Criminal Procedure: Fifth Amendment: Judicial Comment on Failure to Testify Allowed. (Lakeside v. Oregon)

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CRIMINAL PROCEDURE — Fifth Amendment — Judicial Comment on Failure to Testify Allowed. Lakeside v. Oregon, 435 U.S. 333 (1978). In Lakeside v. Oregon the Supreme Court held that it is constitutionally permissible for a trial court to instruct the jury, over the objection of defense counsel, not to draw adverse inferences from the defendant’s failure to testify. The decision should be compared with the Court’s holding in Griffin v. California that a defendant’s fifth amendment privilege against self-incrimination was violated when the jury was advised, either by the court or the prosecution, that it could draw adverse inferences from the defendant’s silence. The instruction used in Lakeside, however, was held not to violate the privilege. Therefore, the Lakeside decision raises two questions: (1) Whether and to what extent it is consistent with the decision in Griffin; and, (2) what implications it has for the permissibility of the type of comment involved in Griffin. This note will compare Lakeside with Griffin in an attempt to answer these questions.

I.

Prior to Malloy v. Hogan, the issue was largely academic. In the first instance, under the common law in force at the time of the adoption of the fifth amendment, a criminal defendant was not a competent witness. Thereafter, when Congress legislated to remove a defendant’s incompetency, the legislation explicitly provided that defendant’s failure to take advantage of his newly granted competency should not create any presumptions against him. The Court construed that provision

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3. 378 U.S. 1 (1964) (which made the right not to incriminate oneself applicable to the states).
5. The first such legislation was the Act of March 16, 1878, ch. 37, 20 Stat. 30.
6. The current version is at 18 U.S.C. § 3481 (1970) and reads as follows:

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 a request shall not create any presumption against him.
in *Wilson v. United States* as barring any unfavorable comment concerning the defendant's silence. Since the question of the permissibility of such comment was covered by statute, there was no need for the courts to consider whether the same would be required by the fifth amendment itself.8

In state courts, the question was no less academic since, in *Twining v. New Jersey*, the Court had held that the fifth amendment privilege against self-incrimination would not be made applicable to the states through the fourteenth amendment.10 The propriety of comment was thus left to be determined by the states and all but six, by statute, case law or constitution, prohibited such comment.11

Prior to *Malloy*, the scope of protections afforded a defendant in a state trial was analyzed in terms of the due process clause of the fourteenth amendment.12 Initially, the Court applied a limited standard to determine which of those privileges and immunities were extended through the due process clause. In *Twining*, for example, it was held that, before a right would be so extended, it had to be of the very essence of national government;13 under that standard, even concededly fundamental rights could be denied incorporation.14 Subsequent to *Twining*, the process of selective incorporation of Bill of Rights guarantees proceeded apace.15 Then, in *Palko v. Connecticut*,16

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7. 149 U.S. 60 (1893).
8. The analysis in *Wilson* dealt solely with the requirements of the statute, without referring to the fifth amendment. *Id.* at 66. Section 3481 applied only to federal courts, of course.
11. The six states in which comment was permitted were: California—CAL. CONST. art. I, § 13; Connecticut—State v. Ford, 109 Conn. 490, 146 A. 828 (1929); Iowa—State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939); New Jersey—Parker v. State, 61 N.J.L. 308, 39 A. 651 (1898); New Mexico—N.M. STAT. ANN. § 41-12-19 (1964) (repealed by supreme court order effective July 1, 1972); Ohio—OHIO CONST. art. I, § 10. See Note, *Comment and Inference Under the Fifth and Fourteenth Amendments*, 25 OHIO ST. L.J. 578, 581-84 (1964) [hereinafter cited as *Comment Under the Fifth Amendment*].
12. Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1873), had, of course, precluded the application of all federal privileges and immunities, as enumerated in the Bill of Rights, to state court defendants.
14. *Id.* at 97.
15. In the years between *Twining* and *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court had incorporated the following Bill of Rights guarantees into the fourteenth amendment: (1) Sixth amendment right to counsel, *Powell v. Alabama*, 287 U.S. 45
which was decided almost thirty years after *Twining*, the Court broadened the standard by which it would determine which rights were incorporated. The standard formulated in that case required that those rights which were "of the very essence of a scheme of ordered liberty" would be so incorporated. However, the point at which the fifth amendment privilege against self-incrimination was considered such a right had not yet been reached.  

In refusing to incorporate the privilege, the *Palko* Court said, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without . . . [the immunity from compulsory self-incrimination]."

This reasoning, of course, made it unnecessary for the Court to determine, in the context of comment on the defendant's failure to testify, what purposes the privilege served; such formulation was left for academic development. Wigmore, for example, stressed two significant purposes:

- The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner . . . . The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself . . . .

Comment on the defendant's failure to testify was seen as consistent with the first of these purposes. The jury, after all, was bound to notice that the defendant had not testified. Therefore, it was reasoned that, left to its own devices, the jury would treat the defendant's silence as a virtual admission of guilt.

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17. Id. at 325.
18. Id.
19. Id.

Thus, it would be in defendant's best interest if the jury were
told that it could draw reasonable inferences, but no more,
from the defendant's silence.

Far from being considered inhumane, such comment was
thought to be for defendant's benefit. Convinced that the first
of these purposes controlled, and that comment was perfectly
consistent therewith, one writer stated categorically:

All that was in the minds of the framers of the constitutional
provisions was the desire to prevent injustice and direct comp-
pulsion. Theirs was a protest against and a fear of the inquisi-
tion of torture . . . . Their protest was against compulsion
and not against the reasonable inferences which might be
drawn from voluntary acts or from the use of one's volition
in refraining from acting.\footnote{22}

Wigmore's second purpose was largely ignored since the Court
had not stressed the significance of that purpose.\footnote{23}

II.

In \textit{Malloy}, the privilege against self-incrimination was ap-
plied to the states; the Court overruled \textit{Twining} and \textit{Adamson}
in the process. But the Court was forced to do more: it was
forced to clearly enunciate fifth amendment requirements as
applied to the federal government and the states. This was so
because the majority found it necessary to deal with the con-
tentions contained in the dissent written by Justice White. He
reasoned that, while incorporation of the fifth amendment was
mandated, the privilege against self-incrimination had not
been violated in \textit{Malloy}.\footnote{24}

When called as a witness before a grand jury in Hartford,
Connecticut, Malloy invoked his privilege against self-
incrimination; as a result, he was jailed for contempt. The
Court, therefore, had to deal not only with the question of
whether the privilege could be invoked at all in a state proceed-
ing, but, if so, with the proper standards for determining
whether the privilege was properly invoked by Malloy.

\footnote{22} Id. at 233.
\footnote{23} The significance of that purpose had previously been recognized by Justice
Cardozo when he stated in Doyle v. Hofstadler, 257 N.Y. 244, 177 N.E. 489, 491
(1931) that the privilege against self-incrimination "is a barrier interposed between the
individual and the power of the government, a barrier interposed by the sovereign
people of the state; and neither legislators nor judges are free to overlap it."
\footnote{24} 378 U.S. at 33-38 (White, J., dissenting).
In overruling *Twining* the Court held that the basis for its earlier refusal to extend the privilege against self-incrimination to state proceedings had been eroded by subsequent decisions. First, in *Brown v. Mississippi*\(^{26}\) the Court had invalidated a conviction based upon a coerced confession. In that decision, however, the Court had been careful to emphasize that its holding was not rested upon the fifth amendment privilege; rather, the Court used general fourteenth amendment principles to hold that "[*c]ompulsion by torture to extort a confession is a different matter."

Later, in *Lisenba v. California*,\(^{27}\) the Court found that in a state proceeding a defendant had a "free choice to admit, to deny, or to refuse to answer."\(^{28}\) This was found to be substantially identical to the federal standard, enunciated in *Bram v. United States*,\(^{29}\) by which the admissibility of a confession in federal court would be determined by whether it was "'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . .'"\(^{30}\) The *Malloy* Court, therefore, felt compelled to conclude that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified,"\(^{31}\) and that the notion has been rejected that "the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"\(^{32}\)

The amendment was characterized by the *Malloy* Court as the essential mainstay of the American system of criminal prosecution, which is accusatorial, not inquisitorial\(^{33}\) in its nature. It therefore was said to guarantee "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

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26. *Id.* at 285. The general supervisory powers of the Court, found in the fourteenth amendment's due process clause, was the stated basis for the decision.
27. 314 U.S. 219 (1941).
28. *Id.* at 241.
29. 168 U.S. 532 (1897).
30. *Id.* at 542-43 (quoting 3 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (9th ed. 1877).
31. 378 U.S. at 11.
32. *Id.* at 10-11 (quoting Ohio ex rel Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).
33. 378 U.S. at 7.
The Court's emphasis was clearly upon the free will of the individual and his autonomy vis-a-vis the state. This was brought into even sharper focus when the standard was applied to the particular facts in Malloy. In choosing whether the petitioner's or the Court's determination of the incriminatory nature of the questions was to control, the Court held that the fifth amendment required that the individual's determination supersede; upon his invocation of the privilege, "the judge must be 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate" in order to deny it.

In the Malloy Court's view, then, the individual must be given the benefit of every doubt. This is a reflection of Wigmore's conception of the second purpose of privilege: the individual's freedom must not be disturbed for less than good reason. Malloy makes it apparent that such good reason could only be present when no doubt as to the bad faith of the defendant in asserting the privilege could be found.

This interpretation was strongly contested by Justice White, in dissent:

While purporting to apply the prevailing federal standard of incrimination . . . the Court has all but stated that a witness' invocation of the privilege to any question is to be automatically, and without more, accepted. With deference, I prefer the rule permitting the judge rather than the witness to determine when an answer sought is incriminating.

In the opinion of Justices White and Stewart, the interest of the individual in the absolute freedom to determine when he is being compelled to incriminate himself should be balanced against the interest of the state in the testimony of every citizen. Since this balance would necessarily be upset by according the individual absolute autonomy to determine when the privilege is properly invoked, Justice White reasoned that the

34. Id. at 8.
35. Id. at 12 (quoting Hoffman v. United States, 341 U.S. 479, 488 (1951)) (emphasis in original).
36. See text accompanying note 20 supra.
37. For examples of improper reasons for invoking the privilege, see Malloy v. Hogan, 378 U.S. at 33-34.
38. Id. at 33 (White, J., dissenting). Justice Stewart joined in Justice White's dissent.
39. Id. at 34, 39-40.
privilege would be adequately safeguarded were the court to make a "meaningful determination" of the incriminatory nature of defendant's proposed testimony.\textsuperscript{40}

III.

After \textit{Malloy}, it was still not clear that comment on defendant's failure to testify would be barred by the fifth amendment.\textsuperscript{41} The facts of \textit{Malloy}, involving a witness before a grand jury, could be distinguished from a situation in which the defendant stood accused at a criminal trial; such a distinction could be rested upon either of Wigmore's stated purposes.\textsuperscript{42}

In \textit{Griffin}, however, the Court dispelled all doubts as to the applicability of \textit{Malloy} in the context of comment on the defendant's failure to testify. Petitioner was convicted of first degree murder after a trial at which the prosecution made much of his failure to testify, failing thereby to explain or rebut evidence which placed him with the victim at the time of the murder.\textsuperscript{43} The trial court carefully instructed the jury that it could have reasonably expected the defendant to explain or deny the incriminating evidence from facts within his own knowledge, were he capable of doing so, but that his failure to

\textsuperscript{40} Id. at 34.

\textsuperscript{41} See, e.g., People v. Modesto, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965).

\textsuperscript{42} See text accompanying note 20 supra. See also Meltzer, \textit{Required Records, the McCarran Act, and the Privilege Against Self-Incrimination}, 18 U. Chi. L. Rev. 687, 691-92 (1951) (contrasting a defendant's situation at trial with his situation during police interrogation). See, e.g., \textit{Comment Under the Fifth Amendment}, supra note 11, at 593.

\textsuperscript{43} The text of the prosecutor's comments is set forth in \textit{Griffin v. California}, 380 U.S. 609, 610-11 (1965). It provides an excellent example of the lengths to which prosecutorial comment is capable of going:

\begin{quote}
The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

What kind of a man is it that would want to have sex with a woman that beat up [sic] if she was beat up at the time he left?

He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

And in the whole world, if anybody would know, this defendant would know.

Essie Mae is dead, she can't tell you her side of the story. The defendant won't.
\end{quote}
do so did not by itself create an inference of guilt or relieve the prosecution of its burden of proof.\textsuperscript{44} The Court found that reversible error had been committed. To draw adverse inferences from the defendant's silence, in the Court's view, was to ignore other possible reasons for defendant's failure to testify.\textsuperscript{45}

The Griffin Court also stressed that comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."\textsuperscript{46} The trial judge may believe that the jury is bound to notice the defendant's silence and to think the worst without any prodding. But Griffin stands for the proposition that, if the defendant feels that comment would work to his detriment, his feelings in that regard must be respected.\textsuperscript{47}

It is submitted that to hold otherwise would be to subvert the purpose of the privilege, which is to safeguard the individual's right to decide whether or not to testify. If the defendant

\begin{footnotes}
\item[44.] Id. at 610. The comments made by the prosecutor should be contrasted with the instruction given by the trial court:

\begin{quote}
It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.
\end{quote}

\textit{Id.} at 618.

This instruction was based upon \textsc{Cal. Const.} art. I, § 13, which provided in part:

"[I]n any criminal case, whether the defendant 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." 380 U.S. at 617.

\item[45.] Among those reasons are the fear that his demeanor on the witness stand might make an unfavorable impression on the jury, 380 U.S. at 613 (quoting \textit{Wilson v. United States}, 149 U.S. 60, 66 (1893)) and the fear that his record of prior convictions will be brought out on cross-examination, 380 U.S. at 615 (quoting \textit{People v. Modesto}, 62 \textsc{Cal. 2d} 436, 453, 398 P.2d 753, 763, 42 \textsc{Cal. Rptr.} 417, 427 (1965)). For a fuller discussion of this point, see text accompanying notes 67-71 infra.

\item[46.] 380 U.S. at 614.

\item[47.] \textit{Id.} at 613.
\end{footnotes}
has decided that the advantages of not testifying outweigh the risk that the jury will draw inferences against him, that is his decision to make. The court should not be entitled to reweigh that risk. As the Court observed, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."\(^4\)

Justice Stewart, in dissent, deemed it beyond all cavil that the jury, left to its own devices, will convict the defendant from his silence.\(^9\) Therefore, Justice Stewart thought that the Court could ignore defendant’s wishes without abridging his fifth amendment right not to incriminate himself.\(^5\) Justice Stewart thus adhered to the view of the dissenters in *Malloy*.

**IV.**

In *Griffin*, the jury was told that it could draw reasonable adverse inferences from defendant’s failure to testify. In *Lakeside*, a trial court instruction, given despite defendant’s objection, directed the jury not to draw any adverse inferences from that failure.\(^5\) The question of whether a situation such as that present in *Lakeside* was governed by *Griffin* received varying treatment in the years between the two decisions.

Cases holding that a *Lakeside* situation was governed by *Griffin* are exemplified by *Russell v. State*.\(^2\) In that case, the Arkansas Supreme Court held that “the instruction ought not to be given against the wishes of the defendant. If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury’s attention.”\(^3\) This argument lays stress on the fifth amendment purpose of safeguarding

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48. Id. at 614.
49. Id. at 621 (Stewart, J., dissenting).
50. Id. at 620. Justice Stewart’s description of the fifth amendment is substantially identical to that found in Bruce, supra note 21; the defendant is far better off having the inferences to be drawn by the jury guided by “the limiting and carefully controlling language of the instruction here involved [than he would be] if the jury were left to roam at large, with only its untutored instincts to guide it, to draw from the defendant’s silence broad inferences of guilt.” 380 U.S. at 621 (Stewart, J., dissenting). The determination is thereby made that such comment as is here involved is in the defendant’s best interests, and therefore has no incriminatory effect.
51. It had been well settled, at least in federal court, that such an instruction was mandatory once requested by a defendant. See, e.g., Bruno v. United States, 308 U.S. 287 (1939).
52. 240 Ark. 97, 398 S.W.2d 213 (1966).
53. Id. at --, 398 S.W.2d at 215.
individual autonomy, the purpose which was emphasized in both *Malloy* and *Griffin*. Decisions taking the opposite view are illustrated by *State v. Dean,* in which the Arizona Court of Appeals said,

> At the whim of the accused, an instruction which properly states the law on the subject undergoes a monumental transformation from a procedural safeguard required by the Constitution to a noxious and abhorrent comment forbidden by the very same Constitution. The only basis for this rather startling metamorphosis is the subjective desire of the accused.

With the issue thus joined, the Supreme Court granted certiorari in *Lakeside,* and it would be difficult to conceive of a more appropriate fact situation for the presentation of the issue. Petitioner, charged with escape, had presented an insanity defense. One must strain the imagination to conceive of a situation in which an allegedly insane person could add to his defense by testifying. Indeed, petitioner did not testify and any mention of this fact was studiously avoided by defense counsel. Nevertheless, the trial court, over defendant’s objection, instructed the jury not to draw any adverse inferences from defendant’s silence.

The matter fell into the hands of Justice Stewart, and the outcome was predictable. Although careful to distinguish *Griffin,* the Court in *Lakeside* made essentially the same arguments as had been made in Justice Stewart’s *Griffin* dissent. Dismissing petitioner’s contention that the instruction drew the jury’s attention to the defendant’s silence, the Court stated that such an argument

would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have

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55.  Id. at ——, 447 P.2d at 895. The Arizona and Arkansas decisions stand in stark contrast: The Arizona court found unreasonable the very individual autonomy stressed as a defendant’s right by the Arkansas court.
57.  Id. at 334.
58.  Id. at 338-39.
been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these.\textsuperscript{59} 

In dissent, Justice Stevens dealt with the first of these "doubtful assumptions" by pointing out that "the jury will probably draw an unfavorable inference despite instructions to the contrary. Although this 'cost' can never be eliminated, \textit{Griffin} stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute."\textsuperscript{60} In answer to the second assumption, the dissent offered the following:

Even if jurors try faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted. When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear.\textsuperscript{61}

Justice Stewart characterized these assumptions as doubtful; \textit{Malloy} and \textit{Griffin} said that the benefit of that doubt must go to the defendant. \textit{Malloy} required that defendant make his choice as to whether or not to testify "in the unfettered exercise of his own will,"\textsuperscript{62} and \textit{Griffin} required that there be no "penalty imposed by courts for exercising a constitutional privilege."\textsuperscript{63} As one of the purposes of the fifth amendment privilege is to safeguard the individual's autonomy, the determination of when a penalty is imposed is for the individual to make, and not, as Justice Stewart has consistently argued, for the trial court. Therefore, it appears that, despite Justice Stewart's attempts, \textit{Lakeside} and \textit{Griffin} cannot be reconciled.\textsuperscript{64}

V.

Whether or not the \textit{Griffin} rule will withstand \textit{Lakeside} remains to be seen. There is, of course, an obvious difference in degree between the two types of comment; the interference is certainly not as great in a \textit{Lakeside} situation. However, there may not be a difference in kind. What is needed is some sort of principled distinction between the two types of comment for, if none is found, and the Court in \textit{Lakeside} has adopted a new

\begin{itemize}
\item \textsuperscript{59} Id. at 340 (footnotes omitted).
\item \textsuperscript{60} Id. at 344.
\item \textsuperscript{61} Id. at 345.
\item \textsuperscript{62} 378 U.S. at 8.
\item \textsuperscript{63} 380 U.S. at 614.
\item \textsuperscript{64} See \textit{Lakeside} v. Oregon, 435 U.S. at 344 n.3.
\end{itemize}
principle inconsistent with Griffin, that is as much as to say that Griffin has been overruled. Some basis must be found to support Justice Stewart’s contention that Lakeside involved “‘comment’ of an entirely different order.”

It is not enough to say that the distinction lies in the fact that the comment involved in Lakeside is clearly to the defendant’s benefit, whereas the comment involved in Griffin is not; reasonable minds may differ about the truth of that proposition. For example, Justice Stewart argued in Griffin that the comment there involved merely had the effect of limiting, not encouraging, the inference to be drawn by the jury. Furthermore, in Lakeside, as in Griffin, the defendant did not concur in the evaluation of the comment as beneficial. If defendant’s assessment can be ignored in Lakeside, why not in Griffin as well?

As mentioned earlier, adverse inferences drawn from a defendant’s failure to testify may not always be warranted. A defendant may have reasons to avoid testifying which bear no relation to fear of exposing his guilt.

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 offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.

Other reasons for refusing to testify include, inter alia, fear that a record of prior convictions will be revealed upon cross-examination, poor demeanor and hesitancy to implicate those loved or feared. Thus a Griffin instruction can mislead the jury; such danger is not presented by a Lakeside instruction since it does not ask the jury to draw possibly unwarranted inferences.

Of course, this is no more than an argument for requiring the trial court to exercise discretion in giving a Griffin instruc-

65. Id. at 339.
66. 380 U.S. at 621.
67. See text accompanying note 45 supra.
68. See, e.g., Note, 70 DICK. L. REV. 98, 116-17 (1965).
70. See Comment Under the Fifth Amendment, supra note 11, at 595 n.82, where it is suggested that a possible reason for a defendant’s reluctance to testify may be his overt homosexuality.
In many, if not most, cases it will be clear that none of these factors is present. Personable and articulate defendants do exist; this argument says nothing that would bar the trial court from giving such an instruction when faced with such a defendant. Moreover, to the extent that a Lakeside instruction pressures a defendant to give testimony, such an instruction compels him to testify though he may have good reasons for not doing so. Thus, a price is exacted for the exercise of the right not to incriminate oneself.

It may, however, be incorrect to distinguish Lakeside from Griffin by attempting to consistently apply any absolute principle. Rather, perhaps what we are observing in Lakeside is a process of balancing the competing interests of the state and the individual. The roots of such a balancing process can be traced as far back as United States v. Burr, in which Chief Justice Marshall stated, "The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded." Each state, as well as the federal government, has an interest in assuring that its criminal trials ascertain the truth. It, therefore, has an interest in any light that may be shed by the testimony of any witness, including the defendant. This interest obviously is at loggerheads with the defendant's interest in being free from compulsion to incriminate himself.

Chief Justice Marshall taught us that neither interest can be held always to supersede the other; a proper balance must be struck in each case. Justice Stewart expressed the same idea in his dissenting opinion in Griffin when he stated, "Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, . . . to shape a legal process designed to ascertain the truth."

With this analysis, the difference in degree between the comments in Lakeside and Griffin becomes significant. Although both comments impose the same kind of cost upon the defendant's decision not to testify, a Lakeside comment imposes that cost to a lesser degree. The jury is being told, after

71. See Clapp, supra note 20, at 556.
73. Id. at 39-40.
74. 380 U.S. at 622.
all, not to draw an adverse inference; there is always the chance that it may comply. When a Griffin comment is made, on the other hand, there is no question but that the jury will draw at least some adverse inference. The Lakeside holding may very well stand for no more than the proposition that the balance is to be struck in favor of the state because the cost to the defendant is smaller.

In this way, Lakeside can also be reconciled with Brooks v. Tennessee,76 a case cited by the dissent as compelling a result different from that reached by the majority. In that case the Court invalidated a Tennessee law76 which required that the defendant must testify ahead of all other defense witnesses, if at all. This rule was established to prevent the defendant, who could not be sequestered,77 from molding his testimony to fit that of other defense witnesses. A defendant who planned to testify but who found, after the presentation of all other evidence, that his testimony was unnecessary would have been compelled by that law to testify where otherwise he would not. In Brooks, the Court found that law violative of the fifth amendment privilege; the dissent in Lakeside argued that if the compelling state interest in preventing perjury did not outweigh the privilege in Brooks, then in Lakeside, where no state interest was clearly identified, the privilege should certainly be capable of successful assertion.78 The answer to that argument is that the state interest involved in Lakeside is in securing all testimony which will help in ascertaining the truth. In Brooks,79 the defendant planned to testify, so this state interest was not in need of advancement. While the state in Brooks had an interest in preventing perjury, the possibility of perjury was merely speculative.

If the Lakeside and Griffin opinions differ merely because, on balance, the competing interests of the state and the individual mandated one answer in the first case but a different answer in the second, the implications of Lakeside are still not entirely clear. The fact situation in Griffin involved comment by both the trial court and the prosecution. Comment by the prosecution, of course, imposes a greater cost upon the de-

77. 406 U.S. at 607.
78. 435 U.S. at 347 n.8.
fendant than does comment by the trial court. The prosecutor is, after all, an adversary and can be expected to be less restrained in his comment than would an impartial judge.  

Although Professor Bruce argued that the trial court will see to it that the prosecutor's comments will be reasonable, it cannot be denied that the possibility of abuse is present. If the balance is to be struck, who is to say that it should not be struck in favor of all comment by the restrained and impartial trial court and no comment by the zealous and partisan prosecution? This would be no less consistent than Lakeside with the Griffin holding. It is only for the Court to say, and at this point it is no longer clear how the Court would rule on such a question.

CONCLUSION

This note has attempted in vain to find a clear distinction between Lakeside and Griffin, based upon the consistent application of fifth amendment principles, which would justify the differing results in the two cases. Rather than signaling the overthrow of the Griffin principle, however, Lakeside was found to represent the application of a process of balancing the competing interests of the state and the individual consistently with the dictates of the fifth amendment.

The problem with a process of balancing is that it is never clear just where the balance is to be struck. There are at least four possible results of such a balancing process: (1) allowing no comment of any kind; (2) allowing a Lakeside instruction but not allowing a Griffin instruction; (3) allowing a Griffin instruction but not allowing a Griffin comment by the prosecution; and, (4) allowing any type of comment. There are also distinctions to be drawn between comment by the trial court and comment by the prosecution, with possible distinctions between them as to the cost imposed. If the distinguishing criterion is to be merely the cost imposed upon the defendant,

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80. See, e.g., the text of the prosecutorial comment in note 43 supra.
81. Bruce, supra note 21, at 231.
83. See Lakeside v. Oregon, 435 U.S. at 344 n.3.
how is that cost to be measured? Without a guiding principle consistently applied, no final answer can be expected. At any given time, the balance will be struck wherever the nine Justices of the Supreme Court think it should be struck.

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FEDERAL JURISDICTION—Ancillary Jurisdiction
—Independent Grounds of Jurisdiction Required for Plaintiff's Claim against Third Party Defendant. Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396 (1978). Within the last fifty years, and especially since the adoption of the Federal Rules of Civil Procedure, the doctrine of ancillary jurisdiction has been greatly expanded by the inferior federal courts. Importantly, this evolution has occurred in the absence of specific direction from the United States Supreme Court. Indeed, prior to the recent decision of Owen Equipment & Erection Co. v. Kroger, the Court had last directly addressed a question regarding the permissible scope of ancillary jurisdiction in 1926 in Moore v. New York Cotton Exchange. Owen's primary significance is that it (1) directs that jurisdictional statutes be interpreted narrowly and (2) delineates a rather ambiguous three part test in cases involving questions of ancillary jurisdiction. While a possible interpretation of Owen is that two of the factors involved in this latter test—logical dependence of the federal and nonfederal claims and the loss of a party's legal rights—are to be required only of plaintiffs, in the author's judgment the better view is that either factor should be required of any party to a lawsuit asserting a claim requiring ancillary or pendent jurisdiction. Although the full

2. This statement follows the distinction between ancillary, pendent and pendent party jurisdiction which has been developed by the inferior federal courts. Owen, however, makes fairly clear that there are no "principled" differences between the three doctrines. Thus, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction), and Aldinger v. Howard, 427 U.S. 1 (1976) (pendent party jurisdiction), may properly be viewed as addressing the question of ancillary jurisdiction. Nevertheless, Owen is the most comprehensive pronouncement on the matter to date.
3. 270 U.S. 593 (1926).
5. A nonfederal claim is one as to which there are no independent grounds of jurisdiction. A federal claim has such grounds.