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On Silence: A Reply to Professors Cribari and Judges

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Abstract
In 2009, the author wrote an article on the Self-Incrimination Clause. In response to this article, Professors Cribari and Judges wrote a Response suggesting that the author was an abolitionist of the Self-Incrimination Clause. This article is intended to clarify the author's position on the Self-Incrimination Clause and on Griffin v. California. The article begins by explaining the purposes of the Self-Incrimination Clause and highlighting the differences between the right to testify and the right to remain silent. It then analyzes the "test the prosecution" reasoning for the Griffin rule, pointing out its shortcomings and lack of Constitutional basis. The article continues by critiquing the argument that Murphy v. Waterfront Commission, which describes the various values served by the Self-Incrimination Clause, gives several reasons to uphold the Griffin rule. The article concludes by summing up the policy reasons for abandoning the Griffin rule and attempting legal reform in another way.

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Reply

On Silence: A Reply to Professors Cribari and Judges

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INTRODUCTION

I thank Professors Cribari and Judges for taking the time to respond to *Making Defendants Speak*.[1] Their Response, *Speaking of Silence*,[2] makes many thoughtful and impassioned arguments. To a substantial extent, however, their Response is not directed at me, but rather at the likes of Judge Henry Friendly[3] and Professor Albert Alschuler,[4] who have offered more thoroughgoing critiques of the Self-Incrimination Clause itself. Cribari and Judges characterize me as an "abolitionist,"[5] and suggest that my "real aim" is the Self-Incrimination Clause itself.[6] In that respect, they misread my article. I do not propose outright repeal; rather, in addition to other proposals that do not implicate the Self-Incrimination Clause, I propose overruling *Griffin v. California*.[7] In my view, the *Griffin* rule represents an unwise and constitutionally unwarranted judicial

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1. Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1327 (2009).

2. Donald P. Judges & Stephen J. Cribari, *Speaking of Silence: A Response to* Making Defendants Speak, 94 MINN. L. REV. HEADNOTES 11 (2009), http://www.minnesotalawreview.org/sites/default/files/Judges_Cribari_Speaking_of_Silence.pdf.

3. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 674–77 (1968).

4. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996).

5. Judges & Cribari, *supra* note 2, at 39.

6. *Id.*

7. 380 U.S. 609, 615 (1965) (holding that the Self-Incrimination Clause prohibits instructions and comments suggesting that an adverse inference can be drawn from a defendant's silence).

extension of the Clause, so it should be abandoned. But abandoning *Griffin* does not mean abandoning the core right itself.

The Self-Incrimination Clause, at its core, prohibits the use of torture to obtain confessions from a suspected criminal.[8] It also prohibits the use of imprisonment and contempt sanctions to compel a suspect to offer testimonial evidence against himself.[9] The *Griffin* rule—which prohibits adverse inferences from silence at trial[10]—is, in my view, a peripheral extension of the right to remain silent. I propose lopping off that judicially created extension, but I do not thereby propose to abolish it.

To use a (very) rough sports metaphor, think of the two polar rights—the right to testify and the right to remain silent—as the opposite end zones of a football field. Between the end zones, there is a large field that provides room for play with various legal rules that affect a defendant's decision to testify or remain silent. Currently, the line of scrimmage is set at the forty-yard line closest to the silence end zone. I propose moving the line of scrimmage to the opposite forty-yard line. I do not propose moving the ball all the way to the end zone. There are important values underlying the Self-Incrimination Clause, but there are competing values as well. The current body of American case law represents an attempt (though not an explicit or thoughtful attempt) to balance competing values. I think that the current balance is a bit off, while Cribari and Judges appear to think that the current balance is about right.

More concretely, their defense of *Griffin* has two main threads. First, they argue that *Griffin* is justified by a "test the prosecution" theory of modern criminal trial[11] and also by the Self-Incrimination Clause itself.[12] Second, they argue that *Griffin* is justified by intuitions about what prosecution practices are reasonable and appropriate.[13] For the reasons that follow, I find neither argument persuasive. Ultimately, I suspect their defense of *Griffin* has little to do with any interpretive theory of the Self-Incrimination Clause. Rather, Cribari and Judges seem to be motivated by a sense that the modern criminal jus-

8. *See, e.g.*, Alschuler, *supra* note 4, at 2651 (explaining that the history of the Self-Incrimination Clause indicates that it was designed to prohibit coercive interrogation techniques, including torture).

9. *See id.*

10. 380 U.S. at 615.

11. *See* Judges & Cribari, *supra* note 2, at 13.

12. *See id.* at 14–15.

13. *See id.* at 36–37.

tice system is unfair to criminal defendants, and thus that any change that would benefit the state must be resisted. By contrast, I conclude that maintaining *Griffin* does nothing to remedy the injustices or iniquities of contemporary criminal law.

I. "TESTING THE PROSECUTION"

Cribari and Judges argue that the expansive modern police state—and the resulting "test the prosecution" theory of modern trial—necessitates the *Griffin* rule.[14] They reject the use of history to guide interpretation of the Self-Incrimination Clause because the criminal justice system has changed so dramatically since the Founding Era.[15] They argue that the expansion in the state's power to prosecute over the last two centuries justifies new offsetting rights—rights needed to test the state's case—and that *Griffin* is one such right.[16]

Their argument has several shortcomings. To begin with, it rests on an overwrought historical story. They suggest that over the last two centuries, the American criminal law has been transformed from a small, somewhat idyllic system into an Orwellian leviathan.[17] But the history of American criminal law is not a history of relentless linear expansion. Indeed, in many ways, the criminal law is narrower in scope than it was in the past. States impose the death penalty less frequently and for fewer crimes.[18] Many "morals" crimes have been deregulated.[19] The overall numbers of criminal prosecutions and prisoners have risen dramatically, of course, but that is in large part because crime rates themselves have risen dramatically.[20] Murder was illegal in 1791 as it is today; what has changed is that

14. *Id.* at 13.

15. *Id.* at 15–16.

16. *See id.* at 48.

17. *See id.* at 26 ("The extensive and complex web of today's federal, state, and local criminal laws, and malum prohibitum regulatory provisions enforced by criminal sanctions, would have been unimaginable in the eighteenth century.").

18. *Cf.* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42–44 (discussing the imposition of capital punishment in colonial America against repeat offenders and for crimes including, but not limited to, rape and murder).

19. *See generally* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (arguing that the standard historical story that there has been a relentless increase in the scope of the criminal law is a myth).

20. *See id.* at 267 (explaining that the increase in incarceration rates derives from decisions to punish offenders more severely).

people do it more often.[21] Thankfully, the state has increased the supply of murder prosecutions to match the growth in demand. Such expansion does not provide any justification for altering the scope of defendants' procedural rights.

History aside, the "test the prosecution" theory of defendants' rights does not offer a cogent account of the wide variety of procedural and evidentiary rules that characterize the contemporary criminal justice system. To begin with, it is not even clear whether the "test the prosecution" label can be sensibly applied to *Griffin* or many of the other procedural protections afforded to defendants. Some rights are sensibly called "testing" rights. The right of confrontation, for example, allows a defendant to test the prosecution's case by cross-examining the prosecution's witnesses. But the Self-Incrimination Clause does not allow a defendant to *test* anything—rather, it allows a defendant to *withhold* evidence that the prosecution might otherwise be able to obtain and admit at trial. Even at the level of characterization, calling *Griffin* a "test the prosecution" rule is awkward.

Even setting aside such qualms about labels, the "test the prosecution" theory is inadequate because it cannot explain why we have certain testing practices rather than others. Wouldn't a *beyond any doubt* standard test the prosecution better than the *beyond a reasonable doubt* standard? If so, why do we have the latter instead of the former? Wouldn't a defendant be better able to test the prosecution if the state were required to disclose every detail of its case well in advance of trial? And wouldn't a defendant be better able to test the prosecution if he were not required to make any pretrial disclosures at all? If so, how can contemporary discovery practices be reconciled with the "test the prosecution" theory?

We could draft and propose countless new legal rules that would help criminal defendants test the prosecution's case. But many such rules would not be sensible. Some rules that test the prosecution are justified, but others are not, in part because their cost would be too high. Even as a policy matter, therefore, a rule, such as the *Griffin* rule,[22] cannot be justified simply by noting that it helps defendants to "test the prosecution." The "test the prosecution" theory offered by Cribari and Judges is so

21. *Cf.* FRIEDMAN, *supra* note 18, at 270 (describing that the number of prisoners has increased since the 1900s).

22. Griffin v. California, 380 U.S. 609, 615 (1965).

vague that it offers no real guidance about which practices should be adopted and which should not.

As a legal matter, moreover, it is difficult to tie the "test the prosecution" theory to our constitutional text. The Constitution does not say "in all criminal cases, the accused shall enjoy the right to test the prosecution's case." Instead, it grants to criminal defendants a set of particular procedural rights—such as the right to confront witnesses, the right to the assistance of counsel, and the right to a jury trial.[23] Cribari and Judges might deride me as a formalist,[24] but I maintain that the *Griffin* rule is constitutionally required if and only if it is mandated by some actual provision of the Constitution.[25] Asserting that the *Griffin* rule helps to "test the prosecution" does little to answer the constitutional question.[26]

II. REASON AND INTUITION

Many legal rules exist that would help defendants test the prosecution, and many practices exist that would at least arguably implicate the Self-Incrimination Clause. Ultimately, an interpretive theory must provide some framework to help decide which practices are permissible and which are not. My framework begins with the text of the Clause itself, and attempts to analyze which practices constitute "compulsion." I propose that we should measure compulsion by reference to generally applicable rules of evidence and procedure. Applying that framework, I conclude that an adverse inference drawn from silence at trial does not constitute compulsion. Cribari and Judges, by contrast, simply refer to the various values (drawn from *Murphy*[27]) that can be said to underlie the Clause, and analyze

23. U.S. CONST. amend. VI.

24. *See generally* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 161 (2010) (describing how jurists often use the term "formalist" as "a term of abuse with no real theoretical content").

25. Professors Cribari and Judges also argue that *Griffin* is "consistent" with a "robust right to remain silent." *See* Judges & Cribari, *supra* note 2, at 37. I suppose I have no quarrel with that proposition, but the relevant question is whether the *Griffin* rule is mandated by the Self-Incrimination Clause.

26. *Cf.* Eric A. Posner, *The Decider*, THE NEW REPUBLIC, Jan. 11, 2010, http://www.tnr/com/print/book/review/the-decider ("Abstract propositions about human values cannot decide cases.").

27. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 56 n.5 (1964) (describing the various values served by the Self-Incrimination Clause).

whether the use of an adverse inference would undermine those values.[28]

But just as their "test the prosecution" approach offers no concrete interpretive guidance, their appeal to *Murphy*'s values offers no concrete interpretive guidance. *Murphy* is a pastiche. It lists a myriad of different "fundamental values" and "noble aspirations" which the Self-Incrimination Clause is said to further.[29] Some of the "values" are exceedingly vague—I struggle to find any actual semantic content in phrases like "respect for the inviolability of the human personality."[30] An approach based on *Murphy* risks quick degeneration into sloganeering. And again, while there are innumerable legal practices that implicate the diffuse *Murphy* values to at least some extent, only some of those practices actually violate the Self-Incrimination Clause. Even if the *Murphy* values provide an appropriate starting point, we would still need some framework for deciding which of those practices are unconstitutional and which are not. Cribari and Judges do not provide any such framework. Instead, they suggest that we may rely on intuition.

When it comes to *Griffin*, their intuition does not match my own. Our debate is about whether a prosecutor may stand up in closing and say: "Ladies and gentlemen of the jury, in addition to the other evidence of guilt, you should consider the fact that the defendant has declined to testify." While such an argument might not be very strong as an evidentiary matter, it does not strike me as being particularly unseemly or demeaning.[31] If forced to debate in *Murphy*'s dissolute and wandering terms, I would have to say that I do not intuit any disrespect for the inviolability of the human personality in such a closing argument.

But intuition is a sorry substitute for law. Intuition alone cannot justify *Griffin* or anything else. Constitutional adjudication requires more than intuition—it requires reason.

The scope of the Self-Incrimination Clause is not easy to define, and application of the Clause in modern criminal law raises a variety of difficult and debatable questions about various investigatory and evidentiary practices. May the state

28. *See* Judges & Cribari, *supra* note 2, at 29–37.

29. *Murphy*, 378 U.S. at 55, 56 n.5.

30. *Id*. at 55.

31. *See* Judges & Cribari, *supra* note 2, at 36–37 (characterizing adverse inferences as "unseemly").

compel a defendant to answer questions on cross-examination once he has testified on direct? May the state compel a defendant to turn over documents or other physical evidence?[32] May the state compel a suspect to answer questions if it gives him only testimonial, rather than transactional, immunity?[33] The Supreme Court's case law must answer these questions and give legal reasons for its answers. The Court cannot strike down a legal rule as unconstitutional simply by calling it "unseemly."

CONCLUSION

Judging by the tenor of *Speaking of Silence*, I suspect that Cribari and Judges are not much concerned with any arguments about the text, history, and structure of the Constitution. Their arguments are more extralegal than legal. Their defense of *Griffin* draws much of its rhetorical force from the emotional picture they draw of the poor and lonely defendant who faces the powerful and menacing state.[34] It would be easy to respond in kind with an emotional appeal about the horrible toll that crime takes on victims, and about the necessity of deterring, punishing, and incapacitating the men (and occasional women) who commit crime. But that road leads nowhere good.

After all, Cribari and Judges are correct that the contemporary American criminal justice system is awesome in its scope and in its power. The sheer number of incarcerated American citizens—which presently hovers above two million[35]—is staggering. Even considering our high crime rates, our incarceration rates are indefensible.[36]

32. *See* United States v. Hubbell, 530 U.S. 27, 56 (2000) (Thomas, J., concurring) (arguing that the Court should reconsider its doctrine that the Clause only applies to "testimonial" evidence).

33. *See* Kastigar v. United States, 406 U.S. 441, 442 (1972) (holding that testimony can be compelled from a witness who invokes the Fifth Amendment by conferring immunity from use of the compelled testimony and evidence derived from it in subsequent criminal proceedings).

34. *See* Judges & Cribari, *supra* note 2, at 35–36.

35. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228417, PRISONERS IN 2008, at 1 (2009); *see also* John Schwartz, *Report Finds States Holding Fewer Prisoners*, N.Y. TIMES, Mar. 17, 2010, at A15 (noting that state and federal prisons currently hold approximately 1.6 million people, and local jails currently hold approximately 700,000).

36. *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3–6 (2003) (analyzing the comparatively harsh sentencing practices of contemporary American criminal law).

But it is important to locate the source of that problem. The criminal justice system has different spheres. In one sphere, substantive criminal law and sentencing law define what acts are illegal and how much they are punished. In another sphere, evidence law and criminal procedure create and regulate our system for deciding whether an accused individual is guilty or not. The scope of the American criminal justice system is daunting, but that problem results from substantive law and sentencing law, not from evidence and procedure. In other words, the problem is not that we are locking up many innocent people, but that we are locking up guilty people for too long. A better criminal justice system might have fewer crimes, and it might have shorter sentences. But that question is independent of the diagnostic question—we should always strive to have the most accurate system possible for determining who is guilty and who is not.

Substantive law and sentencing law are predominantly political, while evidence law and procedure are more classically legal. As lawyers, we have very little power over substantive and sentencing law, but we have some power in the sphere of evidence and procedure. It is tempting, as a means of protesting the injustices of substantive and sentencing law, to fight any legal reform in evidence or procedure that would provide a marginal benefit to the state. That temptation should be resisted. Maintaining a constitutionally shoddy rule like *Griffin* does nothing to remedy the injustices of modern American criminal law.