

Courtroom Comment On An Accused's Reliance On The Privilege Against Self-Incrimination: California's Application Of *Griffin v. California*

"[I]f I am ever charged with a crime . . . I will go upon the stand and hold up my hand before high Heaven and testify to my innocence. . . ."¹

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. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.²

I. INTRODUCTION

Courts and commentators have traditionally construed the privilege against compulsory self-incrimination to consist of two distinct privileges.³ Accordingly, the California Evidence Code recognizes the privilege of an *accused* in a criminal proceeding "not to be called as a witness and not to testify,"⁴ and the privilege of *any witness* "to refuse to disclose any matter that may tend to incriminate him."⁵ In

Note: In referring to counsel, accused and members of a court, the authors intend the masculine gender to include the feminine gender as well.

¹Wilson v. United States, 149 U.S. 60, 62 (1893) (prosecutor comment).

²*Id.* at 66 (opinion of the court).

³See generally E. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 116 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

⁴CAL. EVID. CODE § 930 (West 1968).

⁵*Id.* § 940. Both code sections recognize the privileges "[t]o the extent that such a privilege exists under the Constitution of the United States or the State of California." U.S. CONST. amend. V provides in part: "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ." CAL. CONST. art. 1, § 15 provides in part: "Persons may not . . . be compelled in a criminal cause to be a witness [sic] against themselves." Federal Rule of Evidence 501, of general application to all privileges, recognizes the privilege as "governed by the

Griffin v. California,⁶ the United States Supreme Court significantly expanded the constitutional breadth of the accused's privilege.⁷ The Court held in *Griffin* that the self-incrimination guarantee of the fifth amendment⁸ as applied to the states through the fourteenth amendment⁹ barred, in a state criminal trial, prosecution comment on a defendant's failure to testify or court instruction that such silence constitutes evidence of guilt.¹⁰

This article examines the response of California courts to the constitutional mandate of *Griffin*. After discussing the history and rationale underlying the *Griffin* decision, it considers the theoretical framework and actual practice by which California courts review alleged *Griffin* error. The discussion analyzes principles the courts employ in determining whether challenged comment or instruction is within the scope of *Griffin*. The article further analyzes factors the courts consider in deciding whether *Griffin* error compels reversal or is harmless. The final section assesses the tendency of California courts to merge these separate determinations in reviewing potential violations of the accused's privilege.

II. HISTORY AND POLICY UNDERLYING *GRIFFIN*

The privilege against compulsory self-incrimination stems from the abhorrence with which the infamous inquisitorial practices of the English courts of Star Chamber and High Commission were regarded in England and America.¹¹ Its incorporation within the fifth amendment of the Constitution signaled a rejection of the ethic of those tribunals that the search for truth should proceed without regard for the dignity of the individual. As the United States Supreme Court has observed:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by in-

principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience," "[e]xcept as otherwise required by the Constitution." 28 U.S.C., FED. R. EVID. 101 *et seq.* (1975).

⁶380 U.S. 609 (1975).

⁷The accused's privilege insulates the defendant from being called to the stand at the state's behest. A defendant not only may remain silent but cannot be subjected to the spectacle of his silence on the stand in the face of persistent questioning. This is so fundamental a dimension of the privilege that illustrative case law is scarce. For a rare example, see *People v. Talle*, 111 Cal. App. 2d 650, 662, 245 P.2d 633, 640 (1st Dist. 1952).

⁸For the text of that clause, see note 5 *supra*.

⁹See discussion in the text accompanying notes 27-29 *infra*.

¹⁰380 U.S. at 615.

¹¹*In re Tahbel*, 46 Cal. App. 755, 758, 189 P. 804, 806 (2d Dist. 1920). See generally L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968); MCCORMICK (2d ed.), *supra* note 3, § 114; 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2250 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE].

humane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government, in its contest with the individual, to shoulder the entire load" . . . ; . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."¹²

The Supreme Court granted certiorari in *Griffin v. California*¹³ to consider whether comment on a defendant's failure to testify was inimical to these policies underpinning the privilege. Defendant Griffin was charged with the slaying of the paramour of a friend.¹⁴ Relying on the privilege against self-incrimination, Griffin chose not to take the stand and testify in his own defense at his trial for first degree murder. The prosecutor urged the jury that since Griffin had been seen with the victim shortly before her death, he would know what had happened if anyone in the world would; yet "[t]hese things he has not seen fit to take the stand and deny or explain Essie Mae is dead, she can't tell you her side of the story. The defendant won't."¹⁵ The court instructed the jury that it might draw adverse inferences from the defendant's failure to testify. Both the prosecution's remarks and the court's instructions were expressly sanctioned by a 1934 amendment to the California constitution.¹⁶ The amendment permitted counsel and the court to comment on, and the trier of fact to consider in its determination of guilt, a defendant's failure to explain or deny by his testimony evidence in the case against him.¹⁷ The California Supreme Court affirmed the conviction,¹⁸ and the United States Supreme Court reversed.

¹²Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55 (1964). For an exhaustive catalogue of the policies supporting and militating against the privilege, see 8 WIGMORE, *supra* note 11, § 2251. See also MCCORMICK (2d ed.), *supra* note 3, § 118; Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541 (1956).

¹³380 U.S. 609 (1965).

¹⁴The friend had allowed Griffin to spend an evening in the couple's shared house. The following morning a witness saw Griffin walking away from a nearby alley in which the police found the victim bleeding from wounds causing her death. Griffin told the police officers that for a sum of money the woman had voluntarily accompanied him into the alley to have intercourse with him. He denied beating her. *People v. Griffin*, 60 Cal. 2d 182, 383 P.2d 432, 32 Cal. Rptr. 24 (1963), *rev'd*, 380 U.S. 609 (1965).

¹⁵380 U.S. at 610.

¹⁶CAL. CONST. art 1, § 13 (1934). Prior to the adoption of this provision, the California Supreme Court had found such comment violative of the state's witness competency statute and of the spirit of the state constitution's self-incrimination clause. *People v. Tyler*, 36 Cal. 522, 530 (1869).

¹⁷The amendment provided in part:

. . . in 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.

¹⁸*People v. Griffin*, 60 Cal. 2d 182, 383 P.2d 432, 32 Cal. Rptr. 24 (1963), *rev'd*, 380 U.S. 609 (1965).

Griffin followed several Supreme Court decisions reviewing the propriety of comment on a defendant's failure to testify.¹⁹ In *Wilson v. United States*,²⁰ the court held that prosecution remarks on the defendant's election not to testify²¹ violated the federal statute making a witness competent only upon his own request,²² by creating a presumption of guilt expressly proscribed by the statute.²³ In *Twining v. New Jersey*²⁴ and *Adamson v. California*,²⁵ state criminal prosecutions, the Supreme Court assumed that comment on a defendant's failure to testify abridged the self-incrimination guarantee of the fifth amendment.²⁶ The Court's refusal to find that the fourteenth amendment safeguarded the self-incrimination clause of the fifth amendment from state encroachment,²⁷ however, precluded the Court from reaching the issue of the constitutionality of such comment.

Relying on a changing concept of due process, the Court, in *Malloy v. Hogan*,²⁸ reversed itself, holding the fifth amendment privilege applicable to the states. Because American criminal prosecution is accusatorial rather than inquisitorial, and the privilege against self-incrimination is its mainstay, the Court held:

The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.²⁹

¹⁹For an extensive discussion of the constitutional precedents leading to *Griffin*, see Note, *Griffin v. California: Comment on Accused's Failure to Testify Prohibited by the Fifth Amendment*, 70 DICK. L. REV. 98 (1965).

²⁰149 U.S. 60 (1893).

²¹For some of those remarks, see the quotation in the text at note 1 *supra*.

²²Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (1878), as amended 18 U.S.C. § 3481 (1970). That statute provided that in criminal trials in the federal courts, "the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not carry any presumption against him."

²³149 U.S. at 65.

²⁴211 U.S. 78 (1908).

²⁵332 U.S. 46 (1947). *Adamson* challenged the same provision of the California constitution struck down in *Griffin*. See notes 16 and 17 *supra*.

²⁶211 U.S. at 114, 332 U.S. at 50.

²⁷In both *Twining* and *Adamson*, the Court rejected arguments that the self-incrimination guarantee of the fifth amendment was binding on the states through the fourteenth amendment as a privilege or immunity inherent in national citizenship or by the wholesale incorporation of the Bill of Rights; nor was it such an immutable principle of justice as to be a fundamental right guaranteed by the fourteenth amendment's due process clause. 211 U.S. at 99, 113; 332 U.S. at 53, 54.

²⁸378 U.S. 1, 6-9 (1964). The Court relied heavily on the marked shift to a single federal standard in judging coerced confessions and in excluding evidence obtained by unreasonable searches and seizures, particularly its decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁹378 U.S. at 7-8 (emphasis added).

Malloy thus provided the foundation of *Griffin*. The *Griffin* Court expressly rejected argument that permitting comment and instructions concerning the defendant's failure to testify only circumscribed inferences too natural and irresistible for a jury to ignore.³⁰ Instead, the California comment rule exacted a court-imposed penalty for an accused's reliance on his constitutional privilege against self-incrimination; "[i]t cut down on the privilege by making its assertion costly."³¹ Such a penalty was compulsion within the meaning of the fifth amendment. The comment and the California constitutional rule sanctioning such comment were therefore unconstitutional.

III. THE EXISTENCE OF ERROR

Expressly mentioning the defendant's failure to take the stand while urging the jury to draw inferences adverse to the defendant is clear *Griffin* error. Indirect references to the defendant's failure to take the stand, however, cause greater problems. Indirect references are error if they focus the jury's attention on the defendant's failure to testify. Beyond that general principle the law is much less clear; recognizing those situations where an indirect reference constitutes *Griffin* error is difficult. California cases provide some guidance for determining when remarks indirectly focus jury attention on the defendant's invocation of the privilege against self-incrimination. This section examines the spectrum of comments and instructions which California courts have held to constitute *Griffin* error and abstracts those principles which seem to determine when remarks indirectly refer to the defendant's failure to testify. Generally, *Griffin* error³² may occur in jury instructions or amidst the remarks of prosecutors, counsel for a codefendant or trial judges.

A. PROSECUTORIAL COMMENT

A series of possible prosecution comments during closing argument to the jury in the following hypothetical case will help to dis-

³⁰ *Griffin v. California*, 380 U.S. 609, 614-15 (1965). The Court answered such contentions, stating: "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." *Id.* at 614. See also text accompanying note 116 *infra*.

³¹ *Id.*

³² No subsequent United States Supreme Court decision elucidates the scope of the *Griffin* proscription. This article uses the term "*Griffin* error" broadly to refer to any courtroom comment on an accused's failure to testify which the reviewing court finds violative of the *Griffin* Court's reasoning, as well as comment expressly held unconstitutional by *Griffin*.

See generally MCCORMICK (2d ed.), *supra* note 3, § 131; 8 WIGMORE, *supra* note 11, § 2272 at 425-39 (pre-*Griffin*); *id.* at 50-54 (Supp. 1975); B. WITKIN, CALIFORNIA EVIDENCE §§ 912 (pre-*Griffin*), 913 (2d ed. 1966) [hereinafter cited as WITKIN (2d ed.)]; *id.* §§ 913A-C & 914B (Supp. 1974) [hereinafter cited as WITKIN (Supp. 1974)].

tinguish those comments which are constitutional from those which are not.

At the defendant's trial for murder, the People's case consists solely of the testimony of the coroner and the single eyewitness to the crime. The eyewitness testifies that after an argument the defendant drew a knife and began stabbing the victim; during the ensuing struggle the victim's blood stained the defendant's clothing. The coroner testifies that the knife wounds caused the victim's death. The defendant neither testifies nor presents any evidence or witnesses in his behalf. The prosecutor's closing argument incorporates one of the following eight statements.

Comment 1: The defendant has failed to explain or deny by his testimony any of the evidence in the case against him. He does not, of course, have to take the stand, but with all of the things that have been said in this trial — the physical evidence and the eyewitness testimony — you must assume that the facts presented by the People are true. Clearly, the most probable inferences arising from those facts are unfavorable to the defendant.

Prosecutors routinely made comments of this nature pursuant to the previously mentioned 1934 amendment to the California constitution.³³ *Griffin* declared this practice unconstitutional.³⁴ Any statement suggesting that jurors may draw an inference of guilt from the defendant's failure to testify³⁵ penalizes his reliance on the privilege against self-incrimination and thereby violates the fifth amendment.

*Comment 2: We have not heard from the defendant during this trial; he has not testified in his own behalf.*³⁶

after cited as WITKIN (Supp. 1974)]; Annot., 24 A.L.R. 3d 1093 (1969); Annot., 18 A.L.R. 3d 1335 (1968); Annot., 14 A.L.R. 3d 723 (1967); Annot., 1 A.L.R. 3d 989 (1965).

³³CAL. CONST. art. 1, § 13 (1934); see notes 16 & 17 *supra*.

³⁴The first California case expressly following *Griffin* was *People v. Bostick*, 62 Cal. 2d 820, 823, 402 P.2d 529, 530, 44 Cal. Rptr. 649, 650 (1965).

³⁵Before *Griffin*, California courts distinguished between comments on the defendant's failure to deny facts in the case against him and comments on the defendant's failure to take the stand. The California Supreme Court reasoned that under the California constitutional self-incrimination guarantee (CAL. CONST. art. 1, § 13 [now appearing in § 15]) the former comment was permissible although the latter was not:

It is clear from the terms of the constitutional provision that the . . . comment relates, not to the defendant's failure to take the stand, but to "his failure to explain or deny by his testimony any evidence or facts in the case against him" whether he testifies or not.

People v. Adamson, 27 Cal. 2d 478, 488, 165 P.2d 3, 8 (1946), *aff'd*, 332 U.S. 46 (1947) (see note 27 *supra*). The *Griffin* decision implicitly rejected such a fine distinction; see 380 U.S. 609, 614 n.5 (1965).

³⁶Similar comment occurred in *Griffin*; see text accompanying note 15 *supra*.

Here the prosecutor does not ask the jurors to draw an inference of guilt from the defendant's failure to testify. Nevertheless, the prosecutor emphasizes the defendant's reliance on his constitutional privilege by expressly referring to the defendant's absence from the stand. *Griffin* forbids such a reference.³⁷ Similarly, the prosecutor may not argue that the defendant failed to tell the jury his defense.³⁸ Any remark noting the defendant's failure to personally present exculpatory evidence or to rebut the People's case is *Griffin* error.

Comment 3: "Who is the only person who had blood on him, besides the [victim]? You know who he is. He is sitting here in this courtroom — and just sitting."³⁹

This comment does not specifically mention the defendant or request that the jury draw inferences adverse to him. However, the prosecutor's query — "[w]ho is the only person who had blood on him, besides the [victim]"⁴⁰ — effectively identifies the defendant because the eyewitness has testified that in the struggle following the stabbing, the victim's blood stained the defendant's clothing. The prosecutor's further comment that the defendant was "just sitting [in the courtroom]"⁴¹ alludes to the defendant's election not to

³⁷See, e.g., *People v. Teale*, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965), *rev'd* (on grounds that error was prejudicial rather than harmless) *sub. nom.* *Chapman v. California*, 386 U.S. 18, 27 (1967). The prosecutor commented "that neither one of these defendants has seen fit to . . . take that witness stand. . . ."

³⁸In *People v. Morse*, 70 Cal. 2d 711, 727 n.9, 452 P.2d 607, 616 n.9, 76 Cal. Rptr. 391, 400 n.9 (1969), *cert. denied*, 397 U.S. 944 (1970), the prosecutor attacked the validity of psychiatric testimony that the defendant was incapable of premeditated murder. He remarked that: "The defendant hasn't told you what he was thinking. He hasn't told you why he did this or how he did this." Such comment was held error, though harmless. (For an extensive discussion of harmless *Griffin* error, see generally text accompanying notes 122-200 *infra*.) In *People v. Glass*, 44 Cal. App. 3d 772, 778, 118 Cal. Rptr. 797, 801 (5th Dist. 1975), the prosecutor urged the jury to find that the defendant had specific intent to sell amphetamines. He remarked that

"[t]here is only one way to connect by direct evidence what Mr. Glass' intent was and that is if he would take the witness stand and tell us, say that my intent was to sell those."

The court held this comment error, and in conjunction with another *Griffin* error, such error was prejudicial. In *People v. Keller*, 234 Cal. App. 2d 395, 398, 44 Cal. Rptr. 432, 435 (1st Dist.), *appeal dismissed & cert. denied*, 382 U.S. 43 (1965), the prosecutor contended that the defendant's self-defense argument "falls flat, because the Defendant himself doesn't ever tell you or deny the allegations" The court held the comment prejudicial error.

³⁹*People v. Modesto*, 66 Cal. 2d 695, 711, 427 P.2d 788, 798-99, 59 Cal. Rptr. 124, 134-35, *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds* in *Maine v. Superior Court*, 68 Cal. 2d 375, 383 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968).

⁴⁰*Id.*

⁴¹*Id.*

testify. The California Supreme Court condemned this precise language in *People v. Modesto*⁴² because the comment conveyed an “implied [invitation] to the jury”⁴³ to conclude that if the defendant were innocent, he would have appeared as a witness in his own behalf.⁴⁴

Comment 4: *The People’s case is ironclad; no one has denied these facts.*

Comment 5: *The testimony of the single eyewitness to this crime stands unrefuted.*

Comment 6: *The People’s evidence of the defendant’s guilt is unexplained, uncontradicted and uncontroverted.*

These comments pose a single issue: the degree of latitude judges should allow prosecutors in contrasting defense and prosecution evidence.⁴⁵ In resolving this issue, California courts have attempted to balance general principles of evidence law designed to secure the truth with the privilege against self-incrimination designed to assure individual dignity.⁴⁶ On the one hand, the California Evidence Code⁴⁷ states that the failure to produce contradictory evidence justifies an

⁴²*Id.*

⁴³*People v. Giovannianni*, 260 Cal. App. 2d 597, 604, 67 Cal. Rptr. 303, 308 (1st Dist. 1968).

⁴⁴*Accord*, *People v. Crawford*, 253 Cal. App. 2d 524, 535-36, 61 Cal. Rptr. 472, 480-81 (5th Dist. 1967), *cert. denied*, 397 U.S. 944 (1968). The court held that the prosecutor committed harmless error in commenting that the defendant’s alibi defense was not convincing because “the only thing we have heard from the defendant is this roundabout story from these relatives.” *Id.* at 535, 61 Cal. Rptr. at 480.

⁴⁵*See generally* Annot., 14 A.L.R. 3d 723 (1967).

⁴⁶In *People v. Montigo*, 248 Cal. App. 2d 32, 38, 56 Cal. Rptr. 33, 36 (5th Dist. 1967), the court stated that

[t]he concept of a fair trial requires that a defendant’s constitutional right to remain silent be protected within the principles enunciated in *Griffin*, and at the same time that counsel be permitted to fully discuss the evidence, drawing all reasonable inferences.

The court affirmed the defendant’s burglary conviction, holding that the prosecutor did not err in commenting that “[t]here’s no explanation for [the prosecution’s evidence of the defendant’s guilt].” *Id.* at 37, 56 Cal. Rptr. at 36.

⁴⁷CAL. EVID. CODE § 413 (West 1968) provides:

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto if such be the case.

A corollary to § 413 is CAL. EVID. CODE § 412 (West 1968), which provides:

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

inference that no such evidence exists.⁴⁸ Therefore, courts permit prosecutors to argue that the uncontradicted evidence is the most convincing.⁴⁹ This general evidentiary principle would justify Comments 4, 5 and 6. On the other hand, the fifth amendment forbids any indirect reference to the absence of the defendant's testimony. Comments on and characterizations of the state of the evidence are therefore constitutionally permissible only to the extent they do not focus the jury's attention on the defendant's failure to testify.

California courts have purported to strike the balance between these two sometimes-competing considerations solely on the basis of the prosecutor's choice of words. Thus, if the prosecutor's comment contains a particular word which when construed by itself requires a personal answer by the defendant to rebut the prosecution's facts, then the comment falls into the *Griffin* web.⁵⁰ Accordingly, Comment 4 that no one has "denied"⁵¹ the People's case and Comment 5 that the eyewitness testimony stands "unrefuted"⁵² are constitutionally impermissible because the quoted words on their face call for the defendant's personal response.⁵³ In contrast, Comment

⁴⁸*Griffin* does not bar comment suggesting such an inference unless the comment indirectly refers to and focuses the jury's attention on the defendant's failure to testify. *People v. Chandler*, 17 Cal. App. 3d 798, 806, 95 Cal. Rptr. 146, 150 (2d Dist. 1971). See generally Note, *The Constitutionality of Evidence Code Section 413 in Criminal Cases*, 18 HASTINGS L.J. 198 (1966).

⁴⁹In *People v. Sutherland*, 59 Cal. App. 462, 464, 210 P. 965, 966 (2d Dist. 1922), the court affirmed the defendant's conviction, holding that the prosecutor's comment on the failure of the defense to rebut the prosecution's incriminating evidence did not relate to the defendant's failure to testify. The court reasoned that

[i]t would be a strange rule indeed that would prevent a prosecuting officer from contrasting the evidence and pointing to that which he believed stood without contradiction or was the most convincing.

In *People v. Wademan*, 38 Cal. App. 116, 133, 175 P. 791, 797 (3d Dist. 1918), the court affirmed the defendant's rape conviction and found no error in the prosecutor's comment that

"[y]ou have got to believe the story of the girl in a rape case The girl's testimony is undisputed. If her story was contradicted, you might be in doubt"

⁵⁰*People v. Vargas*, 9 Cal. 3d 470, 476, 509 P.2d 959, 962-63, 108 Cal. Rptr. 15, 18-19 (1973).

⁵¹*Id.* In *People v. Gioviannini*, 260 Cal. App. 597, 605, 67 Cal. Rptr. 303, 308 (1st Dist. 1968), the prosecutor committed harmless *Griffin* error in commenting that "[t]he defendant, in his own words [voluntarily confessed] to Sergeant Wrona, [and] there is no denial of those words"

⁵²*People v. Medina*, 41 Cal. App. 3d 438, 459, 116 Cal. Rptr. 133, 148 (2d Dist. 1974), see text accompanying notes 59-61 *infra*; cf. *People v. Northern*, 256 Cal. App. 2d 28, 30-31, 64 Cal. Rptr. 15, 17 (2d Dist. 1967). The court held that the prosecutor committed harmless *Griffin* error when he commented that the prosecution's evidence had "not been refuted by the Defendant" (emphasis in original). Such comment was a direct reference to the defendant's failure to testify because the prosecutor expressly mentioned the defendant.

⁵³*People v. Vargas*, 9 Cal. 3d 470, 476, 509 P.2d 959, 962-63, 108 Cal. Rptr. 15, 18-19 (1973); *People v. Medina*, 41 Cal. App. 3d 438, 459, 116 Cal. Rptr. 133,

6 that the People's evidence of the defendant's guilt is "unexplained," "uncontradicted" and "uncontroverted" is constitutionally permissible because the quoted words merely refer to the general state of the evidence⁵⁴ and do not focus on the defendant's personal failure to rebut the evidence.

In *People v. Vargas*,⁵⁵ the California Supreme Court applied the foregoing analysis in reviewing whether the prosecutor's choice of words related to the state of the evidence or the defendant's failure to testify. The victim and an eyewitness identified the defendant as the perpetrator of the charged robbery. The defendant did not testify or present any controverting evidence. The prosecutor commented that "there is no denial at all that [the defendant and his accomplice] were there."⁵⁶ Distinguishing prosecutorial comment that evidence was "unexplained"⁵⁷ as constitutionally permissible, the court held that the challenged comment violated *Griffin* because

the word "denial" connotes a personal response by the accused himself. Any witness could "explain" the facts, but only [the] defendant could "deny" his presence at the crime scene. Accordingly, the jury could have interpreted the prosecutor's remarks as commenting upon [the] defendant's failure to take the stand and deny his guilt.⁵⁸

The *Vargas* court's holding created the possibility that reviewing courts might find future comments erroneous on the ground that the prosecutor spoke a word which, like the word "denial," called for

148 (2d Dist. 1974). *Contra*, *People v. Giovannianni*, 260 Cal. App. 2d 597, 604, 67 Cal. Rptr. 303, 308 (1st Dist. 1968). The court held that the prosecutor did not commit *Griffin* error in remarking that "the State has presented very persuasive evidence that the defendant did murder [the victims], . . . and there is no challenge, no testimony to refute that." The court held that the comment related to the state of the evidence and thus was proper.

⁵⁴*People v. Smith*, 22 Cal. App. 3d 25, 32, 99 Cal. Rptr. 171, 175 (3d Dist. 1971) (comment that no contradictory evidence presented); *People v. Bethea*, 18 Cal. App. 3d 930, 936, 96 Cal. Rptr. 229, 231-32 (2d Dist. 1971), *cert. denied*, 405 U.S. 1042 (1972) (comment that prosecution's evidence had not been explained; *see* text accompanying notes 65-68 *infra*); *People v. Hardy*, 271 Cal. App. 2d 322, 330, 76 Cal. Rptr. 557, 562 (1st Dist. 1969) (prosecutor asked "what does the defense offer by way of explanation?"); *People v. Burns*, 270 Cal. App. 2d 238, 247, 75 Cal. Rptr. 688, 693 (1st Dist. 1969) (comment that evidence had not been explained; *see* note 63 *infra*), *People v. Erickson*, 254 Cal. App. 2d 395, 401, 62 Cal. Rptr. 108, 112 (4th Dist. 1967) (comment that the prosecution's evidence was "uncontroverted and uncontradicted"); *People v. Montigo*, 248 Cal. App. 2d 32, 37, 56 Cal. Rptr. 33, 36 (5th Dist. 1967) (comment that there was "no explanation" for prosecution's evidence); *cf. People v. Vargas*, 9 Cal. 3d 470, 475-76, 509 P.2d 959, 962-63, 108 Cal. Rptr. 15, 18-19 (1973).

⁵⁵9 Cal. 3d 470, 509 P.2d 959, 108 Cal. Rptr. 15 (1973).

⁵⁶*Id.* at 474, 509 P.2d at 961, 108 Cal. Rptr. at 17. The California Supreme Court italicized this sentence.

⁵⁷*See* text accompanying notes 65-68 *infra*.

⁵⁸*People v. Vargas*, 9 Cal. 3d 470, 476, 509 P.2d 959, 962-63, 108 Cal. Rptr. 15, 18-19 (1973). The court affirmed the defendant's conviction on harmless error grounds.

the defendant's personal response. In *People v. Medina*,⁵⁹ this reasoning was applied to a comment that the prosecution's evidence was "unrefuted."⁶⁰ Reversing the defendants' conviction, the appellate court held that the prosecutor's reference to the "unrefuted" testimony implicitly called for a personal response by the defendants.⁶¹

Although certain words by themselves, such as "denial" and "unrefuted," require a finding of *Griffin* error, other words, such as "unexplained," "uncontradicted" and "uncontroverted," do not demand, per se, a personal reply by the defendant. Courts should resist categorical approval of a prosecutor's remark similar to Comment 6 that the People's evidence is "unexplained," however, for several reasons. Such a broad rule ignores the crucial role that facts play. It dispenses with the need for courts to analyze whether a particular comment in fact focuses jury attention on the defendant's failure to testify. For example, in the previously posed hypothetical only the defendant, the eyewitness and the murder victim were present at the crime. The prosecutor's comment that the People's evidence is "unexplained" necessarily points to the defendant. The eyewitness, having testified for the prosecution, would not be in a position to contradict his damaging testimony.⁶² Therefore, the only witness who could "explain," "contradict" or "controvert" the People's case is the defendant himself. *Griffin* proscribes such comment because it penalizes the defendant who invokes his right to remain silent.⁶³

⁵⁹41 Cal. App. 3d 438, 116 Cal. Rptr. 133 (2d Dist. 1974).

⁶⁰*Id.* at 457-60, 116 Cal. Rptr. at 146-48.

⁶¹*Id.* at 459, 116 Cal. Rptr. at 148.

⁶²Only the defendant could testify, for example, to the possibility of provocation, which if established could lead the jury to conclude that the defendant was guilty of the lesser offense of manslaughter, rather than murder. *Cf. People v. Medina*, 41 Cal. App. 3d 438, 457, 116 Cal. Rptr. 133, 146 (2d Dist. 1974) (alternative holding). There were five witnesses to the murder. Three of these witnesses were accomplices who testified for the prosecution after the state granted them immunity. The other two witnesses were the defendants; they did not testify. The prosecutor remarked that: "Incidentally, you realize that there were five people up there on this thing and three of them were subjected to cross-examination . . ." The court noted that this statement left the two defendants unaccounted for. The prosecutor then commented on the credibility of the testimony of the three accomplices: "[a]nd whatever else we say about them, . . . their testimony is unrefuted." The court held that

[t]he net effect of these passages in combination was to urge the jury to believe the testimony of the three accomplice witnesses because the defendants, *who were the only ones who could have refuted it*, did not take the stand and subject themselves to cross-examination . . .

(emphasis supplied).

⁶³The foregoing analysis is consistent with the rule followed by federal courts. See generally Annot., 14 A.L.R. 3d 723, § 4 at 730-32, § 8 at 746-50 & § 10 at 763-65. The leading post-*Griffin* case to review a prosecutor's remark and recognize the constitutional dimension of the suggested analysis is *Desmond v. United States*, 345 F.2d 225 (1st Cir. 1965). The defendant was on trial for the

Moreover, a steadfast rule permitting the trial court to ignore the facts of the case and to approve a comment simply on the basis that the prosecutor chose to state that the evidence was "unexplained," rather than "unrefuted," would be inconsistent with the California Supreme Court's reasoning in *Vargas* that *Griffin* error occurs when the challenged comment requires a personal response by the defendant. The same court has also said that courts should determine *Griffin* error by appraising the communication in terms of its probable effect upon the jury.⁶⁴ Accordingly, California courts should employ

transfer of heroin to a federal agent. At the time of the alleged transfer, only the defendant and the federal agent were present. The prosecutor commented that the government agent's testimony stood "unimpeached and uncontradicted." *Id.* at 227. Since only the defendant could have "contradicted" the agent's testimony, the comment violated *Griffin*. Accordingly, the First Circuit Court of Appeals vacated the defendant's conviction and ordered a new trial. *Id.* The prosecutor's remark went beyond merely contrasting the state of the evidence; the comment invited the jury's attention to the defendant's failure to testify.

Since *Desmond*, several California cases have reviewed prosecution comment challenged as *Griffin* error on the ground that only the defendant could "explain" the incriminating evidence. In *People v. Burns*, 270 Cal. App. 2d 238, 247, 75 Cal. Rptr. 688, 693-94 (1st Dist. 1969), the defense, relying on *Desmond*, contended that since only the defendant could have produced controverting evidence, the prosecutor's comment that the People's evidence had not been explained was *Griffin* error. The *Burns* court found *Desmond* unpersuasive on the sole ground that "a different rule applies" in California. *Id.*, 75 Cal. Rptr. at 693. The court did not examine whether anyone other than the defendant was in a position to explain the evidence and simply held that the comment reflected upon the state of the evidence. *Id.*, 75 Cal. Rptr. at 694. The *Burns* court relied in part on *People v. Erickson*, 254 Cal. App. 2d 395, 62 Cal. Rptr. 108 (4th Dist. 1967). *Erickson*, however, fails to support the broad position asserted in *Burns*. In *Erickson*, the court held that the prosecutor's comment that a police officer's testimony was "uncontroverted and uncontradicted" was proper. *Id.* at 401, 62 Cal. Rptr. at 112. Yet the court expressly noted that there was another witness present during the alleged sale of marijuana who could have controverted the damaging testimony. *Id.*

In *People v. Roberts*, 51 Cal. App. 3d 125, 123 Cal. Rptr. 893 (3d Dist. 1975), the defense contended that the prosecutor committed *Griffin* error by commenting that there were "no conflicts" in the prosecution's evidence and no "conflicting witnesses" had been presented. *Id.* at 135-36, 123 Cal. Rptr. at 899. The defense argued that since only the defendant, the murder victim and the People's eyewitness were present when the crime was allegedly committed, such comment pointed to the defendant's failure to testify. Framing the issue in terms of the propriety of prosecution comment on the "lack of conflicting witnesses" (*id.* at 136, 123 Cal. Rptr. at 900; *see text accompanying notes 72-76 infra*), the court found no error. *See note 202 infra*, for criticism of this analysis.

The *Burns* and *Roberts* decisions are unsatisfactory in light of the California Supreme Court's admonition in *Vargas* that courts should strike down comments which call for the defendant's personal response. Consideration of the factual context in which the jury assessed the challenged comment is necessary to determine whether the comment indirectly referred to the defendant's failure to testify. *Cf. note 67 infra*.

⁶⁴*People v. Modesto*, 66 Cal. 2d 695, 711, 427 P.2d 788, 799, 59 Cal. Rptr. 124, 135, *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in Maine v. Superior Court*, 68 Cal. 2d 375, 383 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968).

a two-step test to determine whether prosecution comment indirectly refers to the defendant's failure to testify. The first inquiry would be the same as the one undertaken in *Vargas*. If the prosecutor's words, per se, call for a personal reply by the defendant, then the comment is violative of *Griffin*, irrespective of the facts of the case. A second inquiry would be mandatory, however, if the words alone do not call for the defendant's response. If the record fails to disclose witnesses other than the defendant who could "explain" the prosecution's evidence, then comment that it is "unexplained," "uncontradicted" or "uncontroverted" should be constitutionally impermissible. Considering the factual context in which remarks are delivered would more accurately determine whether the comment anticipates a personal response by the defendant.

Even under this test a prosecutor's comment that the People's evidence is "unexplained" may, of course, still be legitimate. In *People v. Bethea*,⁶⁵ prosecution comment on the state of the evidence withstood *Griffin* challenge. The defendant called his wife as an alibi witness. She testified that five days prior to the charged robbery the couple had moved to Chicago and that they had not returned to Los Angeles, where the robbery subsequently occurred. On rebuttal, the prosecution introduced a certified copy of a Los Angeles municipal court docket. It showed that the defendant had appeared in court to answer drunk driving charges two days before the robbery. The prosecutor remarked:

"We have the prosecution's positive evidence that the defendant is guilty of robbery in the first degree, and we have the defense which has just been shot out of the water, zero. So you have the prosecution's case against nothing for the defense. The state of the record is that there has been no explanation given for this"⁶⁶

This comment does not on its face call for a personal reply by the defendant. Furthermore, given the facts of the case there was someone other than the defendant who could have explained or contradicted the prosecution's evidence. Since the defendant's wife attempted and failed to convincingly supply the defendant with an alibi, the statement addressed the shortcomings of her testimony.⁶⁷

⁶⁵ 18 Cal. App. 3d 930, 96 Cal. Rptr. 229 (2d Dist. 1971), *cert. denied*, 405 U.S. 1042 (1972).

⁶⁶ *Id.* at 936, 96 Cal. Rptr. at 232.

⁶⁷ Although the facts of *Bethea* permit this interpretation, such a narrow construction is not required. In *People v. Vargas*, 9 Cal. 3d 470, 475-76, 509 P.2d 959, 962-63, 108 Cal. Rptr. 15, 18-19 (1973) (dictum), the California Supreme Court expressly indicated its approval of *Bethea*. In *Vargas*, the court noted that the prosecutor had remarked

"[w]hy didn't [the defendants] have some witnesses to say where they were on . . . the evening of the [crime]. They had to be somewhere"

Id., at 474, 509 P.2d at 961, 108 Cal. Rptr. at 17. Although the defense did not contend that such remarks were *Griffin* error, the court, in dictum, indicated

The fifth amendment does not limit the prosecutor's right to comment that an identified defense witness has failed to "explain" evidence of the defendant's guilt. The District Court of Appeal in *Bethea* held such comment permissible under *Griffin* on the broad ground that the prosecutor's remarks related to the state of the evidence.⁶⁸ The foregoing analysis would, on firmer reasoning, reach the same appropriate result.

In summary, the *Griffin* rationale should prohibit any comment concerning inferences to be drawn from uncontradicted evidence, when the defendant can produce no contradictory evidence other than his own testimony.⁶⁹ Such a rule would appropriately resolve the policy tension that may exist in determining the scope of permissible prosecution contrast of defense and state evidence. As noted at the outset of this discussion,⁷⁰ the privilege against self-incrimination may conflict with the inference that the failure to produce contradictory evidence suggests that no such evidence exists.⁷¹ The suggested rule would secure the defendant's constitutional right to silence. Yet, as a practical matter, the impact on the prosecution's case would be minor. In those few cases where the prosecutor could not expressly contrast the prosecution and defense evidence, he would remain free to argue the persuasiveness of the People's affirmative case. Moreover, if the defense presents evidence, the prosecutor could argue that specific defense evidence fails to rebut convincingly elements of the People's case. Thus, the jury's attention would remain focused on the proper inquiry: whether the prosecution has shouldered its burden of demonstrating the defendant's guilt beyond a reasonable doubt.

that these comments were proper "under the rule in *Bethea*." *Id.* at 476 n.5, 509 P.2d at 962 n.5, 108 Cal. Rptr. at 18 n.5. The court reasoned that the well established California rule is that "comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses" are not *Griffin* error. *Id.* at 475, 509 P.2d at 962, 108 Cal. Rptr. at 18, quoting *People v. Burns*, 270 Cal. App. 2d 238, 247, 75 Cal. Rptr. 688, 693 (1st Dist. 1969); accord, e.g., *People v. Gaulden*, 36 Cal. App. 3d 942, 955, 111 Cal. Rptr. 803, 810 (3d Dist. 1974). At Gaulden's trial for murder, the prosecutor commented: "'And now [the defendant] sits there and asks you to acquit him on the evidence that's been presented, which is none.'" (emphasis in original). The court held that since the defendant failed to object to this comment at trial, he could not raise his *Griffin* error contention on appeal. Nonetheless, the court indicated that such comment related to the state of the evidence and was not *Griffin* error; but even if such comment were error, it was harmless. *Id.* Compare the *Gaulden* comment above with the comment in the text accompanying note 39 *supra*. See note 54 *supra* and accompanying text. *But cf.* note 63 *supra*.

⁶⁸18 Cal. App. 3d at 936, 96 Cal. Rptr. at 232, cert. denied, 405 U.S. 1042 (1972).

⁶⁹Courts have failed to distinguish those instances where the defendant is the only one who could contradict the evidence from those situations where he is the only one willing to do so. Annot., 14 A.L.R. 3d 723, 730-31 n.20 (1967). (1967).

⁷⁰See text accompanying notes 45-49 *supra*.

⁷¹CAL. EVID. CODE § 413 (West 1968); set forth in note 47 *supra*.

Comment 7: *If the defendant is innocent of this murder, why hasn't he produced witnesses who could establish his presence elsewhere at the critical time?*⁷²

California courts have consistently rejected *Griffin* challenges to prosecution remarks on the failure of the defendant to call a logical witness.⁷³ Instead, the courts have held that the failure to produce a material witness justifies an inference that the witness is either non-existent or unfavorable to the defendant.⁷⁴ The rhetorical question posed in Comment 7, however, may amount to an indirect comment on the defendant's failure to take the stand and rebut the prosecution evidence. As previously noted,⁷⁵ such a remark should constitute *Griffin* error if the facts indicate that the defendant is the only possible alibi witness. To insure against infringing upon the defendant's privilege against self-incrimination, courts should permit prosecutors to comment on the defendant's failure to call only witnesses whose existence and probable knowledge of material facts are verifiable from the record.⁷⁶

⁷²The prosecutor made a similar comment during a prosecution for robbery and burglary in *People v. Chandler*, 17 Cal. App. 3d 798, 805, 95 Cal. Rptr. 146, 150 (2d Dist. 1971).

⁷³*People v. Roberts*, 51 Cal. App. 3d 125, 135-37, 123 Cal. Rptr. 893, 899-900 (3d Dist. 1975) (see notes 63 *supra* and 202 *infra*); *People v. Chandler*, 17 Cal. App. 3d 798, 806, 95 Cal. Rptr. 146, 150-51 (2d Dist. 1971); *People v. Hall*, 7 Cal. App. 3d 562, 567, 86 Cal. Rptr. 504, 507 (2d Dist. 1970), *disapproved on other grounds in* *People v. Beagle*, 6 Cal. 3d 441, 451-52, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972); *People v. Grant*, 268 Cal. App. 2d 470, 474-75, 74 Cal. Rptr. 111, 114-15 (2d Dist. 1968), *cert. denied*, 396 U.S. 858 (1969); *People v. Romero*, 244 Cal. App. 2d 495, 502-04, 53 Cal. Rptr. 260, 264-65 (1st Dist. 1966); *cf.* *People v. Vargas*, 9 Cal. 3d 470, 475, 509 P.2d 959, 962, 108 Cal. Rptr. 15, 18 (1973).

⁷⁴*People v. Chandler*, 17 Cal. App. 3d 798, 806, 95 Cal. Rptr. 146, 150-51 (2d Dist. 1971); CAL. EVID. CODE § 413 (West 1968), set forth in note 47 *supra*.

⁷⁵See text accompanying notes 62-64 *supra*.

⁷⁶See *People v. Hall*, 7 Cal. App. 3d 562, 567, 86 Cal. Rptr. 504, 507 (2d Dist. 1970), *disapproved on other grounds in* *People v. Beagle*, 6 Cal. 3d 441, 451-52, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972). Affirming the defendant's conviction for the sale of heroin, the court held that the prosecutor did not commit *Griffin* error in commenting on the defendant's failure to call witnesses who were allegedly present at the house when the charged sale occurred. Since the record disclosed that other persons were present, the comment was proper. The defendant's failure to produce those persons who were present during the commission of the crime warranted an inference that those persons would fail to substantiate the defendant's contention that he was not present when the crime occurred. See Comment, *Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations*, 61 CALIF. L. REV. 1422, 1434-38 (1973), suggesting that comment on the defendant's failure to produce material evidence infuses his reliance upon silence with "testimonial significance." The inference that such evidence is either non-existent or unfavorable to the defendant renders his conduct at trial incriminating.

Comment 8: *As you know, the defendant has not testified. The judge will instruct you that the defendant has a constitutional privilege not to be called as a witness. You may not draw any inferences from the defendant's exercise of that right.*

The issue in this comment is whether the prosecutor may properly tell the jury that the defendant has a constitutional privilege not to testify. California case law on this point is scant. The two cases which have considered this type of comment have found no *Griffin* error.⁷⁷ One commentator, however, has noted that the permissibility of such "prosecution instruction" should depend on the degree of emphasis and repetition employed.⁷⁸ Histrionic or extended references to the defendant's constitutional right to silence inevitably focus the jury's attention on the defendant's absence from the witness stand and should be condemned under *Griffin*.⁷⁹

Violations of *Griffin* may occur in even more subtle ways than those considered above. For example, prosecutorial discussion of the statutory development of an accused's competency to testify in his own behalf⁸⁰ is constitutional error because it is a "thinly veiled"⁸¹

⁷⁷In *People v. Smith*, 22 Cal. App. 3d 25, 32-33, 99 Cal. Rptr. 171, 175-76 (3d Dist. 1971), the prosecutor's remark, similar to Comment 8 in the text, occurred in conjunction with a comment that no contradictory evidence had been produced. The court did not find *Griffin* error because comment on the state of the evidence is permissible; see note 67 *supra*. In *People v. Romero*, 244 Cal. App. 2d 495, 502-04, 53 Cal. Rptr. 260, 264-65 (1st Dist. 1966), the prosecutor informed the jury of the defendant's constitutional right not to testify while commenting on the defendant's failure to call material witnesses. In rejecting *Griffin* error contentions, the court reasoned that the prosecutor had referred to the defendant's constitutional right in order

to distinguish his failure to testify, from which no inference could be drawn, and the failure to summon his companions to appear and explain his [incriminating] activities . . . from which the inference was requested.

Id. at 504, 53 Cal. Rptr. at 265.

⁷⁸Note, *Prosecutor's Reading and Emphasizing of Court's Charge Regarding Failure of Accused to Testify is Not Improper Comment*, 4 HOUSTON L. REV. 707 (1967) (criticizing the rejection of a similar challenge in *Bannon v. State*, 406 S.W. 2d 908 (Tex. Crim. App. 1965), *cert. denied*, 385 U.S. 816 (1966)).

⁷⁹Since the defendant maintains a degree of control over the delivery of instructions, the trial judge, and not the prosecutor, should instruct the jury on the defendant's privilege not to testify. See text accompanying notes 119-21 *infra*.

⁸⁰See ch. 644, § 1, [1866] Cal. Stat. 865. Prior to the enactment of this statute, the defendant could not appear as a witness in his own behalf.

⁸¹*People v. Mendoza*, 37 Cal. App. 3d 717, 726, 112 Cal. Rptr. 565, 570 (2d Dist. 1974). The defendant was charged with committing a lewd act upon a child under fourteen years of age. The prosecutor argued that

[s]ince olden days, I guess it is from the time when the defendant was not capable of taking the stand, you know, he couldn't be a witness in those days"

Id.

allusion to the defendant's failure to testify. Moreover, even the prosecutor's physical conduct, which does not appear in the trial record, may violate *Griffin*. Subtle hints by means of voice inflection, bodily gestures or exaggerated staring at the defendant can emphasize his silence.⁸² One California court has indicated its willingness to consider such prosecutor excesses *Griffin* error.⁸³

In summary, California courts have found a wide range of prosecutorial comments to violate an accused's constitutional right to silence. *Griffin* expressly proscribes any suggestion by the prosecution that the jury may consider the defendant's failure to testify in assessing guilt. Even in the absence of a request that the jury draw inferences adverse to the defendant, *Griffin* error occurs when the prosecutor effectively focuses the jury's attention on the defendant's silence. Such indirect references to the defendant's reliance upon his fifth amendment privilege may occur in three instances: (1) when the prosecutor's argument impliedly invites the jury to draw inferences unfavorable to the defendant from his failure to testify; (2) when the prosecutor's words alone can only be construed as requiring a personal response from the defendant; or (3) when the facts indicate that the defendant is the only person who can respond to the prosecution comment and rebut the People's evidence.

B. COMMENT BY CODEFENDANT'S COUNSEL OR TRIAL JUDGE

Statements made by the prosecutor are not the only source of *Griffin* error. Remarks by counsel for a codefendant or the trial judge can also direct the jury's attention to the defendant's silence. Thus, the *Griffin* rationale forbids counsel for one defendant to alert the jurors to another defendant's failure to testify.⁸⁴ In *People v. Haldeen*,⁸⁵ for example, the reviewing court affirmed the trial court's declaration of a mistrial. The trial court had granted the mistrial because one defendant's counsel insinuated in closing argument that

⁸² See generally Comment, *Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations*, 61 CALIF. L. REV. 1422, 1431 (1973).

⁸³ In *People v. Kagan*, 264 Cal. App. 2d 648, 664-65, 70 Cal. Rptr. 732, 743-44 (1st Dist. 1968), cert. denied, 394 U.S. 911 (1969), the prosecutor allegedly made a perceptible pause following his reference to the defendant's silence in response to an accusatory statement. The defense moved for a mistrial. At the hearing on the motion, three witnesses testified that they had observed the pause. Since the trial judge did not notice the pause, he denied the mistrial motion. The reviewing court held that it was not at liberty to overrule the lower court's factual finding. On the basis of a cold trial record, then, adroit prosecutor intimations to the defendant's silence may constitute remediless *Griffin* violations.

⁸⁴ See generally WITKIN (Supp. 1974), *supra* note 32, § 913C.

⁸⁵ 267 Cal. App. 478, 73 Cal. Rptr. 102 (4th Dist. 1968).

the codefendant's failure to testify demonstrated that the codefendant alone was guilty of the charged marijuana offense.⁸⁶ Thus, the *Haldeen* decision acknowledged that "[i]t is the fact of the comment rather than the source of the comment that effects" the violation of *Griffin*.⁸⁷

Similar error can occur when the trial judge "solemnizes"⁸⁸ the defendant's silence. In *People v. Ham*,⁸⁹ the trial judge overruled a defense objection to testimony that the getaway car used in a robbery was registered to the defendant. The judge reasoned that "[i]n view of the presumption from the registration, [the] defendant was in the best position to explain whether the car belonged to him."⁹⁰ The appellate court found that the jury could naturally infer from such a comment that the abandoned automobile belonged to the defendant, and that otherwise he would have taken the stand and personally denied the asserted fact.⁹¹ In view of the unparalleled status of the trial judge in the courtroom, his remarks may have a particularly significant impact upon the jury. Accordingly, strict scrutiny by reviewing courts of trial judge remarks seems appropriate.⁹²

⁸⁶The defendants in *Haldeen* moved for separate trials on two occasions. One ground for the motions was "the probability that one [defendant] might not testify and [counsel for] the other [defendant] might comment on this fact." *Id.* at 482, 73 Cal. Rptr. at 104. The trial judge denied the motions for separate trials, but failed to rule on whether counsel for one defendant may comment on a codefendant's failure to testify. *Id.* If notified by counsel that his client's interest requires counsel to comment that a codefendant's silence warrants an inference of guilt, the trial court should order separate trials for the defendants. *De Luna v. United States*, 308 F.2d 140, 141 (5th Cir. 1962). Since a trial judge may not know in advance of counsel's intention to make the proscribed comment, the judge should routinely forewarn both counsel of the impropriety of such comment and its attendant sanctions. *See People v. Haldeen*, 267 Cal. App. 2d 478, 483, 73 Cal. Rptr. 102, 105 (4th Dist. 1968).

⁸⁷*People v. Haldeen*, 267 Cal. App. 2d 478, 481, 73 Cal. Rptr. 102, 103 (4th Dist. 1968). Extending the *Griffin* rationale to preclude counsel for one defendant from commenting on a codefendant's failure to testify may be challenged on the ground that the fifth amendment proscribes the state, and not defense counsel, from compelling the defendant to testify. Such an argument is similar to the contention that ineffective assistance of retained counsel is not reversible constitutional error, because it is not state action. The issue is discussed and authorities on both sides are cited in Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1244-45 (1970).

⁸⁸*Griffin v. California*, 380 U.S. 609, 614 (1965).

⁸⁹7 Cal. App. 3d 768, 86 Cal. Rptr. 906 (1st Dist. 1970), *disapproved on other grounds* in *People v. Compton*, 6 Cal. 3d 55, 60 n.3, 490 P.2d 537, 540 n.3, 98 Cal. Rptr. 217, 220 n.3 (1971).

⁹⁰*Id.* at 778, 86 Cal. Rptr. at 912.

⁹¹*Id.* at 779, 86 Cal. Rptr. at 913. The court held that the comment was harmless *Griffin* error. *Id.* at 784, 86 Cal. Rptr. at 916-17. (For an extensive discussion of harmless *Griffin* error, see generally text accompanying notes 122-200 *infra*.)

⁹²For example of overly deferential review, see *People v. Gomez*, 252 Cal. App. 2d 844, 60 Cal. Rptr. 881 (5th Dist. 1967), *overruled on other grounds* in

C. COMMENT ON THE DEFENDANT'S FAILURE TO RESPOND TO AN ACCUSATORY STATEMENT

The foregoing discussion has centered on comments upon the defendant's failure to testify. An accused's privilege against self-incrimination, however, is not confined to the trial. During a custodial interrogation, the accused also has a constitutional right to remain silent.⁹³ Thus, *Griffin* error may also occur when the prosecutor comments that the defendant remained silent when confronted with an accusatory statement. This section states the general principles applicable when the defendant refuses to respond to an accusatory statement.

The *Griffin* rationale

implicitly proscribes drawing an inference adverse to the defendant from his failure to reply to an accusatory statement if the defendant was asserting his constitutional privilege against self-incrimination.⁹⁴

Prosecutors may not, therefore, comment on or introduce in evidence as an admission of guilt the defendant's silence during a custodial interrogation; nor may the court instruct the jury that such silence gives rise to an inference unfavorable to the defendant.⁹⁵ Thus, for example, the prosecutor may not argue that an alibi first

People v. Tribble, 4 Cal. 3d 826, 832, 484 P.2d 589, 593, 94 Cal. Rptr. 613, 617 (1971). The defendant interrupted the proceedings, contending that the Deputy District Attorney was telling lies. The trial judge stated:

"I want to admonish the defendant that his opportunity to talk in this case has expired. He could have taken the stand and testified. He elected not to do so."

Id. at 855-56, 60 Cal. Rptr. at 888. The trial judge was not speaking to the jurors, nor was he requesting that they draw any inference from the defendant's exercise of his constitutional right not to testify. Although the reviewing court recognized that the trial judge "could have admonished the defendant to refrain from interrupting argument without [mentioning his election not to testify]," *id.* at 856, 60 Cal. Rptr. at 888, the court ruled that such remarks were not violative of *Griffin*, and even if they were improper, such error was harmless. *Id.*, 60 Cal. Rptr. at 888-89. In light of *Griffin's* admonition that the court should not solemnize the defendant's silence, the *Gomez* ruling is not sound.

⁹³*Miranda v. Arizona*, 384 U.S. 436, 467-79 (1966).

⁹⁴*People v. Cockrell*, 63 Cal. 2d 659, 669-70, 408 P.2d 116, 123, 47 Cal. Rptr. 788, 795 (1965), *cert. denied*, 389 U.S. 1006 (1967). It is unnecessary for an accused to expressly invoke the privilege during an in-custody interrogation. *Id.* at 670, 408 P.2d at 123, 47 Cal. Rptr. at 795.

⁹⁵*In re Banks*, 4 Cal. 3d 337, 348-52, 482 P.2d 215, 223-27, 93 Cal. Rptr. 591, 559-602 (1971) (defendant's silence improperly admitted as adoptive admission, commented on by prosecution and subject of court's instruction); *People v. Haston*, 69 Cal. 2d 233, 255-56, 444 P.2d 91, 106, 70 Cal. Rptr. 419, 434 (1968) (defendant's silence improperly admitted as adoptive admission, commented on by prosecution and subject of court's instruction); *People v. Ridley*, 63 Cal. 2d 671, 674-76, 408 P.2d 124, 126-27, 47 Cal. Rptr. 796, 798-99 (1965) (defendant's silence improperly admitted as adoptive admission and subject of court's instruction); *People v. Cockrell*, 63 Cal. 2d 659, 669-70, 408 P.2d 116, 122-23, 47 Cal. Rptr. 788, 794-95 (1965), *cert. denied*, 389 U.S. 1006 (1967) (defendant's silence improperly admitted as adoptive admission).

offered at trial could have been offered during interrogation.⁹⁶ The natural inference of such an argument is that the defendant manufactured the alibi offered at trial.⁹⁷

Even comment on the defendant's evasive responses to accusations made during custodial interrogation may constitute *Griffin* error, if the defendant refused to waive his fifth amendment right to silence. In *People v. Haston*,⁹⁸ the defendant initially refused to answer police questions relating to his knowledge of the alleged robberies and kidnapping. After further questioning, however, the defendant said that he would tell the interrogating officers "all about it,"⁹⁹ but first he wanted to see what evidence the state would present against him at the preliminary hearing. He further stated that he could improve his chances for release by refusing to divulge details of "all the offenses that he committed recently."¹⁰⁰ The trial court admitted these answers as evidence against the defendant. The California Supreme Court reversed the defendant's conviction. Since the jury might consider the defendant's evasive replies an admission of the truth of the accusation, the court found *Griffin* error in the introduction of this evidence, as well as in the prosecutor's comment and the trial court's instruction thereon.¹⁰¹

D. INSTRUCTIONAL ERROR

Griffin error is not restricted to violations readily labeled as "comments." The *Griffin* Court also condemned instructions which allow the jury to infer guilt from the defendant's failure to testify.

Prior to *Griffin*, in any case in which the defendant did not testify, California trial courts charged the jury that:

⁹⁶*People v. Crawford*, 253 Cal. App. 2d 524, 534-36, 61 Cal. Rptr. 472, 480-81 (5th Dist. 1967), *cert. denied*, 390 U.S. 1006 (1968).

⁹⁷*Id.*

The Due Process Clause of the fourteenth amendment limits use of a Mirandized defendant's silence in the face of police interrogation. In *Doyle v. Ohio*, 44 U.S.L.W. 4902 (June 17, 1976), the United States Supreme Court held that use of the petitioner's silence at the time of arrest and after receiving Miranda warnings to impeach his explanation offered at trial was fundamentally unfair and a deprivation of due process. "[P]ost-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, *supra*, 44 U.S.L.W. at 4904.

⁹⁸69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968).

⁹⁹*Id.* at 255, 444 P.2d at 105-06, 70 Cal. Rptr. 433-34.

¹⁰⁰*Id.*, 444 P.2d at 106, 70 Cal. Rptr. at 434.

¹⁰¹*Id.* at 255-56, 444 P.2d at 106, 70 Cal. Rptr. at 434. Perhaps this case exemplifies overkill. The court excluded statements which arguably constituted a waiver of the privilege and excluded evidence which tended to prove that the defendant had knowledge of the crimes charged. Three dissenting justices expressed such a reservation. *Id.* at 258-60, 444 P.2d at 107-10, 70 Cal. Rptr. at 435-38.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. . . . 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 most probable.¹⁰²

Griffin held this instruction unconstitutional.¹⁰³

The post-*Griffin* California instruction concerning the defendant's failure to testify tells the jury that:

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.¹⁰⁴

In certain situations giving this instruction may be error. In other situations refusing to give it may be error.

1. DEFENSE REQUESTED INSTRUCTION

Griffin expressly reserved decision on whether the defendant has a constitutional right to require the trial court to instruct the jury to disregard his silence.¹⁰⁵ The Court noted, however, that federal judges must so instruct upon the defense's request.¹⁰⁶ The Supreme Court of the United States derived this requirement from a federal statute¹⁰⁷ permitting the defendant to testify in his own behalf upon his request, and forbidding any presumption to arise from his failure to make such a request. Thus, the instruction insures against violation of the statute. Since the *Griffin* Court reasoned that this federal statute reflected "the spirit of the Self-Incrimination Clause,"¹⁰⁸ a trial court's refusal to instruct upon the defendant's request should

¹⁰²CAL. JURY INSTRUCTIONS CRIMINAL 51 (West, Rev. ed. 1958) [hereinafter cited as CALJIC (Rev. ed.)]. This instruction was permissibly given, rather than constitutionally mandated, under CAL. CONST. art. 1, § 13(1934); see notes 16 & 17 *supra*.

¹⁰³380 U.S. 609, 615 (1965); *accord*, *People v. Bostick*, 62 Cal. 2d 820, 823, 402 P.2d 529, 530, 44 Cal. Rptr. 649, 650 (1965). CALJIC 51 (Rev. ed.), *supra* note 102, which instructs when an adverse inference may be drawn, and its counterpart CALJIC 51-A (Rev. ed.), *supra* note 102, which instructs that an inference adverse to the defendant would be unreasonable if he lacks the knowledge necessary to explain or deny the evidence, have been incorporated into CAL. JURY INSTRUCTIONS CRIMINAL 2.62 (West, 3d ed. 1970) [hereinafter cited as CALJIC (3d ed.)]. CALJIC 2.62 (3d ed.) is used only when the defendant testifies.

¹⁰⁴CALJIC 2.60 (3d ed., Supp. 1974), *supra* note 103.

¹⁰⁵380 U.S. 609, 615 n.6 (1965).

¹⁰⁶*Id.*, citing *Bruno v. United States*, 308 U.S. 287, 292-94 (1939).

¹⁰⁷Act of Mar. 16, 1878, ch. 37, 20 Stat. 30, quoted in note 22 *supra*. Similar provisions now appear in 18 U.S.C. § 3481 (1970).

¹⁰⁸380 U.S. 609, 613-14 (1965).

constitute a violation of the fifth amendment. To date only one California appellate court has found error in the trial court's refusal to instruct pursuant to a defense request.¹⁰⁹ Given the rationale of *Griffin*, however, it seems likely that the failure to instruct the jury to disregard the defendant's silence upon his request will constitute error.¹¹⁰

2. INSTRUCTION SUA SPONTE OR AT THE PROSECUTION'S REQUEST

The constitutional issue in this setting is twofold. First, does the trial court have a duty to instruct upon its own motion that the jury may not draw any inference from the defendant's failure to testify? Second, does the trial court err if it gives such an instruction sua sponte or at the prosecution's request? The California decisions reflect two inconsistent rationales in responding in the negative to both questions,¹¹¹ holding that the trial court has no duty to instruct sua sponte, but does not err by charging the jury sua sponte or at the

¹⁰⁹ *People v. Smith*, 265 Cal. App. 2d 775, 779, 71 Cal. Rptr. 557, 560 (2d Dist. 1968). The court found such error harmless in the context of the case. *Id.* at 780, 71 Cal. Rptr. at 561.

¹¹⁰ Upon the request of the defendant, CALJIC 2.61 (3d ed., Supp. 1974), *supra* note 103, advises the trial court to instruct the jury that:

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony of the defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

This instruction was revised, deleting the words "by itself" from the phrase, "no lack of testimony on the defendant's part will supply a failure of proof by the People so as to support *by itself* a finding against him on any such essential element." CALJIC 2.61 (3d ed.), *supra* note 103 (emphasis added). Relying on *People v. Williams*, 22 Cal. App. 3d 34, 45-56, 99 Cal. Rptr. 103, 111-13 (2d Dist. 1971) and *People v. Townsend*, 20 Cal. App. 3d 919, 923-25, 98 Cal. Rptr. 8, 10-11 (2d Dist. 1971), the California Supreme Court in *People v. Vargas*, 9 Cal. 3d 470, 509 P.2d 959, 108 Cal. Rptr. 15 (1973), held that the words "by itself" rendered the instruction inconsistent with the preceding charge. CALJIC 2.60 (3d ed., Supp. 1974), *supra* note 103, set forth in the text accompanying note 104 *supra*, which instructed that no inference of guilt may be drawn from an accused's failure to testify. The erroneous language

permitted the jury to consider [the] defendant's failure to testify in appraising his guilt or innocence. . . . [A]n ordinary juror reading it might assume that if the People have presented some evidence of guilt, the defendant's silence can then be considered as supplementing the People's case.

Id. at 477, 509 P.2d at 963, 108 Cal. Rptr. at 19.

¹¹¹ Some reviewing courts avoid the threshold determination of whether the trial court erred in failing to instruct sua sponte by holding the error, if any, harmless. *People v. Graham*, 251 Cal. App. 2d 513, 518-20, 59 Cal. Rptr. 577, 580-81 (5th Dist. 1967); *People v. Elliot*, 241 Cal. App. 2d 659, 665-68, 50 Cal. Rptr. 757, 761-62 (2d Dist.), *cert. denied*, 385 U.S. 941 (1966). Similarly, some courts avoid the question of whether the trial court erred by instructing at the

prosecution's request.

In response to the first question, reviewing courts have upheld the trial court's failure to charge the jury *sua sponte* because the instruction highlights the defendant's failure to testify, the vice condemned in *Griffin*.¹¹² "The jury, not otherwise focused to a situation, is so directed to it by the instruction given *sua sponte* by the court."¹¹³ The courts adhering to this position reason that such an instruction may do the defendant more harm than good and conclude that the court has no duty to instruct on its own motion.¹¹⁴

People's request by holding the error, if any, harmless. *People v. Cooper*, 10 Cal. App. 96, 104-06, 88 Cal. Rptr. 919, 923-25 (2d Dist. 1970); *People v. Hernandez*, 264 Cal. App. 2d 206, 212, 70 Cal. Rptr. 330, 334 (2d Dist. 1968); *People v. Mason*, 259 Cal. App. 2d 30, 39-41, 66 Cal. Rptr. 601, 606-07 (2d Dist. 1968); *People v. Northern*, 256 Cal. App. 2d 28, 31, 64 Cal. Rptr. 15, 17-18 (2d Dist. 1967). For criticism of this practice, see generally text accompanying notes 201-05 *infra*. On the propriety of giving the charge *sua sponte*, see generally Annot., 18 A.L.R. 3d 1335 (1968).

¹¹²*People v. Ham*, 7 Cal. App. 3d 768, 777-78, 86 Cal. Rptr. 906, 911-12 (1st Dist. 1970), *disapproved on other grounds in* *People v. Compton*, 6 Cal. 3d 55, 60 n.3, 490 P.2d 537, 540 n.3, 98 Cal. Rptr. 217, 220 n.3 (1971); *People v. Duran*, 275 Cal. App. 2d 35, 37, 79 Cal. Rptr. 666, 667 (4th Dist. 1969); *People v. Horrigan*, 253 Cal. App. 2d 519, 521-23, 61 Cal. Rptr. 403, 405-07 (4th Dist. 1967). In *People v. Gardner*, 71 Cal. 2d 843, 457 P.2d 575, 79 Cal. Rptr. 743 (1969), the California Supreme Court upheld the trial court's failure to instruct *sua sponte*, on two grounds. First, the court held that the defendant could not complain because he had objected to the charge at trial. *Id.* at 854, 457 P.2d at 582, 79 Cal. Rptr. at 750. Second, and more important, the court recognized that the instruction risks

the evil of pointing up to the jury the defendant's failure to testify.

However, the instruction also seeks to prevent the evil condemned in *Griffin* in that it expressly forbids the jury from drawing an inference of guilt from the defendant's failure to testify.

Id. at 853-54, 457 P.2d at 582, 79 Cal. Rptr. at 750. Having articulated the competing policies, the court declined to decide which was more compelling. Instead, the court held that the trial court need only "instruct on the general principles of law relevant to the issues raised by the evidence." *Id.* at 852-53, 457 P.2d at 581, 79 Cal. Rptr. at 749. Citing cases from the period prior to the 1934 constitutional amendment (see notes 16 & 17 *supra*) when the California constitution proscribed comment on an accused's failure to testify, the court held that an instruction on the defendant's failure to take the stand was not required for the jury's comprehension of the case. *Id.* at 853, 457 P.2d at 581, 79 Cal. Rptr. at 749 (alternative holding); accord, *People v. Du Bose*, 10 Cal. App. 3d 544, 547-48, 89 Cal. Rptr. 134, 136-37 (4th Dist. 1970).

¹¹³*People v. Horrigan*, 253 Cal. App. 2d 519, 522, 61 Cal. Rptr. 403, 406 (4th Dist. 1967).

¹¹⁴*People v. Ham*, 7 Cal. App. 3d 768, 777-78, 86 Cal. Rptr. 906, 911-12 (1st Dist. 1970), *disapproved on other grounds in* *People v. Compton*, 6 Cal. 3d 55, 60 n.3, 490 P.2d 537, 540 n.3, 98 Cal. Rptr. 217, 220 n.3 (1971); *People v. Duran*, 275 Cal. App. 2d 35, 37, 79 Cal. Rptr. 666, 667 (4th Dist. 1969). In *People v. Horrigan*, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (4th Dist. 1967), the defendant first requested the instruction and then withdrew his request. Unwilling to rest its decision on the ground that the defendant was not in a position to complain, the court reasoned that

[w]e cannot but formulate a conclusion that this, the giving of such an instruction *sua sponte*, is a constitutionally proportioned invasion of and a violation of the rights of the defendant.

In response to the second question, California courts have held that the trial court does not err by charging the jury at the request of the prosecution or upon the court's own motion that no inference of guilt may be drawn from the defendant's failure to testify.¹¹⁵ These courts reason that the charge is

merely an accurate statement of the law, cautionary in nature. . . which would serve to still the jury's unwarranted and unlimited roaming at large in drawing such inferences as it will from the failure to testify.¹¹⁶

Underlying this rationale is the assumption that jurors are unaware of the reasons for the privilege against self-incrimination; therefore, they will naturally draw an inference of guilt from the defendant's failure to testify.¹¹⁷ Such reasoning, however, is in essence an argu-

Id. at 522, 61 Cal. Rptr. at 406. Such reasoning seems consistent with language in *Griffin*:

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.

380 U.S. 609, 614 (1965).

Although the pre-*Griffin* instruction [CALJIC 51 (Rev. ed.) *supra* note 102; set forth in the text accompanying note 102 *supra*] authorized inferences unfavorable to the defendant, while the post-*Griffin* instruction [CALJIC 2.60 (3d ed., Supp. 1974), *supra* note 103; set forth in the text accompanying note 104 *supra*] forbids such inferences, the post-*Griffin* instruction still alerts the jury to the defendant's failure to testify. Arguably, then, these instructions differ only in degree, not in kind. *Griffin*, therefore, may implicitly proscribe the sua sponte instruction. *But see* note 116 *infra*.

¹¹⁵*People v. Gaulden*, 36 Cal. App. 3d 942, 956-57, 111 Cal. Rptr. 803, 811 (3d Dist. 1974) (trial record failed to indicate whether the trial judge charged the jury sua sponte, as contended by the defendant on appeal, or at the request of the prosecution); *People v. Brady*, 275 Cal. App. 2d 984, 992, 80 Cal. Rptr. 418, 422-23 (4th Dist. 1969) (prosecution requested the instruction); *People v. Brown*, 253 Cal. App. 2d 820, 830, 61 Cal. Rptr. 368, 374 (2d Dist. 1967).

¹¹⁶*People v. Brown*, 253 Cal. App. 2d 820, 830, 61 Cal. Rptr. 368, 374 (2d Dist. 1967). Arguably, this reasoning is consistent with and mandated by *Griffin*. In striking down language in the pre-*Griffin* instruction [CALJIC 51 (Rev. ed.), *supra* note 102; set forth in the text accompanying note 102 *supra*] which suggested that inferences adverse to the defendant could be drawn from his failure to testify, the *Griffin* Court implicitly authorized a cautionary instruction which would serve to guide the jury. *But see* note 114 *supra*.

¹¹⁷The court in *People v. Hernandez*, 264 Cal. App. 2d 206, 211-12, 70 Cal. Rptr. 330, 334 (2d Dist. 1970) (holding that charging the jury at the People's request was harmless error, if error at all), articulated this premise.

There are many and varied reasons for a defendant's failure to testify, none of which have anything to do with his guilt, among them, excessive timidity, nervousness, confusion, embarrassment, the fear of being compromised by association with others, and the danger of impeachment by introduction of prior convictions. Unfortunately these reasons more often than not are lost to lay jurors whose normal reaction, after hearing strong prosecution evidence against a defendant that he could reasonably be expected to explain or deny, is to consider his failure to do so as tending to indicate the truth of such evidence; thus, [the instruction] could do nothing but aid [the] defendant

ment that there is a constitutional duty always to instruct because absent the charge, the danger of constitutional violation is always present.¹¹⁸ Thus, the California cases present two irreconcilable views of the psychology of the jury process.

The reported decisions appropriately afford the defendant the opportunity to determine which rationale is more compelling and, accordingly, whether or not the court should instruct.¹¹⁹ Thus, if the defendant desires the cautionary instruction he should request that it be given. As previously noted, the trial court's refusal to so instruct should be constitutional error.¹²⁰ If, however, the defendant decides that the instruction might be detrimental he should object to the trial court's intention to instruct sua sponte or at the prosecution's request. When the defendant expressly objects to the instruction, giving it is error because "such an instruction highlights and emphasizes the fact that the accused did not take the witness stand."¹²¹ Thus, with the aid of counsel, the defendant can assess the probable impact of the instruction on the jury. Since any attempt to satisfy both competing rationales at the same trial would be futile, this case-by-case approach appears more appropriate and valuable than a generalized rule.

IV. THE PREJUDICIAL IMPACT OF *GRIFFIN* ERROR

If a trial court on a motion for a new trial, or an appellate court, finds *Griffin* error, it must then determine whether the error is sufficiently prejudicial to warrant a new trial or reversal.¹²² This section sets forth the standard which governs this determination and examines factors California courts consider in complying with the governing standard.

¹¹⁸ One appellate court, nonetheless, held that the instruction was properly given at the People's request and indicated in dictum that the trial court did not have a duty to instruct sua sponte. *People v. Brady*, 275 Cal. App. 2d 984, 992, 80 Cal. Rptr. 418, 423 (4th Dist. 1969). Compounding the confusion is an earlier opinion from the same division and court. While holding that the trial court did not err by failing to instruct sua sponte, that court reasoned that such an instruction if given sua sponte would be a "constitutionally proportioned invasion." *People v. Horrigan*, 253 Cal. App. 2d 519, 522, 61 Cal. Rptr. 403, 406 (4th Dist. 1967), quoted at length in note 114 *supra*.

¹¹⁹ The cases permit but do not require this interpretation.

¹²⁰ See text accompanying notes 105-10 *supra*.

¹²¹ *People v. Molano*, 253 Cal. App. 2d 841, 846-47, 61 Cal. Rptr. 821, 824-25 (2d Dist. 1967), citing *United States v. Gainey*, 380 U.S. 63, 73 (1965) (Douglas, J., dissenting).

¹²² See generally WITKIN, (Supp. 1974), *supra* note 32, § 914; Annot., 24 A.L.R. 3d 1093 (1969).

A. THE HARMLESS ERROR STANDARD

After *Griffin*, California courts continued to affirm convictions tainted by comment on the defendant's failure to testify¹²³ on the basis of the state constitution's harmless error provision limiting reversal to cases with error effecting "a miscarriage of justice."¹²⁴ The California Supreme Court had construed that provision to require the appellant to show that there was a reasonable probability that he could have obtained a more favorable result in the error's absence.¹²⁵ In *Chapman v. California*,¹²⁶ the United States Supreme Court reviewed the petitioner's conviction for murder in a trial punctuated by comment on his failure to testify. The Court agreed with the California Supreme Court that not every violation of due process or *Griffin* error was prejudicial per se.¹²⁷ The Supreme Court, however, rejected the state's harmless error test and reversed the conviction. The Court found federal law applicable in fashioning a harmless constitutional error standard:¹²⁸ error mandated reversal if there was a "reasonable possibility that . . . [it] might have contributed to the conviction";¹²⁹ it could be deemed harmless only if the reviewing court was satisfied beyond a reasonable doubt that the

¹²³See, e.g., the following cases vacated and remanded by the United States Supreme Court for further consideration in light of *Chapman v. California*, 386 U.S. 18 (1967): *People v. Boyden*, 237 Cal. App. 2d 695, 47 Cal. Rptr. 136 (2d Dist. 1965), *vacated & remanded per curiam*, 386 U.S. 278 (1967); *People v. Fontaine*, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1st Dist. 1965), *vacated & remanded per curiam*, 386 U.S. 263 (1967); *People v. Hudgins*, 236 Cal. App. 2d 578, 46 Cal. Rptr. 199 (2d Dist. 1965), *vacated & remanded per curiam*, 386 U.S. 265 (1967); *People v. Erb*, 235 Cal. App. 2d 650, 45 Cal. Rptr. 503 (4th Dist. 1965), *vacated & remanded per curiam*, 386 U.S. 273 (1967); *People v. Propp*, 235 Cal. App. 2d 619, 45 Cal. Rptr. 690 (1st Dist. 1965), *vacated & remanded per curiam*, 386 U.S. 275 (1967).

¹²⁴CAL. CONST. art. 6, § 13 provides:

No judgment shall be set aside, or new trial granted . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

¹²⁵*People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956).

¹²⁶386 U.S. 18 (1967).

¹²⁷*Id.* at 22; see *People v. Bostick*, 62 Cal. 2d 820, 402 P.2d 529, 44 Cal. Rptr. 649 (1965).

¹²⁸*Chapman v. California*, 386 U.S. 18, 21 (1967). The Court referred to 28 U.S.C. § 2111 and FED. RULE CRIM. PROC. 52(a), authorizing affirmation of judgments based on errors not affecting the parties' "substantial rights."

The basis of the Court's authority for promulgating the *Chapman* standard is not evident. The Court did not state that the Constitution directly mandated such a rule. Moreover, the Court suggested that the rule stands subject to amendment by "appropriate congressional action." 386 U.S. at 21. This form of adjudication was recently discussed with approval in Monaghan, *The Supreme Court, 1974 Term-Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). *But cf. Chapman, supra*, 386 U.S. at 46-48 (Harlan, J., dissenting) (arguing that such adjudication is beyond the power of the Court), and Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 522 (1969).

¹²⁹386 U.S. at 24, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

prosecution had demonstrated its harmlessness.¹³⁰

B. CALIFORNIA REVIEW OF *GRIFFIN* ERROR PREJUDICE

California courts consider two broad elements in determining whether *Griffin* error is "harmless beyond a reasonable doubt": first, the severity of the comment or instructional error; second, the strength and nature of the evidence against the defendant.¹³¹ This section will analyze each of these elements and suggest the impact each has on appellate review.

1. SEVERITY OF THE *GRIFFIN* VIOLATION

California courts examine several factors in assessing the seriousness of *Griffin* errors: the character of the challenged comment or instruction, the extent to which the violation encourages jurors to treat a defendant's silence as evidence of guilt, the propriety of other aspects of the trial in which the error arises, and whether defense counsel objected to or invited the error.

The character of prosecution comment on an accused's failure to testify, *i.e.*, its directness, duration and repetition, often a factor in evaluating whether *Griffin* error exists,¹³² is central to determining whether such error requires a new trial. California courts have almost uniformly found proscribed comment which is indirect or brief to be harmless,¹³³ while the courts have regarded the explicit or extensive

¹³⁰ 386 U.S. at 24. The controlling constitutional standard remains unclear. California Supreme Court Chief Justice Roger Traynor, in his dissent in *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd mem.*, 391 U.S. 470 (1968), interpreted *Chapman* as requiring a two step procedure in evaluating whether constitutional error is harmless. Even if it could be concluded that the impropriety would not have changed the result of a prosecution, reversal was necessary if the error constituted a substantial part of the prosecution's case. "[T]he jury may have reached its verdict because of the error without considering other reasons untainted by the error that would have supported the same result." *Id.* at 85, 429 P.2d at 621, 60 Cal. Rptr. at 269. The Court's memorandum reversal lent some credence to that position.

And, in *Harrington v. California*, 395 U.S. 250 (1969), the Court purported to apply the *Chapman* formulation of harmless error; yet the test applied in *Harrington* seems essentially different than that utilized in *Chapman*. Inquiry seemed shifted to whether the constitutional impropriety was harmless in light of "overwhelming" support for the conviction by untainted evidence, with a diminished concern for the role that any tainted evidence played. See Comment, *A Multi-Rule Approach to Harmless Constitutional Error*, 18 U.C.L.A. L. REV. 202, 205 (1970). See also *Milton v. Wainwright*, 407 U.S. 371 (1972).

¹³¹ *People v. Vargas*, 9 Cal. 3d 470, 472, 478-81, 509 P.2d 959, 960, 964-66, 108 Cal. Rptr. 15, 16, 20-22 (1973), *construed in* *People v. Medina*, 41 Cal. App. 3d 438, 460, 116 Cal. Rptr. 133, 148 (2d Dist. 1974); *People v. Garrison*, 252 Cal. App. 2d 511, 515-16, 60 Cal. Rptr. 596, 599 (3d Dist. 1967).

¹³² See text accompanying notes 32-83 *supra*.

¹³³ *People v. Vargas*, 9 Cal. 3d 470, 479, 509 P.2d 959, 965, 108 Cal. Rptr. 15, 21 (1973) (comment "indirect"). See, *e.g.*, *People v. Morse*, 70 Cal. 2d 711, 730, 452 P.2d 607, 618, 76 Cal. Rptr. 391, 402, *cert. denied*, 397 U.S. 944 (1969)

nature of comment a strong factor toward reversal.¹³⁴ In *Chapman*, the Supreme Court expressly cautioned against reiteration of *Griffin* remarks: the prosecutor's continuous and repeated urging of the jury to draw adverse inferences from the petitioner's failure to testify was "a machine-gun repetition of a denial of constitutional rights."¹³⁵ The Court considered such a *Griffin* error egregious; it could "no more be considered harmless than the introduction against a defendant of a coerced confession."¹³⁶ Accordingly, in weighing the seriousness of a *Griffin* violation, California courts often expressly consider whether the proscribed remarks were uttered with "machine-gun repetition."¹³⁷

Courts similarly appraise the directness, duration and repetition of *Griffin* error within jury instructions. Additionally, the position of improper remarks within instructions may influence their severity.

(comment "mild"); *People v. Cotter*, 63 Cal. 2d 386, 398, 405 P.2d 862, 870, 46 Cal. Rptr. 622, 630 (1965), *vacated & remanded per curiam*, 386 U.S. 274 (1967) (comment "temperate"); *People v. Glass*, 44 Cal. App. 3d 772, 780, 118 Cal. Rptr. 797, 803 (5th Dist. 1975) (comment "brief"); *People v. Boyden*, 251 Cal. App. 2d 798, 800, 60 Cal. Rptr. 271, 272 (2d Dist. 1967), *appeal dismissed & cert. denied*, 389 U.S. 568 (1968) (comment "restrained").

¹³⁴*People v. Modesto*, 66 Cal. 2d 695, 714, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136, *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in* *Maine v. Superior Court*, 68 Cal. 2d 375, 378 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968); *accord*, *Anderson v. Nelson*, 390 U.S. 523, 525 (1968); *see, e.g.*, *People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 150 (2d Dist. 1947) (comment "not of the minimal type").

¹³⁵*Chapman v. California*, 386 U.S. 18, 26 (1967). The Court viewed such repetition as "designed and calculated to make petitioner's version of the evidence worthless." *Id.* A few California decisions appear to recognize that the design and intent of the prosecutor may be relevant to reviewing *Griffin* error. *See* *People v. Hill*, 66 Cal. 2d 536, 561, 426 P.2d 908, 924, 58 Cal. Rptr. 340, 356 (1967) *cert. denied*, 390 U.S. 911 (1968) (alleged *Griffin* reference of prosecutor "neither intended or framed to constitute [a]n . . . invitation to draw adverse inferences"); *People v. Crawford*, 253 Cal. App. 2d 524, 535, 61 Cal. Rptr. 472, 480 (5th Dist. 1967) (*Griffin* remarks "reprehensible" since "an obvious attempt to direct the jury's attention "to accused's failure to testify"). Although distant from the view that reversal is warranted only where error affects the outcome of a trial (regardless of intentional misconduct of the state), focus on the prosecution's apparent intent seems justified. Automatic reversal would give deterrent effect to constitutional rules such as *Griffin* which are seldom abridged in the absence of some culpable conduct on the part of the prosecution. *See* Comment, *A Multi-Rule Approach to Harmless Constitutional Error*, 18 U.C. L.A. L. REV. 202, 208 (1970); *cf.* *Chapman v. California*, 386 U.S. 18, 44-45 (1967) (Stewart, J., concurring); *id.* at 52 n.7 (Harlan, J., dissenting).

¹³⁶386 U.S. at 26.

¹³⁷*People v. Morse*, 70 Cal. 2d 711, 730, 452 P.2d 607, 618, 76 Cal. Rptr. 391, 402 (1969); *cert. denied* 397 U.S. 944 (1969); *People v. Modesto*, 66 Cal. 2d 695, 714, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136 (1967), *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in* *Maine v. Superior Court*, 68 Cal. 2d 375, 378 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968); *People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 150 (2d Dist. 1974); *People v. Gauden*, 36 Cal. App. 3d 942, 956, 111 Cal. Rptr. 803, 811 (3d Dist. 1974).

The California Supreme Court has held nonprejudicial, for example, *Griffin* error "buried" within an otherwise acceptable instruction and preceded by a correct statement of the scope of the accused's privilege.¹³⁸

The California Supreme Court has also insisted that reviewing courts assess the "extent to which the comment itself might have increased the jury's inclination to treat the defendant's silence as an indication of his guilt."¹³⁹ The cases distinguish comments merely noting the silence of the accused from statements further suggesting that such silence implies guilt. While both clearly violate the privilege, the absence of an express suggestion that jurors should infer guilt from a defendant's failure to testify "tends to mitigate [the proscribed comment's] independently damaging effect."¹⁴⁰ In determining whether *Griffin* error increased the jurors' inclination to infer guilt from silence, courts have considered the length and complexity of the trial. In *People v. Steele*,¹⁴¹ the defendants, charged with diversion of funds by a complex land financing scheme, elected not to testify. Prosecutorial and instructional *Griffin* errors marred their "long and cumbersome" trial. The reviewing court reversed their conviction. The court noted that in such circumstances, comment on the defendant's failure to come forward and vouch for their

¹³⁸In *People v. Vargas*, 9 Cal. 3d 470, 479, 509 P.2d 959, 965, 108 Cal. Rptr. 15, 21 (1973), the prejudicial impact of the inclusion of the words "by itself" within the otherwise proper CALJIC No. 2.61 (3d ed.), set forth in note 110 *supra*, instruction was ruled harmless. CALJIC No. 2.60 (3d ed.), set forth in text accompanying note 104 *supra*, preceded the erroneous instruction and correctly set forth the defendant's constitutional right to remain silent and the further principle that no adverse inferences may be drawn from his silence.

¹³⁹*People v. Modesto*, 66 Cal. 2d 695, 713, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136 (1967), *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in Maine v. Superior Court*, 68 Cal. 2d 375, 378 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968); *accord*, *People v. Vargas*, 9 Cal. 3d 470, 478, 509 P.2d 959, 964, 108 Cal. Rptr. 15, 20 (1973).

¹⁴⁰*People v. Modesto*, 66 Cal. 2d 695, 713, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136 (1967), *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in Maine v. Superior Court*, 68 Cal. 2d 375, 378 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968); *accord*, *People v. Vargas*, 9 Cal. 3d 470, 479, 509 P.2d 959, 965, 108 Cal. Rptr. 15, 21 (1973); *see, e.g.*, *People v. Gaulden*, 36 Cal. App. 3d 942, 956, 111 Cal. Rptr. 803, 811 (3d Dist. 1974).

Yet prohibited comments unaccompanied by such an explicit suggestion are not "necessarily or even ordinarily harmless." *People v. Modesto*, *supra* at 713, 427 P.2d at 800, 59 Cal. Rptr. at 136. In light of the facts of the case, a comment may strongly imply that the jurors should infer guilt from silence. *See, e.g.*, *People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 150 (2d Dist. 1974) (argument that defendant would have refuted accomplices' testimony by taking the stand if that testimony was not true, increased the likelihood of jurors' inferring guilt from silence alone; held "relatively serious *Griffin* error"). Courts may also find such remarks highly prejudicial in light of other factors discussed in this article.

¹⁴¹235 Cal. App. 2d 798, 45 Cal. Rptr. 601 (2d Dist. 1965).

integrity on the stand, "a fact which the jury could readily grasp," had "a strong persuasive effect."¹⁴²

Severity of *Griffin* error is not gauged in isolation; courts consider the related errors at trial. California cases recognize that comment on a defendant's silence in the face of in-custody accusations¹⁴³ magnifies the prejudicial effect of comment on his failure to take the stand.¹⁴⁴ Lack of or inadequate instruction on the range of permissible inferences from an accused's exercise of the privilege,¹⁴⁵ partial repetition of proscribed prosecutor comments within instructions,¹⁴⁶ and the giving of standard instructions found defective on review,¹⁴⁷ also may compound prosecutorial *Griffin* error. At least one California decision, however, has recognized that a trial judge's "prompt admonishment" may ameliorate the severity of *Griffin* error.¹⁴⁸

¹⁴²*Id.* at 814, 45 Cal. Rptr. at 611; *cf.* *People v. Hernandez*, 264 Cal. App. 2d 206, 212, 70 Cal. Rptr. 330, 334 (2d Dist. 1968).

¹⁴³See text accompanying notes 93-101 *supra*.

¹⁴⁴*In re Banks*, 4 Cal. 3d 337, 352, 482 P.2d 215, 226, 93 Cal. Rptr. 591, 602 (1971) (accused's silence at police lineup urged as an admission that he was "the man"; comment on defendant's failure to testify therefore prejudicial); *People v. Haston*, 69 Cal. 2d 233, 256-57, 444 P.2d 91, 106-07, 70 Cal. Rptr. 419, 434-35 (1968) (instruction permitting adverse inference from defendant's extrajudicial silence compounded *Griffin* prejudice to harmful level).

In *Banks*, *supra*, the following interchange occurred between the trial judge and a police witness for the prosecution:

THE COURT: . . . When he told the defendant that "Some robberies had been committed and you fit the description," what did the defendant say, if anything?

THE WITNESS: Nothing, he didn't say anything.

THE COURT: What did he do?

THE WITNESS: Well, he wanted to search him and he just raised his --

THE COURT: No, what did the defendant do?

THE WITNESS: He did nothing.

THE COURT: Nothing all right.

In *re Banks*, *supra*, 4 Cal. 3d at 345 n.5 482 P.2d at 221 n.5, 93 Cal. Rptr. at 597 n.5. Such emphasis by the court seemingly further magnifies the prejudicial effect of comment on the defendant's failure to testify and on his failure to respond to an accusatory statement.

¹⁴⁵*People v. Modesto*, 66 Cal. 2d 695, 713, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136 (1967) (by implication), *cert. denied*, 389 U.S. 1006 (1967), *disapproved on other grounds in Maine v. Superior Court*, 68 Cal. 2d 375, 378 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968); *People v. Summerfield*, 262 Cal. App. 2d 626, 632-33, 69 Cal. Rptr. 10, 14 (2d Dist. 1968).

¹⁴⁶*In re Banks*, 4 Cal. 3d 337, 349, 482 P.2d 215, 224, 93 Cal. Rptr. 591, 600 (1971).

¹⁴⁷*People v. Mendoza*, 37 Cal. App. 3d 717, 726, 112 Cal. Rptr. 565, 570 (2d Dist. 1974) ("by itself" phrase in instruction aggravated prosecutor remarks); see discussion in note 110 *supra*.

¹⁴⁸*People v. Vargas*, 9 Cal. 3d 470, 479, 509 P.2d 959, 965, 108 Cal. Rptr. 15, 21 (1973); *cf.* *People v. Roberts*, 51 Cal. App. 3d 125, 137, 123 Cal. Rptr. 893, 900 (3d Dist. 1975); *People v. Gaulden*, 36 Cal. App. 3d 942, 955, 111 Cal. Rptr. 803, 810 (3d Dist. 1974). For a collection of largely non-California decisions finding the potential prejudice from *Griffin* violative comment "cured," see Annot., 24 A.L.R. 3d 1093, 1122 (1969).

Finally, two procedural concerns bear on appellate review of the gravity of *Griffin* error. First, courts generally view failure to make timely objection to any alleged *Griffin* error as mitigating against reversal.¹⁴⁹ To the extent that posing the objection itself underscores an accused's failure to testify,¹⁵⁰ however, such a rule forces the defendant to choose between forfeiting review of prosecution comment on his failure to take the stand, and self-condemnation by such emphasis. Such a judicially created situation seems intolerable in light of the express rationale of *Griffin*: "[i]t cuts down on the privilege [against compulsory self-incrimination] by making its assertion costly."¹⁵¹

Second, whether *Griffin* error is invited may affect a reviewing court's assessment of its severity. California courts have judged *Griffin*-proscribed prosecutor comment relatively innocuous where the defense itself has invited or provoked it.¹⁵² While "not relegated to dumb show in response,"¹⁵³ the prosecution is entitled to only narrowly meet misleading defense argument concerning the accused's failure to take the stand.¹⁵⁴ The doctrine of invited error does not, however, protect prosecution comment going beyond those bounds and further suggesting to the jury that the accused's failure to testify justifies an inference of guilt.¹⁵⁵ Such comment may warrant reversal.

¹⁴⁹ See *People v. Gauden*, 36 Cal. App. 3d 942, 955, 111 Cal. Rptr. 803, 810 (3d Dist. 1974); *People v. Smith*, 22 Cal. App. 3d 25, 32, 99 Cal. Rptr. 171, 175 (3d Dist. 1971); *People v. Ham*, 7 Cal. App. 3d 768, 777, 86 Cal. Rptr. 906, 911 (1st Dist. 1970), *disapproved on other grounds in* *People v. Compton*, 6 Cal. 3d 55, 60 n.3, 98 Cal. Rptr. 217, 220 n.3, 490 P.2d 537, 540 n.3 (1972); *People v. Crawford*, 253 Cal. App. 2d 524, 534 & n.5, 61 Cal. Rptr. 472, 481 & n.5 (5th Dist. 1967), *cert. denied*, 390 U.S. 1006 (1968). Although language in some of these cases adheres strictly to this principle of waiver by failure to object, none of the courts have rested their decisions entirely on such narrow procedural grounds. The cases have instead declared the absence of *Griffin* error or found any violation independently harmless.

¹⁵⁰ For judicial recognition of this danger, see *People v. Williams*, 22 Cal. App. 3d 34, 45, 99 Cal. Rptr. 103, 112 (2d Dist. 1971), accepting defense argument that the "consequent emphasis" of formal assignment of misconduct and the seeking of a curative instruction "would do more damage than a secured judicial admonition would assist." *Id.* But see *People v. Gauden*, 36 Cal. App. 3d 942, 955, 111 Cal. Rptr. 803, 810 (3d Dist. 1974).

¹⁵¹ *Griffin v. California*, 380 U.S. 609, 614 (1965).

¹⁵² *People v. Davenport*, 240 Cal. App. 2d 341, 346, 49 Cal. Rptr. 575, 578-79 (4th Dist. 1966); see *People v. Stout*, 66 Cal. 2d 184, 198-200, 424 P.2d 704, 713-14, 57 Cal. Rptr. 152, 161-62 (1967); *People v. Boyden*, 251 Cal. App. 798, 800, 60 Cal. Rptr. 271, 272 (2d Dist. 1967), *appeal dismissed & cert. denied*, 389 U.S. 568 (1968).

¹⁵³ *People v. Roberts*, 51 Cal. App. 3d 125, 137, 123 Cal. Rptr. 893, 900 (3d Dist. 1975).

¹⁵⁴ *People v. Hill*, 66 Cal. 2d 536, 561, 426 P.2d 908, 923, 58 Cal. Rptr. 340, 355, *cert. denied*, 390 U.S. 911 (1968).

¹⁵⁵ See, e.g., *People v. Stout*, 66 Cal. 2d 184, 424 P.2d 704, 57 Cal. Rptr. 152 (1967). The defendants were charged with the alteration of a firearm's serial numbers. The defendants' attorney raised the issue of their failure to testify,

The effect of defendant's requesting, or acquiescing in, the giving of *Griffin*-violative jury instructions remains unresolved, as Court of Appeal decisions are in conflict.¹⁵⁶ The clear majority of such decisions have disregarded the fact that defense counsel requested or acceded to a *Griffin*-defective instruction, at least in the absence of any suggestion that the request or acquiescence was a deliberate ploy.¹⁵⁷

2. STRENGTH AND NATURE OF THE EVIDENCE OF DEFENDANT'S GUILT

The second broad determinant of whether *Griffin* error is "harmless beyond a reasonable doubt" is the strength and nature of the evidence against the defendant.¹⁵⁸ The persuasiveness of the prosecution's case, the nature of the evidence, *i.e.*, whether it is direct or

stating to the jury that he advised his clients not to take the stand because the state's case was only one of circumstantial evidence. The prosecutor subsequently commented that "by failing to testify the defendants were subject to . . . [the] inference that they came unlawfully into possession of the gun . . . and thereafter removed . . . [its] identification marks." *Id.* at 198, 424 P.2d at 714, 57 Cal. Rptr. at 162. Reversing the conviction, the court held such comment violated *Griffin* and was not invited. The prosecutor could have adequately met the defense remarks by apprising the jury that the defendants' failure to testify did not mean the case against them was circumstantial. *Id.* at 198-200, 424 P.2d at 713-14, 57 Cal. Rptr. at 161-62.

¹⁵⁶*People v. Vargas*, 9 Cal. 3d 470, 477, 509 P.2d 959, 963-64, 108 Cal. Rptr. 15, 19-20 (1973). Compare, *e.g.*, *People v. Burns*, 270 Cal. App. 2d 238, 248, 75 Cal. Rptr. 688, 694 (1st Dist. 1969) with *People v. Davenport*, 240 Cal. App. 2d 341, 346, 49 Cal. Rptr. 575, 579 (4th Dist. 1966).

¹⁵⁷See *People v. Glass*, 44 Cal. App. 3d 772, 780, 118 Cal. Rptr. 797, 803 (5th Dist. 1975); *People v. Williams*, 22 Cal. App. 3d 34, 58, 99 Cal. Rptr. 103, 122 (2d Dist. 1971); *People v. Davenport*, 240 Cal. App. 2d 341, 346-47, 49 Cal. Rptr. 575, 579 (4th Dist. 1966). Such courts have insisted that the trial judge must give such instructions as are proper and applicable to the case.

¹⁵⁸What evidence of guilt means in appraising its overall strength in the review of *Griffin* error is not altogether clear. The court in *People v. Butts*, 236 Cal. App. 2d 817, 46 Cal. Rptr. 362 (3d Dist. 1965), insisted that since "[g]uilt turn[s] not alone on external events but on questions of criminal intent," courts could not cavalierly find comment on an accused's failure to testify harmless simply because of overwhelming evidence that the defendant committed the criminal acts. Although the mass of evidence that the defendant assaulted the victim was "hardly to be dented let alone shaken, by the relatively puny force of the comment," the jury's evaluation of whether he did so with the specific intent to inflict death might well have been swayed. *Id.* at 833, 46 Cal. Rptr. at 372. Cf. *People v. Keller*, 234 Cal. App. 2d 395, 44 Cal. Rptr. 432 (1st Dist. 1965), *appeal dismissed & cert. denied*, 382 U.S. 43 (1965). The California Supreme Court has apparently passed by the opportunity to adopt such a finely-reasoned approach, to the dismay of one of its members. See *People v. Modesto*, 66 Cal. 2d 695, 717, 427 P.2d 788, 803, 59 Cal. Rptr. 124, 139 (Peters, J., dissenting), *cert. denied*, 389 U.S. 1006 (1967), *disapproved on other grounds in Maine v. Superior Court*, 68 Cal. 2d 375, 383 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968), and *People v. Morse*, 70 Cal. 2d 711, 751, 452 P.2d 607, 632, 76 Cal. Rptr. 391, 416 (Peters, J., dissenting), *cert. denied*, 397 U.S. 944 (1969), arguing *Griffin* error severely prejudicial as to degree of guilt, in view of victim's diminished capacity defense. *But cf.* *People v. Stout*, 66 Cal. 2d 184,

circumstantial, and the credibility and posture of the defense, together define this element of prejudice.

a. Persuasiveness of the State's Case

Judicial appraisal of the prejudicial impact of a *Griffin* error necessarily involves consideration of the persuasiveness and completeness of the state's case against the defendant. *Chapman v. California* established that consideration of reversal for proscribed comment is especially warranted if "the question of guilt or innocence is a close one" and "absent the . . . comment, honest, fair-minded jurors might very well have brought in not-guilty verdicts."¹⁵⁹ Accordingly, if the evidence of an appellant's guilt is overwhelming,¹⁶⁰ California courts rarely find comment on the accused's failure to testify sufficiently prejudicial to merit a new trial.¹⁶¹ If the question of guilt is judged a difficult one,¹⁶² however, courts are reluctant to find any *Griffin* violation harmless.¹⁶³ One court has argued that any case substantially consisting of the testimony of accomplices is sufficiently close

199-200, 424 P.2d 704, 714, 57 Cal. Rptr. 152, 162 (1967). The court's position seems justified only to the extent it may reflect a pragmatic judgment that such a laborious examination of the possible infringement of a constitutional privilege is outweighed by the interests of judicial economy.

¹⁵⁹*Chapman v. California*, 386 U.S. 18, 22 (1967).

¹⁶⁰*People v. Morse*, 70 Cal. 2d 711, 729, 452 P.2d 607, 617, 76 Cal. Rptr. 391, 401 (1969), *cert. denied*, 397 U.S. 944 (1969); *People v. Modesto*, 66 Cal. 2d 695, 712, 427 P.2d 788, 799, 59 Cal. Rptr. 124, 135 (1967), *cert. denied*, 389 U.S. 1009 (1967); *People v. Daugherty*, 253 Cal. App. 2d 564, 566, 45 Cal. Rptr. 528, 530 (4th Dist. 1965). *See also* *People v. Ham*, 7 Cal. App. 3d 768, 784, 86 Cal. Rptr. 906, 917 (1st Dist. 1970), *disapproved on other grounds in* *People v. Compton*, 6 Cal. 3d 55, 60 n.3, 490 P.2d 537, 540 n.3, 98 Cal. Rptr. 217, 220 n.3 (1972) (finding of guilt "bolstered by ample independent evidence"); *People v. Burns*, 270 Cal. App. 2d 238, 249, 75 Cal. Rptr. 688, 694 (1st Dist. 1969) (evidence of guilt "quite strong"); *People v. Mason*, 259 Cal. App. 2d 30, 41, 66 Cal. Rptr. 601, 607 (2d Dist. 1968) (evidence of guilt "complete and persuasive"); *People v. Parker*, 253 Cal. App. 2d 567, 573, 61 Cal. Rptr. 411, 414 (2d Dist. 1967) (evidence of guilt "clear, direct and convincing").

¹⁶¹*People v. Vargas*, 9 Cal. 3d 470, 479-80, 509 P.2d 959, 965, 108 Cal. Rptr. 15, 21 (1973) (citing numerous cases). As this article will explain, a reviewing court's assessment of the overall state of the evidence is an important factor but it is not conclusive in measuring prejudice. *See, e.g.,* *People v. Mendoza*, 37 Cal. App. 3d 717, 112 Cal. Rptr. 565 (2d Dist. 1974). After acknowledging the state's presentation of a "strong case," the court nonetheless found reversal mandated in light of the prosecutor's "even stronger appeal to passion and prejudice." *Id.* at 727, 112 Cal. Rptr. at 571.

¹⁶²*E.g.,* *People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 151 (2d Dist. 1974); *People v. Williams*, 22 Cal. App. 3d 34, 40, 99 Cal. Rptr. 103, 108 (2d Dist. 1971) (case "demonstrably close"); *People v. Haston*, 69 Cal. 2d 233, 256, 444 P.2d 91, 106, 70 Cal. Rptr. 419, 434 (1968) (evidence of guilt "not of a clear and convincing nature"); *People v. Sigal*, 235 Cal. App. 2d 449, 456, 45 Cal. Rptr. 481, 486 (3d Dist. 1965) (state's case "not strong").

¹⁶³*People v. Vargas*, 9 Cal. 3d 470, 480 & n.6, 509 P.2d 959, 956-66 & n.6, 108 Cal. Rptr. 15, 21-22 & n.6 (1973) (dictum).

that *Griffin* error should compel reversal.¹⁶⁴ Lengthy jury deliberations may also signal a case sufficiently close that comment on the defendant's failure to testify requires reversal.¹⁶⁵ In *People v. Summerfield*,¹⁶⁶ for example, the jury deliberated nearly a day following a trial of less than a day and a half, at which only three witnesses testified and at which the single issue was whether the defendant committed a burglary. The reviewing court overturned the conviction because of *Griffin*-proscribed comment.¹⁶⁷

b. Nature of the State's Evidence

The nature of the prosecution's evidence also influences a reviewing court's assessment of whether unconstitutional comment is prejudicial. Following the lead of the United States Supreme Court,¹⁶⁸ California courts have found the possibility of prejudice substantially increased where the only evidence of the defendant's guilt is circumstantial. Two explanations underlie the belief that a lack of direct evidence renders a trial peculiarly subject to *Griffin* error influence.

First, a case based entirely on circumstantial evidence is often weaker than a case in which there is some direct evidence of the defendant's commission of the charged offense. In *People v. Davenport*,¹⁶⁹ for example, the defendant, a white male, was on trial for armed robbery. The victim, unable to identify the defendant, testified that he had been robbed of over two hundred one dollar bills by one white and three black men. The only evidence against the de-

¹⁶⁴*People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 151 (2d Dist. 1974). Ostensibly, the court was relying on the general rule that all accomplice testimony must be "viewed with distrust." Yet the court noted that the accomplice witnesses had been granted immunity, further diminishing the weight of their testimony; their perception and recollection of events was suspect because of barbiturate narcosis at the time of the crime; and all had conceded lying at one point in the proceedings. *Id.*

¹⁶⁵*People v. Medina*, 41 Cal. App. 3d 438, 463, 116 Cal. Rptr. 133, 151 (2d Dist. 1974); *People v. Williams*, 22 Cal. App. 3d 34, 40, 99 Cal. Rptr. 103, 107-08 (2d Dist. 1971).

¹⁶⁶262 Cal. App. 2d 626, 69 Cal. Rptr. 10 (2d Dist. 1968).

¹⁶⁷*Id.* at 633, 69 Cal. Rptr. at 14.

¹⁶⁸In enunciating its harmless constitutional error rule, the Court had rejected the California Supreme Court's reliance on "the reasonably strong circumstantial web of evidence" in finding *Griffin* error harmless in *People v. Teale*, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965), *rev'd sub nom.* *Chapman v. California*, 386 U.S. 18, 26 (1967). The following year the Court reversed a conviction for the sale of marijuana to an informer who disappeared during the period the state delayed in bringing the case to trial. The Court was not satisfied the *Griffin* defects were harmless since the jury had been asked to convict the defendant "on the basis of circumstantial evidence, in the absence of testimony from the state's agent, who allegedly made the purchase." *Fontaine v. California*, 390 U.S. 593, 596 (1968). And, in finding *Griffin* error harmless in *Harrington v. California*, 395 U.S. 250 (1969), the Court emphasized that "[t]he case against Harrington was not woven from circumstantial evidence." *Id.* at 254.

¹⁶⁹240 Cal. App. 2d 341, 49 Cal. Rptr. 575 (4th Dist. 1966).

fendant was his presence in a car with three black men an hour and a half after the robbery with 46 dollar bills in his pocket. The reviewing court found prosecutor comment on the defendant's failure to testify prejudicial in view of the "very thin threads which identify the defendant and entangle him in this offense."¹⁷⁰

Second, a circumstantial case may fairly support conflicting inferences; any intimation that the inferences adverse to an accused should be drawn because of his failure to take the stand may tip the balance in the jury's minds.¹⁷¹ Thus, in reviewing a conviction for the grand theft of saddles from a farm where the defendant was previously employed, the court in *People v. Gills*¹⁷² noted that, except for an ambiguous out of court statement, all evidence of the defendant's guilt was circumstantial. Because such evidence also fairly supported the inference of receiving stolen goods, a theory the state chose not to prosecute, as well as the charged offense of grand theft, the court refused to find *Griffin* comment harmless.¹⁷³

Neither of these possibilities, however, justifies always treating the circumstantial nature of the defendant's guilt as a factor towards reversal in evaluating *Griffin* error. Circumstantial evidence of guilt may be compelling, indeed so compelling that inferences other than those evincing defendant's guilt are so unreasonable and are given so little weight by the jury that such inferences are virtually unaided by prosecutor comment on the accused's failure to testify. In *People v. Garner*,¹⁷⁴ for example, the defendant's conviction for the burglary of two auto agencies rested on completely circumstantial evidence: tools stolen from the burglarized premises were found in defendant's possession; insulation material from the pilfered safe was detected on trousers he was wearing on the night of the burglary; an identical modus operandi was employed in both burglaries; and the defendant's proffered alibi was contradicted. In finding prosecution comment on the accused's failure to testify harmless beyond a reasonable doubt, the court observed:

[T]he jurors were not requested to fill in gaps in the circumstantial proof by inferences from unexplained circumstantial evidence

The theory of the defense was not designed to produce inferences favorable to the defendant in relation to facts which were left unexplained by the proof, a process which, if undermined by the comment, would be seriously prejudiced [T]he defense was relying upon speculation and conjecture to create doubts. . . .¹⁷⁵

¹⁷⁰ *Id.* at 347, 49 Cal. Rptr. at 579.

¹⁷¹ *Cf.* *People v. Butts*, 236 Cal. App. 2d 817, 46 Cal. Rptr. 362 (3d Dist. 1965).

¹⁷² 255 Cal. App. 2d 812, 63 Cal. Rptr. 560 (3d Dist. 1967).

¹⁷³ *Id.* at 815, 63 Cal. Rptr. at 562; *cf.* *People v. Sigal*, 235 Cal. App. 2d 449, 45 Cal. Rptr. 481 (3d Dist. 1965).

¹⁷⁴ 258 Cal. App. 2d 420, 65 Cal. Rptr. 780 (1st Dist. 1968).

¹⁷⁵ *Id.* at 431; 65 Cal. Rptr. at 787; *cf.* *People v. Burns*, 270 Cal. App. 2d 238, 249, 75 Cal. Rptr. 688, 694 (1st Dist. 1969).

Thus, only where the circumstantial evidence of a defendant's guilt fairly supports the drawing of two reasonable and conflicting inferences should courts consider its circumstantial nature a factor in finding comment on his failure to testify reversibly prejudicial.

c. Credibility and Posture of the Defense

In evaluating evidence against the defendant in order to decide whether *Griffin* error warrants reversal, California courts have considered not only the nature and persuasiveness of the People's case, but also the credibility and posture of the defense. In *People v. Modesto*,¹⁷⁶ the defendant was convicted of the first degree murder of two young girls, one found at home, the other in a nearby stream. At his trial, Modesto argued that he was innocent, and alternatively that he had acted while intoxicated and with diminished capacity. In affirming the conviction, the California Supreme Court held the prosecutor's comments on Modesto's failure to testify¹⁷⁷ to be harmless. The court reasoned that the challenged comment "in no way touched"¹⁷⁸ the diminished capacity defense. And the defendant's explanation of innocence—that he found one of the victims wounded in front of her home, that he put her in his car with the intention of driving her to a nearby physician, and that when he stopped at a storm drain to wash blood from the girl's face she fell into the water—the court found "inherently implausible."¹⁷⁹ Thus, the posture of Modesto's defense "minimized to the point of insignificance the possible impact of the comment." The court declared:

In order to prove prejudicial, a [*Griffin*] comment which could not serve to fill an evidentiary gap in the prosecution's case must at least touch a live nerve in the defense, not one which has been rendered inert by such intrinsic improbability as would prevent it from generating any real doubt in the mind of a reasonable juror.¹⁸⁰

A later decision of the California Supreme Court suggests that this language in *Modesto* constitutes an imperative test in deciding whether *Griffin* error warrants reversal.¹⁸¹

¹⁷⁶ 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124, *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in* *Maine v. Superior Court*, 68 Cal. 2d 375, 383 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968).

¹⁷⁷ The prosecutor's remarks are quoted in the text accompanying note 39 *supra*.

¹⁷⁸ 66 Cal. 2d at 714, 427 P.2d at 800, 59 Cal. Rptr. at 136.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*, 427 P.2d at 800-01, 59 Cal. Rptr. at 136-37.

¹⁸¹ *People v. Vargas*, 9 Cal. 3d 470, 481, 509 P.2d 959, 966, 108 Cal. Rptr. 15, 22 (1973). Courts have often applied these phrases, but generally with little analysis. *See, e.g.*, the court's perfunctory treatment in *People v. Glass*, 44 Cal. App. 3d 772, 780, 118 Cal. Rptr. 797, 803 (5th Dist. 1975):

[I]n view of the paucity of evidence of guilt in this case, it is apparent to us that the errors must have served "to fill an evidentiary gap in the prosecution's case."

Thus, *Modesto* provided two reasons why within a particular case, *Griffin* remarks may be harmless respecting certain defenses but seriously prejudicial respecting other defenses. First, the proscribed comment may "in no way touch" a defense argued to the jury.¹⁸² When, for example, a defendant unequivocally confesses and bases his defense solely on his lack of capacity to premeditate and deliberate, comment on his failure to take the stand and deny committing the charged acts arguably results in little prejudice.¹⁸³ Second, the comment may strike at an intrinsically improbable defense;¹⁸⁴ the prejudicial impact of such comment is likely to be insignificant.¹⁸⁵

¹⁸² Compare, e.g., *People v. Steele*, 235 Cal. App. 2d 798, 814, 45 Cal. Rptr. 601, 611 (2d Dist. 1965) (comment on defendant's failure to vouch for their integrity by taking the stand struck at "the very heart of [their] defense" of good faith; error reversibly prejudicial) with *People v. Hill*, 66 Cal. 2d 536, 561, 426 P.2d 908, 924, 58 Cal. Rptr. 340, 356 (1967) (*Griffin*-proscribed comment concerning the accused's testifying only as to voluntariness of the confession, related only "to matters on the periphery of the determinative considerations on the penalty phase"; error harmless).

People v. Ross, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd per curiam*, 391 U.S. 470 (1968), held that a reviewing court need not consider the impact of *Griffin* comment on theories defensible by the evidence but not argued to the jury. There the California Supreme Court rejected defense contentions that it should "speculate whether the comment *might* have assumed significance if the defense had planted [another exculpatory] suggestion." *Id.* at 75, 429 P.2d at 614, 60 Cal. Rptr. at 262 (emphasis in original). The United States Supreme Court's *per curiam* reversal on harmless error grounds, however, cast some doubt on that proposition.

¹⁸³ Cf., e.g., *People v. Morse*, 70 Cal. 2d 711, 452 P.2d 607, 76 Cal. Rptr. 391, *cert. denied*, 397 U.S. 944 (1964).

¹⁸⁴ *People v. Vargas*, 9 Cal. 3d 470, 481, 509 P.2d 959, 966, 108 Cal. Rptr. 15, 22 (1973) ("[M]any of [the harmless error cases] emphasize the failure of the defendant to present a credible . . . defense."); see, e.g., discussion in text accompanying note 179 *supra*; *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd per curiam*, 391 U.S. 470 (1968), discussed in note 185 *infra*.

¹⁸⁵ Dissenting opinions in decisions holding *Griffin* error harmless because of the defendant's failure to present a plausible defense, protest the subjective nature of such a standard. In *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd per curiam*, 391 U.S. 470 (1968), for example, the defendant was apprehended near a vehicle matching the description of a getaway car and containing the proceeds of a robbery. The majority of the California Supreme Court stated that the defense portrayed the defendant's possession of the car as "purely fortuitous." Since the defendant fled from the police and fired at them with a gun similar to that used in the robbery, the court held that the defense theory "evaporated into the inherently incredible, leaving no real gap in the prosecution's case." Accordingly, the *Griffin* error was harmless. *Id.* at 75, 429 P.2d at 614, 60 Cal. Rptr. at 262. The dissent, however, noted that the People chose to prosecute the defendant on the theory he had personally committed the robbery, and not that he was an accomplice, and viewed the defense as having "cast considerable doubt on the defendant's being the [actual] robber." *Id.* at 77, 429 P.2d at 615, 60 Cal. Rptr. at 263 (Traynor, C.J., dissenting). See also discussion in note 182 *supra*. Such screening of defense credibility in reviewing prejudicial impact tends to take from the jury its right to judge the persuasiveness of a particular defense untainted by unconstitutional comments or instructions.

California cases suggest that certain legal theories may be inherently vulnerable to emphasis on the defendant's refusal to testify; other theories may seem virtually immune from such emphasis. Thus, on the one hand, California courts tend to favor reversal when comment strikes at plausible defenses of alibi,¹⁸⁶ weakness of witness identification,¹⁸⁷ or *absence* of criminal intent.¹⁸⁸ With such defenses, the defendant's testimony would presumably aid the jury greatly in their deliberations; the defendant is uniquely able to describe his whereabouts or his state of mind at a particular time. Comment focusing on his absence from the stand is therefore likely to contribute to his conviction.

On the other hand, the courts have downplayed prejudice to the accused arising from comment striking solely at defenses of *incapacity* to form the requisite intent¹⁸⁹ or reliance on the presumption of innocence.¹⁹⁰ Logically, an accused's testimony concerning his incapacity to form the requisite intent would be of doubtful importance to the trier-of-fact.¹⁹¹ Comment focusing on his failure to testify is therefore less likely to contribute to his conviction.

¹⁸⁶ See, e.g., *In re Banks*, 4 Cal. 3d 337, 350-51, 482 P.2d 215, 225, 93 Cal. Rptr. 591, 601 (1971); *People v. Haston*, 69 Cal. 2d 233, 256-57, 444 P.2d 91, 106-07, 70 Cal. Rptr. 419, 434-35 (1968).

¹⁸⁷ See, e.g., *People v. Vargas*, 9 Cal. 3d 470, 480, 509 P.2d 959, 966, 108 Cal. Rptr. 15, 22 (1973); *In re Banks*, 4 Cal. 3d 337, 350-51, 482 P.2d 215, 225, 93 Cal. Rptr. 591, 601 (1971); *People v. Haston*, 69 Cal. 2d 233, 256-57, 444 P.2d 91, 106-07, 70 Cal. Rptr. 419, 434-35 (1968); *People v. Crawford*, 253 Cal. App. 2d 524, 536, 61 Cal. Rptr. 472, 481 (5th Dist. 1967), *cert. denied*, 390 U.S. 1006 (1968) (by implication); *People v. Odom*, 236 Cal. App. 2d 876, 881, 46 Cal. Rptr. 453, 456 (2d Dist. 1965) (sole disputed question of fact one of identification; since substantial doubt, *Griffin* error prejudicial).

¹⁸⁸ See, e.g., *People v. Keller*, 234 Cal. App. 2d 395, 399, 44 Cal. Rptr. 432, 435 (1st Dist.), *appeal dismissed & cert. denied*, 382 U.S. 43 (1965). At Keller's trial for assault with a deadly weapon, he contended that his display of a penknife was merely a gesture of self-defense and was unaccompanied by intent to use the knife. In reversing the conviction for *Griffin* error, the reviewing court felt that prosecutor comment on the defendant's failure to testify assumed great importance to the jury, in its rejection of Keller's defense. See also *People v. Butts*, 236 Cal. App. 2d 817, 833, 46 Cal. Rptr. 362, 372 (3d Dist. 1965); *People v. Steele*, 235 Cal. App. 798, 814, 45 Cal. Rptr. 601, 611 (2d Dist. 1965).

¹⁸⁹ See, e.g., *People v. Morse*, 70 Cal. 2d 711, 730, 452 P.2d 607, 618, 76 Cal. Rptr. 391, 402, *cert. denied*, 397 U.S. 944 (1969), discussed in note 191 *infra*.

¹⁹⁰ See *People v. Giovannianni*, 260 Cal. App. 2d 597, 67 Cal. Rptr. 303 (1st Dist. 1968).

¹⁹¹ In *People v. Morse*, 70 Cal. 2d 711, 452 P.2d 607, 76 Cal. Rptr. 391, *cert. denied*, 397 U.S. 944 (1969), the prosecutor disparaged defense psychiatric testimony on the basis of defendant Morse's failure to testify. Holding such remarks harmless error, the California Supreme Court reasoned:

the defendant's own impressions or opinion in respect to his [mental] capacity . . . would have been of no more significance than the questionable thinking of a schizophrenic on the etiology of his own particular disorder.

Id. at 730, 452 P.2d at 618, 76 Cal. Rptr. at 402.

The dissent in *People v. Morse*,¹⁹² however, illuminates the fallacy of viewing *Griffin* error touching such mental incapacity defenses as harmless per se: the logic ascribed by the majority to the trier-of-fact in drawing inferences may well elude the average juror. The improper comments in *Morse* "struck . . . with shattering impact" defense contentions that the accused acted "instinctively and as an automaton."¹⁹³ The comments told the jury that the defendant's failure to take the stand and corroborate his psychiatrist's testimony made such testimony less credible.¹⁹⁴

Judicial reluctance to find *Griffin* error prejudicial where the defense rests solely on the presumption of innocence and burden of proof beyond a reasonable doubt¹⁹⁵ seems similarly ill-conceived. California courts have rationalized such treatment by distinguishing between "the impact of the defendant's *silence* [and] the impact of the prosecutor's *comment* upon that silence."¹⁹⁶ Thus, when a defendant presents no exculpatory defense and relies on the privilege, reviewing courts have attributed any prejudice to the fact of his refusal to testify rather than to the impact of proscribed comment and its emphasis on that refusal. Yet an accused's reliance on prosecution inconsistencies or gaps in circumstantial evidence linking him to a crime is a constitutionally privileged defense.¹⁹⁷ When a defendant stands on the presumption of innocence alone, comment on his failure to testify may easily fill an "evidentiary gap" — the crucial gap between a juror's reasonable doubt of guilt and his satisfaction that

¹⁹²70 Cal. 2d 711, 452 P.2d 607, 76 Cal. Rptr. 391, *cert. denied*, 397 U.S. 944 (1969).

¹⁹³*Id.* at 753, 452 P.2d at 633, 76 Cal. Rptr. at 417 (dissenting opinion).

¹⁹⁴*Id.*

¹⁹⁵*See, e.g.*, *People v. Giovannini*, 260 Cal. App. 2d 597, 605, 67 Cal. Rptr. 303, 309 (1st Dist. 1968), *citing* language discussed in text accompanying note 196 *infra*. There the evidence indicated that at the time of the crime only the defendant and the victim were present at the bar where the victim was murdered. The defendant relied solely on the presumption of innocence, offering no evidence in his defense. In finding the *Griffin* comment harmless, the court observed that the jury, entirely apart from any impropriety of the prosecution, "could hardly have avoided taking . . . the prosecution's reconstruction of the murder [as] correct."

¹⁹⁶*People v. Modesto*, 66 Cal. 2d 695, 712, 427 P.2d 788, 800, 59 Cal. Rptr. 124, 136, *cert. denied*, 389 U.S. 1009 (1967), *disapproved on other grounds in* *Maine v. Superior Court*, 68 Cal. 2d 375, 383 n.8, 438 P.2d 372, 377 n.8, 66 Cal. Rptr. 724, 729 n.8 (1968) (emphasis in original). Language in *Griffin* intimating such a distinction, 380 U.S. at 614, is quoted in note 30 *supra*.

¹⁹⁷*See, e.g.*, *Williams v. Florida*, 399 U.S. 78, 112 (1969) (Black, J., dissenting):

The defendant, under our Constitution, . . . has an absolute, unqualified right to compel the State to . . . prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"

See also In re Winship, 397 U.S. 358 (1970).

guilt of the defendant has been demonstrated beyond a reasonable doubt.¹⁹⁸

Thus, courts should refrain from categorically treating as harmless, *Griffin* errors touching defenses which seemingly do not require the defendant's testimony. Despite neatness of logic, such a practice often allows emphasis on an accused's assertion of his constitutional privilege against self-incrimination to contribute to his conviction.

In summary, whether *Griffin* error is sufficiently prejudicial that it compels reversal hinges on California courts' evaluation of several factors affecting the severity of the error, and evidence of the defendant's guilt. Such a framework gives a court great flexibility in reviewing a *Griffin*-marred case. Serious *Griffin* violations may mandate reversal even though the quantum and nature of the evidence of the defendant's guilt is exceptionally condemning.¹⁹⁹ Yet even moderate comment on an accused's failure to testify may compel reversal if the comment strikes at a vulnerable defense in a close case.²⁰⁰

V. MERGER OF THE SEPARATE DETERMINATIONS OF *GRIFFIN* REVIEW

In reviewing challenged courtroom remarks or instructions, California courts have frequently failed to consider separately whether *Griffin* error exists and whether such error compels reversal. As an analytic shortcut, courts may dismiss *Griffin* error contentions with

¹⁹⁸ *Cf.* *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd per curiam*, 391 U.S. 470 (1968) (dissenting opinion). There Chief Justice Roger Traynor, speaking for the dissent, argued that the *Griffin* error served to make the defendant, who was effectively relying on his presumption of innocence and the requirement of proof beyond a reasonable doubt, "a witness against himself by using his silence to stifle the doubts . . . engendered by the inconsistencies in the prosecution's case." *Id.* at 86, 429 P.2d at 621-22, 60 Cal. Rptr. at 269-70.

¹⁹⁹ *E.g.*, *People v. Mendoza*, 37 Cal. App. 3d 717, 112 Cal. Rptr. 565 (2d Dist. 1974), discussed in note 161 *supra*.

²⁰⁰ *E.g.*, *People v. Williams*, 22 Cal. App. 3d 34, 99 Cal. Rptr. 103 (2d Dist. 1971) (prosecution comment held allusion to defendant's failure to testify in light of prior remark; prejudicial since "demonstrably close case").

Such a rule also permits courts to reverse convictions only with respect to one of several codefendants, *see, e.g.*, *People v. Collier*, 237 Cal. App. 2d 259, 264, 46 Cal. Rptr. 887, 890 (4th Dist. 1965), or only with respect to one count of a multiple count conviction, *see, e.g.*, *People v. Stout*, 66 Cal. 2d 184, 424 P.2d 704, 57 Cal. Rptr. 152 (1967). In reviewing a conviction for possession of and conspiracy to possess marijuana and forged checks, receiving stolen checks, and alteration of serial numbers on a firearm, the California Supreme Court in *People v. Stout*, *supra*, found that with respect to all the counts except altering the firearm, evidence of defendants' guilt was "overwhelming." Yet, since the alteration charge required the jury's drawing further inferences, prosecution remarks on the defendants' failure to take the stand and explain away their possession of the altered gun substantially aided the jurors in reaching their verdict. The court therefore held the *Griffin* comment prejudicial as to that single count alone. *Id.* at 199-200, 424 P.2d at 714-15, 57 Cal. Rptr. at 162-63.

the finding that the "error, if any, was harmless."²⁰¹ Courts also dismiss proscribed comment as too tenuous to violate the privilege, rather than basing their affirmance on harmless error grounds.²⁰² Marking on a continuum the point at which allusions to a defendant's refusal to take the stand begin to constitute violations of *Griffin* is concededly a difficult task. And, since the severity of a particular comment is one determinant of whether such error warrants reversal, tenuous allusions to a defendant's failure to testify may often be harmless beyond a reasonable doubt. This approach of the California courts, however, abuses the accused's privilege in several respects.

First, unlike the assurance of the fourth amendment which is subject to a flexible standard of reasonableness, the self-incrimination guarantee of the fifth amendment is absolute in its terms. The protection of such a constitutional right requires at a minimum explicit judicial recognition and disapproval of its violation. While subtle allusions to a defendant's failure to testify may be harmless in some circumstances, a vague dismissal by the courts without condemnation as constitutional error only serves to implicitly sanction such misconduct.

²⁰¹See, e.g., *People v. Hill*, 66 Cal. 2d 536, 562, 426 P.2d 908, 924, 58 Cal. Rptr. 340, 356 (1967); *People v. Cooper*, 10 Cal. App. 3d 96, 106, 88 Cal. Rptr. 919, 925 (2d Dist. 1970); *People v. Burns*, 270 Cal. App. 2d 238, 249, 75 Cal. Rptr. 688, 694-95 (1st Dist. 1969); *People v. Grant*, 268 Cal. App. 2d 470, 475, 74 Cal. Rptr. 111, 114-15 (2d Dist. 1968), *cert. denied*, 396 U.S. 858 (1969); *People v. Hernandez*, 264 Cal. App. 2d 206, 212, 70 Cal. Rptr. 330, 334 (2d Dist. 1968); *People v. Gomez*, 252 Cal. App. 2d 844, 856, 60 Cal. Rptr. 881, 888 (5th Dist. 1967), *overruled on other grounds in* *People v. Tribble*, 4 Cal. 3d 826, 832, 484 P.2d 589, 593, 94 Cal. Rptr. 613, 617 (1971) (comment by trial judge that the defendant "could have taken the stand" might well have been omitted, but considered in context not violative of *Griffin* or if error, not prejudicial).

²⁰²See, e.g., *People v. Roberts*, 51 Cal. App. 3d 125, 123 Cal. Rptr. 893 (3d Dist. 1975). In *Roberts*, the defendant and the victim had been drinking at the plant where the defendant was employed as a security guard. A single witness testified that the shooting occurred as the result of the defendant's irritation at the victim's incessant talking. At the defendant's trial for murder, the prosecution argument met defense challenges to the credibility of the witness. On review, the appellate court rejected defense contentions of overstepping by prosecution remarks that "There is [sic] not two or four or five witnesses saying it's this way, it's this way and it's that way." *Id.* at 136, 123 Cal. Rptr. at 899. The defendant's contention that such remarks were an indirect allusion to the defendant's not taking the stand was rejected as "resourceful but rather fanciful analysis." The reference to the defendant's silence was "too tenuous and tangential to fall within the ambit of *Griffin*," *id.* at 136-37, 123 Cal. Rptr. at 900, despite the fact that the jury could only infer that Roberts was the only one of two, four, or five witnesses who could get up on the stand and say that things were another way.

While the quantum and direct nature of the evidence against the defendant and the posture of the defense (diminished capacity due to voluntary intoxication) may have rendered any such allusions harmless beyond a reasonable doubt, the reviewing court indiscriminately rested its disposition of the *Griffin* error claim on the broader underpinning. It flatly held: "There was no error in the prosecutor's argument to the jury." *Id.* at 137, 123 Cal. Rptr. at 901.

Second, failure to isolate even harmless *Griffin* error allows increasingly greater infringements on the privilege. The scope of innuendo permitted under *Griffin* inevitably broadens. As the Supreme Court observed in striking down another practice as violative of the fifth amendment privilege:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations. . . .²⁰³

Third, the failure to consider separately whether *Griffin* error exists and whether such error compels reversal allows reviewing courts to gloss over circumstances and factors peculiarly relevant to each determination. If courts separate these determinations, challenged comments may not seem so innocuous within their specific context. For example, several cases recognize the cumulative prejudicial effect of *Griffin* errors, or of *Griffin* error together with other trial improprieties.²⁰⁴ In conjunction, such errors may contribute to conviction, even though considered individually, they are harmless. If such "harmless" errors are not recognized as error, their combined prejudicial effect is not accurately evaluated or remedied.

Fourth, because the persuasiveness and nature of the evidence against the defendant constitutes a second element of prejudice, even the most restrained innuendo may have reversible impact.²⁰⁵ Accordingly, remarks harmless in one case may sway a jury in another case.

Predictability and fairness, as well as the requirements of the Constitution, therefore demand that courts carefully analyze challenged remarks and recognize comment only tangentially violating the privilege as *Griffin* error, even if they find such error harmless beyond a reasonable doubt. Only then will a defendant be apprised of the true scope of his freedom from adverse inferences in exercising his privilege to refuse to testify. Only then also will prosecutors be apprised of the propriety of conduct found "not error" by some courts, "error but harmless" by others and "error, if any, harmless" by still others.

²⁰³*Boyd v. United States*, 116 U.S. 616, 635 (1885). The Court held that the federal statute requiring forfeiture of imported goods for the failure to produce invoices, violated the fifth and fourth amendments.

²⁰⁴*See, e.g., People v. Williams*, 22 Cal. App. 3d 34, 40, 99 Cal. Rptr. 103, 108 (2d Dist. 1971) ("Any one of the [*Griffin*] defects, as a sole irregularity in the face of a strong prosecution case probably not . . . prejudicial" but such "near improprieties . . . taken together spell prejudice"); *People v. Mendoza*, 37 Cal. App. 3d 717, 727, 112 Cal. Rptr. 565, 571 (2d Dist. 1974) (reviewing court "not persuaded beyond a reasonable doubt that the cumulative impact of ['thinly veiled' *Griffin* and other unrelated errors] had no effect in bringing about the guilty verdict").

²⁰⁵*See* note 200 *supra* and accompanying text.

VI. CONCLUSION

Since the accused's privilege may impede the search for the truth, it is sometimes accorded hostile treatment by legislatures and courts. Yet, the privilege against compulsory self-incrimination is an essential element of the protection offered by the Constitution to the individual in our society. Because "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them,"²⁰⁶ the United States Supreme Court in *Griffin v. California* held comment on an accused's decision not to testify a violation of the fifth amendment privilege.

California law has fairly responded to the spirit of *Griffin* by condemning new and increasingly subtle comment which infringes on the accused's privilege. Yet, as this article has suggested, the rationale of *Griffin* mandates several extensions of California case law respecting what remarks constitute impermissible comment on a defendant's failure to take the stand.

Although "[t]he law encompasses a tolerance to harmless errors adrift in an imperfect world,"²⁰⁷ careful scrutiny of the prejudicial impact of any error of constitutional dimension is essential to give meaning to the Constitution's specific guarantee against self-incrimination. This article has outlined several problems with California courts' analysis of what makes *Griffin* error harmless. Yet, on the whole, that analysis is fairly conceived, striking a balance between the state's interest in prosecuting crime and the constitutional concern for preserving the dignity of the individual.

Thus, California courts have constructed a flexible and sophisticated framework for reviewing alleged *Griffin* error. The failure of some California courts, however, to consider separately whether courtroom comment violates *Griffin* and whether any such error compels reversal, undermines that framework and frustrates the goals of *Griffin*. Distinguishing these determinations will truly safeguard "the right of a person . . . to suffer no penalty for [his] silence."²⁰⁸

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²⁰⁶ *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring).

²⁰⁷ R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* ix (1970).

²⁰⁸ *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964).

