Journal of Criminal Law and Criminology

Volume 72
Issue 4 *Winter*

Article 8

Winter 1981

Fifth Amendment--The Right to a no Adverse Inference Jury Instruction

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0091-4169/81/7204-1307
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 72, No. 4

Printed in U.S.A.

FIFTH AMENDMENT—THE RIGHT TO A NO "ADVERSE INFERENCE" JURY INSTRUCTION

Carter v. Kentucky, 101 S. Ct. 1112 (1981).

I. INTRODUCTION

In *Carter v. Kentucky*,[1] the Supreme Court held that a criminal defendant remaining silent at trial has a right to a jury instruction that his silence is not evidence of his guilt. Invoking his fifth amendment right against compulsory self-incrimination, Carter elected not to take the stand at his state criminal trial.[2] Carter requested a jury instruction that "[t]he defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."[3] The trial judge refused Carter's request, on the authority of the applicable Kentucky statute.[4] The Supreme Court held that the trial court's refusal to issue this no "adverse inference" instruction was reversible error. The Court decided that, upon request, a defendant in a state criminal trial has a right under the fifth amendment[5] to a jury instruction on the meaning of the privilege against compulsory self-incrimination.[6] In so holding, the Court answered a constitutional question which it twice anticipated and reserved.[7]

II. RELEVANT HISTORY OF THE FIFTH AMENDMENT

The fifth amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[8] This safeguard of individual liberty was born of the colonists' reaction to the

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1 101 S. Ct. 1112 (1981).

2 *Id.* at 1115.

3 *Id.* at 1113.

4 KY. REV. STAT. § 421.225(1) (1979): "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." *Id.*

5 The fifth amendment to the United States Constitution provides in part that: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

6 101 S. Ct. at 1119.

7 *Id.* at 1116; Lakeside v. Oregon, 435 U.S. 333, 337 (1978); Griffin v. California, 380 U.S. 609, 615 n.6 (1965).

8 U.S. CONST. amend V.

inquisitorial practices of the English Star Chamber and High Commission.[9] The amendment reflects "many of our fundamental values and most noble aspirations,"[10] our "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial,"[11] and our "sense of fair play which dictates a fair state-individual balance by requiring the government. . .in its contest with the individual to shoulder the entire load."[12]

When the fifth amendment was first incorporated into the Bill of Rights, the common law did not permit a defendant to testify on his own behalf.[13] In the eighteenth and nineteenth centuries, an accused relied on the law's presumption of innocence, and left it to the government to establish his guilt.[14] Since a defendant was not permitted to testify, the jury did not infer his guilt from his failure to speak out in his own defense.[15]

In 1878, Congressman Frye of Maine introduced a bill proposing a new rule of evidence, making persons charged with crimes competent witnesses in federal courts.[16] The bill was introduced for the benefit of defendants desiring to explain incriminating circumstances.[17] The drafters of the bill were apparently sensitive to the dilemma that its enactment would present to defendants electing not to testify. Such a law, by giving a defendant the opportunity to testify, would make possible for the first time speculation on the reasons for a defendant's refusal to testify. It would make possible the tempting inference that the defendant did not testify because he could not deny the government's incriminating evidence. If the bill would force the defendant to choose between taking the stand, or admitting his guilt through his silence, its enactment would violate the spirit of the privilege against self-incrimination. This perhaps explains why the second section of the first draft of the bill provided that "nothing herein contained shall be construed as compel-

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9 101 S. Ct. at 1118 n.14.

10 Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964).

11 Malloy v. Hogan, 378 U.S. 1, 7 (1964).

12 Murphy v. Waterfront Commission, 378 U.S. at 55.

13 Wilson v. United States, 149 U.S. 60, 65 (1893).

14 *Id.*

15 Brief for Petitioner, Carter v. Kentucky, 101 S. Ct. 1112 (1981).

16 7 CONG. REC. 363 (1878). The bill was passed by the House of Representatives on January 17, 1878, passed by the Senate on March 11, 1878, and approved by the President on March 18, 1878. It was known as the Act of March 16, 1878, ch. 37, 20 Stat. 30, now 18 U.S.C. § 3481 (1976):

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Id.

17 149 U.S. at 65.

ling any such person to testify; nor shall any inference of his guilt result if he does not testify; nor shall the counsel for the prosecution comment thereon in case the respondent does not testify."[18]

The bill was sent to the House Committee on the Judiciary, and the Committee proposed an amendment striking the second section of the bill and replacing it with the phrase "and his failure to make such a request [to testify] shall not create any presumption against him."[19] Before voting on the proposed amendment, Congressman Carlisle asked whether the amendment would preserve the substance of section two of the first draft. Congressman Frye announced to the House that it would, under the provision of the bill outlawing any presumption from a defendant's failure to testify.[20] With this understanding, the amendment was approved and the bill became law.[21]

The Supreme Court construed this federal competency act on two relevant occasions and each time, without explicitly mentioning the legislative history, conformed to the legislative intent as discussed above. In *Wilson v. United States*,[22] decided in 1893, the Supreme Court held that the "no presumption" clause of the act demands that "comment, especially hostile comment, upon [the defendant's failure to take the stand] . . . must necessarily be excluded from the jury" in federal courts.[23] Under the authority of the federal statute, the Supreme Court ordered a new trial because the prosecution had unlawfully suggested to the jury that it was a "circumstance against the innocence of the defendant that he did not go to the stand and testify."[24] The Court decided that "[t]he minds of the jurors can only remain unaffected from this

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18 7 CONG. REC. 363 (1878).

19 *Id.*

20 *Id.* at 385.

> Mr. Carlisle: I should like to inquire of the gentleman from Maine [Mr. Frye] whether the amendment . . . prohibits the counsel of the prosecution from commenting upon the defendant's refusal to testify.
>
> Mr. Frye: It does, under the provision of the bill that no presumption shall arise against the prisoner by reason of his refusal to testify.

Id.

21 Act of March 16, 1878, ch. 37, 20 Stat. 30, now 18 U.S.C. § 3481 (1976). The states of the Union passed similar competency acts, Maine being the first to do so in 1864. The Kentucky statute at issue, KY. REV. STAT. § 421.225 (1979), is the competency act for the State of Kentucky. *See* Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in his Own Behalf in Criminal Proceedings*, 3 WASH. L. REV. 161, 164 (1928).

22 149 U.S. 60.

23 *Id.* at 65.

24 *Id.* at 66:

> [T]he District Attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, "I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime. . . .

Id.

circumstance by excluding all reference to it."[25]

In 1939, the Supreme Court again interpreted the "no presumption" clause of the federal competency act in *Bruno v. United States*.[26] In *Bruno*, the Court held that a federal defendant has a right to a jury instruction that his silence is not evidence of his guilt.[27] The Court decided that Congress, by means of the "no presumption" clause, gave an "implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant. . . ." to its verdict.[28]

In *Malloy v. Hogan*,[29] decided in 1964, the Supreme Court held that the fifth amendment is applicable to the states through the fourteenth amendment.[30] Before 1964, the Supreme Court answered fifth amendment questions by reference to the "no presumption" clause of the federal competency act. Through its decision in *Malloy*, however, the Supreme Court opened the question of the effect of the fifth amendment on state competency acts. The issue before 1964 was largely academic since the states were not bound by the Supreme Court's interpretation of the fifth amendment.[31]

In *Griffin v. California*,[32] decided shortly after *Malloy*, the issue of the affect of the fifth amendment on state competency acts first arose. The Court examined the constitutionality of a California rule of evidence which permitted adverse comment on a defendant's failure to testify.[33]

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[25] *Id.* at 65.

[26] 308 U.S. 287 (1939).

[27] *Id.* at 292. The instruction Bruno requested, but was refused, was that

> [t]he failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

Id.

[28] *Id.* at 293. The *Bruno* right to a no "adverse inference" jury instruction is made applicable to state defendants in *Carter*.

[29] 378 U.S. 1.

[30] In so holding, the Court reversed Twining v. New Jersey, 211 U.S. 78 (1908), *aff'd*, Adamson v. California, 332 U.S. 46 (1947). In *Twining*, the Supreme Court rejected the argument that the fifth amendment is applicable to the states, and so avoided reaching the issue of whether the fifth amendment itself commands that no comment be made on a defendant's failure to testify. 211 U.S. 78.

[31] *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1965):

> (1) For more than half a century, beginning in 1908, the Court adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination. (2) Because of this position, the Court during that period never reached the question whether the federal guarantee against self-incrimination prohibits adverse comment upon a defendant's failure to testify at his trial.

Id. at 412. In the federal judicial system, the matter was controlled by a statute. *Id.* at 412 n.8.

[32] 380 U.S. 609 (1964).

[33] CAL. CONST. ART. I, § 13 (repealed 1974):

> In criminal prosecutions . . . . [n]o person shall be . . . compelled, in any criminal case, to be a witness against himself . . . but in any criminal case, whether the defendant

The Court acknowledged that the issue was similar to the question previously decided in *Wilson*, and quoted the *Wilson* opinion.[34] The *Griffin* Court found that if the words "fifth amendment" were substituted for the words "act" and "statute" in *Wilson*, the *Wilson* opinion would reflect the "spirit of the Self-incrimination clause."[35] The Court held that the California comment rule, which allowed the state to use the defendant's silence as evidence against him, violated the fifth amendment.[36]

Justice Stewart, in dissent, argued that the fifth amendment was not applicable to *Griffin* since the defendant did not testify, and therefore was not "compelled in any criminal case to be a witness against himself."[37] In response to this literal reading of the fifth amendment, the

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testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury . . . .

Id.

In *Griffin*, the California trial court instructed the jury that the defendant's failure to take the stand may be taken into consideration "as tending to indicate the truth of [evidence or facts against the accused] . . . and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." 380 U.S. at 610.

34 *Id.* at 613. The *Griffin* Court quoted the following portion of the *Wilson* opinion:

> [T]he *act* was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The *statute*, in tenderness to the weakness of those who from the causes mentioned might refuse to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him.

Id. (emphasis added).

The *Carter* Court quoted a portion of the above passage and added that there are other reasons unrelated to guilt or innocence for declining to testify: "fear of impeachment by prior convictions . . . or by other damaging information not necessarily relevant to the charge being tried, and reluctance to incriminate others whom [defendants] either love or fear." 101 S. Ct. at 1119 n.15.

The Court pointed out that Carter may have refused to testify out of fear of being impeached by his prior record. *Id.* If fear of impeachment was the only reason Carter refused to testify, then an inference from silence to guilt would not be justified in his case. However, the *Carter* Court did not base its holding on the fact that the defendant possibly did not testify for reasons unrelated to guilt. 101 S. Ct. 1112.

35 380 U.S. at 613.

36 *Id.* In *Tehan*, the Court refused to give *Griffin* retroactive application. The Court considered the state's reliance on the *Twining* doctrine, the possible effect of a retroactive application of *Griffin* on the administration of justice, and the purpose of the *Griffin* rule. The Court concluded that since the states' reliance was great, the effect on the administration of justice would be devastating, and the purpose of the *Griffin* rule was not related to the truth-finding function of a trial, *Griffin* was to be given only prospective application. 382 U.S. 406.

37 380 U.S. at 623 (Stewart, J., dissenting) (quoting U.S. CONST. amend. V.).

majority introduced the "penalty theory:"[38] the rule permitting comment on a defendant's failure to testify is "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[39] Without directly addressing Justice Stewart's argument, the *Griffin* Court simply held that the fifth amendment will not permit penalties imposed for the exercise of the privilege, even if those penalties are not sufficiently strong to compel a defendant to testify.

In *Lakeside v. Oregon*,[40] decided in 1978, the Court limited *Griffin* by deciding that *Griffin* outlawed only adverse comment on a defendant's failure to testify.[41] In *Lakeside*, a *Carter*-type instruction was given over the defendant's objection.[42] The defendant argued that the giving of the instruction violated his fifth amendment privilege since it was comment on his failure to testify.[43] He argued that the instruction unconstitutionally emphasized his silence. The Court responded that the defendant's argument rested on "two very doubtful assumptions."[44] It presupposed that the jury on its own had not noticed the defendant's silence, and that the jurors totally disregarded the instruction to avoid giving it evidentiary weight. The Court decided that "[f]ederal constitutional law cannot rest on speculative assumptions so dubious as these."[45] Consequently, the Supreme Court held that a no "adverse inference" instruction, even when given over the defendant's objection, does not violate the very constitutional privilege which it is meant to protect.[46]

This fifth amendment history reveals that when the fifth amendment was adopted, it was not reasonable to infer guilt from a defendant's silence, since a defendant had no opportunity to testify. The federal and state governments gave a defendant the option to testify through competency acts, and so made possible speculation on a defendant's refusal to testify. Congress was aware that this speculation could easily lead to the unconstitutional inference that a defendant remained

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38 *See generally* Comment, *Defendant's Failure to Testify in State Criminal Trial*, 79 HARV. L. REV. 159 (1965).

39 380 U.S. at 614.

40 435 U.S. 333 (1978).

41 *Id.* at 338.

42 The no "adverse inference" instruction at issue in *Lakeside* was the charge to the jury that

> [u]nder the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.

Id. at 335.

43 *Id.* at 338.

44 *Id.* at 340.

45 *Id.* at 339.

46 *Id.*

silent because he was guilty. The federal competency act therefore included the provision that a defendant's silence should create no presumption against him. Prior to *Malloy*, the Supreme Court avoided reaching the fifth amendment issues raised by the federal competency act. It did so by construing the "no presumption" clause in ways which brought the federal competency act into conformity with the fifth amendment. In *Wilson*, the Court prohibited comment suggesting that an inference could be made from a defendant's silence to his guilt and, in *Bruno*, the Court gave a defendant the right to a jury instruction that his silence is not evidence of his guilt. When the fifth amendment became applicable to the states, it opened the question of the constitutionality of the state competency acts. In order to meet this question, the Court abandoned its method of interpreting the federal competency act, and confronted the fifth amendment question directly. The Supreme Court, first in *Griffin* and then in *Carter*, held that the fifth amendment demands the protection given federal defendants in *Wilson* and *Bruno*.

III. CARTER V. KENTUCKY

On December 22, 1978, two men fled from an officer investigating suspicious circumstances in an alley behind a hardware store in Kentucky. The officer discovered that a hole had been made in the wall of the store, and found store merchandise outside of the opening. The officer reported the incident to a second officer in the area.[47] The second officer saw two men running in the vicinity of the store, and apprehended one of them, the defendant Lonnie Joe Carter. The first officer identified Carter as wearing clothing similar to one of the two men she observed, and as being of similar height and weight. The petitioner was taken to police headquarters and charged with third degree burglary and with being a persistent felony offender, in violation of Kentucky criminal statutes.[48]

At trial, the judge held a conference to determine whether the petitioner intended to testify.[49] The judge informed the defendant that if he testified, the judge would allow the prosecution to introduce the petitioner's prior felony convictions into evidence. The prosecutor wanted to introduce these convictions to impeach the defendant's propensity to tell the truth. Upon advise of counsel, the petitioner elected not to testify.[50] The judge then refused the defendant's standard[51] and timely

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47 101 S. Ct. at 1114.

48 *Id.*

49 *Id.* at 1115.

50 *Id.*

51 *See, e.g.*, 7 FED. PROC. FORMS § 20:957 (1976):

A defendant in a criminal proceeding has the absolute right not to testify. The fact that

request for a jury instruction that silence is not evidence of guilt.[52] The jury found the petitioner guilty of burglary, and recommended a two year sentence. After the recidivist phase at the trial, the jury found Carter guilty of being a persistent offender, and sentenced him to twenty years in prison.[53]

In an opinion not released for publication,[54] the Kentucky Supreme Court rejected Carter's argument that the refusal to give the no "adverse inference" jury instruction violated the fifth amendment.[55] The Kentucky court cited as controlling its opinion in *Green v. Commonwealth*.[56] In *Green*, the Supreme Court of Kentucky declined to adopt the *Bruno* rule that a defendant has a right to an instruction that silence is not probative of guilt.[57] The court noted that while the *Bruno* decision rests on the federal competency act, the Kentucky competency act contains an additional clause that the defendant's failure to testify "shall not be commented upon."[58] The court decided that a no "adverse inference" instruction would be "comment" within the meaning of the Kentucky statute, and that therefore such a jury instruction would be unlawful. The instruction would emphasize a defendant's refusal to testify, according to the court, and so would do violence to "the clear intent of our legislature to fully protect the rights of an accused. . . ."[59]

The Supreme Court reversed the state court's decision in *Carter v. Kentucky*. The Court held that the principles in prior cases lead "unmistakably" to the conclusion that the fifth amendment requires a no "adverse inference" jury instruction when it is requested by a criminal defendant.[60] Writing for the majority, Justice Stewart first pointed out that in *Bruno* the failure to give a *Carter*-type instruction was found not to be a mere "technical error . . . which does not affect . . . substantial

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the defendant did not testify does not create any presumption of guilt, and you are not permitted to draw any inference against the defendant because he did not testify. Therefore, you are not to discuss or in any way consider that fact.

Id.

52 101 S. Ct. at 1116.

53 *Id.*

54 Carter v. Kentucky, No. 79-SC-452-MR, slip op. (Ky. March 13, 1980).

55 Prior to *Carter*, Kentucky was joined by Minnesota, Nevada, Oklahoma, and Wyoming in refusing to give a no adverse inference jury instruction upon request. 101 S. Ct. 1114 n.2.

56 Carter v. Kentucky, No. 79-SC-452-MR, slip op. at 6:

In *Green v. Commonwealth* . . . this court had under consideration a request by an accused that the court instruct the jury that no inference of guilt should be drawn from his failure to testify. This question was considered by this court and we concluded that, "[t]he trial court did not err in refusing to give Green's requested instruction."

Id.

57 488 S.W.2d 339, 341 (Ky. 1972).

58 KY. REV. STAT. § 421.225(1) (1979).

59 488 S.W.2d at 341.

60 101 S. Ct. at 1119.

rights . . . ."[61] Justice Stewart noted that the *Bruno* Court stated that the right of an accused to insist upon "the privilege to remain silent is of a very different order of importance . . . from the 'mere etiquette of trials and . . . the formalities and minutiae of procedure.' "[62] While *Bruno* relied on the authority of a federal statute, the Court concluded that it was plain that the opinion was influenced by the constitutional guarantee against compulsory self-incrimination.[63] In *Carter*, the Court proposed that it could adopt the *Bruno* reasoning, just as the *Griffin* Court adopted the *Wilson* reasoning. The Court decided that *Bruno* will reflect the spirit of the self-incrimination clause when the words "fifth amendment" are substituted for the word "Congress" in the text of the *Bruno* opinion.[64]

The *Carter* Court then stated that *Griffin* stands for the proposition that a defendant must pay no court-imposed penalty for the exercise of his constitutional privilege not to testify.[65] The penalty was exacted in *Griffin* by comment suggesting that the defendant's silence is evidence of guilt. The Supreme Court reasoned that the penalty may be just as severe when the jury arrives at the "silence implies guilt" reasoning on its own.[66]

The Court decided that the significance of a no "adverse inference" instruction was forcefully acknowledged in *Lakeside*.[67] In *Lakeside*, according to the majority, the purpose of the instruction was deemed so important that it outweighed the defendant's preference to have the instruction excluded.[68]

The Court next stated that for juries to function effectively, they must be accurately instructed in the law.[69] Such instructions are critical when a defendant exercises his privilege against self-incrimination, according to the Court, since too many assume that those who invoke the privilege are guilty of crime.[70] The Court stated that it cannot be dog-

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61 *Id.* (quoting 308 U.S. at 293).

62 101 S. Ct. at 1119 (quoting 308 U.S. at 294).

63 101 S. Ct. at 1119.

64 *Id.* at 1119 n.16.

65 *Id.* at 1119.

66 *Id.*

67 *Id.*

68 *Id.*

69 In support of its position that a jury needs guidance in understanding the judicial rules of evidence, the Court cited a recent national public opinion survey, revealing that 37% of those interviewed believe it is the responsibility of the accused to prove his innocence. *Id.* at 1120 n.21 (citing 64 A.B.A.J. 653 (1978)).

70 101 S. Ct. at 1120. The Court stated that "[i]t has been almost universally thought that juries notice a defendant's failure to testify. The jury will of course realize this quite evident fact, even though the choice goes unmentioned . . . . [It is] a fact inescapably impressed on the jury's consciousness." *Id.* at 1120 n.18 (quoting 308 U.S. at 621-22 (Stewart, J., dissenting)). Dean Wigmore commented that:

matically assumed that the jury will not obey the instruction to ignore the inference from silence to guilt, since judges have great influence over the jury.[71]

> [t]he layman's natural first suggestion would probably be that the claim [to privilege in each instance] was a clear confession of the criminating fact. . . . "Logic is logic" . . . and it is on that score impossible to deny that the very claim of the privilege involves a confession of the fact. "Were you assisting the defendant at the time of the affray?"; this may be answered "yes" or "no"; if "no," the fact is not criminating and the privilege is not applicable; if "yes," the fact is criminating and the privilege applies. The inference, as a mere matter of logic, is not only possible but inherent, and cannot be denied.

8 J. WIGMORE, EVIDENCE § 2272, 409-10 (McNaughton rev. 1940). Justice Frankfurter concluded that "[s]ensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict." Adamson v. California, 332 U.S. 46, 60 (1947) (Frankfurter, J., concurring). Yet on another occasion, the Supreme Court cautioned that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." Ullman v. United States, 350 U.S. 422, 426 (1956).

The principle that silence is evidence of guilt has been applied by some courts in civil cases. *See, e.g.*, Smith v. Allen, 297 F.2d 235, 236 (4th Cir. 1961) (quoting Tillman v. Commonwealth, 185 Va. 46, 56, 37 S.E.2d 768, 773 (1946)):

> It is well settled that statements made in the presence and hearing of another, to which he does not reply, are admissible against him as tacit admissions of their truth or accuracy, when such statements are made under circumstances naturally calling for reply if their truth is not intended to be admitted. This principle rests upon the universal rule of human conduct which prompts one to repel an unfounded imputation or claim.

297 F.2d at 236.

[71] The Court approvingly cites *Bruno* for the proposition that "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors if properly admonished, neither could nor would heed the instructions of the trial court. . . ." 101 S. Ct. at 1120 (quoting 308 U.S. at 294). As empirical support for its finding, the Court also cites four studies on jury reaction to court instructions. 101 S. Ct. at 1120 n.20. These studies can be summarized as follows:

(1) Robin Reed, in her article, "Jury Simulation", presents the results of a study conducted with 214 university students. The students were given booklets containing a manuscript of a trial. Four different trials were reproduced, and of each of these four, approximately half of the booklets contained jury instructions, and half did not. The students read the trial manuscripts, and arrived at a verdict. In the first reproduced trial, of those students given trial instructions, 17 voted guilty, 10 not guilty, and 1 undecided. When the instructions were omitted in the first trial, 21 voted guilty, 4 not guilty, and 4 undecided. In the second reproduced trial, with instructions, 18 voted guilty, 7 not guilty, and 3 undecided. Without instructions, 15 voted guilty, 5 not guilty, and 6 undecided. In the third reproduced trial, with instructions, 11 voted guilty, 15 not guilty, and 1 undecided. Without instructions, 14 voted guilty, 10 not guilty, 3 undecided. In the fourth reproduced trial, with instructions, 6 voted guilty, 18 not guilty, and 1 undecided. Without instructions, 11 voted guilty, 8 not guilty, and 5 undecided.

As a result of these findings, Reed concluded that "[t]he final variable, judge's instructions, had a significant effect. The result of this presence-absence manipulation may be the major finding of the experiment. Jurors were affected by judge's instructions. Jurors without instructions were more likely to vote guilty or cannot decide." Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decision-Making*, 71 J. CRIM. L. & C. 68, 71 (1980).

(2) Diane Bridgeman and David Marlowe reported on the results of interviewing 65 jurors upon the completion of 10 felony trials in Santa Cruz County, California. The jurors

The Court's reasoning in *Carter* can be summarized as follows: (1) there is a strong possibility that a jury will notice a defendant's failure to testify, and will draw an inference of guilt from his silence; (2) this inference from silence to guilt imposes a penalty on a defendant for exercising his fifth amendment right; (3) *Griffin* held that such penalties violate the fifth amendment; (4) an instruction will lessen the possibility that jurors will give evidentiary weight to a defendant's silence; therefore, (5) the fifth amendment guarantees the right to a jury instruction, at least when a criminal defendant requests it.

The Court proceeded to dismiss a number of Kentucky's arguments

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were asked to rank in order of importance the factors that influenced their verdicts. Eighteen of the 65 ranked the defendant's testimony as the first or second most important factor in arriving at their verdict, 24 of the 65 so ranked other witness testimony, and 29 of the 65 so ranked police testimony. Eighty-two percent of the jurors reported that they either completely or mostly understood the judge's instructions to the jury. Twelve percent believed that jurors should be allowed to ask questions of the judge or attorneys, and 14 percent wanted more opportunity to talk with the judge regarding the final instructions they had received. Ten of the 65 ranked the judge as the first or second most important factor in arriving at their verdict. Bridgeman & Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, 64 J. APPLIED PSYCH. 91 (1979).

(3) Robert Forston conducted a study to measure jury understanding of court instructions. Thirty-nine university students listened to a set of judge's instructions, and then were tested on their understanding of these instructions. The students averaged a 59.8% accuracy on the examination. They were then divided into groups of approximately six each, and took the test again as a group effort. In this simulation of a deliberating jury, the panels averaged an accuracy rate of 82.9%. Forston concluded that juries understand more of the judge's instructions than previously thought, and that jurors do not act separately in applying rules of law, but function as a group. He was concerned by the result, however, that 85.7% of the jury panels were unable to correctly respond to the question of what constitutes proof of guilt. Forston, *Judge's Instructions: A Quantitiative Analysis of Jurors' Listening Comprehension*, 18 TODAY'S SPEECH 34 (1970).

(4) W.R. Cornish and Dr. A.P. Sealy conducted a study on the reaction of juries to the laws of evidence. Groups of jurors listened to a tape recording of a mock trial and reached a verdict based upon what they had heard. The jurors were divided into three groups. The first group was unaware that the mock defendant had a previous record for an offense similar to the one with which he was charged in the mock trial. Twenty-seven percent of the 92 participants arrived at a guilty verdict. The second group listened to an identical trial, but were made aware of the mock defendant's previous conviction for a similar offense. Fifty-seven percent of the 90 participants adjudged the defendant guilty. The third group was made aware of the defendant's prior conviction for a similar offense, but was instructed by the judge to ignore this evidence. Thirty-five percent of this group of 69 found the defendant guilty.

Cornish and Sealy concluded that the admission of previous convictions does increase the chance of a guilty verdict, but that, contrary to common supposition, juries give real weight to an instruction to disregard relevant previous records wrongly admitted. Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208.

Of the articles cited by the Court, this study is the most persuasive justification for the assumption that juries will heed a judge's instructions to avoid giving evidentiary weight to a defendant's silence. Some of the participants in this study, while presumably not forgetting the defendant's record, managed to put it out of consideration in arriving at a verdict. If it is possible to do so with a previous record, arguably it is possible to do so with respect to a defendant's silence.

against reversal of the defendant's conviction.[72] Kentucky argued first that it has a legitimate state interest justifying its refusal to issue the no "adverse inference" instruction. Kentucky reasoned that the instruction would have been comment by the court, and would have unconstitutionally violated the defendant's fifth amendment right by emphasizing his failure to take the stand. The Court decided that this state interest is unjustified, citing *Lakeside* for the proposition that "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect."[73]

The Supreme Court also found unpersuasive Kentucky's argument that the jurors knew not to make adverse inferences from a defendant's silence.[74] Kentucky pointed out that the jury was instructed to determine guilt from the evidence alone. Since the failure to testify is not evidence, Kentucky argued that the jury knew not to consider the defendant's silence. The Court responded that the jury has no legal background, and cannot be expected to know the technical rules of evidence. Without limiting instructions, jurors can be expected to give evidentiary weight to a defendant's silence.[75]

The Supreme Court also decided that an instruction that "[t]he law presumes a defendant to be innocent" is not a constitutionally acceptable substitute for the requested no "adverse inference" instruction.[76] The majority noted that although the fifth amendment and the presumption of innocence are closely related, the principles serve different functions. Citing *Taylor v. Kentucky*,[77] the Court concluded that the jury would have derived significant additional guidance from the requested instruction. The majority relied on *Taylor* once more as support for its decision that the arguments of counsel did not substitute for the re-

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72 101 S. Ct. at 1121.

73 *Id.* (quoting 435 U.S. at 339).

74 101 S. Ct. at 1121.

75 *Id.*

76 *Id.*

77 *Id.* (citing 436 U.S. 478, 483). In *Taylor*, under the facts of the case, the Court held that the defendant had a right under the due process clause to a jury instruction on the presumption of innocence. Kentucky unsuccessfully argued in *Taylor* that an instruction on the presumption of innocence is not required where the jury is instructed as to the government's burden of proof. 436 U.S. at 483.

The *Carter* Court also referred to United States v. Bain, 596 F.2d 120 (5th Cir. 1979) and United States v. English, 409 F.2d 200 (3d Cir. 1969) in support of its assertion that additional jury instructions are sometimes essential. 101 S. Ct. at 1121. Under the authority of the federal competency act, *English* and *Bain* held, respectively, that an instruction on the presumption of innocence and an instruction on the burden of proof were no substitute for the requested no "adverse inference" instruction.

quested instruction.[78]

Kentucky concluded by arguing that since the evidence against Carter was overwhelming, the trial court's error in refusing to issue the instruction was harmless.[79] On the authority of *Sandstrom v. Montana*,[80] the Supreme Court refused to consider the harmless error issue because that issue was not considered by the Kentucky Supreme Court.[81] The Court suggested in dictum, however, that the refusal to give a no "adverse inference" jury instruction may never be harmless error.[82]

With great reluctance, Justice Powell concurred in the *Carter* holding: "I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require."[83] Attacking the theory underlying both *Griffin* and *Carter*, Justice Powell em-

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78 101 S. Ct. at 1121 (citing 436 U.S. at 489). The defense counsel argued that Carter "doesn't have to take the stand . . . [H]e doesn't have to do anything." *Id.*

The Court's repeated reliance on *Taylor* is misleading since the *Taylor* holding was severely qualified in Kentucky v. Whorton, 441 U.S. 787 (1979). In *Whorton*, the Court decided that *Taylor* did not stand for the proposition that an instruction on the presumption of innocence is required in every case. *Id.* at 788. Rather, the Court held that the failure to give an instruction on the presumption of innocence must be evaluated in light of the totality of the circumstances. *Id.* at 789. The Court noted that the factors that are to be considered include (a) all of the instructions to the jury; (b) the arguments of counsel; and, (c) whether the weight of the evidence was overwhelming—in short, all of the factors that the Supreme Court dismissed in *Carter*. *Id.* This apparent discrepancy can be explained perhaps by the Court's assertion in *Carter* that the right to an instruction on the fifth amendment privilege is "more compelling" than the right to an instruction on the presumption of innocence. 101 S. Ct. at 1120 n.19. "[T]he omission [in Taylor's trial] did not violate a specific constitutional guarantee, such as the privilege against compulsory self-incrimination." *Id.* (quoting Taylor v. Kentucky, 436 U.S. at 492 (Stevens, J., dissenting)).

79 101 S. Ct. at 1121. Kentucky cited Chapman v. California, 386 U.S. 18 (1967), as authority for the harmless error argument. In *Chapman*, the Supreme Court decided that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S. at 22. This "harmless-constitutional-error-rule" was not applied in *Chapman*, however, where the judge unconstitutionally charged the jury that it could draw adverse inferences from the defendant's silence. 386 U.S. at 18.

80 442 U.S. 510 (1979).

81 101 S. Ct. at 1121. "As none of these issues was considered by the Supreme Court of Montana, we decline to reach them as an initial matter here." Sandstrom v. Montana, 442 U.S. 510, 527 (1979). *See also* Moore v. Illinois, 434 U.S. 220, 232 (1977); Coleman v. Alabama, 399 U.S. 1, 11 (1970).

82 101 S. Ct. at 1121. The Court cited *Bruno* for the argument that the refusal to give the instruction is never harmless error. *Id.* Presumably, the passage referred to is the following:

> Is the disregard of the [statutory] right . . . [to a no "adverse inference" instruction] an error, the commission of which we may disregard? We hold not . . . . The Act . . . whereby appellate courts are under [a] duty in criminal as well as in civil cases to disregard 'technical errors, defects, or exceptions . . . .' . . . was intended to prevent matters concerned with the mere etiquette of trials . . . . Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.

308 U.S. at 293-94.

83 101 S. Ct. at 1122 (Powell, J., concurring).

phasized that the fifth amendment forbids compulsion, and that the focus of the inquiry, therefore, should be upon whether the defendant actually has been compelled. He pointed out that the defendants in *Griffin* and *Carter* could not claim that they were compelled to take the witness stand, since each chose not to do so.[84]

Apart from the wording of the amendment, Justice Powell attacked the two decisions on policy grounds. He argued that a defendant usually knows the most about the facts of a case, and that a logical inference does and should follow from his failure to testify. Justice Powell nevertheless concluded that since *Griffin* is now the law, principles of stare decisis bound him to join in the majority's holding.[85]

Justice Stevens, joined by Justice Brennan, concurred in the Court's opinion, and wrote separately only to emphasize that the *Carter* holding is limited to cases in which the defendant requests the jury instruction.[86] He reiterated his position in *Lakeside* that the question of whether an instruction should issue is a question to be answered by the defendant and his counsel.[87] Justice Stevens argued that since a defendant has the right to decide the larger question of whether to take the stand, he logically ought to have the right to decide the lesser companion question of whether an instruction should issue.[88]

Justice Rehnquist, in the only dissenting opinion, attacked the Court's "singular paucity of reasoning" in relying on *Bruno* as support for the *Carter* holding.[89] He argued that *Bruno* was decided under the federal competency act and that this act, since it is not binding on the states, is of no relevance whatsoever to the Court's decision. In agreement with Justice Powell, Justice Rehnquist asserted that this case lacks the compulsion necessary to establish a fifth amendment violation.[90] He was also concerned with the implications of the holding for the federal-state balance of constitutional power. Justice Rehnquist at least hinted that the fifth amendment, with its accompanying constitutional doctrine, should never have been made applicable to the states: "Until the mysterious process of transmogrification by which this amendment was held to be 'incorporated' and made applicable to the States . . . the provision itself would not have regulated the conduct of criminal trials in Kentucky."[91] Justice Rehnquist claimed that *Carter* exceeds even *Griffin* by giving a defendant, as a matter of right, the power to take

84 *Id.*
85 *Id.*
86 *Id.* at 1123 (Stevens, J., concurring).
87 435 U.S. at 344 (Stevens, J., dissenting).
88 101 S. Ct. at 1123 (Stevens, J., concurring).
89 *Id.* (Rehnquist, J., dissenting).
90 *Id.*
91 *Id.*

control over state jury instructions.[92]

IV. CRITIQUE OF CARTER V. KENTUCKY

The Supreme Court in *Carter v. Kentucky* reached the correct result. However, the Court's reasoning in justification of the *Carter* holding is at some points misleading and, at other points, inadequate.

The Supreme Court discussed three cases at length in support of its decision. Although the holding is made to appear to rest on *Bruno, Griffin*, and *Lakeside*, only *Griffin* provides substantial support for the Court's reasoning. The majority stated that it is plain that the *Bruno* opinion, establishing a statutory right to a *Carter*-type instruction, was influenced by the fifth amendment.[93] While this may be true, the Court offered no convincing reasoning for its assertion. The Court suggested that the *Bruno* opinion would reflect the spirit of the privilege against self-incrimination if the word "Congress" in *Bruno* were replaced with the words "fifth amendment."[94] It is a conclusion, not reasoning, however, to assert that by means of a word change, a statutory opinion becomes a constitutional holding.

The Court may have relied on the fact that *Bruno* characterized the right to a *Carter*-type instruction as "substantial".[95] The *Bruno* Court did not, however, characterize the right as "constitutional." The leap from a substantial statutory right to a constitutional fifth amendment right requires justification, and the *Bruno* opinion does not provide it. The Court could have decided that the fifth amendment demands that no presumption is to be raised against a defendant exercising his right to remain silent. If it had done so, then the *Bruno* reasoning, based on the "no presumption" clause, would have automatically applied to the fifth amendment decision in *Carter*. Since the *Carter* Court did not choose this alternative, however, *Bruno* provides no real support for the Court's reasoning.

The *Lakeside* decision is no more helpful to the *Carter* Court's analysis. The *Carter* Court stated that *Lakeside* established the significance of a *Carter*-type instruction.[96] The *Lakeside* opinion did so, according to the majority, by deciding that the purpose of the instruction was so important that it outweighed the defendant's choice of tactics to suppress the instruction.[97] It is difficult to reconcile this summation of *Lakeside* with the Court's caution in *Lakeside* that:

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92 *Id.* at 1124.
93 *Id.* at 1119.
94 *Id.* at 1119 n.16.
95 308 U.S. at 293.
96 101 S. Ct. at 1119.
97 *Id.*

> [i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination . . . .[98]

If this is all that the *Lakeside* Court held, then *Lakeside* did not "acknowledge the significance" of a no "adverse inference" instruction. *Lakeside* simply held that the instruction does not violate the constitution. The majority's reasoning is fallacious since *Lakeside*'s holding that a *Carter*-type instruction does not violate the constitution does not logically lead to the conclusion that the constitution commands such an instruction.

Of the three opinions discussed at length by the Court, then, only *Griffin* can justify the *Carter* Court's position. The *Griffin* Court asserted that the fifth amendment is violated when a defendant suffers a penalty for exercising his right to remain silent.[99] Comment that silence is evidence of guilt is an unconstitutional penalty, since it increases the risk that a silent defendant will be convicted because of his silence. A defendant exercising his fifth amendment right is equally penalized, however, if the jury, without suggestive comment, infers guilt from the accused's silence.[100] Since there is a strong possibility that a jury will arrive at such reasoning independently, a *Carter* instruction, if requested, is constitutionally mandated in the hope that it will offset the unconstitutional inference. The *Carter* opinion follows logically from the *Griffin* decision, and given *Griffin*, the *Carter* holding cannot seriously be questioned.

Two of the justices, however, attacked the majority opinion by disagreeing completely with *Griffin* and, a fortiori, with *Carter*. Justice Powell and Justice Rehnquist posed a strong argument against the *Griffin* and *Carter* rationales, which the majority simply neglected to address. The two Justices argued that since the defendants in *Griffin* and *Carter* chose not to take the stand, they were not compelled to testify against themselves.[101] They reasoned that the fifth amendment only prohibits compulsion and that where, as here, there is no compulsion, there can be no fifth amendment violation. It is puzzling that the Court did not address this argument, particularly in view of its decision, on another occasion, that "a necessary element of compulsory self-incrimination is some kind of compulsion."[102]

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98 435 U.S. at 340.

99 380 U.S. 609.

100 101 S. Ct. at 1119.

101 *Id.* at 1122-23.

102 Hoffa v. United States, 385 U.S. 293, 303 (1966). Justice Stewart, who wrote for the majority in *Carter*, had proposed an argument similar to one made fifteen years earlier in his *Griffin* dissent. 380 U.S. at 620 (Stewart, J., dissenting). See text accompanying note 37 *supra*.

Justice Powell and Justice Rehnquist assumed that a defendant can be a witness against himself only by taking the stand and testifying. They overlooked the possibility that a defendant can be a witness against himself through his silence. If a jury reasons from a defendant's silence to his guilt, a defendant is, in effect, giving evidence of his guilt when he refuses to take the stand. In a real sense, then, through his silence, a defendant becomes a witness against himself. If a defendant's options are limited to not taking the stand, and being a witness against himself, on the one hand, or taking the stand, and being a witness against himself, on the other, then a defendant is compelled to be a witness against himself. He has no choice. As Wigmore stated, "the supposed option lies between answering in confession of the criminating fact or keeping silence and letting the same fact be inferred; which is no option at all."[103] It is the adverse inference from a defendant's silence to his guilt which unconstitutionally compels a defendant to be a witness against himself. If an instruction can help to remove this inference from the jury's consideration, then the instruction is constitutionally required, at least when requested.

The Supreme Court appeared to recognize the possibility, however, that some jurors may not infer a defendant's guilt from his silence. If they do not, an instruction would introduce the unconstitutional inference for the first time. It is possible that after the instruction presents the reasoning, the jury will be unwilling or unable to obey the instruction to disregard the silence. It is at least possible, then, that the jury instruction will foster the very unconstitutional inference it was meant to prevent.[104] Out of deference to this possibility, the Court repeatedly limited the *Carter* holding to those cases in which the defendant requests the instruction.[105]

It appears, then, that the *Carter* Court did not completely discount Kentucky's argument that the instruction may unconstitutionally emphasize a defendant's silence. Indeed, in *Lakeside*, the Court noted in dicta that "[i]t may be wise for a trial judge not to give such a cautionary instruction. . . ."[106] The Court decided, however, that it is the defendant's gamble, and he has the right to the instruction upon request.

It is difficult to reconcile *Carter* with *Lakeside* on this point. If a defendant has the right to decide that the instruction should issue, it appears that he should also have the correlative right to decide that the

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103 8 J. WIGMORE, EVIDENCE § 2272, 425 (McNaughton rev. 1940).

104 This argument is similar to that made by Kentucky in *Carter*. *See* notes 57-59 & accompanying text *supra*.

105 101 S. Ct. at 1112.

106 Lakeside v. Oregon, 435 U.S. at 340.

instruction should not issue. *Lakeside* held, however, that the fifth amendment does not command that the defendant be accorded this latter right.[107]

Lakeside may have been decided with a view towards the eventual resolution of the *Carter* issue, and its possible effects on multiple defendant trials. If a trial has four defendants, and three of the defendants request a no "adverse inference" jury instruction, while one requests that it not be given, under *Carter* and *Lakeside*, the instruction will be given.[108] If *Lakeside* had been decided the other way, however, the fourth defendant would have had a fifth amendment right to prevent the giving of the instruction. Courts trying multiple defendants would be faced with the dilemma of violating the fifth amendment whether they gave the instruction or not. To avoid the problem of calling into question the constitutionality of multiple defendant trials, the Supreme Court may have decided that only one of the two positions could be given constitutional protection. The Court decided that it is more likely that the jury will arrive at the adverse inference on their own, and that an instruction to ignore the reasoning would probably not harm fifth amendment rights, and may serve to protect them.

V. CONCLUSION

Not only precedent, but the wording of the fifth amendment itself, demands the result arrived at in *Carter v. Kentucky*. *Carter* did not enlarge the scope of the fifth amendment, but attempted to restore that privilege to its strength at the time of its adoption into the Bill of Rights. At common law, a jury could not reasonably infer guilt from a defendant's silence. The competency acts first made possible this unconstitutional inference, and so first raised the fifth amendment question at issue in *Carter*. If a jury reasons from silence to guilt, then a defendant is compelled to be a witness, within the meaning of the fifth amendment. He is compelled in a way that he was not compelled at common law. Therefore, to restore some of the original force of the fifth amendment, the Supreme Court correctly decided that a jury instruction is constitutionally mandated, when requested, to reduce the effect of an adverse inference from a defendant's silence.

It is nevertheless possible that, despite a *Carter* instruction, a jury will allow the "silence implies guilt" reasoning to affect its verdict. This possible infringement of fifth amendment rights is inextricably entwined with the competency acts. Some infringement is justified, however, since the government has a substantial interest in allowing defendants

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[107] *Id.* at 342.

[108] *See, e.g.*, United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975).

who want to take the stand to do so. Although a state has a substantial interest in legislation making defendants competent witnesses, such legislation must be narrowly drawn so as not to infringe unnecessarily on fifth amendment rights. *Carter* limited competency acts to their constitutionally permissible bounds by eliminating, as much as judicially possible, the inference that silence is equated with guilt.

A number of people will be uncomfortable with the *Carter* decision because they are uncomfortable with the fifth amendment generally. Prominent authors have posed weighty arguments in favor of abandoning the privilege against compulsory self-incrimination.[109] But "[i]f it be thought that the [fifth amendment] privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."[110] As long as the fifth amendment is in the constitution, defendants have the right to the protection they receive through the Supreme Court's decision in *Carter v. Kentucky*.

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[109] *See, e.g.*, Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L.C. & P.S. 1014 (1934); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 75-88 (1891).

[110] Ullman v. United States, 350 U.S. 422, 427 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).