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Nathan B. Hall

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NOTES

I Don't Believe That Answers Our Question: The Story of *White v. Woodall* and How the Supreme Court's Silence Is Adversely Affecting the Fifth Amendment Privilege

I. Introduction

Have you or someone you know ever been accused of “hiding the ball?” A common occurrence in Constitutional Law classes, hiding the ball happens when you ask a deceptively obvious question—knowing that confusion will inevitably ensue—only to field the subsequent queries in the most coy manner possible. Take this example:

PROFESSOR: The Fifth Amendment provides us a right to remain silent, right?

CLASS: (*Confidently nod heads in affirmation.*)

PROFESSOR: Are you sure? Read it again. . . . Now, raise your hand if you think the Fifth Amendment confers a right to remain silent.

CLASS: (*About half timidly raise their hands while scanning the room for reassurance.*)

PROFESSOR: No. The Fifth Amendment says that no person in a criminal case shall be compelled to be a witness against himself; it says nothing about a right to remain silent. (*Pauses, basking in the puzzled faces and waiting for the first one to speak.*)

STUDENT: Then why do the police say that I have the right to remain silent? Isn't it the Fifth Amendment that requires them to say that before they can ask me questions?

PROFESSOR: Perhaps; perhaps not.

With this rite of passage now concluded, students come away having learned something about textual interpretation and with a better understanding of what Chief Justice Marshall meant when he reminded us “it is a constitution we are expounding.”¹ But what is gained when the

1. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted).

Supreme Court puts us through this exercise? More importantly, what is lost?

The Supreme Court's recent decision in *White v. Woodall*² could certainly qualify as hiding the ball. The Court examined, through the habeas lens, the question of whether the Fifth Amendment requires a judge to give a no-adverse-inference instruction at the penalty phase of a capital murder trial where the defendant has already pleaded guilty to both the capital offense and the aggravating circumstances. This question seemed to have been answered some time ago: the Supreme Court held in *Carter v. Kentucky* that the Fifth Amendment requires trial courts to give such an instruction at the guilt phase,³ and in *Estelle v. Smith*, the Court explained that the guilt and penalty phases of a capital trial are indistinguishable with respect to Fifth Amendment protections.⁴ Then, just in case there was any confusion, the Court held in *Mitchell v. United States*⁵ that a defendant retains his Fifth Amendment privilege through sentencing—even after a guilty plea—and that the “normal rule,”⁶ which prohibits negative inferences from a defendant's failure to testify, applies to the sentencing phase *without exception*.⁷ Now, raise your hand if you think that judges must grant requests for *Carter* instructions at a capital sentencing hearing.⁸

The Supreme Court was not so sure. Two sentences in *Mitchell* indicate that there *may* be an exception to the “normal” *Griffin* rule when it comes to how silence bears on the determination of mitigating factors under the federal sentencing guidelines.⁹ The Court did not answer that question then and has not for fifteen years. This silence provides *Griffin*'s detractors just enough room for fair-minded dispute as to whether the Fifth Amendment

2. 134 S. Ct. 1697 (2014).

3. 450 U.S. 288, 305 (1981).

4. 451 U.S. 454, 462-63 (1981).

5. 526 U.S. 314 (1999).

6. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (establishing the foundation for the no-adverse-inference protection of the Fifth Amendment by explaining that a court or prosecutor may not comment on an accused's silence or indicate that it is evidence of guilt).

7. *See Mitchell*, 526 U.S. at 325, 327-28 (“The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.”) (internal citation omitted).

8. *See generally* Anthony J. Phelps, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing: Mitchell v. United States Settles the Conflict*, 38 BRANDEIS L.J. 107 (1999).

9. *Mitchell*, 526 U.S. at 330.

requires a “blanket” no-adverse-inference instruction at sentencing, and thus led the Supreme Court to deny habeas relief in *White v. Woodall*.¹⁰ But what about moving forward? Is there an exception for mitigating factors under the federal sentencing guidelines? Under state sentencing schemes? Is, in fact, the next logical step from *Carter*, *Estelle*, and *Mitchell* to require blanket no-adverse-inference instructions at the sentencing phase? The Supreme Court’s answer: “[p]erhaps . . . perhaps not.”¹¹

The following is an explanation of the Supreme Court’s habeas decision in *White v. Woodall*, including an overview of the Court’s Fifth Amendment jurisprudence leading up to this case and a map of *Woodall*’s path to the Supreme Court. This will illustrate that the confusion leading to the *Woodall* decision is not over the Court’s clear pronouncements in *Carter*, *Estelle*, or even *Mitchell*, but is instead a self-inflicted confusion arising out of the festering dispute over *Griffin* and its constitutional underpinnings. This Note then argues that *Griffin* and the no-adverse-inference doctrine are built on sound constitutional footing, and therefore, concludes that the Court’s reticence to extend the doctrine, as illustrated by *Woodall*, is unwarranted.

II. The Development of the No-Adverse-Inference Doctrine Leading Up to *White v. Woodall*

The Court began to show signs of a gestating no-adverse-inference doctrine as early as the 1940’s,¹² but the doctrine’s true birth came in 1965 with *Griffin v. California*.¹³ *Griffin* was a capital murder case in which the defendant chose not to testify during the guilt phase of his trial.¹⁴ Both the trial judge and the prosecution commented on the defendant’s failure to take the stand,¹⁵ and, because the federal statutes on which the Court had

10. *White v. Woodall*, 134 S. Ct. 1697, 1704-05 (2014).

11. *Id.* at 1707.

12. *See* *Adamson v. California*, 332 U.S. 46 (1947); *infra* note 205 (discussing *Chaffee Co. v. United States*, 85 U.S. (18 Wall.) 516, 542-46 (1873)); *see also* *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment applied to the states through the due process clause of the Fourteenth Amendment).

13. 380 U.S. 609 (1965).

14. *Id.* at 609-11.

15. *Id.* at 610-11.

[The trial judge] told the jury:

“As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate

previously relied to resolve such issues did not govern adverse comment in California state court,¹⁶ the Justices were forced to consider whether the Constitution itself bars such treatment.¹⁷ In a six-to-two opinion, the Court held that it does, stating that the Fifth Amendment “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”¹⁸ Justice Stewart authored the dissent, arguing that the degree of compulsion brought about by such adverse comments did not, in his mind, rise to a level the Framers would have found constitutionally significant.¹⁹ Nevertheless, Justice Stewart acknowledged that the real danger to a defendant in this situation comes from the jury, particularly when no judge has instructed them on how to properly handle the accused’s silence.²⁰

Sixteen years later, Justice Stewart removed that danger with *Carter v. Kentucky*.²¹ The *Carter* court considered whether a trial judge is required, upon defendant’s request, to instruct the jury of the defendant’s constitutional right not to testify, and that his choice to exercise this right cannot be used against him.²² The Court, in an eight-to-one decision,²³ held that the trial court’s duty extends beyond merely restraining its own comment on silence and requires judges to affirmatively protect the

the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.”

Id. at 610 (footnote omitted).

The prosecutor made much of the failure of petitioner to testify:

.....
 “These things he has not seen fit to take the stand and deny or explain.
 “And in the whole world, if anybody would know, this defendant would know.
 “Essie Mae is dead, she can’t tell you her side of the story. The defendant won’t.”

Id. at 610-11.

16. See *Bruno v. United States*, 308 U.S. 287, 292-94 (1939); *Wilson v. United States*, 149 U.S. 60, 65-68 (1893).

17. *Griffin*, 380 U.S. at 612.

18. *Id.* at 615.

19. *Id.* at 620-21.

20. *Id.* at 623.

21. 450 U.S. 288, 305 (1981).

22. *Id.* at 289-90.

23. Justice Rehnquist was the sole dissenter. *Id.* at 307. However, Justice Powell wrote a separate concurrence explaining that his agreement with the majority was more a function of stare decisis that it was of his own constitutional interpretation. *Id.* at 305.

defendant's silence with a no-adverse-inference instruction.²⁴ Justice Stewart adopted some of his own language from the *Griffin* dissent to explain that the penalty for silence can be just as severe when it derives from a jury being "left to roam at large with only its untutored instincts to guide it" towards the natural, yet impermissible, interpretations of silence.²⁵ As such, the Court indicated that judges have a "constitutional obligation" to use the "powerful tool" that is the jury instruction to protect the constitutional privilege from the speculations of those who wrongly view the "privilege as a shelter for wrongdoers."²⁶

Two months later, the Court decided *Estelle v. Smith*.²⁷ *Estelle*'s development is not so much associated with the no-adverse-inference doctrine as it is with the Fifth Amendment generally, but it is of immeasurable importance to *White v. Woodall*. The issue in *Estelle* concerned the State's use of the defendant's testimony during a court-ordered psychiatric evaluation.²⁸ Before the exam, the defendant was not informed of the availability of his constitutional rights to remain silent and to be assisted by counsel, nor was he advised of his *Miranda*-right to terminate the interview.²⁹ Despite the State's failure to warn the defendant or disclose the doctor as a potential witness, the State called its doctor to testify about the evaluation during the penalty phase of defendant's capital-murder trial.³⁰ All nine Supreme Court Justices agreed that the State's conduct violated the defendant's Sixth Amendment right to counsel, but six of them went further to explain that it also violated his Fifth Amendment rights.³¹ The Court held that the use of unwarned statements made during custodial interview is just as violative at sentencing as it is at the guilt phase and explained that the "essence" of the Fifth Amendment privilege requires the State to both convict *and punish* "by the independent labor of its officers, not by the simple, cruel expedient of forcing [evidence] from [the defendant's] own lips."³² The Court solidified the Fifth Amendment's role at sentencing by proclaiming, "We can discern no basis to distinguish

24. *Id.* at 300, 303.

25. *Id.* at 301.

26. *Id.* at 302-03.

27. 451 U.S. 454 (1981).

28. *Id.* at 456-57.

29. *Id.* at 461.

30. *Id.* at 458-59.

31. *Id.* at 473; *id.* at 474 (Stewart, J., joined by Powell, J., concurring); *id.* at 475 (Rehnquist, J., concurring).

32. *Id.* at 462 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)).

between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."³³

So by 1981, the fate of the no-adverse-inference doctrine seemed set. *Griffin* held that comment on silence improperly compels testimony. *Carter* held that, to ensure the full privilege provided by the Fifth Amendment, judges must instruct juries not to use the defendant's silence as evidence against him. And *Estelle* promised that whatever the privilege affords at trial, it so affords at capital sentencing. One can only wonder what the result would have been had Woodall asked for review during the fall term of 1981. *Woodall*, however, did not appear on the Court's radar until 2002,³⁴ and in the meantime the Court had to wrestle with *Mitchell v. United States*.³⁵ At this point, if you believe the no-adverse-inference doctrine was born in *Griffin*, then consider *Mitchell* its awkward and unsure adolescence.

Factually speaking, *Mitchell* looked like a great opportunity for the no-adverse-inference doctrine to fully develop. *Mitchell*, unlike *Griffin* and *Estelle*, was not a capital murder case but rather a meager drug bust.³⁶ The defendant, Mitchell, pleaded guilty to the distribution and conspiracy charges, but did not admit how much cocaine could be attributed to her in the conspiracy.³⁷ At her sentencing hearing, the Government called three co-conspirators, all of whom had "agreed to cooperate," and one of whom—the only one that actually testified on how much cocaine Mitchell had sold—conceded that "he had not seen [the defendant] on a regular basis during the relevant period."³⁸ As defense counsel argued, the only seemingly reliable evidence presented on the amount issue came from three transactions monitored during a sting operation.³⁹ Those sales, however, only totaled two ounces, and the Government needed to show that Mitchell had at least five *kilograms* of cocaine in order to qualify her for the mandatory, ten-year sentence.⁴⁰ Mitchell did not put on any evidence of her own, nor did she testify to rebut the Government's evidence.⁴¹ The trial

33. *Id.* at 462-63.

34. Woodall actually petitioned for direct review from the Kentucky Supreme Court in 2002, twelve years before the Court decided his habeas petition. *Woodall v. Kentucky*, 537 U.S. 835 (2002).

35. 526 U.S. 314 (1999).

36. *Id.* at 317.

37. *Id.*

38. *Id.* at 318.

39. *Id.* at 318-19.

40. *Id.* at 317.

41. *Id.* at 319.

judge explicitly informed Mitchell that she waived any Fifth Amendment privilege by pleading guilty, that he held her failure to testify against her, and that her failure to testify was one of the things that persuaded him to find the co-conspirators' testimony credible, and thus qualify her for the ten-year mandatory minimum.⁴²

Mitchell presented two issues for the Court: (1) whether pleading guilty simultaneously waives a defendant's Fifth Amendment privilege for the purposes of sentencing, and (2) whether the trial court's adverse use of defendant's silence at sentencing violated her Fifth Amendment rights.⁴³ All nine Justices agreed that the Fifth Amendment privilege remains available at sentencing even after a guilty plea,⁴⁴ but only five joined to extend the principles of *Griffin* and *Carter* to the sentencing phase.⁴⁵

Though five is surely enough to set binding precedent, the trouble is figuring out what exactly that precedent is. The Court began with the following: "The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted," and "[w]e decline to adopt an exception for the sentencing phase of a criminal case"⁴⁶ If the Court had stopped there, it would have announced a clear and bright rule, fully in line with the decisions of both *Griffin* and *Estelle*. But the Court did not stop there. Instead, it qualified its holding to reach only those inferences that involve "factual determinations respecting the circumstances and details of the crime."⁴⁷ Thus, instead of simply extending *Griffin* in full, the Court just acknowledges that *Griffin* applies to sentencing in *some* degree—a degree sufficient to protect against the inferences in *Mitchell*—but a degree undefined nonetheless. The Court further clarified (or confused, depending on your point of view) that the question left for future consideration is whether courts may use silence to determine lack of remorse or acceptance of responsibility "for the purposes of downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines."⁴⁸ Whether this *potential* exception *might* apply to similar state sentencing schemes or is limited to non-capital cases is not explained.⁴⁹

42. *Id.*

43. *See id.* at 316-17.

44. *Id.* at 321; *see also id.* at 331 ("I agree with the Court that Mitchell had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case.") (Scalia, J., dissenting).

45. *Id.* at 328.

46. *Id.* at 327-28.

47. *Id.* at 328.

48. *Id.* at 330.

49. *See id.* at 340 (Scalia, J., dissenting).

Make no mistake though, *Mitchell* did extend *Griffin* and the no-adverse-inference doctrine to at least part of the sentencing process, and it did so much to the dismay of Justices Scalia and Thomas.⁵⁰ Both had been outspoken in their distaste for *Griffin*,⁵¹ and both took the opportunity in *Mitchell* to criticize it. Justice Scalia comprehensively condemned *Griffin*, attacking its logic, its pedigree, and its drafting.⁵² At one point, he compared its rationale to a “breathhtaking act of sorcery” and concluded “*Griffin* was a wrong turn—which is not cause enough to overrule it, but is cause enough to resist its extension.”⁵³ Justice Thomas went so far as to admit that, given the appropriate case, he “would be willing to reconsider” both *Griffin* and *Carter*.⁵⁴

These dissents demonstrate that most of the Justices’ disagreement is over the root of the no-adverse-inference doctrine; but Justice Scalia also took the opportunity to criticize *Mitchell* itself and to forecast the ensuing confusion.⁵⁵ At one point, he described the image conjured by the majority’s opinion as the Court trying to smuggle its “facts of the offense” caveat with hushed tones and hidden lips.⁵⁶ He explained that the decision completely ignores past intimations of the Court, which denied any “principled distinction” between enhancing a sentence due to the presence of aggravating circumstances and refusing leniency for a lack of mitigating circumstances.⁵⁷ However, the real trouble in the majority’s distinction, he divined, is not in how it will affect section 3E1.1, but in how lower courts will differ on whether such a distinction exists in “all determinations of acceptance of responsibility, repentance, character, and future dangerousness, in both federal and state prosecutions.”⁵⁸ Justice Scalia then concluded with a second prophecy: limit *Griffin* or not, “[s]ooner or later the choice must be made.”⁵⁹

50. *See generally id.* at 331-43.

51. *See e.g.*, *Salinas v. Texas*, 133 S. Ct. 2174, 2184-85 (2013) (Thomas, J., concurring).

52. *Mitchell*, 526 U.S. at 332-36 (Scalia, J., dissenting).

53. *Id.* at 336.

54. *Id.* at 343.

55. *See id.* at 339-41.

56. *Id.* at 339. (“Today’s opinion states, in as inconspicuous a manner as possible at the very end of its analysis (one imagines that if the statement were delivered orally it would be spoken in a very low voice, and with the Court’s hand over its mouth), that its holding applies only to inferences drawn from silence ‘in determining the facts of the offense.’”).

57. *Id.* at 339 (quoting *Roberts v. United States*, 445 U.S. 552, 557 (1980)).

58. *Id.* at 340 (emphasis omitted).

59. *Id.* at 341.

III. Explanation of the Primary Case

A. *The Fifth Amendment in Kentucky State Court: Woodall v. Commonwealth of Kentucky*

The Court's opportunity to make that choice began with the death of a proverbial American sweetheart. On January 25, 1997, local police went searching for a sixteen-year-old honor student, cheerleader, musician, and swim star that never made it to her boyfriend's house for movie night.⁶⁰ When they found her, she was naked and floating lifelessly in a nearby lake.⁶¹ The child had been raped, and her throat had been slashed so violently that it completely severed her windpipe.⁶² Her last experience in life was that of drowning to death.⁶³

The police focused their investigation on Mr. Robert Keith Woodall.⁶⁴ They found his footprint at the scene, his fingerprints on the victim's car, the victim's DNA on his clothes, and his DNA in the young girl.⁶⁵ A Kentucky grand jury indicted Woodall for capital murder, capital kidnapping, and first-degree rape.⁶⁶ A week later, the Commonwealth announced its intention to seek the death penalty,⁶⁷ and Mr. Woodall spared them the cost of a trial. Woodall pleaded guilty to all counts, and the Commonwealth commenced its sentencing procedures.⁶⁸

Over the course of a week-long "jury sentencing trial," the prosecution called eleven witnesses to the defense's fourteen; Woodall did not take the stand.⁶⁹ In an attempt to enjoy the full constitutional protection afforded to a defendant's choice to remain silent at trial,⁷⁰ Woodall asked the trial judge

60. *Woodall v. Commonwealth*, 63 S.W.3d 104, 114 (Ky. 2001).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The defense also requested to *voir dire* the jury on their understanding of a defendant's right not to testify and the effects that such a choice should have on their decision. Brief for Respondent at 1, *White v. Woodall*, 134 S. Ct. 1697 (2014) (No. 12-794), 2013 WL 6040053, at *1. This request was also denied. *Id.*

70. *See Carter v. Kentucky*, 450 U.S. 288, 305 (1981); PATTERN CRIMINAL JURY INSTRUCTIONS § 7.02A (Comm. on Pattern Criminal Jury Instructions Dist. Judges Ass'n Sixth Circuit 2011) ("A defendant has an absolute right not to testify [*or present evidence*]. The fact that he did not testify [*or present any evidence*] cannot be considered by you in any way. Do not even discuss it in your deliberations.") (emphasis added).

to instruct the jury not to make any inference against him based on his refusal to testify.⁷¹ The specific instruction tendered read as follows: “A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way.”⁷²

The trial court, notwithstanding the fact that the prosecution never objected to its reading, refused to give the instruction.⁷³ The court did not find it “appropriate” to so instruct the jury when the defendant stood convicted of such “very serious crimes” and believed that denying the requested instruction “was not error where the guilt was overwhelming.”⁷⁴ In fact, given that Woodall had already pleaded guilty to both the aggravating circumstances (rape and kidnapping), the trial judge went so far as to question whether it was more efficient to just rule that Woodall was eligible for the death penalty as a matter of law—as opposed to submitting it to a jury, as is required by law.⁷⁵ Better judgment won out, and the court submitted both eligibility and selection to the jury.

71. *Woodall*, 63 S.W.3d at 115.

72. Joint App. at 31, *White v. Woodall*, 134 S. Ct. 1697 (2014) (No. 12-794), 2013 WL 5171881, at *31.

73. *Id.* at 35-36.

74. *Id.* (relying on *Commonwealth v. McIntosh*, 646 S.W.2d 43 (Ky. 1983), which held that refusing to give a requested *Carter*-instruction at trial is, of course, erroneous in light of *Carter* itself, but that such an error can be merely harmless when in the face of overwhelming evidence of guilt).

75. *Id.* at 20-22.

THE COURT: . . . The defendant has pled guilty to the aggravators. Of course, generally speaking in the sentencing stage, the proof of an aggravating circumstance beyond a reasonable doubt is submitted to the jury. Do each of you think that’s still a jury question?

MR. VICK [Prosecution]: . . . [W]hile it’s certainly admissible for this jury to let them know [that Woodall has pleaded guilty to the aggravators], I think they still have to go through and should be instructed on that.

MS. GIORDANO [Defense]: Well, it’s hard to believe, Judge, but Mr. Vick’s right. I think we agree upon the issue.

THE COURT: Okay. Well, I’m going to do it that way.

. . . .

THE COURT: I have a deep-seated fear about doing it that way, but I don’t know any way around it. Because juries do strange things, but anyway, it’s conceivable they could go out and find – failure to find beyond a reasonable doubt: aggravating circumstances, even though the defendant has admitted it, but I agree. I think that probably the safest measure would be to go ahead and present it like you would if it was a regular jury trial.

Id. (quoting Transcript of Evidence at 552-54, *Commonwealth v. Woodall*, No. 97-CR-00053 (Ky. Cir. Ct. July 13, 1998)).

Woodall's plea for a lesser selection rested upon his bizarre and broken childhood. Woodall was born with "lower intellectual functioning"⁷⁶ and socially debilitating bowel incontinence.⁷⁷ He was the son of an uninterested, teenage mother⁷⁸ and an absent, alcoholic father.⁷⁹ Between their indifference and his incontinence, the best of his time at home was spent surrounded by his own filth; the worst was marred by alleged sexual abuse.⁸⁰

The defense also offered Woodall's impaired mental capacity as mitigation but constantly fell short. When Woodall was seventeen, he registered a full-scale IQ of seventy-four, and an IQ range between sixty-nine and seventy-nine.⁸¹ He essentially had the mental faculties of a twelve-year-old.⁸² Kentucky statutes prohibit the execution of offenders with serious intellectual disabilities,⁸³ but Kentucky defines "serious intellectual disability" as having an IQ of seventy or below.⁸⁴ In other words, Woodall was handicapped enough to qualify for special-education programs⁸⁵ but

THE COURT: There's no question I'd give [the instruction] if we were talking about guilt or innocence. In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury . . . that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

Woodall v. Simpson, No. 5:06CV-P216-R, 2009 WL 464939, at *7 (W.D. Ky. Feb. 24, 2009) (quoting Transcript of Evidence, *supra*, at 1591-92).

76. Joint App., *supra* note 72, at 71.

77. Brief for Respondent, *supra* note 69, at 3; Joint App., *supra* note 72, at 71; Christian Nordqvist, *What Is Bowel Incontinence? What Is Fecal Incontinence? What Causes Bowel Incontinence?*, MED. NEWS TODAY (Sept. 12, 2014), <http://www.medicalnewstoday.com/articles.165583.php> ("Bowel incontinence, also known as fecal incontinence, is an inability to control bowel movements. The person's stools (feces) leak from the rectum uncontrollably. . . . [T]he sufferer's quality of life, emotional and mental health, as well as self-esteem can be affected.").

78. Brief for Respondent, *supra* note 69, at 3.

79. Joint App., *supra* note 72, at 73.

80. *Id.* at 71-72; Brief for Respondent, *supra* note 69, at 3-4.

81. *Id.* at 2.

82. *Id.*

83. KY. REV. STAT. ANN. § 532.140 (West 1990).

84. *Id.* § 532.130(2).

85. Brief for Respondent, *supra* note 69, at 2.

not handicapped enough for his execution to qualify as cruel and unusual.⁸⁶ Woodall was retested at trial; his IQ was still only seventy-eight.⁸⁷

In the end, none of what happened to Woodall outweighed what he did to that young girl. So on September 4, 1998, Robert Keith Woodall was sentenced to death.⁸⁸

Woodall's appellate journey began with a mandatory review by the Supreme Court of Kentucky.⁸⁹ Woodall alleged twenty-eight points of error, and the court chose to address the denied *Carter* instruction first.⁹⁰ In upholding the trial court's decision, the majority stressed that the Fifth Amendment only protects defendants from adverse inferences of guilt.⁹¹ First, the court reasoned that *Carter* was inapplicable because its protection was fashioned at the guilt phase—to prevent adverse inferences of guilt—which were unnecessary thanks to Woodall's guilty plea.⁹² Next, the court explained that, because *Estelle* dealt only with compelled testimony and did not specifically mention a defendant's choice not to testify, *Estelle* cannot be read to extend *Carter* to the penalty phase, regardless of whatever distinctions the Supreme Court could (or could not) discern at the time.⁹³ The court then disposed of *Mitchell* by noting that it only prohibits negative inferences of "guilt" regarding the aggravating facts of the crime left for determination at sentencing.⁹⁴ Therefore, as Woodall's plea left no question as to the aggravating circumstances surrounding his crime, *Mitchell*'s prohibition did not apply.⁹⁵ In sum, the court explained that rejecting the instruction violated neither the Kentucky nor the U.S. Constitution; but

86. See *Mills v. Commonwealth*, 170 S.W.3d 310, 384 (Ky. 2005) (explaining that the statutory bar was not available to a defendant that scored eighty-six and eighty-seven on pretrial IQ tests).

87. Brief for Respondent, *supra* note 69, at 3.

88. Joint App., *supra* note 72, at 79.

89. *Id.* at 80-81.

90. *Woodall v. Commonwealth*, 63 S.W.3d 104, 114-15 (Ky. 2001).

91. *Id.* at 115 ("The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. . . . The instruction contemplated by *Carter* could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.") (citations omitted).

92. *Id.*

93. *Id.*; see *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.")

94. *Woodall*, 63 S.W.3d at 115; *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

95. *Woodall*, 63 S.W.3d at 115.

even if it did, such an error would be harmless in light of the defendant's plea and the overwhelming evidence against him.⁹⁶

Justice Stumbo dissented, identifying the denied *Carter* instruction as her primary source of disagreement.⁹⁷ Justice Stumbo argued that the majority placed too much weight on the fact that Woodall pleaded guilty and incorrectly determined that “no negative inferences could [possibly] be drawn by the jury from [Woodall's] silence.”⁹⁸ She concluded that, although Woodall did not contest the aggravating circumstances, he did oppose the sought penalty of death and was, therefore, susceptible to an adverse inference.⁹⁹ Furthermore, she explained, the “plain language” of *Mitchell* demonstrates that the majority asked the wrong question—whether the defendant is guilty—as opposed to asking whether the defendant was conscripted into his own prosecution at the cost of his Fifth Amendment privilege.¹⁰⁰

B. Certiorari Denied, Habeas Review in the Lower Federal Courts:
Woodall v. Simpson

With his state remedies now exhausted, Woodall petitioned the Supreme Court to explain his constitutional rights directly. It declined the opportunity.¹⁰¹

Woodall then took his claim to the United States District Court for the Western District of Kentucky in search of the writ of habeas corpus. The district court found that habeas relief was warranted on two of Woodall's thirty points of error, the first of which was the refused no-adverse-inference instruction.¹⁰²

The district court did not read *Carter*, *Estelle*, and *Mitchell* all that different from the Commonwealth of Kentucky. It agreed that *Carter* requires judges to grant requests for no-adverse-inference instructions at the guilt phase, that *Estelle* extends Fifth Amendment rights through sentencing, and that *Mitchell* clarifies that Fifth Amendment rights are not extinguished with a guilty plea.¹⁰³ The district court, however, based its

96. *Id.*

97. *Id.* at 134 (Stumbo, J., dissenting).

98. *Id.*

99. *Id.* at 135.

100. *See id.* at 134-35.

101. Woodall v. Kentucky, 537 U.S. 835 (2002).

102. Woodall v. Simpson, No. 5:06CV-P216-R, 2009 WL 464939, at *1, *14 (W.D. Ky. Feb. 24, 2009), *rev'd sub nom.* White v. Woodall, 134 S. Ct. 1697 (2014).

103. *Id.* at *12.

finding on the theory that *Carter*, *Estelle*, and *Mitchell* must be read together, and that, when they are, the only reasonable conclusion is that the Fifth Amendment mandates granting requests for no-adverse-inference instructions during capital sentencing, even where the defendant pleaded guilty.¹⁰⁴ Therefore, the court found that the trial court's rejection of the *Carter* instruction was a violation of Woodall's constitutional rights.¹⁰⁵ The district court further disagreed with Kentucky and found that this violation was not only harmful,¹⁰⁶ but also worthy of habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁰⁷

The Sixth Circuit affirmed.¹⁰⁸ It agreed with the district court's interpretation of *Carter*, *Estelle*, and *Mitchell* and agreed that the only reasonable sum of their parts required the trial judge to grant Woodall's request for a no-adverse-inference instruction.¹⁰⁹ The court stressed that the heightened due process concerns of capital sentencing require scrupulous attention to constitutional guarantees and, thus, an affirmative protection of a defendant's choice not to testify.¹¹⁰

Judge Cook, playing the role of fair-minded dispute, dissented. "Reasonable though the majority's Fifth Amendment analysis may be," he admitted, Judge Cook reminded his colleagues that AEDPA "precludes [a federal court] from substituting [its] reasonable judgment for that of a state's highest court."¹¹¹ Rather, AEDPA permits habeas relief only if the state court *unreasonably* applied *clearly established* federal law.¹¹² Judge Cook then pointed out the intentionally unresolved—and thus

104. *Id.*

105. *Id.*

106. *Id.* at *14.

107. *Id.* at *12 ("This is not a new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*." (applying standard from the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (2012)). The AEDPA sets the requirements for federal courts to grant habeas relief when performing collateral review of state court judgments. Specifically, section (d) requires that a state judgment be "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" in order for a federal court to grant habeas relief. 28 U.S.C. § 2254(d). For more on this, see *infra* Section III.C. and Part IV.

108. *Woodall v. Simpson*, 685 F.3d 574, 581 (6th Cir. 2012), *rev'd sub nom.* *White v. Woodall*, 134 S. Ct. 1697 (2014).

109. *Id.* at 579.

110. *Id.* at 578-79 (citing *Estelle v. Smith*, 451 U.S. 454, 463 (1981)).

111. *Id.* at 586 (Cook, J. dissenting).

112. *Id.* at 583; 28 U.S.C. § 2254(d)(1).

undetermined—question in *Mitchell* regarding issues of remorse and other mitigating factors.¹¹³ Accordingly, he explained, it was reasonable to conclude that the only thing *Mitchell* established was that an instruction is required where facts of the crime are left to be determined at sentencing.¹¹⁴ But where, as in *Woodall*, there are no disputed facts and only issues of remorse and mitigation to consider, the Supreme Court has been silent.¹¹⁵ As such, he concluded, the Kentucky Court’s decision cannot be *contrary* to anything clearly established in *Mitchell*¹¹⁶ and, if it is not contrary, it is not *unreasonable*.¹¹⁷ Thus, in his opinion, the writ was not appropriate under AEDPA’s standard of review.¹¹⁸

C. Woodall at the U.S. Supreme Court: White v. Woodall

Finally, and almost eleven years after his initial petition for certiorari, Mr. Woodall’s case was before the Supreme Court.¹¹⁹ For Mr. Woodall, alas, the certified question on this trip was not whether his constitutional rights had been violated, but whether, in deciding that they were not, the Kentucky Supreme Court applied such an unreasonable understanding of U.S. Supreme Court precedent as to justify a writ of habeas corpus.¹²⁰ The Court voted six-to-three against Mr. Woodall and reversed the Sixth Circuit.¹²¹ Justice Scalia wrote the majority opinion, as the first of his *Mitchell* prophecies had come to fruition.¹²²

The Court’s opening words immediately reveal its view of Mr. Woodall’s case: “Respondent brutally raped, slashed with a box cutter, and drowned a 16-year-old high-school-student.” From there, the opinion explains that Mr. Woodall pleaded guilty and was sentenced to death, that the Kentucky Supreme Court affirmed the sentence, and that the current Court refused to review the sentence on direct appeal—as if to say that the Court found nothing wrong with Mr. Woodall’s punishment the first time

113. *Woodall*, 685 F.3d at 585 (Cook, J., dissenting).

114. *Id.* at 585-86.

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.* at 586.

119. *White v. Woodall*, 133 S. Ct. 2886 (2013).

120. *White v. Woodall*, 134 S. Ct. 1697, 1702-03 (2014).

121. *Id.* at 1707. The majority included the Chief Justice, and Justices Scalia, Kennedy, Thomas, Alito, and Kagan. Justices Ginsburg, Breyer, and Sotomayor joined in dissent.

122. *See Mitchell v. United States*, 526 U.S. 314, 340 (1999) (predicting a decision on *Mitchell*’s unresolved question only after a “decent period of confusion in the lower courts . . .”).

they saw it.¹²³ The opinion then admonishes the Sixth Circuit for upsetting Mr. Woodall's sentence, reprimanding its "disregard [for] the limitations of 28 U.S.C. § 2254(d)" and reminding it that, though some judges find AEDPA "too confining," they all "must obey" it.¹²⁴ In sum, "We reverse."¹²⁵

The majority's analysis mirrored that of the dissenting Judge Cook below. In essence, it couched its holding in AEDPA's "confining" standard of review.¹²⁶ The Court explained that a federal court may only grant habeas relief if the state court's application of federal law is "objectively unreasonable," which requires more than being "merely wrong" and more than even clear error.¹²⁷ A state court's decision must be "so lacking in justification" that its error is "beyond any possibility for fairminded disagreement."¹²⁸ For Mr. Woodall, this meant that his sentence could only be disturbed if, in reading *Carter, Estelle*, and *Mitchell* together, every fairminded jurist would agree that sentencing courts must instruct juries not to make *any* adverse inferences from silence—including inferences regarding issues of remorse and mitigation.¹²⁹ As Justice Scalia reminded, he disagreed.

Justice Scalia, like Judge Cook below, pointed to the caveat in *Mitchell* for the source of fair-minded uncertainty. *Mitchell*, he explained, "leaves open the possibility that some inferences *might* permissibly be drawn from a defendant's penalty-phase silence."¹³⁰ This "possibility" is important for two reasons. First, it meant that Mr. Woodall's proffered instruction (prohibiting any adverse inference) asked for more than *Mitchell*'s holding required (prohibiting only inferences pertaining to facts of the crime).¹³¹

123. See *White*, 134 S. Ct. at 1701.

124. *Id.*

125. *Id.*

126. *Id.* at 1702.

127. *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)). The Court also devotes a section of the opinion to explain that an "unreasonable refusal to extend" its precedent is not sufficient to award habeas relief. *Id.* at 1705-07. The merits of the unreasonable-refusal-to-extend rationale are beyond the scope of this Note. Suffice it to say that the Court disposed of this theory by reiterating that the AEDPA requires an unreasonable *application* of clearly *established* Supreme Court precedent. Therefore, the unreasonable-extension rationale is inconsistent with the AEDPA to the extent that it would upset state court decisions that refuse to *extend* Supreme Court precedent to scenarios where it did not yet clearly *apply*.

128. *Id.* at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011)).

129. See *id.* at 1702-04.

130. *Id.* at 1703 (emphasis added).

131. *Id.* at 1704.

Second, as there were no facts of Mr. Woodall's crime left to be determined at sentencing, it meant that any inferences that could be drawn from Mr. Woodall's silence arguably fit within the category that *Mitchell* does not specifically prohibit.¹³² Therefore, the majority concluded, the Kentucky Supreme Court's decision was—at the very least—not clearly contrary to Supreme Court precedent and thus not objectively unreasonable.¹³³

Justices Breyer, Ginsburg, and Sotomayor joined in dissent.¹³⁴ The basic disagreement within the Court was over what *Estelle* clearly established versus what *Mitchell* left unresolved (or upset).¹³⁵ Justice Breyer maintained that *Estelle* created a general rule that the Fifth Amendment applies equally to the guilt and penalty phases.¹³⁶ Therefore, the general rule required the same prohibition on adverse inferences and the same no-adverse-inference instruction at sentencing as *Griffin* and *Carter* ensured at the guilt phase.¹³⁷ *Mitchell*, he argued, only acknowledged *Estelle*'s general rule and declined to exempt the district judge's post-conviction inferences with regard to the facts of Ms. Mitchell's crime.¹³⁸ The reserved question in *Mitchell* was also whether to except a category of inferences from the general rule.¹³⁹ That (remorse) category, however, was not at issue in *Mitchell* and thus not necessarily reached.¹⁴⁰ In sum, because both the answered and unanswered questions in *Mitchell* involved whether to adopt an exception to *Estelle*'s general rule, the fact that the Court declined to adopt either exception left the “normal rule” undisturbed and “clearly established.”¹⁴¹

IV. Analysis

A. The Supreme Court's Habeas Decision

The second most unfortunate part of the Court's decision in *White v. Woodall* is that it is correct. The merits of the Court's habeas review scheme are beyond the scope of this paper; suffice it to say that AEDPA and the Court's application of it make habeas relief almost impossible to

132. *Id.*

133. *Id.* at 1702, 1707.

134. *Id.* at 1707.

135. *See id.* at 1708-09 (Breyer, J., dissenting).

136. *Id.* at 1707-08.

137. *See id.* at 1708-09.

138. *Id.* at 1709.

139. *Id.*

140. *Id.*

141. *Id.*

obtain,¹⁴² and the state of the Court's Fifth Amendment jurisprudence did not help Mr. Woodall. Essentially, if there is any confusion within the Court's precedent, there is room for fair-minded dispute as to the future application of that precedent. If there is room for disagreement, there are no grounds for habeas relief. Hence, when Justice Scalia expressed confusion over the majority's caveat in *Mitchell*, Mr. Woodall's habeas fate was virtually sealed. In the Justice's words:

Perhaps the logical next step from *Carter*, *Estelle*, and *Mitchell* would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case.¹⁴³

He was right.

The worst part of the *Woodall* decision is that it does nothing to resolve the confusion in the Court's jurisprudence or the debate over the future efficacy of the no-adverse-inference doctrine. The Court's repeated refusal to address the issues left over from *Mitchell* only perpetuates the confusion and doubt over the doctrine. The only solace from the *Woodall* Court was in its reminder that the "appropriate" time to consider the unresolved question in *Mitchell* would be on direct review.¹⁴⁴ Of course, the ironic piece of this silver lining is that the Court had the opportunity to perform such review eleven years prior, when Mr. Woodall first petitioned them. So, again, what is to become of the no-adverse-inference doctrine moving forward? This Note will attempt to address a portion of the debate, the part that asks whether the no-adverse-inference doctrine is constitutionally sound enough to extend. Simply put: it is.

B. The Unanswered Question: Is Griffin Sound Enough to Extend to Its Logical Conclusion?

As stated before, the heart of the Court's debate is not over the merits of an instruction at sentencing but over the constitutional soundness of *Griffin* and the no-adverse-inference doctrine itself.¹⁴⁵ Despite Justice Thomas's

142. See Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of The Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 SEATTLE U. L. REV. 55, 77 & n.158 (2013).

143. *White*, 134 S. Ct. at 1707.

144. *Id.*

145. See *Mitchell*, 526 U.S. at 331-36 (Scalia, J., dissenting).

offer to “reconsider” *Griffin* and *Carter*,¹⁴⁶ even Justice Scalia agreed that their “wide acceptance in the legal culture” provides sufficient reason not to overrule the no-adverse-inference doctrine as a whole.¹⁴⁷ If *Griffin* is safe, however, then their concessions to merely fossilize the doctrine where it stands are also unlikely.¹⁴⁸ This is because *Griffin*’s rule that prohibits adverse judicial comment on a defendant’s refusal to testify will likely not allow for an instruction that admonishes inferences with respect to facts of a crime but permits (indirectly encourages) them for issues of remorse.¹⁴⁹ The choice, therefore, is whether to extend *Griffin* or overrule *Mitchell*. This Note argues to extend *Griffin*, which, according to the dissents in *Mitchell*, requires a defense of *Griffin*’s jurisprudential underpinnings.

1. Compulsion Is the “Touchstone” of the Fifth Amendment Privilege and the Foundation of the No-Adverse-Inference Doctrine

Generally speaking, the Fifth Amendment prevents the State from *compelling* a person to testify against himself. Thus, it is important to understand how “*Griffin*-style” compulsion actually compels.

In order to do so, one must first define the word *compel*. According to the Merriam-Webster dictionary, *compel* means “to drive or urge forcefully or irresistibly.”¹⁵⁰ Alternatively, *compel* means “to cause to do or occur by overwhelming pressure.”¹⁵¹ Both definitions will apply in the Fifth Amendment context.

The classic case of Fifth Amendment compulsion involves the use of torture to produce adverse evidence. Here, a person is told that if he does not produce evidence against himself, he will be physically harmed until he breaks. At this point, realizing that anything he says will likely be used against him, the accused must choose between providing the State with potentially adverse evidence or bearing physical pain. If on threat of violence the accused speaks, all would agree that he has been compelled to testify against himself. If he first chooses not to speak, yet eventually

146. *See id.* at 343.

147. *Id.* at 331-32.

148. *See e.g., id.* at 336 (“To my mind, *Griffin* was a wrong turn—which is not cause enough to overrule it, but is cause enough to resist its extension.”); *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., dissenting) (“[T]he Court’s decision in *Griffin* ‘lacks foundation in the Constitution’s text, history, or logic’ and should not be extended. . . . Given *Griffin*’s indefensible foundation, I would not extend it to a defendant’s silence during a precustodial interview.”) (citation omitted).

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

150. *Compel*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2012).

151. *Id.*

succumbs to the physical stress, all would agree that he has been compelled to testify against himself. There is, however, a third option: the accused could muster up the will to outlast the torturer and never provide the State with adverse evidence. Though no one in his or her right mind would argue that the availability of this third option makes the scenario any less compelling, the option still exists. Therefore, this scenario best fits the definition of compel that requires “overwhelming pressure,” as the choice to speak is not technically irresistible; there is always that third option.

In the *Griffin* scenario, a person is told that he has a right not to speak, but, if he chooses not to speak, the State will infer from that silence that he is guilty. At this point, realizing that anything he says will likely be used against him (on cross, through impeachment, or through the admission of his criminal record), the accused must choose between providing the State with potentially adverse evidence or having it inferred from his silence. If the accused speaks, the State now has evidence to hold against him. If he chooses not to speak, the State infers his guilt and the State now has evidence to hold against him. There is no third option that avoids “speaking.” Therefore, this scenario best fits the definition of compel that requires irresistibility, as the choice to speak is literally irresistible; there is no other option.

The operative difference between the two scenarios is purely semantic. In the classic scenario, it is arguable whether the accused is urged irresistibly to produce adverse testimony, as it is possible for the strongest of will to resist speaking. The classic example, nevertheless, qualifies as compelling. In the *Griffin* scenario, it is arguable whether the accused is caused to produce adverse evidence by overwhelming pressure, as it is possible for the cleanest of slates to not be pressured by the thought of cross examination or impeachment via criminal record. Yet, this example also meets the definition of compel. Denotatively speaking, therefore, each scenario compels as forcefully as the other. It is this rationale that animates *Griffin*’s no-adverse-inference doctrine.¹⁵²

2. Textual Support for the No-Adverse-Inference Doctrine and Its Extension

The Fifth Amendment does not talk about silence, it does not talk about inferences, and it does not talk about warnings. Moreover, it does not

152. See 380 U.S. at 614 & n.5 (citing *Adamson v. California*, 332 U.S. 46, 124-25 (1947) (Murphy, J., dissenting)), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

reference torture, trilemmas,¹⁵³ or trials. It simply says, “No person shall be . . . compelled in any criminal case to be a witness against himself”¹⁵⁴ However, history explains that these words must prevent something more than just forcing a defendant to take the stand in his own prosecution.¹⁵⁵ Thus, if not the modernly obvious meaning, what is the purpose of the self-incrimination clause? Its placement, punctuation, and ambiguity explain that, at its core, the self-incrimination clause is a limitation on the State’s power to convict its citizens, a covenant to ensure an accusatorial style of criminal justice, and a promise that *by no means* shall a person’s lips be forced to betray him.

The placement of the self-incrimination clause within the text of the Fifth Amendment, as opposed to the Sixth, speaks volumes as to its purpose. Notice the other provisions of the Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.¹⁵⁶

The Fifth Amendment, then, is written in terms of negative checks on the Government’s traditional authority; whereas the Sixth Amendment speaks in terms of positive rights to be enjoyed by the criminally accused.¹⁵⁷ For

153. The trilemma, or cruel trilemma, refers to an inquisitorial scheme whereby an accused was brought to official examination and given the option between self-incrimination (admit), perjury (deny), or contempt (stand silent). *See generally* Andrew J. M. Bentz, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 909-10 (2012).

154. U.S. CONST. amend. V.

155. *See* *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961) (explaining that criminal defendants were categorically barred from testifying at trial until approximately 1878); *see also infra* Section IV.B.3.

156. U.S. CONST. amend. V.

157. Compare with U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

example, the Fifth's text does not absolutely protect private property from Government seizure; it limits the power to seize private property by requiring due process, just compensation, and public usage. Similarly, it does not prevent the Government from accusing, convicting, or punishing its citizens; it limits the Government to one bite at the apple, procured through formal accusation, and performed under proper procedure. Furthermore, the Fifth Amendment applies to "person[s]" generally, and "person[s] . . . in any criminal case"¹⁵⁸ where the self-incrimination clause is concerned. In contrast, the Sixth Amendment applies only to "the accused" in "criminal prosecutions."¹⁵⁹ Therefore, the self-incrimination clause's placement in the Fifth, as opposed to the Sixth Amendment, demonstrates that the clause was designed to be a general limitation on the State's ability to obtain testimonial evidence against its citizens and that it applies to all persons, not just the accused, at every point in a criminal case.¹⁶⁰

The conjunction of the due process and self-incrimination clauses further explains their meaning. Notice that all of the other clauses in the Fifth Amendment are separated via semicolon.¹⁶¹ But the due process clause and the self-incrimination clause are conjoined via comma. Together they read, "[N]or shall [a person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."¹⁶² This purposeful punctuation shows that these clauses are not to be read separately.¹⁶³ Together they form a constitutional

process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.").

158. U.S. CONST. amend. V.

159. U.S. CONST. amend. VI.

160. See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 423 (1968) (explaining that Madison's placement of a self-incrimination clause outside of a grouping of procedural trial rights for the criminally accused was unique to the Federal Constitution). The most widely imitated enumeration model was from Madison's home state of Virginia. Its Declaration of Rights in 1776 attached a self-incrimination clause to rights more akin to those in the Sixth Amendment. *Id.*; see also *id.* at 405-06.

161. See *The Charters of Freedom: Bill of Rights*, NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited Nov. 16, 2015) (depicting the punctuation of the enrolled original of the Joint Resolution of Congress proposing the Bill of Rights).

162. U.S. CONST. amend. V.

163. Compare with LEVY, *supra* note 160, at 405-06 (stating that George Mason's self-incrimination clause in section 8 of the Virginia Declaration of Rights is separate from its subsequent due process clause).

commitment to the American-accusatorial concepts of criminal justice: a panel of our peers to check the urges of inquisitorial justice, a state-borne burden of proof, a presumption of innocence, and a prohibition on forcing persons to be tools of their own demise.¹⁶⁴

Finally, and maybe most importantly, the unique phrasing of Madison's self-incrimination clause demonstrates that it was intended to be expounded broadly, broader than merely prohibiting judicial torture—as “broad as the mischief against which it seeks to guard.”¹⁶⁵ It is undeniable that the self-incrimination clause springs from the common law maxim, *nemo tenetur seipsum prodere*¹⁶⁶ (no one is bound to betray himself). Some argue that this axiomatic concept of accusatorial justice is confined to its pre-colonial context of compulsory oaths and torturous racks.¹⁶⁷ Regardless, however, of what the framers may have experienced or read about the common-law privilege, the words they used to constitutionalize it are not couched in terms of torture or, for that matter, any specific means of compulsion.¹⁶⁸

164. See Eben Moglen, *The Privilege in British North-America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 109, 138 (1997). Moglen describes the self-incrimination clause as a protection of the right to jury trial in that it collected many of the inconsistent rules under the *nemo tenetur* heading and elevated their sum to a fundamental right capable of preventing the government from “instituting inquisitions that would trump the community’s right to find the facts and nullify the law.”

165. *Estelle v. Smith*, 451 U.S. 454, 467 (1981); LEVY, *supra* note 160, at 424 (“Madison, going beyond the recommendations of the states and the constitution of his own state, phrased his own proposal to make it coextensive with the broadest practice.”).

166. Also seen as *nemo tenetur seipsum accusare* (no one is bound to accuse himself).

167. Compare LEVY, *supra* note 160, at 430-31 (“To [the Framers] the statement of a bare principle was sufficient, and they were content to put it spaciouly, if somewhat ambiguously, in order to allow for its expansion as the need might arise. . . . The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception.”) (internal quotation marks omitted), with *Mitchell v. United States*, 526 U.S. 314, 332-33, 335 (1999) (Scalia, J., dissenting) (“The longstanding common-law principle, *nemo tenetur seipsum prodere*, was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony. . . . 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.”).

168. Cf. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 233 (1963) (Brennan, J., concurring) (explaining that the Establishment Clause certainly prohibits the establishment of an official church, but is in no way limited to only that application by its text. “If the framers of the Amendment meant to prohibit Congress merely from the establishment of a ‘church,’ one may properly wonder why they didn’t so state.”) (internal quotation marks omitted).

Madison's clause is instead written in general terms, purposely lending itself to judicial expounding.¹⁶⁹ Moreover, the clause does not speak merely in terms of incrimination. "The 'right against self-incrimination' is a shorthand gloss of modern origin that implies a restriction not in the constitutional clause."¹⁷⁰ The right not to bear witness against oneself in a criminal case implies much more than simply forced confession or accusation: it includes being forced to supply the government with *any* adverse testimony. Therefore, the text of the amendment elevates *nemo tenetur* out of the contexts of torture and trilemma and protects against all creative schemes that force a man to choose between proving his innocence and bearing punishment for silence;¹⁷¹ this includes the adverse inferences highlighted and extinguished in *Griffin*.

Griffin and its logical extensions are simply the modern means to further the textual commitment to American-accusatorial principles. First, the adverse-inference doctrine fits within the scope of the text because criminal trials and sentencing are unquestionably part of a criminal case. Second, *Griffin*'s rationale fosters the due process commitment of the privilege because it requires the State to not only prove beyond a reasonable doubt that the defendant is guilty and eligible for penalty, but also requires it to shoulder the burden of proving that death or another penalty is, in fact, the proper selection. In this regard, the doctrine not only furthers the ideal of a state-borne burden, but also reinforces the prohibition on conscripting the defendant to be a tool in his own execution. Third, it is a proper application of the broad reach of the privilege. In 1789, Pennsylvania Senator William Maclay wrote that compulsory disclosure from defendants at trial "[is] an attempt to exercise a tyranny . . . over the mind. The conscience was to be put on the rack," an extortion he thought every bit as tyrannical as physical

169. See LEVY, *supra* note 160, at 422 ("[Madison] argued that his amendments would raise a standard of conduct for government to follow and provide a basis for judicial review on behalf of civil liberties: 'If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . .'" (citation omitted)).

170. *Id.* at 427.

171. Moglen, *supra* note 164, at 138 (explaining that the constitutionalization of the self-incrimination privilege separated the principles of *nemo tenetur* from its context). It is also worth noting that Thomas Jefferson had attempted to limit Virginia's adoption of *nemo tenetur* to a prohibition on judicial torture. LEVY, *supra* note 160, at 408, 511 n.6. This evidences the fact that Madison knowingly rejected this limited concept of the privilege when he wrote the Fifth Amendment.

torture.¹⁷² The choice between (rock) subjecting yourself to the crucible of cross-examination and (hard place) standing mute—only to have your “protected” silence offered as a tacit confession of guilt or apathy—is the same conscience-racking dilemma criticized by Maclay and the same sought to be prevented under the Madisonian-adaptation of *nemo tenetur*. The fact that death looms over the proceedings only twists that psychological rack further.

3. Historical Support for the No-Adverse-Inference Doctrine and Its Extension

While the Framers were sure that the self-incrimination clause secured a fundamental right,¹⁷³ the effect its broad proclamation had on early-American criminal procedure is less obvious. The new America still saw its fair share of “inquisitorial” justice, most of which could be attributed to the stresses of revolutionary war.¹⁷⁴ But even after the war subsided, there seems to be little evidence that the newly minted privilege affected any immediate change in the American criminal justice system.¹⁷⁵ This should come as no surprise. The Bill of Rights was not supposed to change anything; it was supposed to sustain the fragile, if not crumbling, status quo offered by the Constitution.¹⁷⁶ The Framers proposed the Bill of Rights as a conciliatory promise that the new and scary supreme general government was not, nor ever could be, out to take our liberty.¹⁷⁷ Moreover, the Fifth Amendment privilege had very little opportunity to impact anything, as the

172. WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY: UNITED STATES SENATOR FROM PENNSYLVANIA, 1789-1791, at 93 (entry for June 30, 1789) (Edgar S. Maclay ed., 1890).

173. For more the early history of the privilege against self-incrimination, see Bentz, *supra* note 153, at 908-21.

174. LEVY, *supra* note 160, at 412-14.

175. *Id.* at 409; Moglen, *supra* note 164, at 139.

176. See George C. Thomas, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1461-62 (2005) (“What modern scholars often fail to take into account is that in 1789 the Republic was in danger of falling apart rather than uniting into a single country. When the First Congress took up Madison’s proposed bill of rights on June 8, 1789, only eleven states had ratified the Constitution. . . . ‘Madison designed the Bill of Rights as a wedge between the moderate and radical factions of Antifederalists’. . . . Thus, the true ‘intent’ of the Framers was to isolate the extreme Antifederalists and to ‘impale’ the Antifederalist movement ‘on the very weapon, the clamor for a bill of rights, that it had thrust at its opponents.’”) (citation omitted).

177. *Id.*

federal government rarely prosecuted anyone during the founding era,¹⁷⁸ and the Federal Bill of Rights had nothing to do with the states' criminal jurisdiction until (theoretically) 1868.¹⁷⁹

Frankly though, whatever this ancient "pedigree" may explain,¹⁸⁰ it is mostly inapposite to the modern criminal adjudication. The way that a defendant participates in his trial today differs so greatly from the days of the framers that it renders the early history inconclusive at best in determining the constitutional validity of *Griffin*.¹⁸¹ Moreover, the quest for originalism cannot definitively answer whether *Griffin* stands on sound constitutional footing because it begs the wrong question. The Court's originalism seeks to uncover the Framer's *intent* by looking only to *practice* at the time of ratification.¹⁸² As applied to the adverse-inference doctrine, the question narrows to whether the framers actually implemented an adverse-inference doctrine for criminal defendants, and, as Justices Scalia

178. See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L. J. 1, 59 n.209 (1996) (noting one expert calculation that only 426 criminal charges were brought in federal courts from 1789 to 1801 (approximately thirty-five cases per year)). Compare with the fact that the U.S. Attorney's office filed 61,529 criminal cases during fiscal year 2013, and 33,667 criminal cases in 1965, the year the Court announced *Griffin*. 2013 U.S. ATT'Y ANN. REP. 8; 1965 U.S. ATT'Y ANN. REP. 1.

179. In fact, the Fifth Amendment privilege was not officially applied to state actions until 1964. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

180. See LEVY, *supra* note 160, at 429-30 ("Whether the framers of the Fifth Amendment intended it to be fully co-extensive with the common law cannot be proved—or disproved."); Moglen, *supra* note 164, at 142 ("How widespread [the idea that examinations by Justices of the Peace were inadmissible against the accused], or how many defense counsel in the early Republic argued this position before the courts in an attempt to exclude their clients' incriminating statements, we cannot know. The records of trial process in the period are extremely scant."); see also Thomas, *supra* note 176, at 1461 ("There were, after all, thirteen colonies, an evolving common law, and the British abuses of their own rules. Common-law rules, like constitutional principles, do evolve with time, and when a common law norm is evolving, disagreement among common-law scholars on the authority of a particular legal norm should be expected.") (internal citation and quotation marks omitted).

181. See generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 47-51 (1998) (discussing originalism's primary problem as being rooted in anachronistic history).

182. See *id.* at 50-51. Though, in all fairness, the reliance on practice is often due to the fact that the Framers left little behind to evince their intent. See Moglen, *supra* note 164, at 138 ("Unfortunately, the nature of Madison's reasoning process is inaccessible to history—he left no document and made no recorded comment on the principles behind his drafting.").

and Thomas have repeatedly explained, the answer is likely no.¹⁸³ This is because the inquiry looks for concrete examples where only analogies are possible and thus seeks to solve twenty-first-century problems (or twentieth in the case of *Griffin*) by combing through eighteenth-century solutions. George C. Thomas describes this process in the Fourth Amendment context as mistakenly trying to distill a rich and complex history into a set of bright and sterile rules and equates the pursuit of originalism to “trying to make a jet fighter from oak timbers.”¹⁸⁴ Instead, Thomas asks, “[H]ow would the Framers have written the . . . Amendment if they could have foreseen modern . . . methods.”¹⁸⁵ The Fifth Amendment, textually speaking, is already broad enough to house the solutions to modern criminal procedure;¹⁸⁶ thus the only inquiry remaining is whether the Framers’ principles support an adverse-inference doctrine if applied to modern criminal proceedings. In other words, if Madison were here *today*, would he support *Griffin*? I think so.

The first step is to set the scene for Madison, which requires describing a criminal justice setting where a person can actually be a witness in his own criminal case. Criminal defendants were not allowed to testify in the modern sense until the mid-nineteenth-century, almost seventy-five years after the Fifth Amendment.¹⁸⁷ The common-law rules of evidence were built upon the theory that the only competent witness was an uninterested one, and “the criminal defendant was . . . par excellence an interested witness.”¹⁸⁸ Through the efforts of Jeremy Bentham and the utilitarians, untrustworthy stakeholders began to transform into competent witnesses.¹⁸⁹ The last of these parties to gain entry to the witness stand was the criminal defendant in 1864, when Maine passed a general competency statute for all criminal defendants.¹⁹⁰ By the end of the nineteenth century, the federal

183. See *Mitchell v. United States*, 526 U.S. 314, 331-43 (1999) (Scalia, J., dissenting) (Thomas, J., dissenting); *Salinas v. Texas*, 133 S. Ct. 2174, 2184-85 (2013) (Thomas, J., concurring).

184. Thomas, *supra* note 176, at 1462.

185. *Id.* at 1463.

186. See *infra* Section IV.B.

187. Robert Reeder, *Comment upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41 (1932-1933). See generally *Ferguson v. Georgia*, 365 U.S. 570, 573-86 (1961) (discussing the evolution of the defendant’s right to testify).

188. *Ferguson*, 365 U.S. at 574.

189. *Id.* at 575-76.

190. *Id.* at 577. Maine first declared criminal defendants competent to give sworn testimony in 1859, but this statute only applied to a few crimes. The 1864 statute applied to all prosecutions and was the first of its kind in the English-speaking world. *Id.*

government and every state except Georgia had adopted competency statutes acknowledging a right to testify in the criminally accused.¹⁹¹

This paradigm shift regarding a defendant's testimony did not come without its fair share of worry, the primary source of which was "the threatened erosion of the privilege against self-incrimination and the presumption of innocence."¹⁹² Many American jurisdictions saw the new ability for defendants to give sworn testimony as a reason to abolish their unsworn-testimony practices.¹⁹³ Therefore, the procedure for a defendant to give evidence on his own behalf was quickly turning into one in which his only choice was to take an oath or suffer the results in (and of) silence. Justice James Campbell of the Michigan Supreme Court voiced the growing concerns over this new evidentiary process, explaining that offering the accused an opportunity to give sworn testimony would make it "difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and overwhelmed by the shame of false accusation."¹⁹⁴ Justice Campbell further warned that such a system, prone to the adverse inferences he described, could subvert American criminal jurisprudence by "converting it into an inquisitory system."¹⁹⁵ The Justice was right to fear this change, as many of its original supporters were neither friend to the Fifth Amendment privilege nor foe to the adverse inference.¹⁹⁶

The American drafters of the right to testify, however, did not share Bentham's affinity for adverse inferences and provided the best historical support for *Griffin* in the way they reinforced Fifth Amendment principles into their competency statutes.¹⁹⁷ The vast majority of states, starting with Massachusetts in 1866, included provisions that protected the accused's choice and condemned either official comment on his silence or the use of

191. *Id.*

192. *Id.* at 578.

193. *Id.* at 586.

194. *People v. Thomas*, 9 Mich. 314, 320 (1861).

195. *Id.* ("[P]erhaps the worst evil would be the degradation of our criminal jurisprudence by converting it into an inquisitory system, from which we have thus far been happily delivered.")

196. *See Ferguson*, 365 U.S. at 579-80 (explaining the sentiments of Jeremy Bentham and Justice John Appleton of the Maine Supreme judicial court).

197. *See Ruloff v. People*, 45 N.Y. 213, 222 (1871) (explaining that the Legislature understood the "abrogation" of the Fifth Amendment privilege that would ensue if a defendant's choice to remain silent was used as evidence against him, and that they "did what could be done to prevent [that danger] by enacting that the neglect or refusal of the accused to testify should not create a presumption against him").

silence as evidence against him.¹⁹⁸ Massachusetts prohibited “any presumption against the defendant” for “neglect or refusal to testify.”¹⁹⁹ Vermont proclaimed that “the refusal of [the defendant] to testify shall not be considered by the jury as evidence against him.”²⁰⁰ New Hampshire reassured the accused that “nothing [in its competency statute] shall be construed as compelling any such person to testify, nor shall any inference of guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify.”²⁰¹ Nevada went further, foreshadowing not only *Griffin* but also *Carter*, and required its courts to “specially instruct the jury that no inference of guilt is to be drawn against [the defendant] for [declining to testify].”²⁰² The federal government followed suit in 1878, and Maine even amended its standard bearer to include a no-adverse-inference provision in 1879.²⁰³ By the 1930s, forty-two states had bolstered their new right to testify with the protections of a no-adverse-inference doctrine.²⁰⁴ Thus, *Griffin*’s validation is—in fact—its *relevant* pedigree.

Further, the Supreme Court’s decision in *Griffin* was not the first time it condemned the adverse inference; its contempt for this kind of evidence, indeed, predates the federal criminal competency statute.²⁰⁵ In 1873, the Court decided a case called *Chaffee & Co. v. United States*, a civil-penalty case where the burden of proof was still beyond a reasonable doubt and still rested squarely on the shoulders of the government.²⁰⁶ There, the trial judge explained that if the defendants could prove their innocence by taking the

198. *Ferguson*, 365 U.S. at 580; Reeder, *supra* note 187, at 41-43 (“[By 1933] the laws of forty-two states provide[d] that the failure of the accused to testify shall not create any presumption against him or that it shall not be subject to comment, or contain both such provisions.”).

199. *Reeder*, *supra* note 187, at 41 (quoting 1866 Mass. Acts 245).

200. *Id.* at 41-42 (quoting 1866 Vt. Acts & Resolves 52).

201. *Id.* at 42 (quoting 1869 N.H. Laws 282).

202. *Id.* (quoting 1867 Nev. Stat. 58).

203. *Id.* at 43 (citing *Wilson v. United States*, 149 U.S. 60 (1892)).

204. *Id.* at 44 (“The states which do not conform to the *general rule* are: Georgia, where the accused is not a competent witness; Iowa, New Jersey, and Ohio, where the constitutions clearly do not prevent comment upon silence of the accused; Nevada, where the court *may not comment upon his silence unless he requests it to instruct the jury upon his right to refrain from testifying*; and South Dakota, where a rule which had prevailed since 1879 was changed in 1927 to provide that the failure of the accused to testify in his own behalf was a proper subject of comment by the prosecuting attorney.”) (emphasis added).

205. *See Chaffee & Co. v. United States*, 85 U.S. (18 Wall.) 516, 542-46 (1873).

206. *Id.* For more detail on the structure of civil penalties suits, see Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 129-31 (2009).

stand, yet chose not to, “the perplexing question of their guilt need not disturb [the jury]; [the defendants’] silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt.”²⁰⁷ In plain English: If you (the jury) think an innocent man in this case could stand up and prove his innocence, and these defendants don’t, the law permits you to infer from their silence that they are guilty. The Supreme Court responded:

“We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the Authorities condemn it. . . . The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction.”²⁰⁸

This discourse between judge and justice seems identical not only to that in *Griffin*, but also to the authority on which *Griffin* relies.²⁰⁹ Recall that before 1878, there was no federal, statutory right to refuse to testify; there was only the Fifth Amendment privilege.²¹⁰ Therefore, the “established principles” set at naught in this case must have been the constitutional right, which the Court described as a right to refuse to testify without fear of court-imposed penalty.

Regardless of whether Justice Douglas found it “necessary to go into any [historical] argument,” the historical support for *Griffin* still exists, and it is far from dubious.²¹¹ *Griffin*’s exegesis was not alchemy; it was established principle. The choice between swearing your innocence upon testimonial oath or bearing witness to the betrayal of your own silence is “a remnant of the ‘inquisitorial system’ . . . which the Fifth Amendment outlaws.”²¹² If Madison had been around for *Griffin*, I think he would agree.²¹³

207. *Chaffee*, 85 U.S. at 545.

208. *Id.* at 545-46.

209. *See Griffin v. California*, 380 U.S. 609, 614-15 (1965).

210. Reeder, *supra* note 187, at 42-43.

211. *See sources cited infra* note 214.

212. *Griffin*, 380 U.S. at 614; *see also* *Petite v. People*, 8 Colo. 518, 519 (1924); *Commonwealth v. Scott*, 123 Mass. 239, 241 (1877); *Ruloff v. People*, 45 N.Y. 213, 221 (1871); *Commonwealth v. Green*, 233 Pa. 291, 294 (1912); *State v. Hull*, 18 R.I. 207, 221-12 (1893); *State v. Browning*, 154 S.C. 97, 102 (1929); *Staples v. State*, 89 Tenn. 231, 233 (1890) (indicating that the no-adverse-inference provision of the Tennessee competency statute is “in accord with the bill of rights, wherein it is provided that in all criminal prosecutions the defendant ‘shall not be compelled to give evidence against himself.’ No

V. Conclusion

In sum, the dispute over the underpinnings of the no-adverse-inference doctrine is unwarranted. The doctrine is built upon a solid logical foundation, is commensurate with the explicit commands of the text, and benefits from a rich and favorable history. The confusion fostered in the *Mitchell* decision may have been sufficient to preclude habeas relief for Mr. Woodall, but it should not be enough to stunt the full growth of the adverse-inference doctrine the next time a case like Mr. Woodall's petitions for direct review. In that event, the Court should extend the doctrine to its logical conclusion: to require a no-adverse-inference instruction at criminal sentencing regardless of the character of the inference. Hopefully, the Court

inference of guilt can be drawn from the failure of a defendant to testify for himself. . . . The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself.”); *State v. Cameron*, 40 Vt. 555, 565-66 (1868); *Price v. Commonwealth*, 77 Va. 393, 395 (1883); *State v. Mayer*, 154 Wash. 667, 670 (1929); *Anderson v. State*, 27 Wyo. 345, 365 (1921); *State v. Taylor*, 57 W. Va. 228, 235 (1905) (“One of the most excellent principles of the common law was that the state took upon itself the burden of proving the guilt of the prisoner. . . . So the law, having brought the prisoner into court against his will, did not permit his silence to be treated or used as evidence against him. Before the assistance of counsel was allowed, prisoners were at liberty to make statements to the jury . . . but were at liberty to stop at any time, and remain silent, and in that event, their silence was not permitted to raise any inference or presumption against them. This principle of the common law having been embodied in our Constitution as a guaranty of the liberty of the citizens, the Legislature, in raising the common-law privilege from a mere statement on the part of the prisoner in his own behalf to the dignity of evidence under oath, still does not and cannot permit the exercise of that privilege to so operate as to compel him to testify against himself by conduct or otherwise.”); *State v. Chisnell*, 36 W. Va. 659, 671 (1892); *Reeder*, *supra* note 187, at 45-55 (citing *People v. Tyler*, 36 Cal. 522 (1869)). *See contra Mitchell v. United States*, 526 U.S. 314, 335-36 (1999) (Scalia, J., dissenting) (“[I]t is implausible that the Americans of 1791, who were subject to adverse inferences for failing to give unsworn testimony, would have viewed an adverse inference for failing to give sworn testimony as a violation of the Fifth Amendment. Nor can it reasonably be argued that the new [competency] statutes somehow created a ‘revised’ understanding of the Fifth Amendment that was incorporated into the Due Process Clause of the Fourteenth Amendment, since only nine states (and not the federal government) had enacted competency statutes when the Fourteenth Amendment was adopted, and three of them did not prohibit adverse inferences from failure to testify.”) (emphasis omitted).

213. *See Moglen*, *supra* note 164, at 141, 143 (explaining that as early as 1795, states openly rejected the Marian Committal procedures that allowed justices of the peace to submit defendants to pretrial examination and offer their silence against them in court) (citing WILLIAM WALLER HENING, *THE VIRGINIA JUSTICE: COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 132 (1795); AUGUSTIN S. CLAYTON, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 132 (1819)).

will not take another fifteen years to reach that conclusion. When a criminal defendant fighting for his life asks his attorney if it's safe not to testify, he deserves a better answer than "Perhaps . . . Perhaps not."

Nathan B. Hall