SILENCE AND REMORSELESSNESS

*Caleb J. Fountain**

LUCIUS Art thou not sorry for these heinous deeds?
AARON Ay, that I had not done a thousand more.
. . . .
LUCIUS Bring down the devil; for he must not die
So sweet a death as hanging presently.[1]

I

A criminal defendant's expressions of remorse or remorselessness[2] play a consequential role in the sentencing process.[3] Whether a defendant receives a more or less severe sentence sometimes depends upon a sentencer's assessment of the credibility of the defendant's allocution of contrition.[4] This observation is not subject to reasonable dispute,[5] although it remains a pointed area of disagreement among scholars whether remorse or remorselessness

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[1] WILLIAM SHAKESPEARE, TITUS ANDRONICUS act 5, sc. 1.

[2] This essay uses the word "remorselessness" for purposes of convenience. Courts typically refer to the aggravating factor of "lack of remorse," which points more specifically to a lack of remorse *with respect to the crime* of which the defendant has been convicted. The author concedes that "remorselessness" suggests a broader character trait—an inability to *feel* remorse at all—but asks that the reader limit the term to the "lack of remorse" to which courts often refer at sentencing.

[3] *See, e.g.*, U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3E1.1 (2015), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf (authorizing a downward adjustment to a federal criminal defendant's sentence for "acceptance of responsibility"); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131 (2006) ("Over time, through either statutory pronouncement or precedent, state courts have considered a distinct group of factors in determining the proper punishment for a convicted criminal defendant. One of those factors is remorse."); *see also infra* note 171 (collecting cases).

[4] *See, e.g.*, Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1631 (1998) ("Do jurors' beliefs about the defendant's remorse correlate with the sentence they impose? . . . The short answer is yes.").

[5] *See* Ralph Slovenko, *Remorse*, 34 J. PSYCHIATRY & L. 397, 411–12 (2006) (suggesting that remorse is not as important to sentencing as one might expect).

should be considered at sentencing at all.[6] The lived experience of the courtroom in the United States affirms to criminal defendants every day that judges and juries "expect him to feel[] remorseful, ashamed, apologetic, or reformed."[7] If he does not, and the absence of his contrition is detected by the sentencer, he can expect to suffer the consequences.[8]

Shakespeare understood this. When Aaron, the cruel and unrepentant antagonist of the tragedy *Titus Andronicus*, is to be hanged, he refuses to express contrition, instead lamenting only that he had not committed more crimes.[9] His sentencer, Lucius, concludes that Aaron's punishment should consequently be enhanced, and Aaron was ultimately buried "breast-deep in the earth, and famish[ed]"—a far more humiliating execution.[10] Undeterred, Aaron's final words prove the failure of even this most awful death to bring him around: "If one good deed in all my life I did," he announces, "I do repent it from my very soul."[11] This basic formula—the expression of remorselessness and the resulting heightened sentence—has a long pedigree in the Anglo-American penological consciousness.[12]

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[6] *Compare, e.g.*, Ward, *supra* note 3, at 167 ("No one really knows what remorse is—and courts certainly don't seem to know it when they see it. Anything that is so intrinsically unknowable cannot fairly be the basis for extended (or reduced) periods of incarceration in any system of justice."), *and* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1522 (2002) ("[T]he trait of remorselessness can change; it may not serve as a predictor of resistance to rehabilitation."), *with* HANNAH MASLEN, REMORSE, PENAL THEORY AND SENTENCING 91 (2015) (arguing that remorse is relevant to a determination of whether the defendant need further be impressed of his wrongdoing through a more severe sentence), *and* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 87 (2004) ("Remorse and apology should . . . loom large in the criminal arena.").

[7] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1465 (2005).

[8] *See id.* at 1465–66.

[9] SHAKESPEARE, *supra* note 1, act 5, sc. 1.

[10] *Id.* act 5, sc. 3; *see also* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 103 (2003) (discussing the role of humiliation in European punishment throughout the 16th century).

[11] SHAKESPEARE, *supra* note 1, act 5, sc. 3.

[12] *See* Slovenko, *supra* note 5, at 419 ("[S]ociety . . . may find fraudulent expressions of remorse more acceptable than no remorse at all."); MASLEN, *supra* note 6, at 180–97 (discussing the significant role of remorse in the criminal justice systems of the United Kingdom, Australia, and New Zealand). A recent example of the importance of remorselessness in criminal punishment can be found in the high-profile trial of Dzhokhar Tsarnaev, who was sentenced to death in 2015 for his role in the Boston Marathon bombing of 2013. Katharine Q. Seelye, *Dzhokhar Tasarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May, 15, 2015), https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html. Among the aggravating factors the jury was asked to consider, and that the jury unanimously found, was a lack of remorse. Penalty Phase Verdict Form at 14,

The question posed by this essay concerns, not whether remorse is a valid consideration at sentencing,[13] but rather, what evidence is constitutionally permissible to be considered when determining whether a defendant is remorseless. Specifically, it asks whether the Fifth Amendment's self-incrimination clause prohibits the use of a defendant's silence at sentencing as evidence of the defendant's remorselessness,[14] a question on which the United States Courts of Appeals are currently divided.[15] This essay concludes that the self-incrimination clause prohibits such an inference by the sentencer, and demands that a jury be informed of this prohibition at the defendant's request where a jury makes the sentencing decision.[16]

United States v. Tsarnaev, No.1:13-cr-10200 (D. Mass. May 5, 2015). Indeed, the issue of Tsarnaev's degree of contrition was a significant component of the sentencing proceedings and the prosecutor's closing argument to the jury in the penalty phase extensively referenced Tsarnaev's purported lack of remorse. *See* Transcript of Penalty Phase Closing Argument at 61:13–17, 67:22, 70:19–21; 80:21–82::23, United States v. Tsarnaev, No.1:13-cr-10200 (D. Mass. May 13, 2015).

[13] A vast literature has been produced on the proper role of remorse and apology in criminal punishment. The main philosophical trends are discussed ably and at length, with extensive citation, in Hannah Maslen's *Remorse, Penal Theory and Sentencing*. *See generally* MASLEN, *supra* note 6, at 2–3 (examining possible theoretical justifications about using remorse as a mitigating factor in criminal sentencing). Legal perspectives abound and are also discussed in Maslen's monograph, but many are consolidated. *See* Bibas & Bierschbach, *supra* note 6, at 92–101; Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 137–42 (2015).

[14] *See* White v. Woodall, 134 S. Ct. 1697, 1703 (2014) (citing United States v. Whitten, 623 F.3d 125, 131 n.4 (2d Cir. 2010) (Livingston J., dissenting)) (holding state trial judge's denial of *Carter* instruction with regard to remorselessness did not violate clearly established federal law); *see also* United States v. Mikos, 539 F.3d 706, 718 (7th Cir. 2008) (citations omitted) (holding that prosecutorial statements about defendant's demeanor in court did not amount to a penalty for his failure to testify in violation of the Fifth Amendment); *cf.* United States v. Whitten, 610 F.3d 168, 198–99 (2d Cir. 2010) (citations omitted) (applying the no-adverse-inference rule in the context of a prosecutor's argument about a defendant's apparent lack of remorse at sentencing).

[15] *See* United States v. Caro, 597 F.3d 608, 629 (4th Cir. 2010) (first citing, *inter alia*, *Mikos*, 539 F.3d at 718, then citing Lesko v. Lehman, 925 F.2d 1527, 1544–45 (3d Cir. 1991)); *see also* United States v. Runyon, 707 F.3d 475, 509–10 (4th Cir. 2013) (citations omitted) (avoiding question of constitutionality); United States v. Duran-Munez, 539 F. App'x 407, 408 (5th Cir. 2013) (citing Mitchell v. United States, 526 U.S. 314, 330 (1999)) (holding *Mitchell* does not apply to sentencing phase with regard to remorse); Edwards v. Roper, 688 F.3d 449, 460 (8th Cir. 2012) (finding that *Griffin* did not apply); Thomas v. United States, 368 F.2d 941, 942–46 (5th Cir. 1966) (holding that enhanced penalty based on finding of remorse on grounds of defendant's silence violated a constitutional right).

[16] *Cf.* Carter v. Kentucky, 450 U.S. 288, 305 (1981) (holding that jurors must be instructed, upon request by the defendant, not to hold the defendant's failure to testify against him). Typically jurors are impaneled for sentencing purposes in only capital cases, but juries may decide non-capital sentences in a limited number of states. *See, e.g.*, ARK. CODE ANN. § 5-4-103(a) (2017) (authorizing jury sentencing in felony cases in which a jury trial was held); TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(b) (2017) (authorizing jury sentencing if the defendant so elects it before *voir dire*); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L. J. 951, 953 n.1 (2003).

Its conclusion flows from historical considerations underpinning *Griffin v. California*,[17] the text of the self-incrimination clause,[18] and the reasonable interpretations of its scope advocated by the Supreme Court in the nineteenth century.[19] At a time when the self-incrimination clause is undergoing intense scrutiny and increasing limitation,[20] it is important to affirm its applicability to facts that can increase a punishment in the sentencing phase, including a finding of remorselessness.

This essay proceeds in four parts. This part states the issue concisely: does the self-incrimination clause prohibit the use of a defendant's silence as evidence against him at sentencing in determining his lack of remorse? Part II addresses the historical underpinnings of the rule in *Griffin*—that a prosecutor may not comment upon, and a juror may not draw any inferences from, a defendant's failure to testify at trial.[21] Any proposition that a defendant's silence at sentencing may not be held against him with regard to remorselessness must necessarily flow from the decision in *Griffin*.[22] If *Griffin*'s integrity is unsound, or if it must otherwise be narrowly circumscribed, then the silent defendant will have little protection at sentencing with respect to contrition.[23] To make a complete argument in favor of *Griffin*'s applicability to findings of remorselessness at sentencing first requires *Griffin* to be defended.[24]

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[17] Griffin v. California, 380 U.S. 609 (1965).

[18] U.S. CONST. amend. V.

[19] *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 563–64 (1892) ("It is an ancient principal of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him *or subject him to fines, penalties or forfeitures*.") (emphasis added).

[20] More recent trends have been more hostile to the legacy of *Miranda*. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (citation omitted) (requiring explicit invocation of the Fifth Amendment privilege before *Miranda* protections are triggered). However, the limitations implied in *Mitchell* and the decision in *White* do not augur well for the future of *Griffin*, as discussed below. *See Mitchell*, 526 U.S. at 330 (suggesting that *Griffin*'s applicability to the sentencing context may not apply to a "determination of a lack of remorse"); White v. Woodall, 134 S. Ct. 1697, 1704 (2014) (holding that it was not clearly established federal law that a defendant's silence could be held against him with regard to remorselessness). At least one commentator has concluded that *Griffin* is "vulnerable" to reversal. *See* Lissa Griffin, *Is Silence Sacred? The Vulnerability of* Griffin v. California *in a Terrorist World*, 15 WM. & MARY BILL OF RTS. J. 927, 961 (2007).

[21] *Griffin*, 380 U.S. at 613–14.

[22] *See, e.g.*, *Mitchell*, 526 U.S. at 332–33 (Scalia, J., dissenting) (attacking *Griffin*'s historical "pedigree"); *id.* at 341–342 (Thomas, J., dissenting) (proposing to reexamine *Griffin* and *Carter*).

[23] *See id.* at 331 (Scalia, J., dissenting).

[24] As Justice Scalia put it, after a lengthy attack on *Griffin*'s underpinnings in his dissent to the case extending *Griffin* to the sentencing phase with regard to the facts of the crime,

This essay thus proposes a different basis than the one on which the Court relied in *Griffin*. It will argue that *Griffin*'s stated rationale—that the negative inference "is a penalty imposed by courts for exercising a constitutional privilege"[25]—is historically insufficient. Rather, the statutory abrogation of the common-law rule disqualifying the defendant from testifying transformed, by force and without the defendant's consent, a criminal defendant's silence from a legally imposed requirement to a form of in-court evidence.[26] *Griffin* was therefore a necessary step to restore criminal defendants to the position they were in before the marked shift in the law that permitted defendants to give sworn testimony on their own behalf.[27] The case essentially restored defendants to the position they were in at the time the Fifth Amendment was enacted, and was thus a constitutionally necessary corrective measure in the face of shifting laws of evidence.[28]

Part III turns to the issue of whether *Griffin* and its progeny should apply to determinations of remorselessness at sentencing. It begins by discussing *Griffin*'s progress, leading up to the holding in *Mitchell* that a sentencer may not use a defendant's silence against her "in determining the facts of the offense at the sentencing hearing."[29] Then it will principally argue that the text of the self-incrimination clause itself leads to the conclusion advocated here—that the Fifth Amendment precludes the use of silence as evidence of remorselessness. The self-incrimination clause neither requires that the compelled testimony (in the case of a silent defendant, an adopted admission by silence) be literally *criminating* (that is, pertaining exactly and only to elements of the crime), nor that it be in only the trial section of a criminal proceeding.[30] Rather, it broadly prohibits a defendant from being compelled "to be a witness against himself" in a "criminal case."[31] The Supreme Court has consistently held for over 100 years that testimony is protected if it "tend[s] to criminate him *or subject him to fines, penalties or*

"[t]o my mind, *Griffin* was a wrong turn—which is not cause enough to overrule it, but is cause enough to resist its extension." *Id.* at 336. Any argument to extend *Griffin* further should attempt reassessment of *Griffin* itself.

[25] *Griffin*, 380 U.S. at 614.

[26] *See id.* (citing People v. Modesto, 398 P.2d 753, 762–63 (Cal. 1965)).

[27] *See Mitchell*, 526 U.S. at 335 (Scalia, J., dissenting) ("The *Griffin* question did not arise until States began enacting statutes providing that criminal defendants were competent to testify under oath on their own behalf.").

[28] *See Griffin*, 380 U.S. at 615.

[29] *Mitchell*, 526 U.S. at 330.

[30] *See* U.S. CONST. amend. V.

[31] *Id.*

forfeitures,"[32] and that a "criminal case" necessarily includes the sentencing phase.[33] A finding of remorselessness increases a defendant's penalty during the course of a criminal case.[34] The self-incrimination clause consequently applies. Part IV notes that silence is far less probative of remorselessness than it may appear,[35] and suggests that the best, and most constitutionally secure, solution is strictly to apply the self-incrimination clause to such silence. This essay will conclude by arguing that the Fifth Amendment ensures that, to the extent that courts continue to consider remorselessness relevant at sentencing at all, such enhancements must be reserved for those defendants who, like Shakespeare's Aaron, manifest through evidence—but not through silence—that they are remorseless.[36]

II

In relevant part, the Fifth Amendment to the United States Constitution provides that: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[37] Edward Griffin was charged with the murder of Essie Mae in California, and he did not testify at his trial.[38] He was convicted after the prosecutor said to the jury in closing argument that "in the whole world, if anybody would know [who killed Essie Mae], this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't."[39] Griffin was sentenced to death.[40]

Using language that would become a commonplace of Fifth Amendment jurisprudence for years to come,[41] the Supreme Court

[32] Counselman v. Hitchcock, 142 U.S. 547, 563–64 (1891) (emphasis added) (citations omitted).

[33] *See, e.g.*, Teague v. Lane, 489 U.S. 288, 314 n.2 (1989) (citing Flynt v. Ohio, 451 U.S. 619, 620 (1981) (per curiam)) ("As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant.").

[34] *See* Ward, *supra* note 3, at 131.

[35] *See id.* at 163–64, 167.

[36] *See* United States v. Mikos, 539 F.3d 706, 723 (7th Cir. 2008) (Posner, C.J., concurring in part and dissenting in part) ("What would demonstrate a lack of remorse would be statements (such as bragging about the murder), gestures, laughter as the murder was described or a grieving relative testified, or facial expressions that indicated that the defendant had indeed no regret about having committed the murder. . . . Mere silence is not enough to demonstrate lack of remorse.").

[37] U.S. CONST. amend. V.

[38] *See* Griffin v. California, 380 U.S. 609, 609, 611 (1965).

[39] *Id.* at 611 (citation omitted).

[40] *See id.*

[41] *See, e.g.*, United States v. Jackson, 390 U.S. 570, 583 (1968) ("A procedure need not be

reversed the conviction on the ground that the prosecutor's comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[42] The "penalty doctrine,"[43] as this essay refers to it, consists of the idea that exacting a cost on the defendant for the exercise of the right amounts to compulsion of the defendant.[44] It has been the guiding principle of the post-*Griffin* cases, and remains the doctrinal framework within which adverse-inference issues are currently analyzed.[45]

The obvious problem, as opponents of *Griffin* have not grown tired of reiterating since it was first identified in Justice Stewart's opinion dissenting from *Griffin*,[46] is that a prosecutor's comment requesting an adverse inference is not analytically identical to "compulsion."[47]

> Exactly what the penalty imposed consists of is not clear. It 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 evident fact, even though the choice goes unmentioned. Since comment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision [permitting prosecutorial comment on silence] places some other compulsion upon the defendant to incriminate himself, some

inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.").

[42] *Griffin*, 380 U.S. at 614; *see also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 865–66 (1995) (describing the penalty doctrine in *Griffin*).

[43] *See* Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 245–47 (2010) (referring to the theory advanced in *Griffin* as the penalty doctrine); Craig M. Bradley, Griffin v. California*: Still Viable After All These Years*, 79 MICH. L. REV. 1290, 1296 (1981) (defending the penalty doctrine).

[44] *See, e.g.*, Kelsey Craig, Note, *The Price of Silence: How the* Griffin *Roadblock and Protection Against Adverse Inference Condemn the Criminal Defendant*, 69 VAND. L. REV. 249, 256–257 (2016) (summarizing the rationale in *Griffin*). The idea of "penalties" in the context of the self-incrimination clause had been suggested the year before *Griffin* was decided, when the Court wrote, in *Malloy v. Hogan*, "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to *suffer no penalty* . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964) (emphasis added).

[45] *See* Bellin, *supra* note 43, at 247–49.

[46] *Griffin*, 380 U.S. at 617, 621 (Stewart, J., dissenting).

[47] *See id.* at 621.

> compulsion which the Court does not describe and which I cannot readily perceive.[48]

The problem Justice Stewart identified poses a significant problem in contemporary constitutional adjudication.[49] The Warren Court may have been amenable to an outcome only tenuously moored to the text or history of the Fifth Amendment—the Court cites neither historical nor textual support for its penalty doctrine[50]—but the last thirty years of constitutional interpretation again and again affirms the centrality of textual and historical argument in the Supreme Court and below.[51] Its apparent lack of historical "pedigree" leaves *Griffin* vulnerable to erosion or even, some claim, to reversal.[52]

Justices Stewart and Scalia, both of whom argued that *Griffin* had no basis in the text or history of the self-incrimination clause,[53]

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[48] *Id.* at 620–21; *see also* Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 862 (1980) ("[T]he inference of guilt from silence is not most basically a way of punishing the defendant—it is, on account of its rationality, a way of making more likely the correct factual resolution of the case."); Bellin, *supra* note 43, at 248–49 (pointing out that commenting on silence is not the equivalent of compelling someone to testify); Craig, *supra* note 44, at 259 ("Justice Scalia has described adverse inference as 'one of the natural . . . consequences of failing to testify,' 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."); Griffin, *supra* note 20, at 928 (discussing Justice Scalia's dissent in *Griffin*).

[49] *See* Craig, *supra* note 44, at 259–60.

[50] *See Griffin*, 380 U.S. at 611–15 (citations omitted). A common objection among Originalists—particularly of the "first generation" in the 1970s—to the Warren Court was its willingness to forgo historical rigor in favor of "personal predilections and subjective value choices." Mitchell N. Berman & Kevin Toh, *The New Originalism in Constitutional Law: On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 556 (2013).

[51] *See* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1833 (2015); *see also* John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. PUB. POL'Y 83, 84–85 (2003) (discussing the originalist movement's skepticism of the Warren court); *cf.* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 675 (2013) (discussing the Warren court's occasional appeals to history). This essay is not the place to discuss the issues with using history as a guiding interpretive tool; rather, the essay assumes that the use of history has become—as indeed it has—the central principle underlying much of the constitutional adjudication affecting the rights of criminal defendants today. *See, e.g.*, Betterman v. Montana, 136 S. Ct. 1609, 1613–14 (2016) (citations omitted) (explaining the history of the Sixth Amendment's Speedy Trial Clause); Crawford v. Washington, 541 U.S. 36, 42–43, 53–56 (2004) (explaining the history of the Sixth Amendment's Confrontation Clause); California v. Hodari D., 499 U.S. 621, 625–28 (1991) (citations omitted) (demonstrating the Court using the history of the Fourth Amendment to make its decision).

[52] *See* Mitchell v. U.S., 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting) (citations omitted) ("Despite the text [of the Fifth Amendment, that] as for history, *Griffin*'s pedigree is equally dubious."); Griffin, *supra* note 20, at 928–29.

[53] *See Griffin*, 380 U.S. at 619–20 (Stewart, J., dissenting) (citation omitted); *Mitchell*, 526 U.S. at 331–32 (Scalia, J., dissenting).

fail to appreciate the significance of the peculiar situation defendants were in when the Amendment was ratified. The Fifth Amendment was ratified in 1791.[54] At that time, defendants were disqualified from testifying on their own behalf.[55] The rule of disqualification had broad applicability to civil and criminal cases alike and was derived from the idea—intuitive enough—that witnesses who were interested in the outcome of a matter would have an incentive to perjure themselves.[56]

In a criminal matter, the defendant was unable to give sworn testimony at all[57] but, because in these early days of the criminal law he was not permitted to have counsel,[58] he was nonetheless "expected to speak directly to the jury" in unsworn argument.[59] Such statements were not, however, considered to be evidence: indeed, it was not until 1843 that unsworn testimony could be considered evidence in England, when Parliament passed a law permitting the colonies to pass laws admitting unsworn testimony.[60] Eight years later, England would permit unsworn testimony in its own courts.[61] The United States similarly did not permit unsworn testimony until the nineteenth century.[62]

At around the same time, the disqualification rules began to erode, partly at the suggestion of Jeremy Bentham.[63] The renowned philosopher persuasively argued that the mere interest of a witness in the outcome of a case did not necessarily mean that he would lie on the stand.[64] By 1851, civil cases in England had been liberated

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[54] *See* RICHARD S. CONLEY, HISTORICAL DICTIONARY OF THE U.S. CONSTITUTION 89 (2016). A comprehensive account of the Fifth Amendment's ratification is available. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 405–32 (1968).

[55] *See* Robert Popper, *History and Development of the Accused's Right to Testify*, WASH. U. L.Q. 454, 454 (1962). For a general analysis, *see id.* at 454–57. For an illuminating discussion of the creation of defendant-competency statutes, *see* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 181, 197–200 (R.H. Helmholz et al. 1997).

[56] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *370; 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 351–52 (1883).

[57] *Mitchell*, 526 U.S. at 332–33 (Scalia, J., dissenting) (citing Ferguson v. Georgia, 365 U.S. 570, 574–75 (1961)).

[58] *Id.* at 333 (quoting STEPHEN, *supra* note 56, at 440).

[59] *Id.*

[60] (Colonies) Evidence Act of 1843, 6 & 7 Vict. c. 22 (Eng.).

[61] *See* Evidence Act of 1851, 14 & 15 Vict. c. 99 (Eng.).

[62] *See* Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 105 (1981). The trends are documented in Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 AM. L. REG. 373, 395–98 n.41 (1903).

[63] *See* G.S., *Competency of Witnesses*, 10 AM. L. REG. 257, 257 (1862).

[64] 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 39–40 (1827) ("Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie?

in their entirety from the interested-witness disqualification rules.[65] On both sides of the Atlantic, the criminal defendant was well on his way to witness qualification.[66]

As Henry E. Smith observes, "[t]he final chapter in the rise of the modern privilege against self-incrimination . . . was the removal of the disqualification for interest."[67] The introduction of statutes abrogating the common-law disqualification rule inaugurated a vocal debate over the role of the privilege against self-incrimination.[68] A specific concern was that laws rendering a defendant qualified to testify as a witness would "force [the defendant] to testify" because of the obvious inference a juror would draw from the defendant's decision not to avail himself of his newly granted qualification as witness.[69]

In the first judicial discussion of the issue in a court in the United States,[70] Chief Justice Lorenzo Sawyer of the California Supreme Court wrote an opinion reversing a defendant's conviction because the prosecution commented on the defendant's silence in light of the state's new defendant-qualification statute.[71] That statute provided that, "[i]n the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences [sic], the person so charged shall, at his own request, but not otherwise, be deemed a competent witness."[72]

> [T]he strongest objection that has been urged against [the defendant-qualification statute], is, that it places a party charged with [a] crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offense may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him . . . negatively at least, by his silence, or take the risk,

That there is danger in such a case, is not to be disputed: but does the danger approach to certainty? This will not be contended.").

[65] Evidence Act of 1851, c.99; *see* Popper, *supra* note 55, at 458.

[66] *See* Bodansky, *supra* note 62, at 105–06.

[67] Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION, *supra* note 55, at 145, 178–79.

[68] *See id.* at 179; *see also* Popper, *supra* note 55, at 459 n.29 (collecting authorities).

[69] *See* Popper, *supra* note 55, at 459.

[70] *See* People v. Tyler, 36 Cal. 522, 528 (1869). Although *Tyler* appears to be the first judicial decision on the issue, legal commentary was available by the time of the decision. *See* STEPHEN, *supra* note 56, at 201–02.

[71] *Tyler*, 36 Cal. at 527, 530–31.

[72] Act of Apr. 2, 1866, 1866 Cal. Stat. 865.

> under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony.[73]

Rather than adopting a penalty doctrine when confronted with the same question the Supreme Court would face nearly 100 years later in *Griffin*,[74] the California Supreme Court took a different route. It concluded that the defendant-qualification statute "necessarily compelled" the defendant "to exercise one way or the other" the decision to testify.[75] Should an adverse inference be permitted from the exercise of the option to not testify, "the very act of exercising his option . . . would be . . . a crimination of himself."[76]

The California Supreme Court's approach in *Tyler* in 1869, which will be called here the "qualification theory," is wiser, and far more historically justifiable, than the United States Supreme Court's penalty doctrine in *Griffin* in 1965. *Griffin*'s error—which objectors from Justice Powell to Justice Scalia have repeatedly emphasized—was to place the locus of compulsion at the prosecutor's comment on the defendant's silence: "It is a penalty," the *Griffin* court claims, "imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[77] This is not a compulsion, however—it is, as the Supreme Court concedes, a "penalty." The Fifth Amendment does not, however, prohibit "penalties"; it prohibits compelled testimony.[78]

Tyler places the locus of compulsion not on the prosecutor's comment, but on the statute that qualified the defendant to testify in the first place.[79] Without the statute—and in "the humane spirit of the common law"[80]—the defendant's silence had no evidentiary content whatsoever.[81] Prior to the statute's enactment, indeed, such silence had no meaning at all because the defendant could not testify.[82] But once a defendant could give sworn testimony, the

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[73] *Tyler*, 36 Cal. at 528.

[74] Griffin v. California, 380 U.S. 609, 614 (1965).

[75] *Tyler*, 36 Cal. at 530.

[76] *Id.*

[77] *Griffin*, 380 U.S. at 614 (citations omitted).

[78] U.S. CONST. amend. V.

[79] *Tyler*, 36 Cal. at 529.

[80] *Id.* at 528.

[81] *Cf.* Mitchell v. United States, 526 U.S. 314, 332, 335–36 (1999) (Scalia, J., dissenting) (arguing that a defendant's failure to argue against the prosecutor when he was unrepresented by counsel could be held against him). Justice Scalia's point, however, misses the mark: a failure to make legal arguments against the prosecutor might have been held against him, but because such arguments were not sworn testimony, neither the arguments nor their absence could have been considered sworn testimony or the lack thereof. *See, e.g.*, Popper, *supra* note 55, at 464–65.

[82] *See* Popper, *supra* note 55, at 458.

defendant was essentially posed the question by statute: "What is your side of the story?" The defendant was forced to give evidence—either sworn testimony or silence—because any response to the question would be an answer.[83] To ensure that that evidence was not used *against* him, the California Supreme Court recognized, 100 years before *Griffin* and on a sounder historical basis, that some corrective measure would have to be made to ensure that a defendant's decision not to testify not act as compelled testimony against him.[84] The statute, not the prosecutor, forced the defendant to give evidence, whether it be spoken testimony or silence, "often evidence of the most persuasive character."[85] Compelling the defendant to produce evidence in this manner can, the California Supreme Court concluded, be corrected only by categorical prohibition on commenting on silence, as well as an instruction "in all cases where the defendant desires it" that his decision not to testify cannot be used against him.[86]

Although *Griffin* does not consider the foregoing background, it does advance the hint of this theory by observing that "the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."[87] But the Court did not ground this observation in any of the historical background just discussed. It instead placed it in the context of a previous decision interpreting the federal defendant-qualification statute.[88] Rather than discuss the *constitutional* consequences of qualification statutes, *Griffin* rested its reasoning on a judicial interpretation of the federal defendant-qualification statute, which itself sought to avoid the very constitutional issue in question by providing that the "failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."[89] *Griffin*'s rationale hinged on an ameliorative statute, rather than the history of witness qualification, as it should have and as the California Supreme Court did.[90]

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[83] *Tyler*, 36 Cal. at 530.

[84] *See id.*

[85] United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923) (citing Runkle v. Burnham, 153 U.S. 216, 225 (1894); Kriby v. Tallmadge, 160 U.S. 379, 383 (1896)).

[86] *Tyler*, 36 Cal. at 530–31.

[87] Griffin v. California, 380 U.S. 609, 613 (1965).

[88] *Id.* (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)).

[89] *See Griffin*, 380 U.S. at 613 (citing *Wilson*, 149 U.S. at 65) (discussing the federal defendant-competency statute).

[90] *See Griffin*, 380 U.S. at 613–15; *see also Tyler*, 36 Cal. at 528–30 (discussing legislation addressing witness qualification). This judicial sleight of hand leaves much to be desired and is the principal objection of Justice Scalia's in his *Mitchell* dissent:

The foregoing analysis does not appear in *Griffin* or its progeny. It does, however, appear as something of a foil to Justice Scalia's critique of *Griffin* in his pointed dissent in *Mitchell*.[91] In that opinion, Justice Scalia emphasizes at length that "[a]t trial, defendants were expected to speak directly to the jury."[92] He goes on to explain that defendants in seventeenth- and eighteenth-century criminal trials, who "could not be defended by counsel,"[93] had to speak for themselves in argument against the prosecutor, and that their failure adequately to do so would be held against them.[94] From this, Justice Scalia concludes that, "it is clear that adverse inference from silence was permitted."[95]

What is missing from Justice Scalia's critique is an appreciation of the distinction between the type of speaking and silence discussed in his dissent (argument against prosecutors, for example), and that ushered into the courtroom by the competency statutes.[96] As established, unsworn in-court statements *were not evidence*, and the ability to take the oath and testify "was a privilege, for it added immeasurably to the credibility of a witness."[97] Equating, as Justice Scalia does, the silence of a defendant who cannot be sworn with the silence of a defendant when a defendant who can, misses the mark.[98] The sound of silence is far louder the in the latter case because it constitutes *evidence*: the defendant can testify, but essentially makes an adoptive admission of the prosecutor's case by failing to testify.[99] In the

> The Court's decision in *Griffin*, however, did not even pretend to be rooted in a historical understanding of the Fifth Amendment. Rather, in a breathtaking act of sorcery, it simply transformed legislative policy into constitutional command, quoting a passage from an earlier opinion describing the benevolent purposes of 18 U.S.C. § 3481, and then decreeing, with literally nothing to support it: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected."

Mitchell v. United States, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting) (citations omitted).

[91] *Mitchell*, 526 U.S. at 332–35 (Scalia, J., dissenting) (citations omitted).

[92] *Id.* at 333.

[93] *Id.* (quoting STEPHEN, *supra* note 56, at 440).

[94] *Id.* at 334.

[95] *Id.*

[96] *See, e.g.*, 18 U.S.C. § 3481 (2016) ("In trial of 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. His failure to make such request shall not create any presumption against him.").

[97] LEVY, *supra* note 54, at 283.

[98] *See Mitchell*, 526 U.S. at 334 (Scalia, J., dissenting).

[99] *See* People v. Tyler, 36 Cal. 522, 528 (1869).

former, a defendant's silence would have been ill-seeming, but cannot be an adoptive admission of the evidence because he cannot take the stand at all to refute the prosecutor's case as an evidentiary matter.[100]

Justice Scalia's failure to distinguish between pre-qualification silence and post-qualification silence founders on another historical shoal: the *pro confesso* rule.[101] In the days of the much-maligned High Commission,[102] if a defendant refused to testify upon taking the oath *ex officio*,[103] or refused to take the oath and testify altogether, he would be "taken '*pro confesso*'—as if he had confessed—and was pronounced guilty."[104] As a contemporary jurist put it, "if the defendant shall refuse to take [the oath to clere himselfe], he is holden *pro confesso & convicto*."[105]

Although the nineteenth-century competency statutes did not force a defendant *to testify* in the same manner as the oath *ex officio*, without a rule curtailing the use of silence, it is little better:

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[100] *See id.* at 530.

[101] *See Mitchell*, 526 U.S. at 332–35 (Scalia, J., dissenting) (citations omitted); R.H. Helmholz, *The Privilege and the* Ius Commune*: The Middle Ages to the Seventeenth Century, in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENTS, *supra* note 55, at 17, 38.

[102] This essay is not the place to rehash the lengthy history of the High Commission. Two texts with competing pictures of the prohibition on self-incrimination discuss the history of the High Commission at length. *See generally,* LEVY, *supra* note 54, at 43–172 (discussing the history of laws in England and discussing a defendant's right against self-incrimination); Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENTS, *supra* note 55, at 47; *see also* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 411 (1995) (noting the "two schools of thought" on the origins of the privilege against self-incrimination). That the High Commission was the institution against which the privilege against self-incrimination arose has been long accepted in the Supreme Court. *See, e.g.*, Feldman v. United States, 322 U.S. 487, 499 (1944) (Black, J., dissenting) ("Compulsion of self-incriminatory testimony by court oaths and by the less refined methods of torture were equally detested by the Fifth Amendment's liberty-loving advocates and their forbears. Their abhorrence of these practices did not spring alone from a predilection for personal privacy. They had other reasons to despise and fear them. They still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies.").

[103] Although criminal defendants could not testify on their own behalf in a normal criminal case, in the ecclesiastical courts, where there was no indictment, they were forced to take an oath. *See, e.g.*, LEVY, *supra* note 54, at 66–67 (discussing early instances of the oath *ex officio*); *see also id.* at 284 ("Much of the seventeenth century's praise of the common law for not putting the defendant to oath was somewhat misleading, unless it is understood that the oath referred to was the oath *ex officio*, that is, an oath to tell the truth *before* knowing the charges and accusers.").

[104] *Id.* at 55.

[105] RICHARD COSIN, AN APOLOGIE FOR SUNDRIE PROCEEDINGS pt. 3, 27 (1593). "In practice," Levy argues, "refusal to swear the oath was punished as contempt of court" rather than as a conviction, but "[t]he distinction, perhaps, is without meaning since contempt could be punished by imprisonment for an indefinite period." LEVY, *supra* note 54, at 132.

if silence can be used, it operates in much the same fashion as the ancient *pro confesso* rule.[106] Certainly, a defendant could choose not to testify before the High Commission, but he could have been convicted for his silence.[107] Similarly, Tyler or Griffin could choose not to testify, but their silence could be used as competent evidence against them by the prosecutor, and an otherwise flimsy case may thereby be made for the State.[108] Although it is an imperfect historical analogy (prosecutorial comment, as in *Tyler* or *Griffin*, at closing argument is not a per se conviction as was the case with the *pro confesso* rule),[109] the analogy is stronger than the one advanced by Justice Scalia (that an unswearable defendant's silence is the same as a swearable defendant's silence).[110] In the first, the defendant's silence takes place in a legal setting in which the defendant can be sworn and give testimony.[111] Justice Scalia's analogy attempts to draw conclusions from the largely irrelevant fact that defendants, although they could not give sworn testimony, had to act as their own lawyers and speak (in a non-evidentiary manner) to the jury.[112]

In the absence of the ability of a defendant to take an oath and

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[106] *See* LEVY, *supra* note 54, at 132; Alschuler, *supra* note 55, at 199.

[107] LEVY, *supra* note 54, at 132.

[108] *See* Griffin v. California, 380 U.S. 609, 609–11 (1965); People v. Tyler, 36 Cal. 522, 529–30 (1869).

[109] The author has been unable independently to verify Levy's suggestion that the *pro confesso* rule "in practice" operated as a contempt citation rather than adjudication on the merits of the criminal accusation. LEVY, *supra* note 54, at 132. Levy cites no authority for the proposition that contempt, rather than conviction, was the usual cost of a failure to take the oath. *See id.* In the 16th-century trial of John Udall, however, a failure to take the oath did *at first* result in a contempt citation rather than an automatic conviction, but he was later convicted based entirely on his refusal to answer questions, without a reference to the *pro confesso* rule. John Udall, *The Trial of Mr. John Udall*, *in* 1 A COMPLETE COLLECTION OF STATE-TRIALS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS 1271, 1276 (1742) ("Roch[ester]: [W]ill you take the Oath? U[dall]: I dare not take it. Roch[ester]: Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it."); *see* also Levy, *supra* note 54, at 168 (discussing the end of Udall's trial). Udall's case suggests to the author that contempt and *pro confesso et convicto* were hardly mutually exclusive. *See id.* at 169–70 (explaining how Udall would have been pardoned if he agreed to leave England and never return, signifying the difference between a conviction (which would have resulted in execution) and *pro confesso*). Notably, Udall's case has been cited by the Supreme Court as a key case in the history of the privilege against self-incrimination. *See* Brown v. Walker, 161 U.S. 591, 596–597 (1891). In any case, Cosin's account—that an automatic conviction could and did occur—is derived from his treatise on ecclesiastical court procedure on which both Levy and Helmholz rely favorably. *See* Helmholz, *supra* note 101, at 17, 23; LEVY, *supra* note 54, at 132 n.33.

[110] *See* Mitchell v. United States, 526 U.S. 314, 332–35 (1999) (Scalia, J., dissenting).

[111] *See* LEVY, *supra* note 54, at 132.

[112] *See Mitchell*, 526 U.S. at 332–34 (Scalia, J. dissenting) (citing STEPHEN, *supra* note 56, at 440).

give evidence, silence has little, if any evidentiary content; once a defendant can (or must) take an oath, and refuses to testify, the *pro confesso* rule is the natural, "rational" outcome; it is the outcome advocated for by those who, without appreciating the distinction between an unswearable defendant's silence and that of a swearable defendant, oppose *Griffin*.[113] As Professor Alschuler has put it, the "refusal to submit to an oath . . . differ[s] from any other form of silence."[114]

The Fifth Amendment, to restate the obvious, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[115] At the time the self-incrimination clause was ratified, defendants did not need to worry about being compelled to be a verbal witness in court: they could not testify at all.[116] The self-incrimination clause was put in place in response to situations in which a defendant *could* in fact be made a witness,[117] and his silence could be used to convict him.[118] When this situation again arose—with the advent of defendant-qualification statutes—it became necessary to take corrective measures to protect a defendant's choice not to testify.[119] Such protection was necessary, not because adverse inferences exacted a "penalty" on the defendant,[120] but because the defendant-qualification statutes transformed silence into competent evidence against the defendant.[121] *Griffin*'s holding is compelled by the history of the self-incrimination clause, and is not an ahistorical and "breathtaking act of sorcery."[122] Having now reassessed the foundations of *Griffin*'s prohibition on adverse inferences on a defendant's silence during his criminal trial, this essay now turns to the question of whether that rule should prohibit a fact-finder's

[113] *See* Ayer, *supra* note 48, at 862–63 ("[T]he inference of guilt from silence is not most basically a way of punishing the defendant—it is, on account of its rationality, a way of making more likely the correct factual resolution of the case.").

[114] Alschuler, *supra* note 55, at 199. Alschuler also notes the irony of *Rock v. Arkansas*, which held that the Fifth Amendment's self-incrimination clause preserved a defendant's right to testify under oath, "a right the framers might have characterized as the right to be compelled." *Id.* at 200 (citing Rock v. Arkansas, 483 U.S. 44, 52–53 (1987)).

[115] U.S. CONST. amend. V.

[116] *See* Popper, *supra* note 55, at 456.

[117] *See* Feldman v. United States, 322 U.S. 487, 500 (1944) (Black, J., dissenting).

[118] *See* LEVY, *supra* note 54, at 132.

[119] *See* People v. Tyler, 36 Cal. 522, 528 (1869).

[120] *See* Griffin v. California, 380 U.S. 609, 614 (1965) (citing People v. Modesto, 62 Cal. 2d 436, 451–53 (1965)).

[121] *Cf. Tyler*, 36 Cal. at 530 ("[T]he very act of exercising his option . . . would be . . . a crimination of himself.").

[122] Mitchell v. United States, 526 U.S. 314, 336 (1999).

conclusion, based on a defendant's silence at sentencing, that he is remorseless.

III

With *Griffin* now given a stronger historical basis, this essay will address the problem of *Griffin*'s applicability to remorselessness at the sentencing phase of a criminal case.[123] Part III proceeds in two sections. Section A recounts the path *Griffin* has taken in the Supreme Court from a trial right, to a jury instruction at trial in *Carter*, to an apparently limited right at sentencing in *Mitchell*. It also discusses the current state of the law in the federal courts and in selected state jurisdictions on the principal question at issue here: whether *Griffin* prohibits an adverse inference as to remorselessness at sentencing.[124] Section B situates the problem in the history of the self-incrimination clause, concluding that being a "witness against [one]self in a criminal prosecution" encompasses information that would enhance a punishment in the sentencing phase of a criminal case.[125] This section will need to address both the procedural origins of the rule—which did not meaningfully distinguish between the prosecution and punishment "phases" of a criminal case, as well as the Supreme Court's discussion of what "crimination" means and the phrase's history.

A. The Influence of Griffin

Griffin's relevant trajectory can be stated briefly. In its 1981 decision in *Carter v. Kentucky*,[126] the Supreme Court considered a question reserved in *Griffin* and *Lakeside v. Oregon*[127]— whether, upon request by the defendant, the court should instruct the jury not to hold a defendant's silence at trial against him.[128] As in

[123] *See* Amar & Lettow, *supra* note 42, at 866–67 (discussing the self-incrimination clause and sentencing).

[124] *See* United States v. Whitten, 610 F.3d 168, 198–99 (2d Cir. 2010) (citations omitted); United States v. Caro, 597 F.3d 608, 628–29 (4th Cir. 2010) (citations omitted); United States v. Mikos, 539 F.3d 706, 710, 718 (7th Cir. 2008) (citations omitted); Lesko v. Lehman, 925 F.2d 1527, 1544–45 (3d Cir. 1991) (citations omitted); State v. Willey, 44 A.3d 431, 442–43 (N.H. 2012) (citations omitted); State v. Burgess, 943 A.2d 727, 737–38 (N.H. 2008) (citations omitted); State v. McClure, 537 S.E.2d 273, 275–76 (S.C. 2000) (citations omitted).

[125] *See* Counselman v. Hitchcock, 142 U.S. 547, 562, 563–64 (1892) (citations omitted); *but see Mitchell*, 526 U.S. at 337–38 (Scalia, J., dissenting) (citations omitted) (arguing that the sentencing phase of a criminal case is not part of the criminal case).

[126] Carter v. Kentucky, 450 U.S. 288 (1981).

[127] Lakeside v. Oregon, 435 U.S. 333 (1978).

[128] *Carter*, 450 U.S. at 289–90, 295 (first citing Griffin v. California, 380 U.S. 609, 615 n.6

Griffin, the question had been resolved some time earlier with reference to the federal defendant-qualification law in *Bruno v. United States*.[129] And also as in *Griffin*, the Court constitutionalized its earlier statutory decision, by concluding that "while the *Bruno* court relied on the authority of a federal statute, it is plain that its opinion was influenced by the absolute constitutional guarantee against compulsory self-incrimination."[130] The Court again missed an opportunity to place its decision in the Fifth Amendment's historical context in the manner described above,[131] and Justice Powell, quoting Justice Stewart's dissent in *Griffin*, lamented its lack of historical or textual rigor.[132]

The same year it decided *Carter*, the Supreme Court decided *Estelle v. Smith*,[133] a case ancillary to the *Griffin* rule but significant for the purposes of the present essay. In that case, the Court held that "so far as the protection of the Fifth Amendment privilege is concerned," it could "discern no basis to distinguish between the guilt and penalty phases" of capital trials.[134] The Court concluded that the trial court had erred in admitting during the penalty phase of a capital case an un-Mirandized psychiatric examination in which the psychiatrist testified, among other things, based on information learned in the examination, "that [the defendant] has no remorse or sorrow for what he has done."[135] Indeed, the psychiatrist "placed particular emphasis on what he considered to be [the defendant]'s lack of remorse."[136]

Eighteen years later, in its 1999 decision in *Mitchell v. United States*, *Griffin* made a great leap forward, from the trial phase of the criminal process to the sentencing phase.[137] In that case, the Supreme Court held that a defendant's guilty plea did not waive the privilege against self-incrimination and that, consequently, a

(1965); then citing *Lakeside*, 435 U.S. at 337).

[129] *See* Bruno v. United States, 308 U.S. 287, 294 (1939) (interpreting the defendant-competency statute to require a curative instruction at defendant's request).

[130] *Carter*, 450 U.S. at 300.

[131] *See supra* Part II; *see also* People v. Tyler, 36 Cal. 522, 528 (1869) (requiring a jury instruction on defendant's request, on a defendant-qualification theory rather than *Griffin*'s penalty doctrine).

[132] *See Carter*, 450 U.S. at 305–307 (Powell, J., concurring) (quoting *Griffin*, 380 U.S. at 620–21 (Stewart, J. dissenting)); *see also Carter*, 450 U.S. at 310 (Rehnquist, J., dissenting). Rehnquist lambasted the decision's "Thomistic reasoning," and commenting that "where [*Griffin*] will stop, no one can know." *Id.*

[133] Estelle v. Smith, 451 U.S. 454 (1981).

[134] *Id.* at 462–63, 468.

[135] *See id.* at 460–61.

[136] *Id.* at 464.

[137] *See* Mitchell v. United States, 526 U.S. 314, 321 (1999).

defendant's silence at sentencing may not be held against her "in determining the facts of the offense at the sentencing hearing."[138] As in *Griffin*, the Court relied on the penalty doctrine, expressly holding that the sentencer "impose[s] an impermissible burden on the exercise of the constitutional right against compelled self-incrimination" when it increases a penalty against a defendant for remaining silent as to "the facts of the offense."[139] The Court expressly reserved the question posed by the present essay: whether the rule should apply to "the determination of lack of remorse."[140]

Justice Scalia, as has been discussed above, dissented vigorously on the ground that *Griffin* had no historical basis.[141] He also argued that precedent did not support the application of the privilege to sentencing proceedings.[142] Finally, he commented—quite rightly—that "there is no logical basis for drawing . . . a line" between applying the Fifth Amendment to silence concerning "facts of the offense" and a defendant's repentance.[143]

In its 2014 decision in *White v. Woodall*, the Supreme Court hinted at *Griffin*'s direction.[144] A capital defendant had sought a curative instruction in the penalty phase that would have insulated his silence from consideration by the jury for all purposes, including remorse.[145] The trial judge concluded—and the Kentucky Supreme Court agreed—that *Carter* and *Mitchell* did not require such an instruction, because *Mitchell* reserved the question of adverse inferences with respect to facts—like remorselessness—not bearing upon the facts of the crime.[146] On appeal, the Sixth Circuit ultimately upheld the district court's decision granting a writ of habeas corpus on the ground that a *Carter* instruction was required.[147]

The Supreme Court reversed, with Justice Scalia writing for a 6-Justice majority.[148] It concluded that the Kentucky trial court judge's decision neither was "contrary to, [nor did it] involve[] an

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[138] *See id.* at 330.

[139] *Id.*

[140] *Id.*

[141] *See id.* at 332 (Scalia, J., dissenting). Justice Scalia would later raise the same arguments in his opinion concurring in *Salinas v. Texas*. *See* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Scalia, J., concurring in the judgment).

[142] *See Mitchell*, 526 U.S. at 337–38 (Scalia, J., dissenting) (citations omitted).

[143] *Id.* at 340.

[144] *See* White v. Woodall, 134 S. Ct. 1697, 1703–05 (2014).

[145] *Id.* at 1701.

[146] *See* Woodall v. Commonwealth, 63 S.W.3d 104, 115 (Ky. 2001).

[147] *See* Woodall v. Simpson, 685 F.3d 574, 580–81 (6th Cir. 2012) (citations omitted).

[148] *Woodall*, 134 S. Ct. at 1700, 1707.

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[149] as the Antiterrorism and Effective Death Penalty Act of 1996 required for the issuance of the writ.[150] Seizing on the opportunity to suggest limits to *Griffin*'s scope, Justice Scalia argued that *Estelle*'s conclusion that the Fifth Amendment applied to the sentencing phase was dictum,[151] and that, by limiting the scope of *Griffin* at sentencing to the "facts of the offense," *Mitchell* did not apply to Woodall's case because Woodall had admitted to the facts of his crime and was principally defending against the imposition of the death penalty.[152]

The United States Courts of Appeals are divided as to how to proceed in light of the foregoing precedents.[153] One of the earliest cases on the matter preceded *Mitchell*.[154] That case found a *Griffin* violation where a prosecutor admonished the jury to consider the defendant's "arrogance" for taking the stand in the penalty phase of his capital case to testify to mitigating circumstances without having the "common decency to say I'm sorry for what I did."[155] The Second Circuit reached a similar conclusion in *United States v. Whitten*, when it held that a prosecutor's comment that "[t]he path for that witness stand has never been blocked for [the defendant]" violated *Griffin* where the defendant had submitted an unsworn letter to the jury expressing remorse.[156]

On the other end of the spectrum, the Seventh Circuit held in *United States v. Mikos*, no *Griffin* violation was found where a prosecutor commented to the jury in the penalty phase of a capital trial that the defendant is "sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away

[149] *Id.* at 1702.

[150] *Id.*; *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214 (codified as 28 U.S.C. § 2254 (2012)).

[151] *Woodall*, 134 S. Ct. at 1704 n.4 (citations omitted).

[152] *See id.* at 1703–04. In his three-Justice dissent, Breyer discusses mostly what he characterizes as Justice Scalia's crabbed reading of *Estelle* and overbroad reading of *Mitchell*. *See id.* at 1708–09 (Breyer, J., dissenting) ("The Court . . . read[s] *Estelle* too narrowly. . . . The majority . . . places undue weight on dictum in *Mitchell* reserving judgment as to whether to create additional exceptions to the normal rule of *Estelle* and *Carter*.").

[153] *See* United States v. Caro, 597 F.3d 608, 629 (4th Cir. 2010) ("[O]ur sister circuits are divided over whether the Fifth Amendment prohibits using silence to show lack of remorse inviting a harsher sentence."). This essay does not discuss *Caro* at length because it concludes, with bare analysis, that any Fifth Amendment error would have been harmless. *Id.* at 636.

[154] Lesko v. Lehman, 925 F2d 1527, 1530 (3d Cir. 1991).

[155] *Id.* at 1544–55.

[156] United States v. Whitten, 610 F.3d 168, 196–99 (2d Cir. 2010).

with it."[157] The court ultimately characterized the prosecutor's argument, without reference to the words the prosecutor used, as one directed, not at the defendant's "silence (= the lack of an apology) in open court, but [rather at] the fact that [the defendant] had not done anything to reduce or redress the hurt his crimes had caused."[158] Similarly, the Sixth Circuit has held that a defendant's refusal to undergo a psychosexual examination was a proper basis for an enhanced sentence, on the ground that *Mitchell* did not necessarily preclude the use of silence as "bear[ing] upon the determination of a lack of remorse."[159]

Meanwhile, some state courts have grappled with the issue of whether to apply *Griffin* and its progeny to inferences from silence concerning remorselessness.[160] The Supreme Court of South Carolina, for example, has long precluded an adverse inference on the basis of silence to determine remorselessness.[161] The New Hampshire Supreme Court, on the other hand, has crafted a rule in which holds, as a general matter, that "when a defendant maintains his innocence throughout the criminal process and denies committing the predicate acts comprising the charged crime, his silence at sentencing may not be considered as a lack of remorse."[162] "When a defendant admits to committing the acts underlying the charged crime, but disputes that he had the requisite mental state or asserts a legal justification for committing those acts," however, "his silence at sentencing 'might, in certain instances, legitimately be considered as a lack of remorse.'"[163] The distinction drawn by the

[157] United States v. Mikos, 539 F.3d 706, 718 (7th Cir. 2008); *see id.* at 722–23 (Posner, C.J., concurring in part and dissenting in part) ("Mere silence is not enough to demonstrate lack of remorse.").

[158] *Id.* at 718.

[159] United States v. Kennedy, 499 F.3d 547, 551–52 (6th Cir. 2007) (citations omitted).

[160] This essay briefly touches upon the cases of South Carolina and New Hampshire, but several other states have of course weighed in on the issue over the years. *See supra* note 124 (collecting cases). In California, for example, there is no obligation to administer a *Carter* instruction during the penalty phase of a capital case, yet prosecutors are "entitled during closing argument to highlight a defendant's lack of remorse, and doing so does not necessarily violate *Griffin*." People v. Brady, 236 P.3d 312, 342 (Cal. 2010). Vermont has expressly held that *Mitchell* permits an inference of remorselessness from silence at sentencing. *See* State v. Muscari, 807 A.2d 407, 416–17 (Vt. 2002) (citations omitted). Meanwhile, the Montana Supreme Court has stated that "if a district court does not point to affirmative evidence of lack of remorse in its pronouncement of the sentence, a sentence based on lack of remorse is not legal." State v. Briscoe, 282 P.3d 657, 661 (Mont. 2012) (citation omitted).

[161] *See* State v. McClure, 537 S.E.2d 273, 275–76 (S.C. 2000); State v. Hawkins, 357 S.E.2d 10, 13 (S.C. 1987); State v. Sloan, 298 S.E.2d 92, 94–95 (S.C. 1982) (citations omitted).

[162] State v. Willey, 44 A.3d 431, 442 (N.H. 2012) (citing State v. Burgess, 943 A.2d 727, 738 (N.H. 2008)).

[163] *Id.* at 441–42 (quoting *Burgess*, 943 A.2d at 738).

New Hampshire Supreme Court rests on the common-sense observation that "for a defendant to express remorse truthfully, he must to some degree acknowledge wrongdoing and guilt."[164] The court does not appear, however, to explain its conclusion that an admission to all but the intent element of a crime should render this consideration void.[165] Further, it does nothing to explain how its distinction can be reconciled with *Mitchell*'s conclusion that a plea of guilty does not waive the privilege against self-incrimination.[166]

Griffin's application of the self-incrimination clause has evolved a great deal since it was first recognized by the Supreme Court in 1965.[167] From its initial formulation of the penalty doctrine,[168] the Court has recognized the right to a curative instruction in *Carter*,[169] and to the extension of *Griffin* to sentencing, at least with respect to the "facts of the [crime]."[170] The current posture of the rule does not, however, completely resolve the question addressed by this essay: whether the self-incrimination clause prohibits an adverse inference based on silence with respect to remorselessness at sentencing.

B. Remorse as a Factor

Nearly every jurisdiction in the United States has recognized that remorse is a mitigating factor and, generally, that remorselessness is an aggravating factor at sentencing.[171] That a finding of

[164] *Id.* at 441 (citing *Burgess*, 943 A.2d at 736).
[165] *See Burgess*, 943 A.2d at 738 (citations omitted).
[166] *See* Mitchell v. United States, 526 U.S. 314, 330 (1999).
[167] *See* Griffin v. California, 380 U.S. 609, 614–15 (1965).
[168] *Id.* at 615.
[169] *See* Carter v. Kentucky, 450 U.S. 288, 305 (1981).
[170] *Mitchell*, 526 U.S. at 330.
[171] *See* Ex parte Loggins, 771 So.2d 1093, 1101–02 (Ala. 2000) (citations omitted); Godwin v. State, 554 P.2d 453, 454–55 (Alaska 1976); State v. Gerlaugh, 659 P.2d 642, 644 (Ariz. 1983); People v. Salcido, 186 P.3d 437, 487 (Cal. 2008) (citations omitted); People v. Dunlap, 975 P.2d 723, 742 (Colo. 1999) (en banc); State v. Elson, 91 A.3d 862, 896 (Conn. 2014) (citations omitted); Shelton v. State, 744 A.2d 465, 500–01 (Del. 1999); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Sharp v. State, 692 S.E.2d 325, 330–31 (Ga. 2010); State v. Kamana'o, 82 P.3d 401, 407 (Haw. 2003); State v. Knighton, 144 P.3d 23, 25 (Idaho 2006); People v. Mulero, 680 N.E.2d 1329, 1337 (Ill. 1997) (citations omitted); Barnes v. State, 634 N.E.2d 46, 49 (Ind. 1994) (citations omitted); State v. Knight, 701 N.W.2d 83, 88 (Iowa 2005); State v. Swint, 352 P.3d 1014, 1029 (Kan. 2015) (citations omitted); Tamme v. Commonwealth, 759 S.W.2d 51, 55 (Ky. 1988) (citations omitted); State v. Summit, 454 So.2d 1100, 1108 (La. 1984); State v. Discher, 597 A.2d 1336, 1343 (Me. 1991) (citations omitted); Jennings v. State, 664 A.2d 903, 910 (Md. 1995); Commonwealth v. White, 764 N.E.2d 808, 811, 813 (Mass. 2002); People v. Daniel, 609 N.W.2d 557, 564 (Mich. 2000) (Cavanagh, J., dissenting); State v. Folkers, 581 N.W.2d 321, 327 (Minn. 1998) (citations omitted); Doss v. State, 709 So.2d 369, 398, 400 (Miss. 1996); State v. Richardson, 923 S.W.2d 301, 322 (Mo.

remorselessness is a legal basis upon which a defendant's punishment may be increased is nearly beyond dispute.[172] What this essay must resolve, then, is whether the United States Constitution would countenance a punishment enhancement on the ground of a defendant's remorselessness, because of a defendant's silence at sentencing. The text of the self-incrimination clause and its history demand an answer in the negative.[173] In reaching this conclusion, this section first inspects the history of the sentencing phase, concluding that it is part of the "criminal case" to which the self-incrimination clause refers. It then discusses how any attempt to selectively apply the self-incrimination clause to the sentencing phase lacks a historical basis and is flawed.

1. Guilt and Penalty Phases

When the Supreme Court wrote in *Estelle*, that it could "discern no basis to distinguish between the guilt and penalty phases" of a defendant's case, it did not cite any historical authority;[174] however, the conclusion is consistent with the trial practices existing at the time of the Fifth Amendment's ratification in 1791.[175] "[W]ith little

1996); State v. Garrymore, 145 P.3d 946, 953 (Mont. 2006); State v. Beach, 337 N.W.2d 772, 778, 779 (Neb. 1983); McConnell v. State, 102 P.3d 606, 618 (Nev. 2004); State v. Burgess, 943 A.2d 727, 733 (N.H. 2008) (citations omitted); State v. Wakefield, 921 A.2d 954, 999 (N.J. 2007); State v. Allen, 994 P.2d 728, 764 (N.M. 1999); State v. Billings, 500 S.E.2d 423, 434 (N.C. 1998) (citations omitted); State v. Spath, 581 N.W.2d 123, 130 (N.D. 1999); State v. Bey, 709 N.E.2d 484, 504 (Ohio 1999) (citations omitted); Commonwealth v. Begley, 780 A.2d 605, 644 (Pa. 2001); State v. Martinez, 59 A.3d 73, 94 (R.I. 2013) (citations omitted); State v. Blair, 721 N.W.2d 55, 67 (S.D. 2006) (citations omitted); State v. Lafferty, 20 P.3d 342, 371 (Utah 2001); State v. Sims, 608 A.2d 1149, 1158 (Vt. 1991); Lawlor v. Commonwealth, 738 S.E.2d 847, 892 n.33 (Va. 2013); State v. McClarney, 26 P.3d 1013, 1016–17 (Wash. Ct. App. 2001); State v. Georgius, 696 S.E.2d 18, 26–27 (W. Va. 2010) (Davis, J., dissenting); Ruff v. State, 223 N.W.2d 446, 454 n.32 (Wis. 1974) (citations omitted); Johnson v. State, 283 P.3d 1145, 1149 (Wyo. 2012) (citations omitted).

[172] The extent to which findings of remorse or remorselessness actually affect a sentencer's decision as a practical matter, however, is disputed among scholars of the subject. *Compare* Slovenko, *supra* note 5, at 424 ("[T]he question particularly in cases of a serious offense is whether [remorse] should be taken with a grain of salt."), *with* Adam Saper, Note, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. SOC. CHANGE 99, 103, 104 (2014) (arguing that remorse has a significant impact on sentencing and collecting sources). For present purposes this dispute is not relevant: what matters is that a judge or jury may legally enhance a sentence for remorselessness as an aggravating factor; *see also Mikos*, 539 F.3d 706, 719 (discussing the relevance of remorselessness to an enhanced punishment).

[173] *See* U.S. CONST. amend. V; LEVY, *supra* note 54, at 432.

[174] Estelle v. Smith, 451 U.S. 454, 462–63 (1981).

[175] In the very late eighteenth century, some scholars have recognized that sentencing hearings were sometimes held separately from the trial phase of the criminal process, and that they tended to have their own procedural rules. *See* Anat Horovitz, *The Emergence of Sentencing Hearings*, 9 PUNISHMENT & SOC. 271, 283 (2007). It is clear from near-

exception, during most of the eighteenth century sentencing factors were established on the basis of the same single hearing that comprised the entire criminal trial."[176] For the most part, with the exception of certain mitigating evidence that was submitted in the form of affidavit,[177] any evidence that would have been considered at sentencing had been established during trial.[178] Only in the early nineteenth century did a separate sentencing procedure become normalized as a facet of the criminal adjudicatory process.[179]

In its 2016 decision in *Betterman v. Montana*,[180] the Supreme Court recognized that the sentencing phase inextricably a part of the "criminal case" (as contained by the Sixth Amendment).[181] The Court observed that "[c]riminal proceedings generally unfold in three discrete phases," namely, pre-trial investigation, the trial phase from arrest through conviction, and the phase in which "the court imposes sentence."[182] The speedy-trial clause of the Sixth Amendment, the Court concluded in *Betterman*, "homes in on the second period" and "detaches upon conviction, when the second stage ends."[183] In this sense, the speedy-trial clause is indistinguishable from most of the other rights ensconced in the Sixth Amendment that apply to trial, but not to sentencing, the notable exception being the assistance-of-counsel clause.[184]

The Court emphasized in *Betterman* that the speedy-trial clause—like the confrontation clause and the jury-trial clauses of the Sixth Amendment—is principally concerned with "the accused," as to whom the presumption of innocence still attaches.[185] Indeed,

contemporaneous literature on the matter, however, that the sentencing procedure—even as it began to separate from the trial-phase of the criminal process—remained part of the criminal case. *See, e.g.*, 2 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 693 (1978) (discussing the proceedings between verdict and judgment phases in historical English Trials).

176 Horovitz, *supra* note 175, at 283.

177 *See id.*

178 *Id.*; *see also id.* at 279 (noting, accurately, that Blackstone's Commentaries did not reference a separate procedure for sentencing).

179 *See* CHITTY, *supra* note 175, at 693; *see also* LEVY, *supra* note 54, at 427 ("[T]he location of the self-incrimination clause in the Fifth Amendment rather than the Sixth proves that the Senate, like the House, did not intend to restrict that clause to the criminal defendant only nor only to his trial. The Fifth Amendment, even with the self-incrimination clause restricted to criminal cases, still put its principle broadly enough to apply to witnesses and to any phase of the proceedings.").

180 Betterman v. Montana, 136 S. Ct. 1609 (2016).

181 *Id.* at 1613; *see* U.S. CONST. amend. VI.

182 *Betterman*, 136 S. Ct. at 1613.

183 *Id.*

184 *See* Mempha v. Rhay, 389 U.S. 128, 137 (1967).

185 *Betterman*, 136 S. Ct. at 1614 (quoting Reed v. Ross, 468 U.S. 1, 4 (1984)).

the Sixth Amendment itself specifically reserves the rights therein to "the accused."[186]

From the above observations we may draw a number of consequential conclusions. First, at the turn of the eighteenth century, what the Supreme Court in *Betterman* referred to as the "second" and "third" stages of a "criminal proceeding[]" were essentially based on the same evidence, since they were more or less the same proceeding.[187] Any evidentiary prohibitions (including the self-incrimination clause) at trial would, as a general matter, carry over to the sentencing phase.[188] And to the extent that the sentencing phase was beginning, in the late 1700s, to become a distinct proceeding separate from the trial phase, it was nonetheless considered an inextricable part of the whole of the criminal case itself,[189] just as it is today.[190]

Second, the text of the Sixth Amendment principally concerns itself with the trial phase (referring, as it does, to the "accused"),[191] while the Fifth Amendment makes no such textual distinction.[192] It instead refers to "person[s]" generally, and their being compelled to testify, quite broadly, "against" themselves in a "criminal case."[193] Much of the Sixth Amendment is concerned with the preservation of the presumption of innocence,[194] while the Fifth Amendment's self-incrimination clause has historically been concerned with a broader set of values—including, in addition to the preservation of the presumption of innocence, the preservation of a fair balance between the state and the accused, the prevention of prosecution for crimes of belief and association, the curbing of state coercion, and the protection of privacy.[195]

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[186] U.S. CONST. amend. VI.

[187] *Betterman*, 136 S. Ct. at 1613, 1617; Horovitz, *supra* note 175, at 283.

[188] *See* Horovitz, *supra* note 175, at 283 ("[W]ith little exception, during most of the 18th century sentencing factors were established on the basis of the same single hearing that comprised the entire criminal trial.").

[189] *See* CHITTY, *supra* note 175, at 652–53; *see also Betterman*, 136 U.S. at 1614 n.3 ("[A]t the founding, sentence was often imposed promptly after rendition of a verdict.").

[190] *See, e.g.*, FED. R. CRIM. P. 32 (situating sentencing squarely within the criminal process).

[191] *See Betterman*, 136 S. Ct. at 1614.

[192] U.S. CONST. amend. V.

[193] *Id.*

[194] *See Betterman*, 136 S. Ct. at 1614 (citing U.S. CONST. amend. VI).

[195] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting United States v. Grunewald, 233 F2d 556, 581–82 (2d Cir 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957)), *abrogated by* United States v. Balsys, 524 U.S. 666 (1998). For an illuminating discussion of the various justifications of the self-incrimination clause, *see* Steven J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U.L. REV. 311, 317 (1991).

In short, the self-incrimination clause's reference to "criminal case" is capacious enough to include the sentencing proceeding, and the relevant historic practice was to treat sentencing in precisely this manner. Justice Scalia, arguing to the contrary in his dissent in *Mitchell*, contended that "criminal prosecution[]" in the Sixth Amendment and "criminal case" were "indistinguishable" as a historical matter.[196] He then argued—on the basis of no historical authority—that, because some Sixth Amendment rights do not apply to sentencing, it must mean that sentencing is not part of the "criminal prosecution[]," and therefore not part of the "criminal case."[197] This argument is flawed for the reasons outlined above: although a trend existed in the 1780s and 1790s to separate trial and sentencing phases, the sentencing was and always has been part of the criminal case.[198]

Throughout the balance of the seventeenth century, and up to the ratification of the Fifth Amendment, "the judge based [his] . . . decisions [regarding sentencing] on the evidence submitted in court, . . . no procedural difference existed between the way elements of the offense and sentencing factors were established in court."[199] This would have been the practice with which the Framers and the public that voted to ratify the Fifth Amendment would have been most familiar, because it was the dominant practice before the sentencing phase became normalized in the early nineteenth century.[200] Thus, a review of the historical milieu of the Fifth Amendment's ratification vindicates the *Estelle* Court's judgment that there exists "no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned."[201]

In his final sally on the matter, Justice Scalia equates the sentencing stage of a criminal case with a variety of non-criminal

[196] Mitchell v. United States, 526 U.S. 314, 337 (1999) (Scalia, J., dissenting) (quoting Spaziano v. Florida, 468 U.S. 447, 462–63 (1984)).

[197] *Mitchell*, 526 U.S. at 337 (Scalia, J., dissenting) (quoting *Spaziano*, 468 U.S. at 462–63).

[198] *See supra* Section III.B.2.

[199] Horovitz, *supra* note 175, at 283; *see also* Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (citing John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 13, 36–37 (1987)) (noting that, in the eighteenth century, the sentence of the court was based on the evidence that made up the crime, because particular sentences were prescribed for each offense).

[200] Horovitz, *supra* note 175, at 283 ("[W]ith little exception, during most of the 18th century sentencing factors were established on the basis of the same single hearing that comprised the entire criminal trial.").

[201] Estelle v. Smith, 451 U.S. 454, 462–63 (1981).

situations in which penalties or forms of relief were denied on the basis of a petitioner's silence: the denial of clemency, administrative punishment for the violation of prison rules, and deportation.[202] Obviously, the Supreme Court has elsewhere explained that such matters are *not* criminal.[203] To accept Justice Scalia's position—that the Fifth Amendment does not apply to the sentencing phase at all[204]—ultimately requires that a sentencing be, not a criminal proceeding, but a civil one[205]—and such an outcome defies common sense entirely. As Justice Scalia himself wrote, "[t]here is no reason why the increased punishment to which the defendant is exposed in the sentencing phase of a completed criminal trial should be treated differently [than a civil case]—unless it is the theory that the guilt and sentencing phases form one inseparable 'criminal case.'"[206] But it is this theory, which he falsely claims to have refuted, that is most consistent with the text and history of the Fifth Amendment.

The ultimate conclusion is a commonsense one that has been long recognized by the Supreme Court: a criminal judgment necessarily includes the conviction and the sentence.[207] A sentencing proceeding certainly has different procedural requirements and protections than a criminal trial—and some of these can be recognized in the distinction made by the Sixth and Fifth Amendments.[208] As was recognized in 1791, however, "the guilt and sentencing phases form one inseparable 'criminal case.'"[209] The question now becomes whether the Fifth Amendment should, as *Mitchell* suggests, be applied selectively at sentencing so that a sentencer may consider silence—a historically protected form of evidence where a defendant can be sworn[210]—as evidence of a lack of remorse.

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[202] *Mitchell*, 526 U.S. at 337–38 (Scalia, J., dissenting) (first citing Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 285–86 (1998) (addressing clemency); then citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (concerning prison sanctions); and then citing I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1043–44 (1984) (discussing deportation)).

[203] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 390 (2010) (Scalia, J., dissenting) (citations omitted) (noting that removal proceedings are not criminal).

[204] *Mitchell*, 526 U.S. at 337 (Scalia, J., dissenting) (citation omitted).

[205] *See id.* at 337–38 (citations omitted); *Ohio Adult Parole Authority*, 523 U.S. at 285–86; *Baxter*, 425 U.S. at 318–19; *Lopez-Mendoza*, 468 U.S. at 1043–44 (citation omitted).

[206] *Mitchell*, 526 U.S. at 338 (Scalia, J., dissenting).

[207] *See, e.g.*, Teague v. Lane, 489 U.S. 288, 314 n.2 (1989) ("As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant.").

[208] *See supra* notes 182–185 and accompanying text.

[209] *Mitchell*, 526 U.S. at 338 (1999) (Scalia, J., dissenting).

[210] *See, e.g.*, Griffin v. California, 380 U.S. 609, 610 (1965).

2. The Impact of Remorselessness

This essay has so far concluded (a) that *Griffin* is a historically necessary decision, required to restore a criminal defendant to the place he would have been had he not been made competent to give sworn testimony; and (b) that the Fifth Amendment's self-incrimination clause applies, as a textual and historical matter, to sentencing proceedings. Thus, holding a defendant's silence against him in imposing sentence violates the United States Constitution. What remains is to show that the self-incrimination clause prohibits a sentencer's consideration of a defendant's silence as evidence of his remorselessness.[211] Existing Supreme Court precedent shows that it is; indeed, as Justice Scalia himself explains, "there is no logical basis for drawing . . . a line" between evidence of remorselessness and evidence establishing the facts of the crime.[212]

In its 1891 decision in *Counselman v. Hitchcock*, the Supreme Court observed that "[i]t is an ancient principal of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him *or subject him to fines, penalties or forfeitures*."[213] Historically, the focus of the subject matter covered by the privilege has been matters that will subject the defendant to criminal penalty or "could be used in a criminal prosecution."[214] The principal limit on this rule was stated in the 1896 decision, *Brown v. Walker*, in which the Court wrote that because certain material evidence had a "tendency to disgrace [the defendant] or bring him into disrepute, . . . he may be compelled to answer."[215]

Plainly, remorselessness in the context of a criminal sentencing does not merely "tend[] to disgrace [the defendant] or bring him into disrepute."[216] A sentencer's conclusion that a defendant is not contrite can have concrete, even deadly, consequences for the defendant's sentence.[217] Moreover, where a defendant has contested

[211] *Mitchell*, 526 U.S. at 340 (Scalia, J., dissenting).

[212] *Id.*

[213] Counselman v. Hitchcock, 142 U.S. 547, 563–64 (1891) (emphasis added) (citations omitted).

[214] Kastigar v. United States, 406 U.S. 441, 445 (1972); *see also* LEVY, *supra* note 54, at 106 ("[Defendants] could not be compelled to incriminate themselves or even to answer a question that was prejudicial to themselves or revealed infamy which could not be the basis of a prosecution.").

[215] Brown v. Walker, 161 U.S. 591, 598 (1896).

[216] *Id.*

[217] Eisenberg, *supra* note 4, at 1631; *see also* John F. Edens, et al., *No Sympathy for the Devil: Attributing Psychopathic Traits to Capital Murders Also Predicts Support for Executing*

his guilt as to any element of the crime, or has raised an affirmative defense that would justify the crime, a finding of remorse is the equivalent of a finding of an admission of guilt[218]—turning the defendant's silence from not mere remorselessness but positive evidence of crimination.[219] For these reasons, Justice Scalia had to admit that there was no logical, principled basis on which a court could reasonably distinguish between enhancing a sentence for silence as to "facts of the offense"—which *Mitchell* flatly prohibits—and enhancing a sentence for silence as to remorse—which *Mitchell* leaves open.[220]

Whatever remorselessness may say about a person in everyday life—disgracing him or putting him in disrepute[221]—in the context of a criminal sentencing proceeding, remorselessness is an aggravating factor that can and often is used either to expose the defendant "to fines, penalties, or forfeitures"[222] or, in the case of a defendant that has not admitted to any facts of the crime, to prove his guilt,[223] thus "criminating" him.[224] The Supreme Court has already recognized as much in *Estelle* by concluding that a psychiatrist's testimony concerning a defendant's remorselessness was improper because the information was obtained in violation of the privilege against self-incrimination.[225]

IV

The self-incrimination clause is "as broad as the mischief against

Them, 4 PERSONALITY DISORDERS: THEORY RES. & TREATMENT 175, 178 (2013) ("[P]erceptions of remorselessness in particular carry considerable weight in terms of their association with support for a death verdict, consistent with earlier findings that perceived lack of remorse predicts various negative outcomes in legal cases."); Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMP. POL. & C.R. L. REV. 45, 50 (2004) ("[R]emorselessness figures prominently in the calculus of death."); Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY L. 39, 39 (2014) (finding that most judges find remorse relevant at sentencing).

[218] State v. Willey, 44 A.3d 431, 443 (N.H. 2012) (citing State v. Burgess, 943 A.2d 727, 735 (N.H. 2008)).

[219] *Willey*, 44 A.3d at 441–42 (citing *Burgess*, 943 A.2d at 738).

[220] Indeed, this is likely the reason Justice Scalia directed his energies in his *Mitchell* dissent on attacking *Griffin*. *See* Mitchell v. United States, 526 U.S. 314, 330; *id.* at 331–36 (1999) (Scalia, J., dissenting) (citations omitted).

[221] Brown v. Walker, 161 U.S. 591, 598 (1896).

[222] Counselman v. Hitchcock, 142 U.S. 547, 563–64 (1891).

[223] *See Willey*, 44 A.3d at 441–42 (citations omitted).

[224] *See Counselman*, 142 U.S. at 563–64.

[225] Estelle v. Smith, 451 U.S. 454, 464–65 (1981).

which it seeks to guard."[226] This essay has shown that the self-incrimination clause sought, as a historical matter, to guard against adverse inferences on the basis of a defendant's silence when that defendant could be sworn and testify on his own behalf.[227] To the contrary of the Scalia-faction position that "*Griffin* is impossible to square with the text of the Fifth Amendment,"[228] *Griffin* was constitutionally necessary to prevent the enactment of defendant-qualification laws from compelling the defendant's decision to take the stand or not—one he is forced to make—to become evidence.[229] That case thus fits neatly within the history and text of the self-incrimination clause. This essay has further shown that the self-incrimination clause's reference to "a criminal case" refers to both the prosecution and sentencing phases of criminal cases which were at the time of the founding largely indistinguishable as a procedural matter.[230] Finally, this essay concludes that, ultimately, remorselessness is a fact that tends to enhance a defendant's sentence, and that consequently it falls within the subject matter of the privilege against self-incrimination.[231]

This particular outcome not only comports with the text, history, and intent of the Fifth Amendment, it also makes sense as a matter of evidence.[232] Silence can sometimes be relevant, and indeed very probative, to disputed matters of fact.[233] "In most circumstances," however, "silence is so ambiguous that it is of little probative force."[234] As the Court has explained:

> Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.[235]

While one might want to believe it to be "natural under the

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[226] *Counselman*, 142 U.S. at 562.
[227] *See supra* Part II.
[228] Salinas v. Texas, 133 S. Ct. 2174, 2184 (Thomas, J., concurring).
[229] People v. Tyler, 36 Cal. 522, 528 (1869).
[230] *See* Mitchell v. United States, 526 U.S. 314, 320, 328 (1999); *supra* Part III.B.i.
[231] *See* Ward, *supra* note 3, at 163; *supra* Part III.B.ii.
[232] Tracey Maclin, *Contribution: The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047, 1051 n.22, 1055–56, 1061 n.92 (2017).
[233] United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923) (citations omitted) ("Silence is often evidence of the most persuasive character.").
[234] United States v. Hale, 422 U.S. 171, 176 (1975).
[235] *Id.*

circumstances" of a sentencing for a defendant to contest an assertion that he lacks remorse, the lived realities of criminal sentencing militate against that suggestion.[236] Sentencings are intensely stressful experiences during which a defendant has any number of reasons to be quiet (often at the insistence of his attorney).[237] The circumstances of sentencings are those in which it is not necessarily "natural" to speak. Silence, therefore, loses much of its probative force at sentencing.

The challenge that the Fifth Amendment's self-incrimination clause poses to the State is to convict and sentence the defendant based on its own evidence and not on his compelled admissions, including those compelled by force of the defendant-qualification statutes.[238] If the State has evidence, as Lucius did of Aaron, that the defendant is so remorseless that "nothing grieves [him] heartily indeed / But that [he] cannot do ten thousand more" heinous deeds,[239] then the State can present it.[240] The Fifth Amendment, however, prohibits the State from relying on the defendant's silence when it has no such evidence to produce.[241]

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[236] *See id.* at 176; United States v. Mikos, 539 F.3d 706, 719 (7th Cir. 2008); Natapoff, *supra* note 7, at 1485.

[237] Natapoff, *supra* note 7, at 1466 ("[L]awyers who anticipate that their clients will not sway the judge favorably, or worse, might offend the judge, are likely to pressure their clients not to speak."). An attorney may well wish to persuade his client to keep from allocuting at sentencing due to the client's frustration at the proceedings, the client's manner of speaking, or the expectation that the client—who may not trust the judge—will "hedge [his] speech" and not sound as repentant as he really is. *Id.* at 1465–66.

[238] *See* People v. Tyler, 36 Cal. 522, 529–30 (1869).

[239] SHAKESPEARE, *supra* note 1, act 5, sc. 1.

[240] *See, e.g.*, United States v. Caro, 597 F.3d 608, 611, 631 (4th Cir. 2010). Here, the prosecutor's arguments at sentencing concerning remorselessness were proper where the evidence established that the defendant, after killing the decedent, yelled, "Come get this piece of shit out of here," and, when asked whether the decedent was breathing, replied, "No. At this time he's stinking up the room. Get him out." *Id.*; *see also Mikos*, 539 F.3d at 723 (Posner, C.J., concurring in part and dissenting in part) (citation omitted) ("What would demonstrate a lack of remorse would be statements (such as bragging about the murder), gestures, laughter as the murder was described or a grieving relative testified, or facial expressions that indicated that the defendant had indeed no regret about having committed the murder. . . . Mere silence is not enough to demonstrate a lack of remorse.").

[241] In reality, this rule puts the prosecution in the same place as the defense. If the defendant wants to prove his remorse, he must affirmatively express it. As the Supreme Court of Illinois put it a century ago:

> Whether one actually feels remorse, whether he is influenced by the stings of awakened conscience, whether he is influenced by the fear of the wrath of Deity offended, may be difficult of proof; but if such matters are of importance then the party interested in proving them [is] entitled to produce the only evidence which can be produced of their existence [namely, his testimony to that effect].

People v. Simmons, 113 N.E. 887, 890 (Ill. 1916).