gideon*, 372 U.S. at 344.

defendant is subjected to actual imprisonment,<sup>52</sup> whether charged with a petty offense, a misdemeanor, or a felony,<sup>53</sup> and it applies not only at trial but during the pretrial stage “when consultation, thoroughgoing investigation and preparation [are] vitally important.”<sup>54</sup> In fact, the pretrial stage may present even greater dangers for the defendant than the trial itself.<sup>55</sup>

The fundamental, essential role of counsel is recognized by related Sixth Amendment cases as well as in other contexts. The Court’s recent Confrontation Clause cases recognize that a fair trial is not one that reaches an accurate result in a truth-seeking process but, rather, one that reaches a fair result in an *adversarial* system.<sup>56</sup> The Sixth Amendment “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>57</sup> The Court also relied on the role of counsel in abandoning a seventy-year-old evidentiary tradition of deferring to scientific or other specialized sources for a determination of when an expert witness might offer opinion testimony, replacing it with a more traditional evidentiary approach that relies on “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [as] the traditional and appropriate means of attacking shaky but admissible evidence.”<sup>58</sup> And where expert testimony is criti-

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52. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

53. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

54. *Massiah v. United States*, 377 U.S. 201, 205 (1964) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)). This principle has been “broadly reaffirmed” by the Supreme Court. *Id.* at 205 (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963)); *see also* *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (“[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.”); *Gideon*, 372 U.S. at 342–45.

55. *See* *Montejo v. Louisiana*, 129 S. Ct. 2079, 2099 (2009) (Stevens, J., dissenting) (“Given the realities of modern criminal prosecution, the critical proceedings at which counsel’s assistance is required more and more often occur outside the courtroom in pretrial proceedings . . .”).

56. *See* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) (reaffirming the prosecution’s obligation to prove the defendant’s guilt in an adversarial process, a process which “may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”); *Davis v. Washington*, 547 U.S. 813, 833 (2006).

57. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

58. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

cal, the defendant has a due process right not only to cross-examine the state's expert, but also to an expert's assistance "in evaluation, preparation, and presentation of the defense"<sup>59</sup> in an adversarial system where counsel, not the defendant, tests the government's evidence.

The right to counsel is explicitly and implicitly linked to the protections against self-incrimination under the Fifth Amendment. In both the state and federal confession cases that led up to *Miranda*,<sup>60</sup> there was an element of deprivation of counsel that troubled the Court.<sup>61</sup> When the Court applied the Fifth Amendment Self-Incrimination Clause to the states, it noted that ours is an accusatorial, not inquisitorial, system, in which a person has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence."<sup>62</sup> *Escobedo v. Illinois*,<sup>63</sup> the Court's last gasp at avoiding *Miranda*, tried to "tease back" the Sixth Amendment to reach the problem of incommunicado questioning. With *Miranda*, however, the Court finally recognized what it had been wrestling with in various, disparate contexts<sup>64</sup>: that the right to silence was meaningless unless the compulsion inherent in custodial interrogation were to be diffused by warning the suspect not only of his right to silence, but of his right to an attorney to help make the right to silence meaningful.<sup>65</sup> In the four decades since *Mi-*

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59. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

60. *Miranda v. United States*, 384 U.S. 436 (1966).

61. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 513–15 (1963) (repeated requests to call counsel denied); *Spano v. New York*, 360 U.S. 315, 320–23 (1959) (defendant's requests for counsel ignored); *Cicenia v. LaGay*, 357 U.S. 504, 511 (1958) (mutual requests by lawyer and client to meet were denied), *abrogated by Miranda*, 384 U.S. at 479 n.48; *Crooker v. California*, 357 U.S. 433, 439–40 (1958) (law student request for counsel at beginning of interrogation denied), *abrogated by Miranda*, 384 U.S. at 479 n.48. The cases of *Mallory v. United States*, 354 U.S. 449, 455–56 (1957), and *McNabb v. United States*, 318 U.S. 332, 344–45 (1943), *modified by statute*, 18 U.S.C. § 3501 (2006), *as recognized in Corley v. United States*, 129 S. Ct. 1558, 1571 (2009), taken together, respond to a concern that defendants not be left to their own devices when dealing with the criminal justice system.

62. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

63. 378 U.S. 478, 490–91 (2006).

64. The counsel issue also arose in the Fourth Amendment setting, for one of the critical concerns in *Mapp v. Ohio*, 367 U.S. 643, 644 (1961) (applying the exclusionary rule to the states), was the fact that the police would not allow the suspect to consult with her attorney, who was present at Dollree Mapp's home when it was unlawfully searched.

65. See *Miranda*, 384 U.S. at 466.

*randa*, the Court's jurisprudence has been inconsistent to say the least;<sup>66</sup> but if the Court seriously wanted to rethink the involvement of, and reliance on, defense counsel in the criminal justice system, that opportunity came with *Dickerson v. United States*.<sup>67</sup> Rather than upholding Congress's attempt to overrule *Miranda* two years after the case was decided,<sup>68</sup> the Court instead found *Miranda* to be part of our national culture and a constitutional decision that Congress is without power to reject.<sup>69</sup>

Both the right to counsel and the privilege against self-incrimination reinforce the accusatory and adversarial nature of the criminal justice system. Thus, as David Sklansky recently put it, "[a]nti-inquisitorialism" is "a broad and enduring theme of American criminal procedure."<sup>70</sup> At the conclusion of its 2008 term,<sup>71</sup> the Supreme Court reaffirmed its view that ours is an accusatorial, confrontational system of criminal justice in which the government has the burden of proving guilt beyond a reasonable doubt when it chooses to exercise the power to punish. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."<sup>72</sup> The Court's re-

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66. Despite the holding that no statement made in response to non-Mirandized interrogation can be used against the defendant, *Miranda*, 384 U.S. at 479, the Court since *Miranda* has retreated from this central holding. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (allowing non-Mirandized statements to be "cured" by subsequent warnings and waiver); *Michigan v. Tucker*, 417 U.S. 433, 450–52 (1974) (allowing derivative use of non-Mirandized statements); *Harris v. New York*, 401 U.S. 222, 225–26 (1971) (allowing collateral use of non-Mirandized statements). *But see* *Missouri v. Seibert*, 542 U.S. 600, 613 (2004) (plurality opinion) (concluding that deliberate "question-first" tactic compromised subsequent warning's effectiveness); *Elstad*, 470 U.S. at 370–71 (Stevens, J., dissenting) (arguing that whether a statement is actually coerced or irrebuttably presumed to be coerced is a distinction with no constitutional significance).

67. 530 U.S. 428, 444 (2000).

68. See 18 U.S.C. § 3501(a) (1968) ("In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given.").

69. See *Dickerson*, 530 U.S. at 443.

70. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635 (2009). For analysis of the right to silence as reinforcing the prosecution's due process burden, see generally Marvin Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197 (1979).

71. At the time this article was written, the Supreme Court had just decided *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

72. *Id.* at 2540.

jection of the complaint that this “may make the prosecution of criminals more burdensome”<sup>73</sup>—a complaint frequently found in critiques of *Miranda* and *Griffin*—is but the latest pronouncement in a line of cases of which *In re Winship*<sup>74</sup> is the foremost articulation of the principle. All these cases, taken together or alone, stand for the principle that when the government seeks to punish, it must prove each and every element of the offense charged beyond a reasonable doubt, in an adversarial system in which the defendant is represented by counsel who will test the government’s case.

In summary, whatever the normative underpinnings of the right to silence, the modern network of rights comprising today’s “test the prosecution” criminal justice system recognizes—indeed necessitates—its presence just as potently as the network of practices comprising the “accused speaks” system effectuated its practical absence. And if the cluster of protections of which it is a part takes the Fifth Amendment beyond the scope contemplated by its Framers, it does so in the context of a criminal justice system, and more generally an administrative and bureaucratic state, which itself vastly exceeds anything familiar to them or their English counterparts.<sup>75</sup> It is difficult to grasp the extent of those changes. The industrial,

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73. *Id.*

74. 397 U.S. 358, 364 (1970); *see also* United States v. Booker, 543 U.S. 220, 230 (2005) (invalidating mandatory nature of the U.S. Sentencing Guidelines; reaffirming constitutional protection of defendants against conviction in the absence of proof beyond a reasonable doubt; requiring that facts increasing sentences for crimes beyond prescribed statutory maxima must be submitted to a jury and proved beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (requiring that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (finding that the defendant’s “sentence violated his right to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’”); *Patterson v. New York*, 432 U.S. 197, 211 (1977) (limiting states’ ability to “reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes”); *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (“[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt . . .”).

75. *Cf.* Aaron M. Clemens, *The Pending Reinivigation of Boyd: Personal Papers Are Protected by the Privilege Against Self-Incrimination*, 25 N. ILL. U. L. REV. 75, 101 (2004) (recognizing that “the Court has been forced to interpret the privilege in situations that the Founders did not predict”).

administrative, and cyber revolutions have expanded government's ability to criminalize, investigate, monitor, prosecute, convict, and incarcerate citizens to an extent that surely would have staggered and probably horrified founding-era imaginations.<sup>76</sup>

The extensive and complex web of today's federal, state, and local criminal laws, and *malum prohibitum* regulatory provisions enforced by criminal sanctions, would have been unimaginable in the eighteenth century.<sup>77</sup> Indeed, several scholars have located the origins of the modern Fifth Amendment right to silence in the late-nineteenth century's expanding federal regulatory presence.<sup>78</sup> Prosecutorial, defense, and judicial resources—which were relatively scarce in colonial and revolutionary America<sup>79</sup>—are now relatively abundant and deeply institutionalized. And the entire process has managed to achieve an incarceration rate that is one of the highest in the world.

“The most important conclusion” to be drawn about colonial-era crime throughout British North America, especially crimes against person and property, “is that there was very little of it.”<sup>80</sup> Social and economic conditions—small, isolated populations living primarily in villages and towns, with little va-

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76. The founders would never have imagined the use of DNA evidence; evidence obtained from a computer forensic examination; the use of heat sensing, x-ray, and metal detection devices; wiretap and other voice and/or video recordings; the use of surveillance cameras; or “the results of the commonly used gas chromatography/mass spectrometry analysis.” *Melendez-Diaz*, 129 S. Ct. at 2537 (referring to authorities discussing critical errors in gas chromatography/mass spectrometry analysis).

77. If anything, the Court's oddly haphazard attempts to check Congress's Commerce Clause power in this regard only underscore the point. *Compare* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating the Violence Against Women Act on the grounds that sex-based assaults do not constitute “economic activity”), *and* *United States v. Lopez*, 514 U.S. 549, 565 (1995) (invalidating the Gun-Free School Zones Act because the possession of firearms near schools lacked a “substantial effect” on interstate commerce), *with* *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (upholding the Controlled Substances Act by characterizing “the production, distribution, and consumption” of drugs as having “an established, and lucrative, interstate market”).

78. *See, e.g.*, Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 258–59 (1998) (“As federal law grew in scope and importance, courts turned more readily to the constitution to answer challenges to the validity of federal statutes . . . forcing courts to determine whether the witness privilege was a common law or constitutional right . . .”).

79. Moglen, *supra* note 24, at 1105; *see also supra* text accompanying note 36.

80. BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA: 1606–1660*, at 139 (1983).

gabondage, low unemployment, adequate subsistence, and relatively little economic stratification—all likely contributed to the low rate of such crime.<sup>81</sup> And the objects of the criminal justice system changed along with social conditions. In Massachusetts, for example, “crimes against morality dominated in the colonial era,”<sup>82</sup> but by the post-revolutionary period, as wealth and populations increased and became more concentrated and stratified, property crimes and social-order related offenses came to dominate.<sup>83</sup> The localized and parochial nature of community life, preoccupation with sin and heterodoxy, and the absence of organized law enforcement authority meant that in the New England colonies, social control derived from “intense surveillance by neighbors,” rather than “patrol by a public police,”<sup>84</sup> thus enforcing consensus and conformist norms.<sup>85</sup>

Whereas it seems unlikely that most founding-era citizens had personal encounters with law enforcement officials, today such encounters are commonplace. The police presence we take for granted (or at least in stride) today did not begin to emerge in the United States or England until the nineteenth century. As Carol Steiker has observed:

The metamorphosis of the colonial constabulary and watch into the recognizable precursors of modern-day law enforcement illustrates the ways in which the invention of the police created new threats to liberty. Our colonial forebears could not have predicted the sheer numbers of law enforcement agents at work today, the breadth of their operational mandate, or their pervasive authoritarian presence.<sup>86</sup>

In comparison to the eighteenth century, the police today are virtually everywhere, impacting the lives of almost everyone by their very presence, and often their direct actions.<sup>87</sup>

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81. *Id.* at 139–41.

82. MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 63 (1980).

83. *See id.* at 67–70.

84. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 18 (2d ed. 1998).

85. *Id.* at 15–16. Walker, too, warns against overgeneralization, contrasting relatively homogenous Puritan New England (particularly Massachusetts) with more diverse, densely populated, and cosmopolitan New York, and with the slavery-based societies of the South (particularly South Carolina). *Id.* at 16–17.

86. Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 837 (1994).

87. According to the United States Department of Justice, there were 836,787 full-time sworn law enforcement officers in the United States in the

Not only has police presence become substantially more pervasive in general, but the potential consequences of speaking to police have also become more complicated in two particular ways. First, “[a] crude conception of guilt or innocence, according to which the suspect either ‘did it’ or ‘didn’t do it’ has tended to underpin the debate about the right to silence.”<sup>88</sup> Some offenses, however, are defined in terms of mental states “which separate them by a hairsbreadth from innocent conduct” and so the police interview not only can uncover crimes, but in a sense can also help to “create them.”<sup>89</sup> Second, the “current prosecutorial arsenal” concerning perjury and related offenses exceeds its common law antecedents.<sup>90</sup> Under the most widely used federal statute, 18 U.S.C. § 1001, even a minimal denial of guilt—the so-called exculpatory no—can be the basis for prosecution.<sup>91</sup> As Justice Ginsburg has noted, this result gives prosecutors tremendous power to “manufacture crimes” (especially given the frequency of informal, uncounseled, and unwarned interviews of individuals by government agents).<sup>92</sup>

It is by now a familiar if not entirely uncontroversial process for the content of a constitutional protection to evolve beyond the particular scope its framers would have endorsed, especially when conditions have changed in pertinent and im-

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year 2004, of which 731,903 were employed by almost 18,000 different state and local agencies. Bureau of Justice Statistics, U.S. Dep’t of Justice, Law Enforcement Statistics, <http://www.ojp.usdoj.gov/bjs/lawenf.htm> (last visited Nov. 17, 2009). Not only are there literally myriads of different departments, but there are also millions-upon-millions of encounters between police and residents of the United States. In 2005, more than forty-three million, or 19% of United States residents aged sixteen and older, had at least one face-to-face contact with police. MATTHEW R. DUROSE ET AL., U.S. DEPT OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007). Many individuals had more than one encounter and there were a total of approximately seventy-one million such encounters in 2005. *Id.* at 2.

88. Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 MOD. L. REV. 709, 727 (1990).

89. *Id.* at 727–28.

90. Richard H. Underwood, *False Witness: A Lawyer’s History of the Law of Perjury*, 10 ARIZ. J. INT’L & COMP. L. 215, 248 (1993).

91. See, e.g., *Brogan v. United States*, 522 U.S. 398, 398 (1998) (rejecting the “exculpatory no” exception to criminal liability under 18 U.S.C. § 1001, both as a matter of statutory construction and under the Fifth Amendment). For a comprehensive discussion of the broad scope and frequent application of false statement laws, see generally Andrea C. Halverson & Eric D. Olson, *False Statements and False Claims*, 46 AM. CRIM. L. REV. 555 (2009).

92. *Brogan*, 522 U.S. at 408–11 (Ginsburg, J., concurring). To reduce that risk, the Department of Justice discourages such prosecutions. See Halverson & Olson, *supra* note 91, at 567 & n.93.

portant ways.<sup>93</sup> Application of that process to the present problem would seem especially appropriate. To the extent that critics of a robust right to silence base their position on an interpretation of the Fifth Amendment limited to founding-era understandings, they are insisting on a return to the kind of “accused speaks” model which obtained in a world that no longer exists and which the gradual adoption of the “test the prosecution” approach has displaced. And that displacement has resulted from invigoration of a “cluster of legal rules” oriented not so much around the lay jury in this age of plea bargaining<sup>94</sup> as around the requirement that the government prove its case. Superimposition of the earlier, much narrower interpretation on a vastly expanded and intrusive criminal justice system, without regard for such pervasive legal and social change, seems anachronistic and misplaced.

## II. A ROBUST RIGHT TO SILENCE

In view of these two important developments—the emergence of the “test the prosecution” model and government’s vastly increased capacity and willingness to mobilize law-enforcement resources against its citizens—the intuitions expressed in *Murphy v. Waterfront Commission*,<sup>95</sup> while perhaps hyperbolic, do not sound so out-of-place. Those “fundamental values” and “noble aspirations” include: protection of the accused from the “cruel trilemma of self-accusation, perjury, or contempt;” “our preference for an accusatorial rather than an inquisitorial system;” fear of inhumane and abusive interrogation; a “fair play” norm requiring the government to leave the

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93. Famous examples include, of course, *Brown v. Board of Education*, 347 U.S. 483, 492–93 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.”), and *Loving v. Virginia*, 388 U.S. 1, 9–10 (1967) (“While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment.”). The Court explicitly recognized this approach to the Eighth Amendment’s cruel and unusual punishments clause in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

94. See *infra* note 160 and accompanying text. Despite its relatively infrequent invocation however, the right to a jury trial as a bedrock protection has received increased emphasis in recent years by the Court. See *supra* note 74.

95. 378 U.S. 52, 55 (1964).

individual alone unless there is good cause to disturb him or her and “requiring the government in its contest with the individual to shoulder the entire load;” respect for “inviolability of the human personality” and a right to privacy; and protection of innocent defendants.<sup>96</sup> Yet the right to silence has been a heavily criticized doctrine.

The usual approach is to consider the right in isolation and in the abstract, and to dissect each particular rationale. As David Dolinko put it in his comprehensive critique, “[a]ppeal to an unanalyzable intuition . . . is simply unacceptable as support for the privilege against self-incrimination.”<sup>97</sup> He has organized the putative justifications into “systemic” and “individual” rationales.<sup>98</sup> Among the justifications that he seeks to repudiate is the systemic goal of “imposing on the government the entire burden of proving guilt in a criminal case.”<sup>99</sup> And among the “individual rationales” that he finds unpersuasive are the privacy, dignity, and autonomy arguments.<sup>100</sup> A common thread running through criticisms of these justifications is that a right to silence provides incomplete protection to any of the interests they reflect. For example, the privilege does not force the government to “shoulder the entire load”<sup>101</sup> because government may still introduce physical evidence such as blood samples, fingerprints, handwriting and voice exemplars, and the results of eyewitness identification procedures, all involuntarily obtained from the accused.<sup>102</sup> Whatever choices it protects against are not obviously more or less “cruel” than many others it does not preclude.<sup>103</sup> The privilege neither protects a recognizably distinct privacy interest nor precludes a wide array of intrusions and, in any event, constitutional privacy protections are ordinarily subjected to a balancing test which considers the

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96. *Id.*

97. David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1092 (1986).

98. *Id.* at 1065.

99. *Id.* at 1083. For an exposition of this justification based on the Court’s case law, see Schiller, *supra* note 70, at *passim*.

100. Dolinko, *supra* note 97, at 1090–1147.

101. *Id.* at 1084 (citation omitted).

102. *See id.* at 1083. For another statement of this point, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 892–94 (1995). *See also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 373–79 (1998) (cataloging criticisms of “self-determination” justifications for *Miranda*).

103. Dolinko, *supra* note 97, at 1090–97.

government's need.<sup>104</sup> In other words, the right to silence, disliked in practice for its perceived result of shielding the guilty and depriving the prosecution of needed evidence, is criticized in theory for the protection it fails to effectively provide.

But perhaps more might be said in this context on behalf of "intuition" (which, if not unanalyzed, at least is not overanalyzed), and less in favor of objections based on underinclusiveness and overinclusiveness. Underinclusiveness objections seem more appropriately deployed in challenges to choices made by the authorities in the *assertions* of governmental power, rather than to norms underlying rights claims. A government choice only minimally to pursue a particular end is some evidence that the particular end in question is not very important<sup>105</sup> or sincerely sought.<sup>106</sup> This reasoning is most familiar in cases applying antidiscrimination principles and seeks, as Justice O'Connor famously put it, to "smoke out" impermissible purposes.<sup>107</sup> The intensity of the scrutiny of fit is a function of the degree of perceived risk to the norms that might constrain the government action in question. But the privilege's critics surely do not mean that the Court's rejection of Armando Schmerber's Fifth Amendment claim<sup>108</sup> calls into question the sincerity of Edward Dean Griffin's claim. Rather, the critics seem to mean that because the Court has permitted the intrusions it has, no meaningful portion of the rights-domain remains to be protected or that the rights-domain itself is misconceived.

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104. *See id.* at 1108–22.

105. *See, e.g.,* *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) ("The modest nature of Oklahoma's interests may be further illustrated by noting that Oklahoma has chosen not to press its campaign against alcoholic beverage advertising on all fronts."); *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (noting that the "challenged provisions" of a Wisconsin statute purporting to protect the financial interests of children were "grossly underinclusive" with respect to the stated purpose).

106. *See, e.g.,* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., concurring) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (same).

107. *Richmond*, 488 U.S. at 493.

108. *See* *Schmerber v. California*, 384 U.S. 757, 761 (1966) (holding that evidence of analysis of blood taken by a doctor after a drunk driving arrest was admissible and did not violate the Fifth Amendment, despite Schmerber's refusal to consent to the withdrawal of blood); *see also* Amar & Lettow, *supra* note 102, at 885 (arguing that *Schmerber* is an example of the privilege's underinclusiveness).

We see several problems with that proposition. First, even assuming that the Court has allowed a large portion of the interest to be compromised, such result does not necessarily disprove the existence of the interest itself. The Court's reasoning in denying claims could be flawed.<sup>109</sup> Second, the Court's choices do not necessarily mean that no meaningful residuum of protected domain remains. The norms captured by capacious labels such as "privacy," "autonomy," or "dignity"<sup>110</sup> are complex and variegated such that the Court's rejection of a part would hardly seem to constitute negation of the whole. As we briefly suggest below, there is recognizable and meaningful content, even if not theoretically tidy, to a right not to testify at trial and to preclude prosecutorial comment and judicial instruction on its exercise.<sup>111</sup> These difficulties with underinclusiveness reasoning are illustrated by its application to the Court's Fourth Amendment jurisprudence, which is hardly a model of doctrinal clarity. For example, the Court's reasoning in *New Jersey v. T.L.O.*, which found that a full-blown warrantless seizure and search based only on reasonable suspicion adequately protected the right to privacy in the school context,<sup>112</sup> is itself open to question on its own terms and in any event does not exhaust the entire domain of "privacy" or "reasonableness."<sup>113</sup>

The overinclusiveness objection—that the privilege fails to yield through a balancing test to government need—includes at least two flaws. An obvious one is that the text of the Fifth Amendment, in contrast to that of the Fourth, does not include a reasonableness element.<sup>114</sup> Another is that the objection misapprehends the nature of privileges. They are indeed subject to a kind of categorical balancing because their application is circumscribed, as the underinclusiveness critique is at pains to

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109. See, e.g., *supra* note 48 and accompanying text. Also, compare the majority and dissenting opinions in *Moran v. Burbine*, 475 U.S. 412 (1986). For recent work criticizing the Court's Sixth Amendment jurisprudence as resting on confused premises, see Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487 *passim* (2009).

110. See *supra* text accompanying note 100.

111. See *infra* text accompanying notes 162–70.

112. 469 U.S. 325, 347 (1985).

113. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (concluding that a higher standard of suspicion is required to justify more intrusive searches, such as a strip search of a school child).

114. Compare U.S. CONST. amend. IV ("The right of the people to be secure . . . against *unreasonable* searches and seizures . . .") (emphasis added), with U.S. CONST. amend. V (containing no similar reasonableness requirement).

point out.<sup>115</sup> But case-by-case balancing is generally not appropriate with respect to privileges. For those that protect confidential relationships, such balancing would “eviscerate the effectiveness of the privilege.”<sup>116</sup> For the Fifth Amendment, as events since September 11, 2001, demonstrate, the risk that case-by-case balancing would effectively swallow the rule is more than speculative.<sup>117</sup>

Nor is it clear to us that the intuitions attributable to a right to silence are necessarily so opaque or anomalous to warrant such “strict scrutiny.”<sup>118</sup> A point of departure in the literature critical of the right to silence is the observation that it defies, as Judge Friendly put it, “notions of decent conduct generally accepted in life outside the court room.”<sup>119</sup> To Judge Friendly, this point distinguishes the Fifth Amendment privilege from most others recognized by law, which are based on valued relations (such as the husband-wife, lawyer-client, doc-

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115. Examples of limitations on the Fifth Amendment’s scope, some of which include explicit balancing, are easy to find. *See, e.g.*, *United States v. Patane*, 542 U.S. 630, 643–44 (2004); *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189–91 (2004); *Chavez v. Martinez*, 538 U.S. 760, 764–68 (2003); *Oregon v. Elstad*, 470 U.S. 298, 307–08 (1985); *New York v. Quarles*, 467 U.S. 649, 654–58 (1984); *Jenkins v. Anderson*, 447 U.S. 231, 235–38 (1980); *Michigan v. Tucker*, 417 U.S. 433, 444–46 (1974); *Harris v. New York*, 401 U.S. 222, 225–26 (1971).

116. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996). Our reference here to other privileges does not concede the “privileges” analysis in Part II.A.3 of *Making Defendants Speak*. *See* Sampsell-Jones, *supra* note 1, at 1350–53 (distinguishing adverse inferences in the context of various privileges). That analysis fails to adequately account for the constitutional interests at stake and mistakenly assumes a background duty to speak, which the Fifth Amendment itself obviates. *Cf. id.* (noting the historical rationale supporting the use of adverse inferences in instances of failure to speak or to produce evidence). As Justice Black put it, “[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.” *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring). For an argument that adverse inferences from invocation of the attorney-client privilege compromise that relationship, see Deborah Stavile Bartel, *Drawing Negative Inferences upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1407–20 (1995).

117. For a description of such a process regarding the Fourth Amendment, see Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 745–47 (2007).

118. Dolinko concluded that they were. Dolinko, *supra* note 97, at 1068–69 (considering, as a threshold matter, whether the privilege “really needs justifying” and concluding that it does based on “our ordinary intuitions as to when silence in the face of accusatory questioning is appropriate”).

119. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680 (1968).

tor-patient, and priest-penitent privileges).<sup>120</sup> Kent Greenawalt has attempted to bridge that perceived disparity by observing that in their ordinary relations, people do not expect to be obligated to account for their conduct to one another, unless the relations are especially close, or the basis for inquiry or suspicion is especially strong.<sup>121</sup> Dolinko quotes Friendly as an example of the “consensus” view that the right to silence is morally perverse, and sees in the Greenawalt principle a lever for prying the privilege away from criminal defendants who, after all, are not in close relation to the state, and against whom there is almost always more than a slender basis for suspicion.<sup>122</sup> This latter point provided the moral ground for Alschuler’s proposal to overrule *Griffin* and return to something like the Marian Committal Statute process.<sup>123</sup>

But what would things look like if we turned the telescope around and, as we should at the rights-recognition stage, viewed the matter from the defendant’s perspective? As indicated above, the robust right to silence in general, and *Griffin* in particular, are not some dusty vestige of an outmoded legal past, but are part of a cluster of developments to emerge in today’s criminal justice system. One would expect that the intuitions it reflects are compatible with, rather than antithetical to, modern sensibilities. And so they are, if one keeps in mind the nature of the relations involved and views them from the defendant’s perspective.

Friendly’s objection to the privilege<sup>124</sup> and Greenawalt’s sophisticated attempt to justify a limited scope for it<sup>125</sup> would impose the moral understandings and expectations of interpersonal relations on the uniquely inhuman relation between the accused and the state. The mistake in that move underscores our point. The relational norms of reciprocal care and regard between actual people simply do not obtain with the state, es-

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120. *Id.* (contrasting “most other privileges” with the Fifth Amendment).

121. See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 20–32 (1981) (analyzing the role of silence in certain private relationships).

122. Dolinko, *supra* note 97, at 1068–69 (comparing the viewpoints of Friendly and Greenawalt).

123. See Alschuler, *supra* note 16, at 2633–38, 2668–69 (examining Greenawalt’s theories and proposing alternatives to the current self-incrimination privilege).

124. See Friendly, *supra* note 119, at 721–26 (proposing his own alterations to the Fifth Amendment).

125. For an analysis of his position on the privilege, see Greenawalt, *supra* note 121, at 17–71.

pecially when it seeks to punish.<sup>126</sup> The state is not a person who has feelings we ought to consider at all, or who will consider any actual person's feelings in return, and it is an error to premise any argument on such an analogy.<sup>127</sup> The state itself—even if represented by actual people who may be decent and humane individuals—is an inhuman, faceless, unfeeling, often voracious and potentially malignant entity which is precisely why relations with it are always a matter of rights and power rather than care and respect. The very notion of constitutional government presupposes this point. It is naive at best and dangerous at worst to draw, as does Friendly, an analogy between a prosecutor and the loving and forgiving parent who is expected to have his or her child's best interests at heart.<sup>128</sup> In any event, even Judge Friendly's intuitions got the better of his analysis in the end. After soundly ridiculing the *Murphy* claims on behalf of the privilege, he noted that many defendants are "uneducated, unfortunate persons, frightened by their predicament" and opted to *retain* much of the current privilege's protections, including its prohibition on adverse comment.<sup>129</sup>

*Murphy's* much-maligned intuitions, even if overstated, may come closer to capturing the peculiar circumstances of criminal prosecution. The right to silence, if nothing else, preserves one small refuge of dignity for the accused and imposes one relatively modest constraint on governmental power.<sup>130</sup> We

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126. For a discussion of rights and care in the context of abortion rights, compare, for example, Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323 *passim* (1995).

127. Dolinko acknowledges this point. Dolinko, *supra* note 97, at 1070 n.43 ("The notion that one could have a personal relationship with the government may even be dangerous . . ."); *see also* Schulhofer, *supra* note 18, at 321 ("Whether Greenawalt (and Friendly) can fairly build on the morality of private relationships to draw inferences about our moral obligations *vis-a-vis* the state seems to me highly debatable.").

128. *See* Friendly, *supra* note 119, at 680 ("[T]he lesson parents preach is that while a misdeed . . . will generally be forgiven, a failure to make a clean breast of it will not be.").

129. *Id.* at 699–700 (quoting Alfred C. Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 548 (1956)). Thus, Friendly responds to a concern that defendants not be left to their own devices when dealing with the criminal justice system. *See id.* (noting that such a practice "would be cruel"). Greenawalt, disputing the "penalty" rationale of *Griffin*, would allow "restrained judicial comment inviting natural adverse inferences . . . at least in jurisdictions that do not allow free use of prior convictions to impeach credibility." *See* Greenawalt, *supra* note 121, at 58–59.

130. For a theoretical account of the norm in privacy terms, see Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 *passim* (1970).

believe this protection is more than inconsequential, even if modest in practical effect and conceptually indefinite. In a criminal prosecution the state seeks to deploy whatever resources it deems worthwhile for the infliction of punishment on the accused. The ultimate goal may be justice, however well—or ill—conceived and realized, but as a practical matter the immediate aim is conviction and punishment; and whatever protections the accused can expect throughout the entire dehumanizing process derive not from care but from rights. It does not seem to us to flout ordinary moral understandings to recognize a right in someone to refuse to cooperate by providing a public account of his actions to a vastly more powerful and inhuman adversary, itself speaking exclusively through counsel, which is specifically bent on hurting him. To the contrary, it seems of a piece with an understanding of the entire process which, while allowing the state latitude in evidence collection (including the collection of physical evidence from the accused) and presentation, allows the accused to otherwise stand mute and put the state to its proof.

One of the difficulties in the literature on this subject is its theoretical nature, which reflects a triumph of abstraction over empathy. We do not believe that most ordinary people, actually confronted with the shock of finding themselves in the position of a criminal defendant, would have trouble understanding the refuge the right to silence provides. One of us served for years as a federal public defender and found that, apart from those who thought they could outsmart the system or the thoroughly angry and defiant, most clients were simply terrified—terrified at being caught up in the system, by the government’s enormous power, of interrogation and cross-examination, and most of all, terrified by the utter dehumanizing impersonality of it all. They were no longer Ed or Mary, but “the suspect,” “the accused,” “the defendant,” or “the prisoner.” They faced the impersonalized overwhelming power of the jail, the courtroom, and the judge. The right to silence at the least protects the individual from having to subject himself or herself directly and personally to a face-to-face attack by the determined agents of the state.<sup>131</sup> And *Griffin*’s rule recognizes that it is unseemly to

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131. See Schulhofer, *supra* note 18, at 332 (noting that these concerns are especially potent for the innocent defendant “who fears he will be manipulated, intimidated or misunderstood”). As Schulhofer pointed out, “[w]hen life or liberty is at stake, to force such a defendant to run the gauntlet of adversarial cross-examination can fairly be described as inhumane or cruel.” *Id.*

empower the government to overtly bully the defendant in front of the jury by inviting an inference of guilt where there is only silence.

In the end, a robust right to silence, as an integral part of the cluster of rights comprising the “test the prosecution” model, has held its own in American constitutional jurisprudence despite its many energetic and thoughtful critics. This persistence may reflect a set of intuitions which, while not analytically tidy or entirely satisfying, are well-suited to the harsh realities of the modern criminal justice system. *Griffin*’s no-adverse-inference rule, by precluding the prosecution and judge from inviting the jury to employ the silence of the accused as evidence of his guilt,<sup>132</sup> is consistent with that right. Its principle was well-established in the nation’s jurisprudence before *Griffin*, as forty-four states and the federal government had adopted it by that time.<sup>133</sup> It is a rule which the Court in its last consideration characterized as “of proven utility,”<sup>134</sup> as having found “wide acceptance in the legal culture,” and as having “become an essential feature of our legal tradition,”<sup>135</sup> and which even its critics on the Court (with the lone exception of Justice Thomas) expressly declined to reconsider.<sup>136</sup>

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132. *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that “the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”).

133. *Id.* at 611 n.3 (“The overwhelming consensus of the States . . . is opposed to allowing comment on the defendant’s failure to testify.”). The trend it reflects thus was much more firmly established than that embraced under the Eighth Amendment’s “evolving standards of decency” test. *See Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (holding that imposition of capital punishment on one who committed a crime while under the age of eighteen years violates the Cruel and Unusual Punishments Clause); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (holding that execution of the mentally retarded violates the Cruel and Unusual Punishments Clause). And, unlike a free-standing right to post-conviction access to DNA testing, which the Court found was not required by due process despite its adoption in all but a handful of states, neither finality of judgments nor management of post-conviction procedures is implicated by the rule in *Griffin*. *See Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (“If we extended substantive due process to this area, we would cast these [forty-six state] statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves.”).

134. *Mitchell v. United States*, 526 U.S. 314, 329 (1999) (extending the *Griffin* rule to preclude a sentencing court from drawing an adverse inference from the defendant’s silence).

135. *Id.* at 330.

136. *Id.* at 331–32 (Scalia, J., dissenting) (noting that the assertion “that the no-adverse-inference rule has found ‘wide acceptance in the legal culture’ . . . may be true—which is adequate reason not to overrule these cases, a course I in no way propose” (quoting *id.* at 329 (majority opinion))).

## III. MAKING DEFENDANTS SPEAK AS TOO MUCH SUGAR FOR A DIME

## A. “ZERO-SUM GAME”

In addition to our defense of the right to silence, we also offer a few comments on several particular points presented in *Making Defendants Speak*. First, its “zero-sum game” paradigm seems misplaced as a practical matter.<sup>137</sup> For one thing, its proposed reforms are not necessarily interdependent. *Making Defendants Speak* makes a good case for reform of the standards governing admissibility of prior convictions to reduce the prejudice to the testifying defendant as a matter of evidence law.<sup>138</sup> They could be implemented without overruling *Griffin*. Our concerns about overruling *Griffin* obtain whether the Rule 609(a)(1) standard is modified or not. Impeachment by prior conviction is of course a large practical disincentive to testifying, but it is not the only concern. Further, reform of the Rule 609(a)(1) standards obviously would do defendants without a prior criminal record no good at all. For them, even under *Making Defendant Speak*’s own paradigm, it’s all stick and no carrot. And *Making Defendants Speak* would perversely put the innocent, anxious, vulnerable defendant—without any prior convictions and who has nothing much to say except an unconvincing “I didn’t do it”—in the worst position of all.<sup>139</sup> As for the proposed reform to the sentencing guidelines, its main effect may be to drive the consideration of perjury underground in the nonmandatory sentencing guidelines systems under *Blakely v. Washington*<sup>140</sup> and *United States v. Booker*.<sup>141</sup>

*Making Defendants Speak* is more usefully regarded as a relatively weak form of “exchange abolitionism.”<sup>142</sup> This term was coined in a rebuttal to advocates of what was to become the

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137. Sampsell-Jones, *supra* note 1, at 1328 (characterizing the matter as a “zero-sum” game).

138. *Id.* at 1358–69 (proposing to abandon the *Gordon* test for Federal Rule of Evidence 609).

139. See Mike Redmayne, *English Warnings*, 30 CARDOZO L. REV. 1047, 1064 (2008) (explaining the problematic aspect of the evidentiary use of adverse inference in the case of innocent defendants); Schulhofer, *supra* note 18, at 332–33 (noting that concerns about risks to the innocent and silent defendant apply “even if th[e] rule were substantially limited or repealed”). Our concerns are not limited to the innocent defendant.

140. 542 U.S. 296, 303–04 (2004).

141. 543 U.S. 220, 258–65 (2005) (Roberts, J., concurring).

142. See generally Greer, *supra* note 88, at 719–24.

Criminal Justice and Public Order Act of 1994<sup>143</sup> (the CJPOA) in England and Wales, which permitted adverse inferences to be drawn from the accused's silence during police interrogations as well as at trial.<sup>144</sup> Adoption of the CJPOA has inspired leading American critics of *Griffin* and *Miranda*, such as Alschuler.<sup>145</sup> "Exchange abolitionism" would "argue for the abolition of the right to silence in exchange for other defendants' rights."<sup>146</sup> That exchange ultimately occurred in reverse order in England and Wales when the CJPOA was proposed to rectify a perceived imbalance between prosecution and defense attributed to the Police and Criminal Evidence Act of 1984<sup>147</sup> (PACE), which provided suspects ready access to free legal advice during police interrogations (among other important protections).<sup>148</sup> *Making Defendants Speak* is abolitionism because its premises are aimed at undermining the right to silence, but it is relatively weak because it purports to reach only silence at trial, and offers an only modest if not illusory exchange.

The exchange proposed in *Making Defendants Speak* differs from the CJPOA model in several notable respects (in addition to not extending to pretrial interrogations). First, reforms to allow adverse inferences are advocated either on "evidential"

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143. Criminal Justice and Public Order Act, 1994, c. 33 (Eng.).

144. See Greer, *supra* note 87, at 719 (defining exchange abolitionism). According to Greer, "exchange abolitionism" is a softer version of "utilitarian abolitionism," which in turn is based on Bentham's complaints about "the privilege of silence" as the illegitimate refuge of the guilty and his position that the superordinate purpose of adjudication is accuracy of outcome. See *id.* (noting Bentham's influence on utilitarian abolitionism). This latter approach would completely abolish any right to silence and most other defense rights as well. See *id.* (noting that utilitarian abolitionism theory "argued for the abolition of the right to silence without seeking to replace it with other safeguards for defendants").

145. See generally Alschuler, *supra* note 16.

146. Greer, *supra* note 88, at 719. As Greer observed, "[s]ome closet utilitarians may also be found in the [exchange abolitionism] camp, not because they have been converted to the notion of defendants' rights, but because they may consider that acceding to rights discourse is the most effective way of achieving the abolition of the right to silence." *Id.*

147. Police and Criminal Evidence Act, 1984, c. 60 (Eng.).

148. See generally Redmayne, *supra* note 139, at 1048–54 (outlining the background to the CJPOA and summarizing PACE). The CJPOA allows adverse inferences from the accused's silence during interrogation only if he relied at trial on a fact he did not present during earlier interrogation. *Id.* at 1048–49 (explaining the "triggering conditions" for adverse inferences). It generally allows the trier of fact to draw an adverse inference from the accused's silence at trial. See *id.* at 1047.

or “incentivizing” grounds.<sup>149</sup> “Evidential” grounds rest on an assumed logical relationship between the accused’s silence and the adverse inference: that silence during police questioning and at trial is indeed probative of guilt.<sup>150</sup> “Incentivizing” grounds rest on an assumed empirical relationship between the inference and the accused’s likely behavior: that adverse inference will in fact encourage the accused to talk to police or to testify at trial.<sup>151</sup> *Making Defendants Speak* frames its entire project around incentivizing grounds and does not address the implications and nuances of the evidential perspective. Yet, as Redmayne explains, incentivizing grounds are proper (quite apart from the normative debate about the right to silence itself) only if evidential relationships exist.<sup>152</sup> Empirical support for incentivizing arguments is problematic;<sup>153</sup> and the evidential relationships, especially with respect to a general adverse inference, can be complex and are not always well-founded.<sup>154</sup>

Second, the exchange in England and Wales mostly involved—indeed, was in part a reaction to—measures that *strengthened* the accused’s access to counsel during police interviews.<sup>155</sup> *Making Defendants Speak* offers as one of the puta-

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149. *See id.* at 1051 (noting the perceived imbalance sought to be corrected by the incentivizing argument). The pre-PACE Report of the Criminal Law Revision Committee invoked evidential arguments in recommending adverse inferences. *See Greer, supra* note 88, at 715 (describing the basis for the Report’s recommendations); Redmayne, *supra* note 139, at 1051 (noting the evidentiary argument for reform was the “principal one relied upon” by the Committee). Post-PACE arguments included incentivizing justifications. *See generally Greer, supra* note 88, at 716–18 (noting the political debates after the enactment of PACE).

150. *See Redmayne, supra* note 139, at 1051 (noting that the evidentiary argument is based on the assumption that “[s]ilence . . . is evidence of guilt, and should therefore be drawn to the fact finder’s attention”).

151. *See id.* (arguing that “the threat of adverse inferences may encourage defendants to testify, and this will provide fact-finders with more information than they would otherwise get”).

152. *Id.*

153. *See Greer, supra* note 88, at 720–23.

154. *See, e.g., Redmayne, supra* note 139, at 1075 (noting the general adverse inference is “quite complex”). Redmayne notes that “there may be innocent explanations for silence,” including that “[a]n innocent defendant may worry that he will perform particularly poorly on cross-examination owing to being inarticulate or nervous.” *Id.* Counsel for some defendants may legitimately conclude that the client’s demeanor is itself prejudicial independently of the content of the testimony. *Cf. id.* at 1075–76 (noting that nervousness may become prejudicial if the evidence supports such an inference).

155. *See Greer, supra* note 88, at 720 (“Some recent studies have suggested that there has been an increase in the number of suspects remaining silent in

tive *benefits* of its proposed reform a *weakening* of the relationship between counsel and the accused, and the “exchange” right it proposes is in effect the “right” of self-incrimination.<sup>156</sup> This strikes us as a remarkably poor exchange.

Third, the consequences of unqualified importation of the adverse inference to the United States would be far more dire than in England and Wales precisely because of the problem identified by *Making Defendants Speak*—the virtually automatic character impeachment by prior convictions.<sup>157</sup> “To that extent,” Redmayne has observed, “*Griffin* is right.”<sup>158</sup> Where *Making Defendants Speak* proposes only a relatively modest adjustment to the balancing test for admissibility of prior convictions, Redmayne would require such evidence to be disallowed altogether. He concluded that, if “testifying defendants [may] be impeached by previous convictions in situations where nontestifying defendants would not be, the use of silence as evidence is deeply problematic.”<sup>159</sup>

#### B. ACCURACY, PARTICIPATION, AND EQUITY

We also are skeptical of *Making Defendants Speak*’s argument that overruling *Griffin* is necessary, or even very useful, to increase the accuracy of criminal proceedings. If increased accuracy is the goal, other means more promising and less burdensome on rights are worth exploring.

*Griffin*’s scope is limited. It does not constrain government’s investigative capacity. It applies only to the small proportion (usually ten percent or fewer) of defendants who actually go to trial<sup>160</sup> and the even smaller number (perhaps fewer

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police custody and that this correlates with improved access to legal representation since the enactment of the Police and Criminal Evidence Act 1984.”).

156. Sampsell-Jones, *supra* note 1, at 1328–29 (arguing that one “beneficial side” of pressuring defendants to testify includes a reduction in dependence on lawyers).

157. See Redmayne, *supra* note 139, at 1087–88 (noting that defendants may believe taking the stand will lead to impeachment through prior convictions).

158. *Id.* at 1088.

159. *Id.*

160. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 21 (4th ed. 2008) (“Typically, no more than 15% of the felony prosecutions reaching the general trial court will be resolved by a trial . . . . Setting aside dismissals, and looking only to guilty pleas and trials, the ratio of guilty pleas to trials in the general trial court typically will exceed ten to one.”); see also GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 98 (2003) (displaying a table that shows that in the year 1900 only 13% to 14% of

than half of those) who do not testify.<sup>161</sup> Its only prohibition is on the prosecutor's argument or the judge's instruction that the jury may use the silence of the accused as evidence of guilt and its only requirement is that the court give a cautionary instruction if requested.<sup>162</sup> It does not prohibit the prosecutor from responding to defense counsel's argument that the prosecution prevented defendant from telling his side of the story,<sup>163</sup> or from challenging the credibility of defendants who do testify.<sup>164</sup> It does apply at judicial sentencing,<sup>165</sup> but not in prison disciplinary proceedings.<sup>166</sup> It is subject to harmless error analysis<sup>167</sup>

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defendants chose trial over a plea bargain in the Middlesex Court of Common Pleas).

161. According to one survey of 564 responding jurors in Florida, 38.6% reported that the defendant did not testify at trial. Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 260, 263 (2006); Judge Friendly, an oft-cited critic of the privilege, noted the "tremendous proportion of defendants [who] now testify" in stating his conclusion *not* to recommend abandonment of the *Griffin* rule. Friendly, *supra* note 119, at 700.

162. *Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (holding that "the Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so").

163. *United States v. Robinson*, 485 U.S. 25, 31 (1988) (holding that the prosecution's statements "in the light of the comments by defense counsel" did not violate the *Griffin* rule); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978) (holding that the prosecutor did not violate *Griffin* when he referred to the state's evidence as "unrefuted" and "uncontradicted" since defense counsel "focused the jury's attention on her silence" by outlining the defense and stating that the defendant would testify).

164. *Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (upholding prosecutorial comments on testifying defendant's ability to tailor his testimony after hearing other witnesses' testimony); *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (holding that the court impeaching defendant's testimony through reference to a prearrest silence does not violate the Fifth Amendment).

165. *Mitchell v. United States*, 526 U.S. 314, 325 (1999) ("Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony.").

166. *Baxter v. Palmigiano*, 425 U.S. 308, 318–19 (1976) ("In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.").

167. *Chapman v. United States*, 386 U.S. 18, 25 (1967) (reversing conviction after finding error when the prosecutor drew inferences from the defendants' silence to not be harmless). Also, note that the Court did not apply *Griffin* retroactively. *See Tehan v. United States ex rel. Shott*, 382 U.S. 406, 419 (1966).

and, according to one study, *Griffin* reversals are rare.<sup>168</sup> Whether overruling *Griffin* will meaningfully increase the instance of defendant testimony is at best uncertain.<sup>169</sup> And, for those defendants who continue to insist on remaining silent in a post-*Griffin* world, the marginal gain in accuracy of those verdicts depends on the evidential value of the adverse inference, which as mentioned above is probably not uniform across cases.<sup>170</sup>

We also suspect that anti-*Griffin* arguments have overstated the need for, and accuracy-promoting benefits of, defendants' testimony. The dissenters in neither *Griffin* nor *Mitchell* complained about the loss of testimonial resources.<sup>171</sup> There is little reason to believe that overruling *Griffin* will increase the rate of pretrial confessions, so the main incentivizing effect, if any, will likely be to increase the rate of perjurious testimony (especially if *Making Defendants Speak's* recommendation to abolish perjury enhancements<sup>172</sup> is adopted), which hardly seems an optimal way to promote accuracy.<sup>173</sup> Overruling *Grif-*

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168. Laurie L. Levenson, "Griffin" *Errors*, NAT'L L.J., Aug. 4, 2008, at 13 (finding that courts are reluctant to reverse a conviction unless there are egregious circumstances such as a prosecutor making "deliberate, not isolated" statements).

169. For discussion of the difficulties in making the empirical case for incentivization, see Greer, *supra* note 88, at 720–23 (describing studies of changes in the number of suspects remaining silent during police interrogation after enactment of PACE).

170. See *supra* notes 139–54 and accompanying text.

171. *Mitchell v. United States*, 526 U.S. 314, 332–33 (1999) (Scalia, J., dissenting) (stressing the historical tradition that contrasts with the *Griffin* rule and the strong intuitive inferences that are naturally drawn from silence); *Griffin v. California*, 380 U.S. 609, 621–22 (1965) (Stewart, J., dissenting) (finding no disadvantage for the defendant with a prosecutorial comment versus "a court which permitted no comment at all" because it allows a "means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness").

172. *Sampsel-Jones*, *supra* note 1, at 1329 ("[C]ourts should not impose perjury enhancements based on a defendant's trial testimony.").

173. *Making Defendants Speak* cites Olin Guy Wellborn III for the proposition that jurors do have "some ability to assess truthfulness based on the content of a witness's statement" as opposed to demeanor. *Sampsel-Jones*, *supra* note 1, at 1333 (citing Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1100–01 (1991)) (emphasis added). One obvious problem with this position is that, unlike experiments, jury trials do not isolate those two conditions. Jurors are confronted with both demeanor and content evidence. In fact, in the one study Wellborn cited for the content/demeanor distinction, researchers asked participants which cues they looked to in evaluating credibility. Wellborn, *supra*, at 1084. The participants "cited mostly nonverbal cues"—that is, unreliable demeanor evidence. *Id.* at 1084–85. *Making Defendants Speak* also

*fin* may also have the blunt-instrument effect of increasing the attribution of guilt to the silent defendant whether logically warranted or not. The rate of such attribution apparently is already high,<sup>174</sup> as is the rate of misallocation of the burden of proof.<sup>175</sup> The remedy here would seem to be more clearly stated jury instructions, not a dilution of *Griffin's* protections.<sup>176</sup>

In our view, *Making Defendants Speak* would take matters in the wrong direction. A much more promising set of reforms would seek to *reduce* reliance on confessions and potentially problematic defense testimony at trial and *increase* the availability and validity of other forms of evidence—both scientific and nonscientific. One need not have succumbed to the “CSI Effect”<sup>177</sup> to recognize that developments in forensic technologies over the past several decades already have begun to offer some forms of scientific evidence far more reliable than confession

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claims “optimism” about jurors’ ability to distinguish truth from falsehood. Sampsell-Jones, *supra* note 1, at 1333–34 (citing Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 347 (1997)). DePaulo’s paper, however, is a meta-analysis of the literature concerning the relationship between confidence in one’s judgments about truthfulness and the accuracy of those judgments, and identifying moderators of that relationship. DePaulo, *supra*, at 346. As expected, “people’s confidence in their judgments of whether another person is telling the truth or lying is not significantly related to the accuracy of those judgments.” *Id.* at 353. Regarding the global issue of deception detection, DePaulo says, “[d]ozens of studies of the communication of deception provide compelling evidence that people are not very skilled at distinguishing when others are lying from when they are telling the truth.” *Id.* at 346. The bias tends toward overconfidence: “[c]onfidence is not just uncorrelated with accuracy, it is sometimes substantially greater than accuracy.” *Id.* at 354. In other words, “[d]eception detection is a very difficult task” at which people generally do only slightly better than chance, yet in which people tend to overestimate their accuracy. *Id.* at 346.

174. See Frank & Broschard, *supra* note 161, at 259–61 (showing a survey where at least one out of five jurors disagreed with the fundamental protection).

175. See *id.* at 263–69 (finding that jurors, despite the court informing them multiple times of the burden of proof, often consider a defendant’s silence in their deliberation).

176. See *id.* at 282 (“Jurors cannot, except by accident, follow their instructions unless they first understand them.”).

177. See Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1050 (2006) (“The ‘CSI effect’ is a term that legal authorities and the mass media have coined to describe a supposed influence that watching the television show CSI: Crime Scene Investigation has on juror behavior. Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.”).

evidence.<sup>178</sup> For others, to be sure, acceptable levels of scientific validity have yet to be achieved, and most forensic science is dependent on the integrity of the protocols in the laboratories that process it.<sup>179</sup> But much greater gains in accuracy are likely to be had by directly addressing these problems, as recently recommended by the National Academies of Science,<sup>180</sup> than by overruling *Griffin*. With respect to other, nonscientific evidence—e.g., eyewitness evidence—there already is a rich and growing literature regarding a number of investigative and legal reforms which, if implemented, would increase accuracy at trial.<sup>181</sup>

Finally, we reply briefly to *Making Defendants Speak's* provocative suggestion that its rights-abolition proposal benefits defendants (the “participation, legitimacy, and equity” arguments<sup>182</sup>). Its proposal seeks to “punish” defendants for exercising their constitutional right to remain silent at trial by

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178. Kenworthy Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 867–68 (2008) (concluding that scientific evidence will continually improve until it becomes stronger than confessional self-incriminating evidence).

179. For an overview of the shortcomings within parts of the forensic science community, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 109–10, 214 (2009) (detailing how disparities in funding and the lack of governance across the forensic science community—particularly to produce standardized methodologies and procedures for certification and accreditation—throw the general reliability of forensic science evidence at trial into question). The Court recognized some of the concerns with forensic science in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009), an opinion that strengthened rather than weakened the adversary system.

180. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 179, at 214–15.

181. For an excellent resource for eyewitness evidence issues, see Gary Wells's Homepage, <http://www.psychology.iastate.edu/~glwells/> (last visited Nov. 17, 2009). For an overview, see Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 U. ARK. L. REV. 231, 234, 236–37 (2000) (discussing the Department of Justice's attempt to deal with mistaken eyewitness identifications by creating guidelines and recommendations for lineup procedures); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 278, 280–84 (2003) (revealing factors that affect eyewitness identification such as age, environment, and confidence and discussing their importance); see also Richard S. Schmechel et al., 46 JURIMETRICS J. 177, 192 (2006) (studying and discussing the average juror's lack of knowledge concerning the reliability of eyewitness testimony). See generally DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW 369, 391 (2002) (reviewing the scientific and legal issues surrounding eyewitness identification).

182. Sampsell-Jones, *supra* note 1, at 1334–38.

empowering prosecutors to crow to juries about it (as the prosecutor in *Griffin* did) and thereby to pressure defendants into enduring the hazards of testimony and cross-examination while deliberately seeking to distance them from their counsel.<sup>183</sup> We fail to see how such results would enhance defendants' perception of the legitimacy and fairness of the process. The restorative justice literature cited in *Making Defendants Speak*<sup>184</sup>—a mode of corrections that involves diversion from the adversary arena of court to arguably less dehumanizing, nonadversarial, nonpunitive processes—does not support such a proposition.<sup>185</sup> Nor does the *Procedural Justice in Felony Cases* study by Jonathan Casper and colleagues cited in *Making Defendants Speak*.<sup>186</sup> That study included items tapping the dimensions of defendants' sense of having the opportunity to express themselves in the process and interactions with counsel.<sup>187</sup> Indeed, the Casper study failed to find a relationship between a sense of procedural justice and the mode of conviction (that is, whether convicted by guilty plea or by trial), but did find that “the amount of time spent with the lawyer is *positively* related to reports of procedural fairness.”<sup>188</sup>

Erica Hashimoto's study of pro se felony defendants, also cited in *Making Defendants Speak*,<sup>189</sup> plainly does not support the notion that pressuring defendants into distancing them-

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183. *Id.* at 1337 (arguing that defendants would have better results if they represented themselves and avoided “lower quality representation”).

184. *Id.* at 1335–36.

185. See Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553, 565 (2007) (failing to find that restorative justice [RJ] procedures more successfully motivated adults to follow the law, but finding that RJ procedure participants, as opposed to the traditional court trial, indicated that the law was legitimate and that reoffending would create greater interpersonal problems); see also Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 182–86 (2003) (finding limited support for the conclusion that participants in RJ programs were slightly more likely to believe they had been able to tell their side of the story and to have their opinions adequately considered than participants in court).

186. Sampsell-Jones, *supra* note 1, at 1335 n.40.

187. Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 484 (1988) (evaluating the influence of factors such as pre-trial detention, plea bargaining, and other variables on the defendant's satisfaction).

188. *Id.* at 497–98 (emphasis added).

189. Sampsell-Jones, *supra* note 1, at 1335 n.40.

selves from counsel is good for them.<sup>190</sup> Hers is a carefully qualified defense of *Faretta*,<sup>191</sup> not an assault on *Gideon*.<sup>192</sup> To the contrary, she explicitly warns, “[t]hat this small, self-selected group who choose self-representation has met with adequate results does not mean that *all* felony defendants, including those who reject self-representation, would fare as well if forced to navigate the criminal justice system without the aid of counsel. Thus, the right to counsel remains as important as when the Court decided *Gideon*.”<sup>193</sup> And, in our view, the solution to the very real problem of inadequate defense counsel and wealth-based disparities in representation is hardly the *Harrison Bergeron*-type approach of lowering the ceiling proposed by *Making Defendants Speak*<sup>194</sup>—decreasing defendants’ reliance on counsel by pressuring them to testify at trial. A more constructive approach is to look for ways to raise the floor.<sup>195</sup>

### CONCLUSION

*Making Defendants Speak* complains that *Griffin*, like other Warren Court decisions in related areas, “lacked cogency and analytical rigor.”<sup>196</sup> It argues that if *Griffin* were to be overruled so that defendants might be made to speak, we would also improve accuracy in the judicial fact-finding process, and enhance its legitimacy by encouraging defendants’ direct participation in their trials.<sup>197</sup> Its more general project seems to be not only to overrule *Griffin*, but to dilute the defendant’s position in the adversary system and to empower the government by “allow[ing] prosecutors to argue adverse inferences from a

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190. Erica H. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 487 (2007) (“[T]he right of self-representation in fact serves a vital role in protecting the rights of criminal defendants.”).

191. *Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that defendants have the right to conduct their own defense).

192. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

193. Hashimoto, *supra* note 190, at 478.

194. KURT VONNEGUT, JR., *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7–14 (1998).

195. For proposed reform based on advocacy norms of the standards for ineffective assistance of counsel, see Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 64 (1986) (advocating that the standard for effective counsel should be based on the concepts of due process and equal protection).

196. Sampsell-Jones, *supra* note 1, at 1342.

197. *Id.* at 1329–30.

defendant's silence"<sup>198</sup> and by "reduc[ing] dependence on lawyers."<sup>199</sup> To establish a doctrinal foundation for this result, the article asserts that a criminal trial is a "zero-sum,"<sup>200</sup> "sorting process" game.<sup>201</sup> Thus stated, it becomes merely a matter of adjusting the equation to bring about the desired outcome. Two sets of reforms, two sets of adjustments to the judicial equation, will make defendants speak: allow (even invite) inferences of guilt from silence to punish defendants who choose to remain silent; restrict the relevance of prior convictions as impeachment evidence and abolish obstruction-of-justice sentencing guidelines enhancements to reward defendants who choose to testify.

We have briefly noted why we believe *Making Defendants Speak*'s purported benefits are illusory, but have concentrated mainly on explaining why we do not share its apparent antipathy to the right to silence at trial. *Griffin*, like other opinions by Justice Douglas late in his career, is vulnerable to criticism as poor judicial craftsmanship,<sup>202</sup> but we believe its principle is sound. To be sure, that principle did not enjoy much currency among the founders and it has been subject to continued academic criticism. Nevertheless, the no-adverse-inference rule and the right to silence at trial it helps to effectuate have come to be an integral part of an interrelated set of protections, arising within an increasingly complex and intrusive criminal justice system. Those protections accord a modicum of dignity we believe most persons deserve when confronted by an inhuman and powerful adversary in a dehumanizing process. Those protections recognize the central role of counsel as "a medium between the accused and the power of the State."<sup>203</sup> Today's "test the prosecution," anti-inquisitorial model of criminal justice has developed within an ever-burgeoning substantive criminal law and law enforcement system. The particular rights at issue here—the right to silence at trial and *Griffin*'s more specific prohibition on the evidentiary use of its nonexercise against the accused—is by now a well-established part of the cluster of

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198. *Id.* at 1329.

199. *Id.*

200. *Id.* at 1328.

201. *Id.* at 1330.

202. See Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 134 (1991) ("William O. Douglas remains a figure surrounded by controversies concerned with his jurisprudence or lack of it.").

203. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2098 (2009) (Stevens, J., dissenting).

rights that define the model. That cluster may not look like it did in the founders' era, but then neither does much that matters about the practical, day-to-day face of our criminal law and criminal justice system.<sup>204</sup>

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204. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (recognizing that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”).