The Price of Silence: How the *Griffin* Roadblock and Protection Against Adverse Inference Condemn the Criminal Defendant

INTRODUCTION

In 1965, the Supreme Court held in *Griffin v. California* that the Fifth Amendment privilege against compelled self-incrimination prohibits judges and prosecutors from pointing to a defendant's failure to testify as substantive evidence of guilt.[1] This doctrine assumes that such a prosecutorial or judicial "adverse comment" compels a negative inference—that the defendant is hiding something. The *Griffin* Court held that this assumption amounts to an unfair penalty on a defendant's invocation of a constitutionally protected right.[2] This doctrine, however, makes a dangerous misstep in additionally assuming that the prohibition of adverse comment and the administration of limiting instructions curtail a jury's impermissible inference drawing and the associated penalty. Yet the presumption of guilt from silence may be unavoidable, and the "compulsion" created by silence that the Fifth Amendment aims to protect may exist independently of any prosecutorial theatrics, limiting instructions, or well-intended procedural protections. If so, the assumption underlying *Griffin*—that forbidding adverse comment protects a defendant's Fifth Amendment rights—loses its constitutional footing. If an imaginative jury, naturally aware and suspicious of silence, is inclined to draw impermissible connections, then the doctrine's purported shield serves as a roadblock, is arguably ineffective, and perhaps even does more harm than good.

This Note argues that the *Griffin* roadblock should be abandoned as an American jurisprudential tool, whether through judicial review of legislation vacating *Griffin* protections in favor of other procedural safeguards or through the Court's express revisitation of the issue.[3] As the *Griffin* doctrine finds its support with the few remaining liberal justices on an increasingly conservative bench,[4]

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1. 380 U.S. 609, 612 (1965).

2. *See id.* at 614 ("It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.").

3. *See infra* Section III.A.

4. The Roberts Court has been deemed the "most conservative in decades." *See* Adam Liptak, *Court Under Roberts is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all&_r=0 [http://perma.cc/P3R5-BC2Y] ("Four of the six most conservative justices of the 44 who have sat on the court since 1937 are serving now . . . . Justice Anthony M. Kennedy, the swing justice on the current court, is in the top 10 [most conservative justices]."); *see also* Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/ [http://perma.cc/DZ2L-YX78]. This ideological shift became even more pronounced upon confirmation of noted conservative Justice Samuel Alito, an appointment that rendered conservative Justice Kennedy the median and all-important swing vote, carrying dramatic

Griffin may be on its last legs anyway; the Court, despite its "quiet and incremental approach"[5] to overturning precedent,[6] is likely to favor the curtailment of rights currently afforded to criminal defendants in upcoming terms.[7] In the event that the Court acts in accordance with its ideological predilections and scales back existing procedural protections, it will become critically important for the legislature to bolster other adjudicatory safeguards to maintain the fairness and efficacy of the criminal justice system. To achieve this end, Congress should (1) draft legislation allowing for specific, controlled commentary on silence in the form of a procedural burden-shifting mechanism for determining permissibility of such adverse comment, and (2) amend Federal Rule of Evidence 609 to limit the scope of admission of a defendant-witness's past convictions.[8] In *Griffin*'s stead, these substantive changes to both the nature and composition of the criminal adjudicatory process[9] and the Federal Rules of Evidence[10] will serve to encourage defendant testimony, provide sufficient protection when she

implications for the composition of the Court. *See* Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, WASH. POST (Jan. 31, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001356.html [http://perma.cc/S4YP-QBTP] ("Alito forms a four-vote conservative bloc with Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas, leav[ing] Justice Anthony M. Kennedy—a conservative who has occasionally voted with liberals . . . —as the court's least predictable member."); *see also* David Stout, *Alito Sworn in as Justice after 52-48 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), http://www.nytimes.com/2006/01/31/politics/politicsspecial1/31cnd-alito.html [http://perma.cc/29WN-BBB9].

5. *See* Adam Liptak, *Roberts's Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (July 15, 2014), http://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html [http://perma.cc/Z2CA-HZM7] (quoting prominent Supreme Court advocate Paul M. Smith) ("The chief likely is motivated by trying to conserve the court's perceived legitimacy by avoiding express overrulings where possible and sometimes by bringing more liberal justices over to his side.").

6. *See Measuring the Conservatism of the Roberts Court*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/interactive/2010/07/25/us/20100725-roberts-graphic.html [http://perma.cc/S52G-Q8A5] (noting that, while the Roberts Court has struck down precedent less often than either the Burger or Rehnquist court, those decisions have been predominantly conservative).

7. *See* Liptak, *supra* note 4 ("If the Roberts court continues on the course suggested by its first five years, it is likely to allow a greater role for religion in public life . . . . Abortion rights are likely to be curtailed, as are affirmative action and protections for people accused of crimes.").

8. Rule 609 allows for the admission of prior conviction evidence for impeachment purposes in both criminal and civil trials. FED. R. EVID. 609. As *Griffin v. California* applies in only the criminal context, this Note discusses the application of Rule 609 solely with respect to criminal trials. Similarly, this Note limits its scope to amendment of Federal Rule of Evidence 609, ignoring for purposes of discussion states' versions of the rule. While a change in the federal rule would require the states to revisit their respective policy governing the admission of past-conviction evidence, that inquiry remains beyond the scope of this Note.

9. *See infra* Sections III.A–B.

10. *See infra* Section III.C.

does take the stand, and encourage verdict efficacy and perceptions of fairness and legitimacy—by ensuring that the evidence juries take into the deliberation room is only that which is relevant to and probative of guilt.[11]

Part I of this Note outlines the historical analysis of a defendant's right to both testimony and silence in the pre-*Griffin* era, the procedural changes to the criminal trial that generated the *Griffin* inquiry, and the modern defendant's paradox: the idea that a defendant exercises her constitutional right to silence at the cost of the jury condemning this decision, regardless of instructional and doctrinal admonitions. Part II addresses the doctrine's main substantive and textual critiques, which suggest that *Griffin* is an unsound and ineffective constitutional tenet. Part III makes three concomitant recommendations to address *Griffin*'s shortcomings. First, this Note argues that the *Griffin* roadblock must be removed through judicial review of legislative action or direct revisitation, so as to ameliorate jurors' underlying psychological biases.[12] Second, this Note posits a procedural burden-shifting mechanism in lieu of *Griffin*'s blanket prohibition on adverse comment to evaluate if and when comment should be allowed in specific criminal trials.[13] Third, to bolster procedural protections afforded to criminal defendants and to more faithfully adhere to the *Griffin* doctrine's underlying purpose, this Note proposes two possible amendments of Federal Rule of Evidence 609. The first proposed amendment would limit admission of prior convictions to only those crimes of deceit currently admissible under Rule 609(a)(2). However, this Note rejects this proposal in favor of a second more effective amendment of Rule 609, which would allow admission of all crimes, regardless of nature, so long as the probative value substantially outweighs its prejudicial effect.[14]

I. THE DEFENDANT'S PARADOX

The doctrinal underpinning of the modern privilege against self-incrimination is based on the defendant's historical right to testimony and her ability to decline to be a witness against herself in the pre-*Griffin* era. Section I.A analyzes a defendant's choice when facing criminal trial in English and American courts during colonization, noting the "trilemma" that arose when she finally gained the right to

11. *See infra* Section III.D.
12. *See infra* Section III.A.
13. *See infra* Section III.B.
14. *See infra* Section III.C.

formally testify on her own behalf. Section I.B then explores the Court's treatment of testimony and silence in the original *Griffin* decision, laying the groundwork for the modified paradox that a defendant faces post-*Griffin*, as discussed in Section I.C.

A. The Original "Cruel Trilemma"[15]

The doctrinal underpinning of the modern privilege against self-incrimination is inextricably intertwined with the defendant's historical right—or lack thereof—to formal testimony and her ability to decline to be a witness against herself. Prior to the seventeenth century, English criminal trials adopted an "accused speaks" model, which allowed the defendant an opportunity to informally respond to the charges against her and explain away the prosecution's case.[16] Unlike modern formal testimony, the accused functioned as a testimonial resource: speaking not under oath, yet still contesting the merits of the accusation.[17] A defendant answered a judge's questions both before and during a criminal proceeding, and inferences from both silence and testimony were permissible at all stages.[18]

However, an essential element of early criminal procedure was the denial of defense counsel in criminal trials, the effect of which was to severely limit a defendant's right to present defense witnesses[19] and to "pressure the accused into serving as a testimonial resource."[20] Without counsel, a defendant was forced to respond to charges in person, and the functions of advocacy and defense seemingly merged.[21]

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15. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

16. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) ("The essential purpose of the criminal trial was to afford the accused an opportunity to reply in person to the charges against him.").

17. *See id.* at 1053 n.30.

18. Office of Legal Policy, *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1008 (1989).

19. *See* Donald P. Judges & Stephen J. Cribari, *Speaking of Silence: A Reply to Making Defendants Speak*, 94 MINN. L. REV. 800, 807 (2010) (quoting Langbein, *supra* note 16, at 1058) ("[A] defendant was not only locked up, denied the assistance of counsel . . . and restricted in obtaining defense witnesses, he was also given no precise statement of the charges against him . . . ."); *see also* Langbein, *supra* note 16, at 1055:

> The goal of pressuring the accused to speak in his own defense was achieved not only by denying or restricting counsel, but also by impeding defense witnesses. As with the limitations upon counsel, these obstacles to witnesses obliged the defendant to do his defending by himself—that is, by speaking at his trial.

20. Langbein, *supra* note 16, at 1058–59.

21. *See id.* at 1054 ("The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege.").

Despite the dangers of then-permissible inference drawing, a pre-nineteenth century English criminal defendant had little choice but to speak on her own behalf without the protection of defense counsel.[22]

English criminal procedure experienced an epochal change in the latter half of the eighteenth century, transitioning from the former "accused speaks" system to the recently familiar "test the prosecution" approach to criminal trials.[23] In response to the increased prevalence of religious and political nonconformists, broad-based distrust in personal advocacy,[24] and the combination of judicial discretion and the emerging role of defense counsel,[25] English courts began excluding the defendant as a testimonial resource.[26] In deeming the defendant a partial party, courts gradually shifted away from the accused-speaks model[27] by prohibiting all defendant testimony under oath, consequently mooting the permissibility of drawing inferences from a defendant's statements.[28]

Early American Colonial jurisprudence adopted the more informal "accused speaks" model,[29] but a defendant remained prohibited from testifying under oath well into the nineteenth century,[30] rendering the question of technical permissibility of adverse-

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22. *See* Judges & Cribari, *supra* note 19, at 807 ("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." (quoting Langbein, *supra* note 16, at 1058)).

23. *See* Langbein, *supra* note 16, at 1068–69 (mapping the trajectory of the adversary dynamic and the restructuring of the English criminal trial).

24. Office of Legal Policy, *supra* note 18, at 1008:

> The reaction to inquisitions against religious and political dissidents in England led to formal recognition of the principle that a defendant could not be compelled to answer incriminating questions, and the idea that the defendant's interest in the case made him an untrustworthy source of evidence led to the view that he should not be questioned at all at trial, even if he wanted to be questioned.

25. Langbein, *supra* note 16, at 1068.

26. Office of Legal Policy, *supra* note 18, at 1008.

27. The exact means by which this shift occurred remains unknown to scholars. *See* Langbein, *supra* note 16, at 1069 ("We do not yet have an adequate historical account of the stages by which this transformation occurred, and the historical sources are sufficiently impoverished that we may never recover the events in adequate detail.").

28. Office of Legal Policy, *supra* note 18, at 1008.

29. *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1091–92 (1994) ("[The accused-speaks model] represented the common core of English criminal procedure in America during the first century of settlement.").

30. *See* Portuondo v. Agard, 529 U.S. 61, 66 (2000) ("[W]hat [criminal defendants] said at trial was not considered to be evidence, since they were disqualified from testifying under oath.") (citation omitted); Nix v. Whiteside, 475 U.S. 157, 164 (1986) ("The right of an accused to testify in his defense is of relatively recent origin . . . . [C]riminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case."); *see also* Jeffrey Bellin, *Improving the Reliability of*

inference drawing similarly irrelevant.[31] Instead, the courts expected the defendant to provide unsworn pretrial statements reminiscent of those encouraged in English courts, the substance of which—or entire lack thereof—the judge explicitly referenced at trial.[32] Thus, a refusal to respond and advocate on one's behalf remained deadly.[33]

The Bill of Rights constitutionalized the privilege against compelled testimony in 1791 through the Fifth Amendment, applying its protections not only to the initiation of criminal proceedings but also to prosecutorial conduct during a criminal trial.[34] It states, "[No person] shall be compelled in any criminal case to be a witness against himself."[35] At the time, judges and litigators viewed the Fifth Amendment as an absolute defense to commonly drawn inferences—a guilty defendant's shield.[36] However, despite the clause's explicit protection against compulsory self-incrimination, a criminal defendant

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Criminal Trials Through Legal Rules That Encourage Defendants to Testify, 76 U. CIN. L. REV. 851, 860 (2008) (discussing the circumstances and difficulties of pretrial statements).

31. *See* Langbein, *supra* note 16, at 1048–49:

> In order for a privilege against self-incrimination to function, the criminal defendant must be in a position to defend by proxy. If the defendant is to have a right to remain silent that is of any value, he must be able to leave the conduct of his defense to others.

32. *See* Mitchell v. United States, 526 U.S. 314, 333 (1999) (Scalia, J., dissenting) ("The justice of the peace testified at trial as to the content of the defendant's [pre-trial] statement; if the defendant refused to speak, this would also have been reported to the jury."); *see also* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) ("At the time of the founding, English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so."); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996) ("Until the nineteenth century was well underway, magistrates and judges . . . expected and encouraged suspects and defendants to speak during pretrial interrogation and again at trial. Fact finders did not hesitate to draw inferences of guilt when defendants stayed silent."); Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 239–40 (2010) ("[C]riminal defendants in the founding era were invited to speak . . . . If the defendant, despite these opportunities, refused to personally present an exculpatory version of events, the prosecutor could highlight the omission and invite the factfinder to draw an adverse inference."); Lissa Griffin, *Is Silence Sacred? The Vulnerability of* Griffin v. California *in a Terrorist World*, 15 WM. & MARY BILL OF RTS. J. 927, 934 (2007) ("Suspects continued to be questioned, unsworn, before trial and their statements or silence used in evidence at trial.").

33. *See* Langbein, *supra* note 16, at 1048 ("[T]he defendant's refusal to respond to the incriminating evidence against him would have been suicidal . . . . [R]efusing to speak would have amounted to a forfeiture of all defense. The sources show that criminal defendants did not in fact claim any such self-destructive right."); *see also* Griffin, *supra* note 32, at 958 ("[T]he failure to answer questions was deemed to support the conclusion that the defendant could not deny the truth.").

34. Alschuler, *supra* note 32, at 2647.

35. U.S. CONST. amend. V.

36. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 860 (1995) ("[T]he guilty wrap themselves in the clause and walk free.").

could not formally testify even if she wanted to, as criminal defendants were barred from giving sworn testimony in court. A defendant remained so restricted until the end of the nineteenth century when state[37] and federal courts[38] eliminated the prohibition and granted her this right. Upon acknowledgement of the formal right to testimony, however, a guilty criminal defendant[39] now faced a "trilemma": a choice among perjury (by lying about her involvement), contempt (by refusing to answer), or self-incrimination (by admitting guilt).[40] While silence appeared to be a lone safe harbor, those opposed to granting a defendant the right to testify countered that many defendants would commit perjury to avoid the unfavorable inference of guilt, as a refusal to testify was effectively a confession thereof.[41] Silence—and the accompanying adverse inference—was thus effectively the fourth choice in the decisionmaking "quadlemma" facing a guilty nineteenth century criminal defendant.

B. The Griffin *Approach to Testimony and Silence*

The Court's decision in *Griffin* seventy years later aimed to eliminate the quadlemma that the right to testimony created[42] by

37. *See* Griffin, *supra* note 32, at 934 ("Maine was the first U.S. jurisdiction to allow defendants to offer sworn testimony in criminal cases, in 1864. By the end of the 1890s, Georgia was the only state to disqualify defendants.").

38. *See* Nix v. Whiteside, 475 U.S. 157, 164 (1986) ("By the end of the 19th century . . . the disqualification was finally abolished by statute in most states and in the federal courts."); *see also* 18 U.S.C. §3481 (2012) ("In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness."). Although the Supreme Court had repeatedly hinted and assumed that a defendant had the Constitutional right to testify on his own behalf, it did not explicitly acknowledge this right until 1987. *See* Rock v. Arkansas, 483 U.S. 44, 49–51 (1987) ("[A] defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

39. It should be noted that, even if innocent in the case at bar, a defendant could fear incrimination in some unrelated matter. The trilemma thus applies more broadly than at first glance, ensnaring in its paradox anyone who may have something to hide.

40. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) ("The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: [including] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.").

41. *See* Griffin, *supra* note 32, at 934–35:

> Those in opposition [of a defendant's right to testimony] argued that abolition would force defendants to speak, contrary to the Fifth Amendment. They argued that the failure of a defendant to testify would be seen as a confession of guilt and that jurors would draw this inference regardless of any instructions they might receive. To avoid the inference, many defendants would commit perjury.

42. *See id.* at 935 (noting that statutory no-comment rules were born out of a deference to concerns regarding the trilemma defendants now faced).

expressly barring adverse comment on a defendant's silence as a penalty amounting to compulsion under the Fifth Amendment.[43] In a six-two ruling, the Court reversed the Supreme Court of California's decision allowing for prosecutorial comment on the petitioner's failure to testify during his murder trial on the grounds that the state-sanctioned commentary violated the defendant's Fifth Amendment right against self-incrimination.[44] The Court stated that the inference of guilt from silence is strengthened "when the court solemnizes the silence of the accused into evidence against him,"[45] and this condemnatory magnification of the inference amounts to a penalty on the invocation of a constitutional right.[46]

However, the dissenting opinion in *Griffin* acknowledged the paradoxical reality criminal defendants face at the hands of the jury.[47] Joined by Justice White in highlighting a jury's "natural if uneducated assumption[s],"[48] Justice Stewart warned a defendant will be more disadvantaged under *Griffin*'s new sweeping rule of law than under the state's system at issue allowing for controlled comment.[49] While *Griffin* did not address questions as to a court's responsibility to provide procedural reinforcement through limiting instructions,[50] Justice Stewart argued that "[n]o constitution can prevent the operation of the human mind."[51] Rather than broadly forbidding adverse comment and allowing a jury to punish the defendant's silence,[52] Justice Stewart posited that a system allowing for inference and instruction better protects a criminal defendant's interest.

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43. See *supra* text accompanying note 2.

44. *See generally* Griffin v. California, 380 U.S. 609 (1965).

45. *Id.* at 614.

46. *See id.* at 614–15; *see also* supra text accompanying note 2.

47. In his dissent, Justice Stewart noted the "very real dangers of silence" and jurists' underlying psychological tendencies to draw unwarranted inferences, deeming the California statute allowing adverse comment a mechanism by which the courts can "bring[ ] into the light of rational discussion a fact inescapably impressed on the jury's consciousness." Griffin v. California, 380 U.S. 609, 622 (1965) (Stewart, J., dissenting).

48. *Id.* at 622.

49. *Id.* at 621–22:

> How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under . . . [California's] instruction here involved than would result if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt?

50. *See id.* at 615 n.6 (majority opinion) ("We reserve decision on whether an accused can require . . . that the jury, be instructed that his silence must be disregarded.").

51. *Id.* at 623 (Stewart, J., dissenting).

52. *See id.* ("Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand.").

C. The Modern Defendant's Paradox

Despite *Griffin*'s prohibition of adverse commentary, the modern criminal defendant who chooses to remain silent risks that a jury will inadvertently or impermissibly[53] interpret that silence as indicative of substantive guilt.[54] The defendant thus faces a permutation of the nineteenth century quadlemma described above, for *Griffin* paradoxically protects her Fifth Amendment right to silence but allows the jury's psychological biases to condemn her regardless.[55]

Sociologists have determined that juries draw impermissible and arguably unsound conclusions regarding an increased likelihood of guilt based on a defendant's silence, irrespective of instructions and limitations prohibiting these assumptions. In a study conducted ten years post-*Griffin* simulating a jury deliberation,[56] researchers found that the "negative moral evaluation [and inferences of guilt were] in direct proportion to the frequency with which the [F]ifth [A]mendment was taken."[57] This study confirms the common-sense intuition that an accused person faces less threat of condemnation when affirmatively

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53. As jury deliberations are protected by a "black box" theory of infallibility, little is known about the mechanics of a jury decision. Thus, impermissible propensity-based and unsound reasoning is shielded by the very system that prohibits it.

54. Current case law indicates that the Fifth Amendment's protection against compulsory self-incrimination applies only to prevent mandating that a person "furnish[ ] evidence that provides a 'link in the chain of evidence' necessary to convict him of a crime—i.e., substantive evidence of guilt." Bellin, *supra* note 32, at 272; *see also* Hoffman v. United States, 341 U.S. 479, 486–87 (1951) ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.").

55. *See* Griffin, *supra* note 32, at 956 ("[T]he inference of guilt from silence is one that the jury will draw regardless of a court or prosecutor's comments."); *see also* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U.L. REV. 1, 6 (2012) ("Behavior research . . . suggests that [the assumption jurors follow instructions and evaluate only the evidence presented is] often wrong. Jurors are subject to a slew of cognitive biases and are not always attuned to information that legal policymakers expect."). Examples of the psychological biases that engender this deduction include, but are not limited to, the common sense postulates that innocent men have nothing to hide, the moral taint of silence, and the idea that one should be punished for the withholding of information. *See* Clyde Hendrick & David R. Shaffer, *Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality*, 6 BULL. PSYCHONOMIC SOC'Y 449, 449, 451 (1975).

56. Little is known about the mechanics of a jury decision. Thus, a simulation-based study is the means by which sociologists best collect data. In the 1975 study, subjects read a fictitious transcript of a criminal trial in which the defendant either affirmatively denied guilt or plead the Fifth for herself and another participant. The two-by-two study aimed to provide the notably absent systematic data affirming the notion that a stronger inference of guilt does in fact occur when an accused person pleads the Fifth Amendment. *See generally* Hendrick & Shaffer, *supra* note 55.

57. *See id.* at 449.

denying guilt than when invoking her Fifth Amendment right to silence.[58] Withholding information through silence or refusing to cooperate on the stand may create an impetus for moral condemnation, as the study's subjects were very willing to punish a defendant who denied them valuable and potentially definitive information.[59] Thus, the study posited that it was advantageous for a defendant to affirmatively deny guilt and offer an exculpatory explanation whenever possible to prevent jury bias.[60]

This study, however, was not the only pull at the *Griffin* thread. Justice Stewart renewed his objection from the *Griffin* decision fifteen years later. This time, he was joined by seven Justices in the majority opinion in *Carter v. Kentucky*, noting the potential danger facing a criminal defendant in the absence of a court's limiting instruction.[61] Echoing his dissenting opinion from *Griffin*, Justice Stewart argued that a jury engaging in impermissible conclusory reasoning about a defendant's likelihood of guilt based on silence is both unavoidable[62] and dangerous.[63]

Other Justices have challenged the doctrine as a basic mischaracterization of the Fifth Amendment. Since the original 1965 decision, Justice Scalia has described adverse inference as "one of the natural (and nongovernmentally imposed) consequences of failing to testify,"[64] suggesting that the *Griffin* Court mistakenly interpreted adverse inference as a penalty under the Fifth Amendment instead of a mere consequence of a chosen trial strategy.[65] As the Justices' differing

58. *See id.* at 452.

59. *See id.* at 451.

60. *See id.* at 452.

61. *See* Carter v. Kentucky, 450 U.S. 288, 305 (1981) (holding that a court is obligated to give a "no-adverse-inference" instruction upon a criminal defendant's request).

62. *See id.* at 301 ("Even without adverse comment, the members of a jury . . . may well draw adverse inferences from a defendant's silence."); *see also id.* at 303 ("No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must . . . reduce that speculation to a minimum."). Other justices, however, do not share Justice Stewart's fear. *See Griffin v. California*, 380 U.S. 609, 614–15 (1965) ("[T]he inference of guilt is not always so natural or irresistible . . . .") (Justice Douglas); *see also* Portuondo v. Agard, 529 U.S. 61, 67 (2000) (echoing Justice Douglas's sentiment from the *Griffin* decision that the inference of guilt from silence is avoidable).

63. *See Carter*, 450 U.S. at 301 ("[T]he penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt.").

64. Mitchell v. United States, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting).

65. *See id.* Justice Scalia also noted that the consequence of adverse inference is but a part of a pro-and-con-calculation defendants make in deciding whether to testify, and is thus nothing reminiscent of the compulsion against which the Fifth Amendment warns. *See id.*; *see also* Sevier, *supra* note 55, at 2 (noting that the freedom attorneys have in the American jurisprudential system to present a case in the manner they deem fit has potential costs).

views evince, *Griffin* remains a controversial tenet of Supreme Court jurisprudence. Disparaged by current and former Justices alike as a "wrong turn"[66] and a "breathtaking act of sorcery,"[67] *Griffin*'s condemnation of adverse prosecutorial or judicial comment has been challenged on both pragmatic and normative bases, leaving the doctrine with an uncertain future.[68]

II. THE *GRIFFIN* ROADBLOCK

While *Griffin* was born of a desire to protect the criminal defendant from the original "cruel trilemma,"[69] the juxtaposition of *Griffin*'s protections with the jury's psychological tendency to condemn a defendant for exercising her Fifth Amendment rights suggests that *Griffin* endures as an impediment to justice, as it is based on flawed interpretations of both the Fifth Amendment and the Founders' intent. Additionally, the *Griffin* doctrine is not only unhelpful to a criminal defendant; it is harmful to her. The doctrine gives a defendant a false sense of security by providing her with procedural safeguards that have proven ineffective. Furthermore, adverse comment itself may do little to actually harm a criminal defendant. As such, *Griffin* falls short of its charge to protect a criminal defendant against a jury's impermissible silence-based condemnation, instead functioning as a roadblock preventing legislators from addressing these underlying biases. Thus, the doctrine should be replaced with procedural protections that better protect a defendant from compelled self-incrimination.

A. A Flawed Fifth Amendment Interpretation

In the 1965 *Griffin* decision, three of the eight opining Justices[70] believed that the majority's tethering of an adverse-comment prohibition to the defendant's Fifth Amendment right was without constitutional foundation.[71] However, academics aligning with the *Griffin* majority conversely believe a faithful constitutional reading

66. *Mitchell*, 526 U.S. at 336 (Scalia, J., dissenting).

67. *Id.*

68. *See supra* Introduction.

69. *See supra* Section I.A.

70. Chief Justice Earl Warren took no part in the *Griffin* decision. Griffin v. California, 380 U.S. 609, 615 (1965).

71. *See id.* at 617 (Harlan, J., concurring) ("Although compelled to concur in this decision . . . [I] hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history."); *id.* at 623 (Stewart, J., dissenting) ("California has honored the [Fifth Amendment's] constitutional command.").

reveals that adverse inference is, in fact, prohibited by the Fifth Amendment. The central point of dispute between these two camps is how one interprets the Fifth Amendment's prohibition against compulsion. Those who argue that a textual and historical reading of the Fifth Amendment leaves room for adverse comment posit that any compulsion generated by negative inference is drastically different from the pressures that gave rise to the Fifth Amendment protection.[72] Academics supporting this notion argue that the Founders sought to protect criminal defendants in early American courts from physical threats reminiscent of English common law notions of compulsion.[73] The Founders were not aiming to protect defendants from the psychological association between silence and likelihood of guilt.[74] As such, *Griffin* is arguably without a textual constitutional basis and should be revisited.[75]

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72. *See id.* at 620 (Stewart, J., dissenting) ("[I]f any compulsion be detected . . . it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee."). It should be noted that Griffin himself did not testify in the 1965 trial, so he could not have been considered "compelled" to do so. *See* Griffin, *supra* note 32, at 940 (noting Stewart's observation that the California statute did not implicate the Fifth Amendment in the case at bar, in that it did not compel the defendant to testify).

73. *See* Mitchell v. United States, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) ("Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure."); *see also* Griffin, *supra* note 32, at 958 ("[A]t the time the Fifth Amendment was passed, the colonists were concerned with something else: the not-so-distant memory of compulsion by oath or torture and the then-current unrestrained power of the distant King and his judges."); Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1347 (2009) ("The threat of an adverse inference, which is after all a relatively trivial penalty compared to torture or contempt, does not constitute compulsion.").

74. *See Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting) ("[T]hreat of an adverse inference does not 'compel' anyone to testify."); *see also* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) ("A defendant is not 'compelled . . . to be a witness against himself' simply because [the] jury has been told that it may drawn an adverse inference from [ ] silence." (quoting U.S. CONST. amend. V)); *Griffin*, 380 U.S. at 620 (Stewart, J., dissenting) ("[W]hatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel."). *But see* Bellin, *supra* note 32, at 234–35:

> [A]dverse comment so exacerbates the plight of the silent defendant that it transforms a sharp-elbowed trial tactic into something akin to the compulsion to testify forbidden by the Fifth Amendment . . . . This combination of a particularly severe penalty for silence and a desire to avoid self-incrimination satisfies the necessary prerequisites for a Fifth Amendment violation.

75. *See* Salinas, 133 S. Ct. at 2184 (Thomas, J., concurring) ("*Griffin* is impossible to square with the text of the Fifth Amendment."); *see also Mitchell*, 526 U.S. at 336 (1999) (Scalia, J., dissenting) ("The Court's decision in *Griffin*, however, did not even pretend to be rooted in a historical understanding of the Fifth Amendment."); Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 871 (1980) ("Judicial honesty and the integrity of the Constitution demand" that "*Griffin* . . . be rejected as without basis in the [F]ifth [A]mendment."); Griffin, *supra* note 32, at 943 (noting

B. The Founders' Intent

While the ability to testify under oath is of recent origin,[76] a defendant was historically allowed and encouraged to speak informally on her own behalf, and the practice of drawing a negative inference if she chose not to was commonplace.[77] Regardless of whether the drafters of the Bill of Rights would have supported Justice Douglas and the five-member majority's generous interpretation of the Fifth Amendment in *Griffin*,[78] a historical understanding of a defendant's common law rights suggests that *Griffin* is "out of sync"[79] with the text. It is unlikely that the drafters of the Fifth Amendment contemplated barring testimony-based inferences when the law barred formal testimony.[80]

However, had the Founders explicitly considered the permissibility of drawing a negative inference from a failure to formally testify,[81] they likely would have supported the practice since they permitted a negative inference when a defendant both testified informally and declined to testify at all. Given that it was commonplace for a defendant to decline to informally advocate on her own behalf, the Fifth Amendment's silence as to potential impermissibility of adverse comment intimates that the Founders likely would have supported it as a general practice.[82]

Justice Powell's concurrence in *Carter v. Kentucky*, which, although joining in the Court's holding that a requested instruction was constitutionally required, made clear that he believed *Griffin* was wrongly decided); Griffin, *supra* note 32, at 955–56 ("[*Griffin*'s] text repeatedly has been deemed inconsistent with its history, its history with its underlying policy, and its policy inconsistent with its text.").

76. *See supra* Section I.A.

77. *See supra* note 32 and accompanying text.

78. *See supra* Section II.A.

79. Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting).

80. *See* McGautha v. California, 402 U.S. 183, 214 (1971) ("Inasmuch as at the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf, nothing approaching [a defendant's] dilemma could arise."); *see also Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting) ("The question whether a factfinder may draw a logical inference from a criminal defendant's failure to offer formal testimony would not have arisen in 1791, because common-law evidentiary rules prevented a criminal defendant from testifying in his own behalf even if he wanted to do so."); Bellin, *supra* note 32, at 239 ("At the time of the enactment of the Bill of Rights, and in the decades that followed, criminal defendants were barred from testifying. Thus, the nation's founders could not have intended, in enacting the Fifth Amendment, to prohibit adverse comment on a defendant's 'decision' not to testify." (footnote omitted)).

81. *See* Griffin, *supra* note 32, at 958 ("History establishes that it was not until Congress and the states began to enact statutes rescinding the disqualification for interest that the no-comment question ever arose.").

82. *See* Bellin, *supra* note 32, at 239 ("[T]he founders would have endorsed adverse comment on defendant silence.").

C. The False Security in Silence

A defendant's decision to testify, while theoretically entirely her own, is often influenced by the existence of defendant-friendly procedural safeguards, such as a no-comment instruction.[83] However, as psychological studies highlighting the modern defendant's paradox demonstrate,[84] a limiting instruction often provides insufficient protection against impermissible negative inferences.[85] In the context of the current system, *Griffin* may lull a defendant into a false sense of security by encouraging her to invoke Fifth Amendment protection that proves at best ineffective[86] and at worst condemnatory.[87] If adverse comment were allowed in *Griffin*'s absence—essentially sanctioning the natural conclusion that juries are already making, albeit impermissibly—a defendant would be able to more accurately assess the danger she faces at trial in deciding whether to testify. This increased transparency would better protect the Fifth Amendment's normative goals by resulting in better-informed decisions regarding the implications of silence.[88]

D. The Independent Innocuousness of Adverse Comment

Critics of adverse comment denounce the practice as a pointed request that the jury draw an impermissible and arguably unsound conclusion about a defendant's likelihood of guilt based on her silence.[89] While the pointed request itself is procedurally abhorred as detrimental to the criminal defendant's interest, it is only harmful if the prosecution has successfully developed the defendant's culpability. Critics overlook that entwined in this syllogism is the essential evaluation the jury makes of the defendant's likelihood of guilt; specifically, the jury weighs

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83. *See* Carter v. Kentucky, 450 U.S. 288, 303 (1981) ("A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment.").

84. *See supra* Section I.C.

85. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 37 (1999) (pointing to studies that show that, by drawing attention to the accused's record, a limiting instruction actually does more harm than good).

86. *See supra* Section I.C.

87. *See* United States v. Hasting, 461 U.S. 499, 515 (1983) (Stevens, J., concurring) ("[A] defendant's election not to testify 'is almost certain to prejudice the defense no matter what else happens in the court room.'" (quoting United States v. Davis, 437 F.2d 928, 933 (7th Cir. 1971))); *see also* Dodson, *supra* note 85, at 37.

88. *See infra* Section III.D.

89. *See* Griffin v. California, 380 U.S. 609, 614–15 (1965) (noting that the inference of guilt from silence is unnatural and resistible).

any adverse commentary against the strength of the prosecution's case. If the prosecution is unable to prove its case, adverse comment essentially exists in a logical vacuum: the government's failure to carry its burden renders the practice relatively harmless, as the jury will be less tempted to buy the prosecution's unsound conclusion. Adverse comment is thus not simply a gratuitous derision of a defendant, but rather draws its effect from the quality and persuasiveness of the totality of the evidence.[90] In this way, adverse comment is thought to have little inherent force and pose minimal danger absent other convincing evidence, as it relies on the sufficient development of a defendant's culpability for its condemnatory force.

In some cases, damning evidence naturally demands a response,[91] and no protective instruction can prevent a jury from wondering why a defendant has chosen to say silent[92]—a fact that the jury members need not have pointed out to them.[93] With strong evidence, a defendant feels virtually compelled to answer, regardless of whether the court highlights this lack of response or cautions against inference drawing.[94] This pressure to testify arises not from adverse

90. *See* Bellin, *supra* note 32, at 261 ("The critical point . . . ignored in *Griffin* . . . is that adverse comment or instruction has little inherent force. It relies for its effect on the state of the evidence in any particular case."); *see also id.* at 262 (arguing that the opinion in *Carter v. Kentucky* concedes this point).

91. For example, when confronted with evidence establishing a defendant's presence at the crime scene, a jury would reasonably expect an explanation for the evidence. If the defendant chose to remain silent despite this damning evidence, no adverse comment would be necessary to invite the jury to make the logical assumption that a defendant would offer an exculpatory explanation if one existed. Such was the state of the evidence giving rise to the original adverse inference question in *Griffin*. *See Griffin*, 380 U.S. at 609–12 (1965). Factions of the Court continue to argue that the reasonableness of expecting a response influences the significance of silence. *See* Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) ("[W]e have on other occasions recognized the significance of silence, saying that '[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.' " (second, third, and fourth alterations in original) (quoting Baxter v. Palmigiano, 425 U.S. 308, 319 (1976))); *see also* Griffin, *supra* note 32, at 957 ("[I]t is generally permissible to ask the jury to draw an adverse inference where a party fails to proffer a witness or other source of proof that is within his control and that could offer favorable, relevant evidence.").

92. *See* Carter v. Kentucky, 450 U.S. 288, 303 (1981) ("No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation . . . ."); *see also Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting) (noting that a "factfinder's increased readiness to believe the incriminating testimony that the defendant chooses not to contradict" is a natural consequence of choosing to remain silent).

93. *See Griffin*, 380 U.S. at 621 (Stewart, J., dissenting) ("[The penalty] is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite eviden[t] fact, even though the choice goes unmentioned.").

94. *See id.* at 614 ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."); *see also* Bellin, *supra* note 32, at 259 ("Whether or not adverse prosecutorial or judicial

comment or instruction, but rather from the strength of the prosecution's case and the existence of incriminating evidence demanding an exculpatory explanation.[95] Thus, the inherent pressure[96] in the "mere massing of evidence against a defendant"[97] is independent of prosecutorial and judicial negative commentary. As the Court has toyed with the ideas that compulsion is a question of degree and not all pressure to testify violates the Fifth Amendment,[98] it would likely support the argument that the pressure created by incriminating circumstances independent of adverse comment does not constitute compulsion as contemplated by the Fifth Amendment.

E. Irresolute Application of Griffin*'s Underlying Penalty Rationale*

While *Griffin* barred adverse comment as an impermissible penalty imposed for the invocation of one's Fifth Amendment right against compelled self-incrimination,[99] the Court has since allowed similar penalties when exercising other constitutional rights.[100] Since *Griffin*, the Court has often allowed penalties to attach to a defendant's exercise of her Fifth Amendment right, chipping away at the protection of silence in various contexts.[101] For example, during the plea

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comment is permitted . . . the defendant always suffers a 'penalty' for declining to take the witness stand—the likelihood that jurors will notice the failure to testify and discount the probability of innocence accordingly.").

95. *See* Griffin, *supra* note 32, at 957 ("[I]t is generally permissible to ask the jury to draw an adverse inference where a party fails to proffer a witness or other source of proof that is within his control and that could offer favorable, relevant evidence.").

96. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 287 (1998) ("[T]here are undoubted pressures[—]generated by the strength of the government's case against him[—] pushing the criminal defendant to testify . . . . [I]t has never been suggested that such pressures constitute 'compulsion' for Fifth Amendment purposes."); *see also* McGautha v. California, 402 U.S. 183, 213 (1971) (Black, J., concurring) (plurality opinion) ("It is not contended, nor could it be successfully, that the mere force of evidence is compulsion of the sort forbidden by the [Fifth Amendment] privilege.").

97. Barnes v. United States, 412 U.S. 837, 847 (1973).

98. *See* McKune v. Lile, 536 U.S. 24, 49 (2002) (O'Connor, J., concurring) ("The text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself . . . . [S]ome penalties are so great as to 'compe[l]' [a defendant's] testimony, while others do not rise to that level." (third alteration in original)); *see also id.* at 41 (plurality opinion) ("Determining what constitutes unconstitutional compulsion involves a question of judgment . . . .").

99. *See supra* text accompanying note 2.

100. *See* Anne Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 205 (1984) ("The Court has permitted the government to attach some negative consequences to the exercise of a constitutional right.").

101. *See* Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) ("[W]e have on other occasions recognized the significance of silence, saying that '[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the

bargaining process, a defendant who does not admit guilt is penalized in the state's pursuit of more serious charges and higher criminal penalties.[102] Similarly, the Court has denied a Fifth Amendment challenge to a state program that encouraged inmates' disclosure of sensitive information through a reward- and punishment-based system.[103] Dealing directly with the protection of silence, the Court has allowed the use of a defendant's pre-arrest silence[104] and has even expressly permitted adverse inference in the context of the adjudication of correctional disciplinary infractions.[105] This irresolute application of the bedrock "unfair penalty" rationale upon which *Griffin*'s authority rests foreshadows the uncertain future of the classification of adverse comment as an impermissible Fifth Amendment penalty.[106]

III. REMOVING THE ROADBLOCK AND ALLOWING ADVERSE INFERENCE

Ultimately, *Griffin* falls short of its charge to protect a criminal defendant against a jury's impermissible silence-based condemnation.[107] The challenges facing a modern criminal defendant call for a judicial and legislative restructuring of the procedural protections *Griffin* sought and failed to afford her. This Note proposes three concomitant revisions that aim to address *Griffin*'s shortcomings and would significantly reform the jury trial by increasing the amount of relevant information a jury hears in order to encourage the most efficient and accurate verdict determinations. Section III.A argues the *Griffin* doctrine must be eradicated, whether through judicial review or

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circumstances to object to the assertion in question.' " (second, third, and fourth alterations in original) (quoting Baxter v. Palmigiano, 425 U.S. 308, 319 (1976))); *see also* Griffin, *supra* note 32, at 957 ("Adverse comment on a party's silence is also permitted in clemency cases, deportation proceedings, and prison disciplinary actions.").

102. *See* Bellin, *supra* note 32, at 255 ("Perhaps the most compelling rebuttal to the suggestion that the state may not . . . penalize . . . defendants who decline to incriminate themselves can be found in the practice of plea bargaining."). The Court has, however, characterized this as an "optional benefit" rather than a penalty for those who choose to go to trial. *See* Sampsell-Jones, *supra* note 73, at 1344.

103. *See generally McKune*, 536 U.S. 24, 30–32, 48 (2002) (plurality opinion) (rejecting a Fifth Amendment challenge to a state program that rewarded inmates for completing a form detailing all prior sexual activities, even though those who did not compete the form—essentially 'invoking silence'—were penalized).

104. *See* Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that a prosecutor can impeach the credibility of a testifying defendant with his silence prior to arrest).

105. *See* Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (permitting correctional authorities adjudicating disciplinary infractions to draw adverse inferences from prisoners' silence).

106. *See* Griffin, *supra* note 32, at 956–57 (noting that recent Supreme Court case law indicates that prohibiting an adverse inference from silence is illogical and "that the Court may indeed conclude that silence has some evidentiary significance in fact").

107. *See supra* Section I.C.

express revisitation of the *Griffin* issue, if lawmakers are to address the defendant's paradox discussed in Part I and jurors' underlying psychological biases[108] hindering adjudicatory efficacy. Section III.B argues the Court should shift away from *Griffin*'s broad-based prohibition in favor of a looser controlled-commentary regime and a procedural burden-shifting mechanism for determining permissibility of such adverse comment. Section III.C proposes two alternative revisions of the Federal Rules of Evidence that drastically limit introduction of past convictions for impeachment purposes. Together, these modifications would encourage more defendants to speak at trial, ultimately increasing accuracy, participation, legitimacy, and fairness in the criminal adjudicatory process.[109]

A. Moving Beyond the Griffin *Doctrine*

A defendant's right to silence is rightfully under attack.[110] Commentators, academics, and active members of the Court alike challenge the Court's 1965 prohibition on textual and substantive grounds[111]—criticized as a misstep in constitutional jurisprudence—arguing for a return to the former pre-*Griffin* system whereby states enacted legislation for the purpose of managing adverse comment. Prior to *Griffin*, state and federal legislatures handled the treatment of adverse comment, interpreting the Founders' general silence on the matter as acquiescence for the creation of a discretionary hodgepodge system that dealt with a defendant's decision to testify.[112] At the time of the *Griffin* decision, six states authorized adverse comment and held these rules consistent with the right against compelled self-incrimination.[113] However, much to the dismay of local legislators and other lawmaking government entities, many aspects of criminal procedure—including *Griffin*'s adverse inference prohibition—have been constitutionalized, serving as a dramatic barrier to reform.[114]

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108. *See supra* Section I.C.

109. *See infra* Section III.D.

110. *See* Daniel J. Seidmann and Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 432 (2000) (citing examples of scholars criticizing the right to silence).

111. *See supra* Sections II.A–B.

112. *See* Griffin v. California, 380 U.S. 609, 623 n.3 (1965) (noting the difference in treatment that states afford adverse comment).

113. *See* Office of Legal Policy, *supra* note 18, at 1008–09.

114. *See* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 487–88 (1992).

Nevertheless, the exceptions to the doctrine of stare decisis[115] permit direct revisitation of the issue of the Fifth Amendment's compulsion-based application to adverse comment, as the doctrine is effective only when based on well-founded, well-reasoned, and unbiased precedent.[116] The doctrine, however, subverts the law in other scenarios. The Court has consequently stated that stare decisis is an analytical tool rather than an unyielding command,[117] applying less rigidly in constitutional cases and when conditions are such that adhering to the principle would prove a detriment to the interests of justice.[118] But as Justices are often hesitant to overturn legal bedrock except in a very narrow subset of cases,[119] many poorly reasoned or legally unsound doctrines survive—not based on merit, but rather because of a reluctant nod to the past.[120] The current jurisprudential landscape reflects the amalgamation of such conditions; *Griffin* is one

115. *Stare decisis*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining the term as "to stand by things decided"); *see also* Dickerson v. United States, 530 U.S. 428, 443 (2000) (highlighting the Court's acknowledgement that, while they might have reasoned and ruled differently than did a prior decision were they first considering an issue, "the principles of *stare decisis* weigh heavily against overruling [the prior decision] now."); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 208 (2008) (describing *stare decisis* as reflecting "a resolution to stand by [prior] rulings, at least presumptively, in the face of one's belief that one probably would have decided differently"). Many courts have expressly highlighted this tension between first impression and *stare decisis*. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 354 (2009) (Breyer, J., dissenting) ("The matter, however, is not one of first impression, and that fact makes a substantial difference.").

116. *See* JOHN BOUVIER, A LAW DICTIONARY 544 (6th ed. 1856) ("The doctrine of [*stare decisis*] is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle.").

117. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 363 (2010) ("*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.") (citing Helvering v. Hallock, 309 U.S. 106, 119 (1940)); *see also* Hertz v. Woodman, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

118. *See Citizens United*, 558 U.S. at 377 ("At the same time, *stare decisis* is neither an 'inexorable command,' nor 'a mechanical formula of adherence to the latest decision,' especially in constitutional cases." (citations omitted)).

119. The Court has outlined factors to be considered in determining whether to overturn established precedent. *See Gant*, 556 U.S. at 358 (citations omitted):

> Relevant factors identified in prior cases include whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned.

See also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

120. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) ("The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs.").

such decision that subsists, despite incongruity, based on systemic respect and tradition. Instead of struggling to further define the contours of the doctrine[121] and its Fifth Amendment authority,[122] the Court should take the opportunity, as coveted by at least one sitting Justice,[123] to directly revisit the original interpretation that has become an ineffective and dangerous impediment to the criminal defendant.

However, urging the Court to cast *Griffin* aside while simultaneously implementing other procedural safeguards[124] may prove logistically infeasible. As such, in the alternative, Congress should pass dual-purpose legislation that both does away with the *Griffin* roadblock and creates alternative procedural safeguards to operate in its absence. If challenged, the Court should simply uphold the legislation upon judicial review, which would be likely given the ideological predilections of the current Court.[125] Chief Justice John Roberts spoke of this procedure for the congressional override of Court decisions in his confirmation hearings, noting Congress's ability to draft new law if dissatisfied with the Court's interpretation of existing law[126]—in this case, the extensive and amorphous Fifth Amendment protection the Court affords criminal defendants in *Griffin*'s name. Dual-purpose legislation would honor the principle of stare decisis, mitigate the impact of the *Griffin* decision, and avoid the infeasibility of simultaneous doctrinal revisions.

B. A Procedural Mechanism for Controlled Commentary

In *Griffin*'s absence, references to silence would become fair game. Yet while sociological studies indicate that some association between silence and guilt is unavoidable,[127] it is likely that a zealous prosecutor would capitalize on the opportunity and overstate the significance of silence when now given the chance. As noted initially by

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121. *See supra* Section II.E.

122. *See supra* Section II.A.

123. *See* Mitchell v. United States, 526 U.S. 314, 343 (1999) (Thomas, J., dissenting) ("I would be willing to reconsider *Griffin* . . . in the appropriate case."); *see also* Bellin, *supra* note 32, at 232 (noting the Justices' open criticism of *Griffin* and its progeny).

124. *See infra* Sections III.B–C.

125. *See supra* text accompanying notes 4–7.

126. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2005) (statement of John G. Roberts, Jr., nominee) ("[I]n many areas—well, certainly every area involving an interpretation of the statute—the final say is not with the Supreme Court. The final say on a statute is with Congress, and if they don't like the Supreme Court's interpretation of it, they can change it . . . .").

127. *See supra* Section I.C.

Justice Stewart in *Griffin*'s dissent[128] and since by the majority in *Carter v. Kentucky*,[129] an imaginative jury left solely to its "untutored instincts"[130] may fail to correctly assess the probativeness of silence as an indicator of guilt. As such, both parties should be permitted to argue the importance of silence to the Court—and ultimately the jury—once *Griffin* falls. To guide this inquiry, the Court should implement a burden-shifting mechanism for determining the permissibility of case-specific adverse commentary. This narrowed prohibition would allow adverse comment only once the prosecution has made a prima facie case against the defendant, limit adverse comment to only those facts within the defendant's power to explain or deny, and emphasize that comment on a defendant's refusal to testify is no substitute for the prosecution's failure to prove any element of the case to the relevant standard.

If wishing to comment adversely, the prosecution must initially demonstrate during a pretrial hearing that a defendant would be expected to respond to a line of questioning based on an evaluation of substantial independent evidence of guilt. If she wishes to obtain a no-negative-inference instruction to avoid adverse comment, a defendant must then demonstrate that her silence is irrespective of guilt and the veracity of the prosecution's case, providing an alternative explanation for silence based on a cognizable Fifth Amendment protection.[131] As the Court has "long required that a witness assert the privilege to subsequently benefit from it,"[132] it is not implausible to suggest that courts should implement a mechanism that appears to require that a defendant tip her hand in order to find safety in the contours of the Fifth Amendment. This will help to ensure that the threat of self-incrimination remains a cognizable route to Fifth Amendment protection, but will more faithfully adhere to the privilege's foundational principles.

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128. Griffin v. California, 380 U.S. 609, 617–23 (1965) (Stewart, J., dissenting).

129. *See* Carter v. Kentucky, 450 U.S. 288, 301 n.17 (1981) ("[M]ore harm may flow from the lack of guidance to the jury on the meaning of the Fifth Amendment privilege than from reasonable comment upon the exercise of that privilege."); *see also Griffin*, 380 U.S. at 623 (Stewart, J., dissenting) ("Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand.").

130. *See Carter*, 450 U.S. at 301.

131. *See* Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013) ("A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim."). *But see* Hoffman v. United States, 341 U.S. 479, 487 (1951) ("To sustain the privilege [against self-incrimination], it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.").

132. *Salinas*, 133 S. Ct. at 2183.

A defendant, however, is not entitled to protection against adverse inference based on an invocation of her Fifth Amendment right to silence when that silence is motivated by incentives that are not rooted in constitutional protections against compelled self-incriminating testimony.[133] For example, if a defendant chooses not to testify because she is worried her testimony will help the prosecution's case, is wary of her off-putting demeanor or inarticulateness, or wants to avoid implicating a third party, she will be denied protection against the prosecution's desired adverse comment. In any of these scenarios, comment on her silence does not harm her constitutionally protected right against compelled self-incrimination, but rather demonstrates her substantial independent likelihood of guilt. Denying Fifth Amendment protections for silence motivated by these circumstances prevents affording defendants a constitutional windfall.[134]

A court must then determine if the defendant has argued a substantive Fifth Amendment challenge.[135] If she has sufficiently pleaded implication of her Fifth Amendment-based right, the court will deny the prosecutor's request for adverse comment, and the defendant will garner the same—arguably insufficient[136]—amount of protection against a jury's silence-based condemnation as currently allowed under

133. *See* Bellin, *supra* note 32, at 284 ("The witness[']s mere 'say-so' does 'not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer [or, as here, allow adverse comment] if it "clearly appears to the court that he is mistaken." ' ") (citations omitted); *see also Salinas*, 133 S. Ct. at 2182 ("Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation [for silence] protected by the Fifth Amendment."); *United States v. Melchor Moreno,* 536 F.2d 1042, 1046–47 (1976) ("The courts cannot accept Fifth Amendment claims at face value, because that would allow witnesses to assert the privilege where the risk of self-incrimination was remote or even nonexistent, thus obstructing the functions of the courts. The applicability of the privilege is ultimately a matter for the court to decide.").

134. *See* Marchetti v. United States, 390 U.S. 39, 53 (1968) ("The central standard for the [Fifth Amendment] privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."); *see also* Bellin, *supra* note 32, at 267 ("Adverse comment becomes an unconstitutional penalty upon a defendant's silence when . . . the prosecutor or judge suggests the jury draw an unfair (i.e., counterfactual and unrebuttable) inference from protected silence. In all other circumstances, however, *Griffin*'s blanket prohibition of adverse comment is unwarranted.").

135. Currently, such viable routes to Fifth Amendment protection include the fear of impeachment with a prior conviction once on the stand or a fear of implicating herself in some unrelated crime. *See* Bellin, *supra* note 32, at 269 ("A significant portion of criminal defendants . . . fall comfortably within the unfair penalty rationale . . . this group consists of two types of defendants: (1) those who will be impeached with prior convictions should they testify; and (2) those who fear implicating themselves in an uncharged crime."). However, after implementation of the pretrial conference to determine permissibility of adverse comment, the common law may develop to restrict or supplement these recognized routes as the Court deems fit.

136. *See supra* Section I.C.

Griffin. If she fails to meet this burden, the court will allow controlled adverse commentary.

This procedural revision will more effectively protect silent defendants than did *Griffin*'s blanket prohibition on adverse comment by carefully controlling the jury's evaluation of silence during the trial phase.[137] The burden-shifting element ensures that the prosecutor will only be allowed to argue an adverse inference once the defendant has had fair opportunity to respond. Substantively, the evaluation will allow adverse comment only when the unfair-penalty rationale behind the Fifth Amendment fails to justify prohibition. When Fifth Amendment concerns are not implicated, a defendant should not and will not be allowed to hide behind the policies of the Amendment to avoid an unfavorable yet entirely natural inference.[138]

C. Substantive Revision of Federal Rule of Evidence 609[139]

As jurors are prone to make impermissible assumptions about guilt or innocence based on a defendant's silence,[140] so too are they willing to make this determination based on their perceptions of a defendant's general character. While Federal Rule of Evidence 404 broadly prohibits this practice in federal court by barring the admission of evidence of a defendant's character to prove "that on a particular occasion the person acted in accordance" therewith,[141] Rule 609[142]

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137. For an admonition against the dangers of the jury's unguided inference of guilt from silence, see *Griffin v. California*, 380 U.S. 609, 621 (1965) (Stewart, J., dissenting).

138. *See supra* text accompanying note 133.

139. This Note assumes that states will reinterpret the amended federal rules upon their passage. As such, the interplay between a revision of Federal Rule 609 and the state versions could mean a disparate interpretation between both Federal courts using state law to interpret state law claims and different states interpreting and applying their version of Federal Rule 609 in state court. While discussion of complications arising from states' interpretations of the amended Federal Rule 609 remain beyond the scope of this Note's discussion, it should be noted that the proposed change is intended to be broader than Federal Rule 609 and to trickle down to state legislation, as the overwhelming majority of criminal trial defendants are in state court. *See generally Comparing Federal and State Courts*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts (last visited Sept. 9, 2015) [http://perma.cc/66S8-NTM6].

140. *See supra* Section I.C.

141. FED. R. EVID. 404(a)(1).

142. FED. R. EVID. 609. The rule states in relevant part:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
>
> (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

provides a caveat to this general bar: to the extent that prior-conviction evidence tends to show that the defendant is lying on the stand at present, it is relevant to her testimony[143] and should be admitted for the legitimate purpose of evincing her veracity[144] in accordance with the character-based evidence exception found in Rule 404(a)(3).[145] However, to the extent that a prior conviction speaks not to veracity but rather to a defendant's character for criminality, the evidence should be excluded under Rule 404's general bar[146] or Rule 609(a)(1) if the defendant testifies.[147]

This distinction, however, is a fine one, and it is well established that jurors are often unwilling or unable to make this determination between permissible and impermissible use of defendant testimony.[148] Despite Rule 404's procedural prohibition against impermissible

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(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

143. In this sense, prior conviction evidence would be considered relevant only if it makes the likelihood that the witness is lying on the stand at present more likely. *See* FED R. EVID 401 (stating that evidence is relevant when it tends to make any fact at issue "more or less probable than it would be without the evidence").

144. *See, e.g.*, Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) ("[T]he legitimate purpose of impeachment . . . is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses.").

145. *See* FED. R. EVID. 404(a)(3).

146. *See* FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

147. As Rule 404 applies only if the defendant chooses not to testify, Rule 609 applies in these instances. *See* FED. R. EVID. 609(a)(1).

148. *See* People v. Allen, 420 N.W.2d 499, 581 (Mich. 1988) ("[I]t is absurd to suggest that jurors will be able to avoid improper consideration of a defendant's criminal character once it has become known to them."); *see also* James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 602, 607 (1985) ("Few academicians believe . . . that jurors consider past crimes solely for impeachment purposes and not as proof of the defendant's likelihood of having committed the charged offense."); Bellin, *supra* note 32, at 272–73 ("[A]dmission [of a defendant's prior criminal record] is widely recognized as extremely damaging not just as impeachment but also as substantive propensity evidence."); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009) (noting that juries appear to rely on a defendant's criminal record in cases presenting otherwise weak evidence and that "[t]he effect in otherwise weak cases is substantial and can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%").

propensity-based reasoning[149] and instructions to that effect,[150] juries often use convictions for impermissible purposes,[151] such as substantive evidence of guilt and character for criminality, and we let them.[152] Fearing incrimination in the eyes of those determining her fate, a defendant with a prior record will avoid taking the stand altogether so as to prevent the jury's discovery of her past convictions, irrespective of guilt or innocence in the case at bar.[153] Thus, Rule 609 in its current form—initially contemplated to beneficially increase the amount of information heard by a jury[154]—has the adverse effect of denying a jury critical testimony.[155]

While the abovementioned procedure allowing for controlled commentary will generally alleviate the danger adverse inference poses, defendants with criminal records will now be caught between a rock and an even harder place—either invoke a Fifth Amendment right to silence and consequently invite the still impermissible yet even more

149. *See* FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."); *see also* FED. R. EVID. 609(a) (limiting introduction of a criminal conviction to use in attacking a witness's "character for truthfulness").

150. *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

151. *See supra* note 148 and accompanying text.

152. *See* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (citation omitted)); *see also* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013) ("There are two well-known facts about evidentiary instructions of both [limiting and instruction-to-disregard] varieties. The first is that our system relies heavily on these instructions. The second is that they do not work.").

153. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559, 1632 (1996) ("The principle reason why defendants refuse to take the stand is that they fear impeachment with prior convictions—a fear with strong support from empirical evidence."); *see also* Eisenberg & Hans, *supra* note 148, at 1357 (noting a significant statistical correlation between a criminal record and a declination to take the stand); Van Kessel, *supra* note 114, at 482 ("[A] defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not.").

154. *See* Dodson, *supra* note 85, at 46–47 ("Proponents of Rule 609 . . . have defended Rule 609 on the ground that juries need the information in order to weigh the credibility of the defendant witness. . . . Proponents point out that rules of evidence ought to increase the amount of relevant information a jury hears.").

155. *See* Victor Gold, *Impeachment By Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2298 (1994) (noting that juries are denied important defense information when a defendant declines to take the stand out of fear of unfair prejudice); *see also* Dodson, *supra* note 85, at 46–47 (noting that Rule 609 decreases the amount of information a jury hears); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 707 n.32 (2014) (citing data from the 2000s that indicates that defendants without records testify in roughly sixty-two percent of cases, while defendants with criminal records testify in fewer than fifty percent of all cases).

likely adverse inference, or get skewered on the stand.[156] In *Griffin*'s absence, the danger of impermissible use of defendant testimony under Rule 609 remains, but now *all* defendants will feel increased pressure to testify. As juries will be even more tempted to condemn a silent defendant once the practice of testifying becomes more commonplace, the text of Rule 609 and accompanying limiting instructions will prove even less effective than current practice. It is thus increasingly imperative to take steps to mitigate the danger posed by improper use of criminal convictions in an adverse-comment regime for a defendant properly invoking her Fifth Amendment privilege.[157]

To protect defendants with criminal records against the now-amplified threat of adverse inference in the context of this hypothetical regime, Congress must amend the Federal Rules of Evidence to restrict the introduction of past crimes. This restriction will likely prove more effective in ensuring permissible use of a past conviction than relying on jurors to cabin their knowledge of prior offenses to only use for veracity and truthfulness.[158] This Note suggests two alternative routes of legislative revision by which to ensure jurors use convictions for the permissible purposes outlined in Rule 609. First, Congress should consider a proposal limiting the introduction of convictions to only crimes of deceit. As this may prove infeasible and ineffective, Congress should, in the alternative, allow admission of *all* convictions but heighten the standard governing admissibility to the more stringent "Reverse 403"[159] standard currently governing Rule 609(b). Motivated by the same policies and differing only in effectiveness, these proposed alternative revisions to the Federal Rules will ensure that a defendant properly invoking her privilege against self-incrimination is afforded

156. Many argue that this is the reality of the dilemma all defendants face in criminal adjudication, as juries are already making this impermissible leap even with *Griffin*'s protections. *See supra* Section I.C. It should be noted that these substantive changes to Rule 609—though recommended in conjunction with *Griffin*'s repeal—will have similar positive effects on the normative considerations addressed in Section III.D that exist independent of the Court's *Griffin* determination. While especially pertinent in *Griffin*'s absence, these alterations to the Rule remain relevant and advisable even if the doctrine persists in current form, losing a sense of criticalness and urgency but suffering no similar diminution in logical force.

157. *See* Bruton v. United States, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

158. *See* Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 L. & HUM. BEHAV. 477, 496 (1988) ("[I]t appears that it may be more effective to prevent the harmful effects of impeachment and other character-related evidence from occurring in the first place, by limiting the admissibility of the evidence itself, rather than asking jurors to limit its use.").

159. Though likely coined elsewhere, I thank Professor Edward Cheng for this terminology.

more complete protection within the Federal Rules's provisions if she chooses to take the stand.[160]

1. First Proposal: Limit Admission of Prior Convictions to Only Crimes of Deceit

One possible revision to the Federal Rules of Evidence would limit the introduction of past convictions to only crimes of deceit for impeachment purposes under Rule 609, or where "the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."[161] Different crimes are probative of different degrees of truthful character,[162] and this revision would eliminate the current practice of introducing, under the guise of impeachment, evidence of highly prejudicial crimes that are only marginally (if at all) probative of honesty. By introducing only those crimes involving an element of truthfulness, a court would reinforce and encourage the association between the "dishonest act or false statement"[163] and its impeachment value. Under this revised Rule 609, which ensures presentation and evaluation only of crimes related to a defendant's honesty, a defendant with an unrelated criminal record will be more comfortable testifying in order to avoid adverse comment, and less fearful of impeachment and threat of impermissible use once she takes the stand.

While limiting the admission of prior convictions to those crimes of deceit noted in Rule 609(a)(2) will serve to encourage defendant testimony and further the truth-seeking purposes of the Federal Rules

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160. While it is unrealistic to assume a modification in trial procedure will automatically mollify the decades of proven psychological biases addressed in Section I.C., these amendments will remove the threat of unwarranted condemnation posed to those with exculpatory explanations by more faithfully adhering to the impeachment rationale governing Rule 609.

161. FED. R. EVID. 609(a)(2). Similarly, introduction of past crimes as particularly well verified acts under Rule 404 would be prohibited.

162. *See, e.g.*, Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967):

> [A]cts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.;

see also People v. Allen, 420 N.W.2d 499, 580–81 (Mich. 1988) ("We . . . act not on the basis of studies, but on the 'commonsense premise' that some prior convictions are more probative than others, [and] that some are inherently more prejudicial.").

163. FED. R. EVID. 609(a)(2).

of Evidence,[164] this proposed revision remains vulnerable to two notable criticisms that likely render it ineffective and infeasible. First, while this change would ensure that only crimes of deceit are presented to the jury, there is arguably still no guarantee that the jury will use this evidence for the mandated purposes of evaluating a defendant's veracity. Crimes introduced under this proposed revision remain susceptible to use as evidence of "badness." While limiting the scope of admissibility under Rule 609 would tighten the gamut of crimes presented, it would do little to prevent a jury from condemning a defendant based on a general character for criminality, even though the crimes now speak somewhat to a defendant's veracity. Thus, the change will likely prove ineffective in assuring permissible use of impeachment evidence, and additional steps are necessary to mitigate the unfair prejudice these crimes present.

Second, this proposed amendment would likely find little legislative support, as this strict approach to admission of impeachment evidence was contemplated and rejected during the initial drafting of the "hotly contested"[165] Rule 609.[166] The preliminary draft of the rule allowed introduction of only felonies and crimes of deceit with no allowance for judicial discretion based on the threat of unfair prejudice to the defendant.[167] After heated debate and substantial revision, the House Judiciary Committee drafted an even more restrictive version of Rule 609, allowing for admission of prior-conviction evidence "only if the prior crime involved dishonesty or false statement."[168] However, both

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164. *See* FED. R. EVID. 102 ("These rules should be construed . . . to the end of ascertaining the truth and securing a just determination."). *But see* Gold, *supra* note 155, at 2315–16 ("[W]hile a prior conviction could accurately reflect character for untruthfulness, the jury still could overvalue or otherwise misuse the evidence. Thus, it is impossible to know with certainty whether admitting prior conviction evidence will advance or retard the policy goal of accurate fact-finding.").

165. United States v. Smith, 551 F.2d 348, 360 (D.C. Cir. 1976) (citation omitted).

166. *See generally* Gold, *supra* note 155, at 2298–2309 (detailing the legislative history of and policies underlying Rule 609); *see also* Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment By Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 773–76 (1990) (detailing the trajectory of Rule 609 as it was debated in both the House and the Senate).

167. *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 295–96 (1969). The draft provided in pertinent part:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.

Id.

168. *See* Gold, *supra* note 155, at 2302 n.46. The House Report stated:

> In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false

the Senate Judiciary Committee and the Conference Committee subsequently rejected the House Judiciary Committee's version in favor of permitting the introduction of crimes of all natures, subject to fairness considerations.[169] The House Judiciary Committee's restrictive approach to introduction of prior-conviction evidence was thought to weigh too heavily in favor of the accused, and the approach likely remains vulnerable to the same criticism today.[170]

2. Second Proposal: Heighten the Admissibility Threshold of *All* Prior Convictions

While proponents of revising Rule 609 based on the nature of the crime focus on the proposition that different crimes are probative of different degrees of truthfulness,[171] this arguably oversimplifies our understanding of how juries actually perceive prior-conviction evidence. Proponents of a categorically unrestricted standard of admissibility posit that *any* defendant with a criminal record—regardless of the nature of the prior conviction—is likely to lie on the stand,[172] and thus *all* past crimes are directly relevant to a defendant's present truthfulness. The fundamental desire for self-preservation and the old-

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> statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.

H.R. Rep. No. 650, 93d Cong., 1st Sess. 11 (1973).

169. The text of Rule 609(a) as originally enacted is as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a) (1975).

170. *See id.*

171. *See supra* text accompanying note 162.

172. *See* People v. Allen, 420 N.W.2d 499, 520 (Mich. 1988) (noting that juries are well aware of, and consider in determining the weight to afford a defendant's testimony, the fact that *any* criminal defendant has a powerful motivation to lie to avoid conviction in the case at bar); *see also* Dodson, *supra* note 85, at 49–50 (noting that jurors are aware all defendants facing conviction have much to lose and thus seldom take a defendant at his word, regardless of his criminal history); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1527 (1999) ("There is no basis for supposing that recidivists are more likely than first-time offenders to lie; both are criminals, and the incentive of a criminal to lie is unrelated to whether he has committed one crime or more than one.").

timey belief that felons are inherently liars thus implicate a defendant's veracity in the case at bar, not because she once committed a crime of deceit, but because she once committed a crime, period.[173] According to this line of reasoning, the aforementioned proposal, while protecting defendants from the harsh implications of impeachment in an adverse-comment regime, would have the harmful effect of shielding from the jury pertinent indicators of the defendant's penchant for truth telling by unnecessarily limiting the scope of admissible crimes based on their nature alone.[174] As this runs counter to the truth-seeking purpose of the Federal Rules of Evidence,[175] a more balanced and plausible amendment to Rule 609 would allow for the admission of *all* types of convictions (as the current rule allows), but would apply Rule 609(b)'s "Reverse 403" standard to the admission of all convictions, imposing a more stringent bar to admission than the disparate standards currently governing the rule's various provisions.

In present form, Rule 609 reflects a spectrum of likelihood of admissibility based on the nature of the crime.

Figure 1

RELEVANT RULE SECTION	NATURE OF CRIME GOVERNED	RELEVANT ADMISSIBILITY STANDARD	ESTIMATED LIKELIHOOD OF ADMISSION [%][176]
609(a)(2)	Crimes of Deceit	"[M]ust be admitted . . . ."[177]	100
609(a)(1)(A)	Non-Defendant Testimony	"[M]ust be admitted, subject to Rule 403, in a civil or criminal case in which the witness is not a defendant . . . ."[178]	80
609(a)(1)(B)	Non-Stale Defendant Felony	"[M]ust be admitted . . . if the probative value of the evidence outweighs its prejudicial effect . . . ."[179]	50

173. *See* Dodson, *supra* note 85, at 50 ("[I]t obviously is in the defendant's self-interest to give testimony which favors his or her position."). It should be noted that this assumption regarding self-preservation is true of all defendants, regardless of the existence of a criminal record. However, as Rule 609 speaks only to those with prior convictions, the implications of a first time offender's desire for self-preservation remain outside the scope of this Note.

174. *See id.* at 47 (noting that defendant testimony is often considered "the most critical piece of testimony available [to a jury]"). *But see id.* at 49 ("[T]he defendant's credibility is already so much lower than that of the other witnesses

175. *See supra* text accompanying note 164.

176. I thank Professor Edward Cheng for this insight.

177. FED. R. EVID. 609(a)(2).

178. FED. R. EVID. 609(a)(1)(A). While Congress will likely address 609(a)(1)(A) if and when amending Federal Rule 609 in its entirety, it is irrelevant to the *Griffin* question as it governs non-defendant witnesses. Thus, this Note does not consider its effect, as it is primarily concerned with a defendant's constitutional right against compelled testimony.

179. FED. R. EVID. 609(a)(1)(B).

RELEVANT RULE SECTION	NATURE OF CRIME GOVERNED	RELEVANT ADMISSIBILITY STANDARD	ESTIMATED LIKELIHOOD OF ADMISSION [%][176]
609(b)	Stale Defendant Felony	"[A]dmissible only if . . . its probative value . . . substantially outweighs its prejudicial effect . . . ."[180]	20
609(d)	Juvenile Adjudications	"[A]dmissible . . . only if . . . ."[181]	~1

As Figure 1 illustrates, the text of the rule applies a different standard to address the degree of unfair prejudice that the specific nature of the crime is thought to threaten, resulting in varied likelihood of admissibility. However, the considerably more liberal standards governing Sections 609(a)(2) and 609(a)(1)(B) become dangerous upon invitation of adverse comment.[182] In *Griffin*'s absence, a defendant feeling the heightened pressure to testify will be considerably less likely to do so if her conviction is governed by Sections 609(a)(2) or 609(a)(1)(B), for the standards governing those provisions weigh in favor of admissibility. Thus, if we are to mitigate the aforementioned consequences of the defendant's paradox[183] by encouraging defendant testimony, the standard of admission governing Sections 609(a)(2) and 609(a)(1)(B) should be changed to that governing stale defendant felonies under Rule 609(b).

Applying 609(b)'s standard of admission to evidence admitted under the contours of 609's other provisions would purposefully influence the rate of admission. Figure 2 demonstrates just how dramatically the changed standard would affect the rates of admission noted in Figure 1.

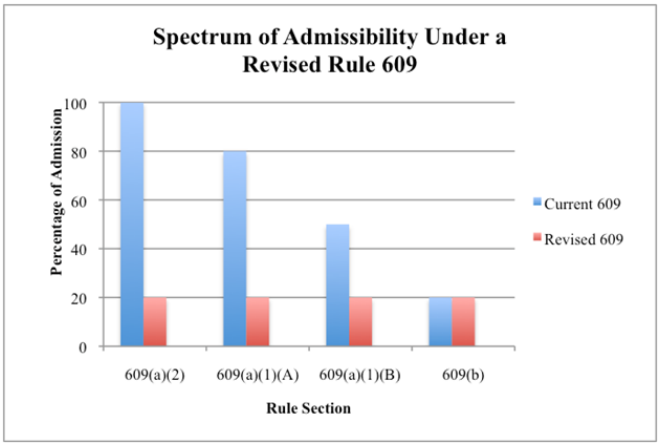
180. FED. R. EVID. 609(b).

181. FED. R. EVID. 609(d). As it is unlikely that juveniles will be aware of or influenced by *Griffin*'s protections and the resulting pressure in its absence, the rationale behind the amendment of Rule 609 in an adverse-comment regime does not support a revision of section 609(d) governing juvenile adjudications. This Note thus suggests maintaining the current standard for admissibility governing Rule 609(d).

182. A non-defendant witness testifying under 609(a)(1)(A) will not face the same pressure as a testifying criminal defendant. Thus, the current standard governing the rule is sufficient for the purposes of ameliorating the danger of the defendant's paradox.

183. *See supra* Section I.A.

Figure 2[184]



As more defendants in a *Griffin*-less world will be looking to testify and will thus be seeking refuge in the bounds of Rule 609 (if worried about the jury's discovery of prior convictions), the standard must be heightened to meet the need for fair extraction of defendant testimony. This "Reverse 403" standard more effectively addresses the normative concerns of an adverse-inference regime by removing the conviction's "permissible or impermissible use" determination from the purview of the jury. Under this new standard, a past conviction is "admissible only if . . . its probative value . . . substantially outweighs its prejudicial effect."[185] Admissibility under this standard therefore requires some extenuating factor of extreme probativeness that surmounts the general assumption against admission. While threat of impermissible use remains a factor of considerable prejudice,[186] the probative value of admitting a defendant's past crime for purposes of impeachment remains, at best, minimal. Because a jury is well aware that a defendant has incentive to lie,[187] prosecutors may impeach a defendant based not on her prior conviction but rather solely on her self-

184. Figure 2 does not include a proposed standard for Federal Rule of Evidence 609(d) as this Note does not advocate for a change in the standard of admissibility of convictions under this rule. *See supra* text accompanying note 181. Figure 2 does, however, include a change in likelihood of admissibility of a past conviction under Rule 609(a)(1)(A) because, as noted above, Congress will likely revise its standard when revisiting Rule 609 in its entirety. *See supra* text accompanying note 178.

185. FED. R. EVID. 609(b).

186. *See supra* text accompanying note 148.

187. *See supra* text accompanying note 172.

interest or bias under Federal Rule of Evidence 613.[188] Given these other indicators of veracity, a defendant's conviction becomes duplicative, thus discounting the probative value of the prior conviction and likely rendering it inadmissible under Rule 609's new heightened bar. The Reverse 403 balancing test would decrease the frequency of admission of a past conviction, encouraging defendant testimony and substantially reducing its cost.[189]

Judges using this heightened standard will have a greater ability to limit the strength of improper influence by controlling what information jurors use for Rule 609 impeachment evidence. If and only if the prosecution can demonstrate this heightened need for the admission of the past crime should the defendant be forced to decide between impeachment and threat of adverse comment—subject still to the balancing test posited in Section III.B.

D. The Normative Impact of Removing the Griffin *Roadblock*

Drastically limiting the admission of prior-conviction evidence in a post-*Griffin* system will serve to encourage defendant testimony, which will ultimately better address certain normative evaluations in the context of the criminal trial process, including verdict efficacy, perceptions of fairness and legitimacy, and transparency.[190]

Abandoning *Griffin*, inviting adverse comment, and bolstering Rule 609 provide the jury access to additional pertinent information to more effectively render an accurate verdict. The Fifth Amendment,[191] the Federal Rules of Evidence,[192] and the criminal trial process itself[193] are all grounded in the policy of ensuring verdict efficacy, a notion alluded to by the original *Griffin* decision.[194] But this has proven a fruitless venture, for the current adverse-comment prohibition

188. *See* FED. R. EVID. 613 (governing admission of "extrinsic evidence of a witness's prior inconsistent statement"); *see also* Sampsell-Jones, *supra* note 73, at 1367.

189. *See* Sampsell-Jones, *supra* note 73, at 1369.

190. *See* Griffin, *supra* note 32, at 956 ("[T]he right to silence operates aggressively in opposition to the search for truth.").

191. *See* Slobogin, *supra* note 155, at 713 (noting that the Fifth Amendment protection stems from desire to "enhance the dignity of the process as from the goal of assuring verdict accuracy").

192. *See supra* text accompanying note 164.

193. *See, e.g.*, Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965) ("The goal of a criminal trial is the disposition of the charge in accordance with the truth.").

194. *See* Griffin v. California, 380 U.S. 609, 622 (1965) (Stewart, J., dissenting):

> [N]o one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence and to shape a legal process designed to ascertain the truth.

contributes to wrongful convictions and excessive punishment.[195] What in fact fosters this desired efficacy is enhanced defendant visibility, which allows the fact finder access to the single most important source of information about the events in question. A defendant who is less fearful that a jury will use impermissible cognitive biases and propensity-based assumptions will be more inclined to take the stand. This increased access to additional information will help the jury reach an accurate result, ultimately helping to eliminate both wrongful convictions and acquittals.[196]

Additionally, a criminal proceeding free from *Griffin*'s restrictions will improve perceptions of fairness and legitimacy by increasing a defendant's participation in the adjudicatory process. The current legal system's shield from adverse comment and the Fifth Amendment's broad protections dissuade many criminal defendants from testifying, for the invocation of their right to silence is perceived as a haven. This decision to not participate in their defense creates negative perceptions of legitimacy and fairness.[197] A system proceeding without *Griffin*'s limitations will remove some of these safe harbors, thus encouraging defendant testimony and positively influencing perceptions of verdict legitimacy.[198]

The removal of the *Griffin* roadblock will also have the added benefit of increasing adjudicatory transparency. Under the *Griffin* doctrine, a defendant assumes the Fifth Amendment and accompanying limiting instructions will protect her against a jury's impermissible propensity-based deductions.[199] However, this is a foolish assumption, for it is apparent that juries will condemn silence despite these cautionary measures.[200] If the prosecution is therefore allowed to comment on a defendant's silence—essentially sanctioning the inferences a jury is already making naturally—a defendant will more accurately assess the danger she faces at trial and will be more likely to make an informed decision as to whether silence is actually her best option. Abolishing *Griffin*'s blanket prohibition on adverse comment

195. *See generally* Slobogin, *supra* note 155.

196. *See* Sampsell-Jones, *supra* note 73, at 1331.

197. *Id.* at 1334 ("For a criminal defendant, 'a participatory opportunity may also be psychologically important' simply 'to have played a part in' the process that decides his fate. . . . [C]riminal defendants view the process as more legitimate if they have the opportunity to tell their side of the story.") (citations omitted).

198. *Id.* at 1352 ("Adverse inferences would create an additional disincentive for exercising the right to silence, but that would simply mean that more defendants would exercise the right to testify, which is also autonomy-enhancing.").

199. *See supra* Section II.C.

200. *See supra* Section I.C.

will thus serve to eliminate a defendant's false sense of security in relying on procedural protections from a jury's psychological biases,[201] resulting in a more just determination.

CONCLUSION

Griffin has lost its bite; a doctrine that was intended to be a defendant's best friend has become an impediment to her best interests. While the principles supporting *Griffin* still hold water, a replacement regime must better address the normative underpinning of the original doctrine.

In lieu of further defining the contours of adverse comment under *Griffin*, the criminal adjudicatory system should abandon *Griffin* entirely, adopting instead both a mechanism for controlled commentary and a substantive overhaul of Rule 609. Allowing for controlled adverse comment and adopting the aforementioned revision of the Federal Rules of Evidence will eliminate the procedural and psychological barriers preventing many defendants from taking the stand and, once they do, will dramatically reduce the cost of testimony. Specifically, removing *Griffin* and bolstering criminal procedural safeguards will encourage verdict efficacy and improve perceptions of fairness and legitimacy by ensuring that the only evidence juries take into the deliberation room is that which is relevant to and probative of guilt.

Similarly, these changes will promote transparency by allowing a defendant to more accurately assess the danger she faces at trial, thereby enabling her to make a more informed decision as to whether she wishes to take the stand. Adopted in tandem, these changes will serve to more faithfully defend the rights that *Griffin* and the Federal Rules of Evidence aim—and currently fail—to protect.

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201. *See supra* Section II.C.

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