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"We reserve the ultimate punishment—the death penalty—for the worst of the worst. And folks, he still sits right in front of you without a shred of remorse."  

"I looked for something in him that might have shown remorse. And I never saw it the whole time."  

INTRODUCTION

In capital cases, a defendant’s silence is deadly. Silence is interpreted as, and argued as, representing remorselessness, a term used to indicate not merely an absence of feeling but coldheartedness or evil. Yet silence by its nature is
ambiguous; indeed, the Supreme Court has described it as “insolubly” so.\(^4\) However, the utilization of silence comes at an unconstitutional price: the denial of the privilege against compelled self-incrimination;\(^5\) the Due Process violation of increased punishment for persons who assert their right to trial, and subsequent right to appeal;\(^6\) and the risk of unjustified capital punishment by deterring the presentation of essential mitigation evidence.\(^7\) Finally, silence is in no way a reliable test for remorselessness, in either meaning of the phrase, and instead proves to be an invalid\(^8\) basis for the evaluative process that is supposed to lead to the quotient of death penalty calculus—“to ensure that only the most deserving of execution are put to death.”\(^9\)

The use of silence as permissible and accurate proof of remorselessness was referenced but left without explicit resolution in *Mitchell v. United States*.\(^10\) This article explores the various means by which a defendant’s silence, read as lack of remorse, is utilized in the courtroom; the devastating impact “lack of remorse” evidence or argument has on jury deliberations; the history of judicial review of these practices; and a demonstration that an erroneous standard for assessing challenges to prosecutorial comment has distorted Fifth Amendment analysis in this area. This article also examines the basis for concluding that all comments on post-arrest lack of remorse are adverse comments on silence, the constitutional and evidentiary bases for excluding such testimony and argument, and why proof of, or comment on, silence serves no valid purpose in penalty trials,\(^11\) even where one accepts as justified a sentence of capital punishment. In doing so it addresses the impact of two developments of constitutional law: the primacy of the right to present mitigation evidence in capital cases and the revolution\(^12\) occasioned by

\(^4\) United States v. Hale, 422 U.S. 171, 176 (1975); see *infra* Part VI.A.

\(^5\) See *infra* Part IV.

\(^6\) See *infra* Part V.B.

\(^7\) See *infra* Part V.D.

\(^8\) See *infra* Part VI.A. By “invalid” I am making a non-constitutional analysis. The silence referred to, a defendant’s silence at trial, or in the penalty phase (an often-brief proceeding of hours or perhaps days), is not a measure (or necessarily even reflective) of a defendant’s feelings regarding the crime, the harm to the victim, or the harm to the victim’s survivors and to society. That silence may reflect an insistence on innocence, the shock of a guilty verdict, and/or a simple lack of acceptable communicative skills. Additionally, even if a surrogate for proving a hardness of heart, that hardness of heart is temporal and usually that of a young person lacking maturity or the biological capacity to fully appreciate the consequences of his/her conduct.

\(^9\) Atkins v. Virginia, 536 U.S. 304, 319 (2002). This author does not accept this calculus, and is personally and categorically opposed to the punishment. However, given that this formulation is currently deemed constitutional, the author applies it here.

\(^10\) 526 U.S. 314 (1999). See *infra* Part IV.A.

\(^11\) The term “penalty trials” is used throughout this article because the impact of *Ring* and *Sattazahn*, discussed *infra* Part IV.C., makes such proceedings trials of fact requiring jury determinations and proof beyond a reasonable doubt.

\(^12\) The term “revolution” is used anticipatorily. Whether described as ‘fall-out’ or development, the impact of these cases is only beginning to be felt and envisioned. See, e.g., U.S. v. Booker, 125 S. Ct. 738 (2005) (applying Sixth Amendment jury trial to Sentencing Guidelines determinations and rendering Guidelines advisory); compare, Schriro v. Summerlin, 124 S. Ct. 2519, 2522 (2004) (finding, S-4, that *Ring* is not retroactive as applied to death sentences imposed by a judge rather than a jury); Rachel W. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of*
Apprendi v. New Jersey,13 Ring v. Arizona,14 and Sattazahn v. Pennsylvania.15
The conclusions are, first, that courts erroneously admit comments on lack of remorse without recognizing the impingement upon Fifth Amendment privilege and the reliability command of capital case jurisprudence; second, that decisional law precludes such comment for both the non-testifying defendant and the defendant who testifies to mitigation evidence at a penalty hearing; and, finally, that silence (even if constitutionally admissible), has no probative value in establishing a character trait or condition of remorselessness.

I. REMORSELESSNESS—ITS VARIED APPEARANCE IN THE COURTROOM

There are a number of scenarios through which a defendant’s silence is equated with remorselessness:

1) The defendant offers no testimony, and this silence is argued as proof of remorselessness in the penalty phase closing.
2) The defendant does not testify, but relatives or other witnesses testify on his/her behalf and are asked whether the defendant ever expressed sorrow for his conduct and the resulting harm.
3) The defendant does not testify, but relatives or others testify on his/her behalf and, in closing argument, the prosecutor notes that none of the witnesses mentioned that the defendant ever said he was (or acted) sorry, which stands as proof of remorselessness.
4) The defendant testifies as to mitigation16 and makes no statement regarding culpability or remorse, and the prosecutor argues in closing that the failure to have made such a statement is proof of remorselessness and a basis for imposing the death penalty.17

II. THE SIGNIFICANCE AND IMPACT OF LACK OF REMORSE

Remorse is at the core of many religions’ doctrines of justice and righteousness.18 Apparently concurrent with this view is the perception that

16. The term “mitigation” and its constitutional significance are detailed infra Part V.D.
17. A fifth scenario, technically conceivable, is where the defendant chooses to testify regarding mitigating evidence and the prosecutor directly cross-examines him/her regarding culpability and the lack of remorse. This scenario led to the holding in McGautha v. California, 402 U.S. 183 (1971), discussed infra Part V.B. To this author’s knowledge, this practice rarely, if ever, occurs today.
18. Numerous texts link the importance of expressions of remorse with religious tenets, and as an essential component of punishment. In Punishment as Atonement, Stephen P. Garvey notes the religious roots of atonement and suggests that punishment is “a form of secular penance aimed at the expiation of the wrongdoer’s guilt and his reconciliation with the victim and the community.” 46 UCLA L. Rev 1801, 1802-03 (1999). See Harvey Cox, Repentance and Forgiveness: A Christian Perspective, in
remorselessness causes a second harm, namely one beyond that of the crime itself; often "[t]hose who are not remorseful are viewed as if they offended the community twice: once in whatever offense they have committed and, second, in their refusal to acknowledge that mores were violated."19 While polling data20 and prosecutorial arguments seeking death21 confirm the importance of religion in the lives of many Americans, the significance of remorse, or its corresponding absence, is easily extrapolated.

However, one need not rely on general perceptions to demonstrate the importance of remorse or its absence as a sentencing factor in capital cases. Beyond an intuitive understanding that perceptions of the remorse-related attitude of the defendant are often determinative or strongly influential on punishment, a comprehensive study of capital case jurors22 establishes the significance of both an expression of remorse and the absence of such feeling. The former is strongly supportive of a sentence less than death and the latter weighs significantly in favoring the ultimate punishment.

Scott Sundby’s authoritative review of data from studies of capital juries in California compellingly establishes these propositions.23 Sundby used data from detailed post-verdict interviews with jurors from thirty-seven sentencing proceedings in which prosecutors, after a trial conviction of murder, sought the death penalty.24 Of those, nineteen defendants received the sentence of death, seventeen received a sentence of life without parole, and one proceeding resulted in a hung jury.25

Sundby’s findings include:

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19. Amitai Etzioni, Introduction to Repentance, in REPTONANCE: A COMPARATIVE PERSPECTIVE 1, 9, supra note 19.
20. The data from national surveys conducted in 2002 and 2003 showed 69% of registered voters believe that religion plays too small a role in public life; 92% believe in God; 68% support religious monuments or symbols being placed in public buildings; 46% describe themselves as evangelical or "born-again"; and 59% believe that religion can resolve "all or most of today's problems." Polling Reports on Religion, available at http://www.pollingreport.com/religion.htm (last visited Sep. 24, 2004).
21. See John H. Blume & Sheri Lynn Johnson, Don't Take His Eyes, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases, 9 WM. & MARY BILL RTS. J. 61, passim (2000) (providing instances where prosecutors have invoked religious principles to support the death penalty and an analyzing the Constitutional problems such arguments raise).
24. Id.
25. Id. at 1560.
1) Jurors identified the perceived degree of the defendant's remorse as one of the most frequently discussed issues in the penalty phase deliberations;\(^{26}\)

2) Sixty-nine percent of jurors who voted for a sentence of death cited the lack of remorse as a factor leading to their vote to impose the death penalty;\(^{27}\)

3) Within the sixty-nine percent, many deemed this the "most compelling reason" for their vote in favor of a death sentence;\(^{28}\)

4) The concern with remorselessness was pervasive - across the 37 death cases studied, in every case at least one juror justified the vote for a death sentence on the perceived lack of remorse. Many of those jurors cited it as the most compelling reason for their decision;\(^{29}\)

5) Most often, the conclusion of remorselessness derived from the defendant's silence, or lack of expressiveness, during the trial.\(^{30}\)

6) The expectation of an expression of remorse was substantial and prominent - and the failure to 'hear' or 'see' such expressions strongly supported the vote for death.\(^{31}\)

7) A defendant who testified to, or otherwise presented, a complete innocence/lack of responsibility defense was most likely to be deemed remorseless.\(^{32}\)

These conclusions are not limited to the California study. A similar study of death penalty jurors in South Carolina concluded that jurors' belief about a defendant's lack of remorse correlates with a decision to vote for the death penalty, although that decision is also impacted substantially by the perceived viciousness of the particular murder charged in the case.\(^{33}\) The authors of the study based on South Carolina jurors concluded, in a subsequent paper, that "[a]ll else being equal, a remorseful defendant is more apt to receive a life sentence than is a defendant who shows no remorse."

There are, unquestionably, multiple behaviors other than silence at guilt-innocence or penalty trials from which jurors might infer the lack of remorse: the viciousness inherent in the crime's commission; the degree of planning involved; and/or affirmative conduct such as braggadocio or laughter during or after the crime's commission, during arrest or interrogation, or at trial. Nonetheless,

\(^{26}\) Sundby, supra note 23, at 1560.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id.

\(^{30}\) Id. at 1563-64.

\(^{31}\) Id. at 1564.

\(^{32}\) Sundby, supra note 23, at 1576-77.


\(^{34}\) Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty, 30 J. LEGAL STUD. 277, 289 (2001).
whatever its source, and however counter-intuitive to conclude a lack of remorse post-crime based upon acts prior to or during its commission, remorselessness figures prominently in the calculus of death.

III. REMORSELESSNESS AND SILENCE—JUDICIAL APPROVAL, QUALIFICATION AND REJECTION

Judicial response to prosecutorial argument addressing the lack of remorse is varied, depending on the context that gave rise to the argument and the particular jurisdiction's sensitivity to, or concern with, Fifth Amendment and reliability issues. It is also an area of imprecision—courts often make broad pronouncements that a lack of remorse is relevant without distinguishing among words or behavior at the time of the crime, post-incident, and in court, and without identifying the boundaries of permissible proof of lack of remorse. Neat grouping is not possible. Nonetheless, for this article the decisions are analyzed by category.

A. Lack of Remorse as Aggravating Factor

Many jurisdictions have accepted that evidence of lack of remorse may stand as an aggravating factor, statutory or informal, to be weighed in favor of the death penalty. This position draws support from the language of Zant v. Stephens.

35. In a rare contrast, Florida has explicitly rejected lack of remorse as a permissible aggravating factor. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). In Pope, the Supreme Court of Florida stated that "henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Id.

36. State v. Aragon, 690 P.2d 293, 302-03 (Id. 1984) (noting that evidence of defendant's "utter lack of remorse" is relevant to determining whether the defendant "poses a continuing threat to society"); State v. Langford, 813 P.2d 936, 949 (Mont. 1991) (stating that "while lack of remorse is not statutorily enumerated as an aggravating circumstance, it still relates to the propriety of the death sentence"); Cudjo v. State, 925 P.2d 895, 902 (Okla. Crim. App. 1996) (noting that a "defendant's... lack of remorse" is relevant to determining the statutory aggravating circumstance of being a continuing threat to society); State v. Young, 853 P.2d 327, 353 (Utah 1993) (holding that "a jury may legitimately consider a defendant's character, future dangerousness, lack of remorse, and retribution in the penalty phase hearing"); Thomas v. Commonwealth, 419 S.E. 2d 606, 619 (Va. 1992) (finding lack of remorse admissible to prove dangerousness or vileness).

37. 462 U.S. 862, 885 n.22 (1983) (finding that "[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation") (quoting Fair v. State, 268 S.E.2d 316, 321 (Ga. 1980). Working back from Zant, there is little traceable historical antecedent in twentieth century jurisprudence for reliance on lack of remorse evidence at sentencing. At the same time, beginning in the late 1960s, courts began to grapple with the impermissibility of enhancing sentences for defendants who maintain their innocence. See State v. Kamana'o, 82 P.3d 401, 408-09 (Haw. 2003) (collecting cases back to 1968). Even there, however, some courts maintained a distinction between failure to admit guilt and remorselessness. See, e.g., State v. Fuerst, 512 N.W.2d 243, 247 (Wisc. App. 1984) (stating that "[a] court is prohibited from imposing a harsher sentence solely because the defendant refused to admit his guilt. However... a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence.").
approving "lawful evidence . . . [of] lack of remorse . . . ." Yet the decisions make no attempt to decide the appropriate method of proof for this aggravating factor and give no consideration to the potential Fifth Amendment problems. Indeed, these general holdings often involve time-of-crime lack of remorse conduct.

In a particularly detailed decision, a federal district court rejected generic lack-of-remorse evidence as appropriate proof of aggravation, but admitted a specific non-remorseful act as evidence supportive of the claim of future dangerousness. This parsing elucidates the problems attendant upon use of lack of remorse testimony, both in terms of reliability and its potential to encroach on the privilege against self-incrimination:

The government’s third proposed nonstatutory aggravating factor is DAVIS’ alleged lack of remorse for the offense. Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don’t necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt. To allow the government to highlight an offender’s “lack of remorse” undermines those safeguards. Without passing on whether lack of remorse is per se an inappropriate independent factor to consider, the court finds it inappropriate in this case.

38. Zant, 462 U.S. at 885 n.22 (quoting Fair v. State, 268 S.E.2d 316, 321 (Ga. 1980)).
39. See, e.g., Ellis v. State, 867 P.2d 1289 (Okla. Crim. App., 1992) (noting that a “defendant’s lack of remorse” is relevant to determining the statutory aggravating circumstance of being a continuing threat to society). The State also presented evidence that appellant showed no remorse for the killings, that he had acted calmly and coolly in the commission of each crime, and that appellant said he had not killed all of the people he had meant to. Id. at 1302. After committing the murders, he called his place of employment and asked them, “[h]ow did you like that trick or treat I just gave you?” Id. He also told his sister that he had been there taking care of “business.” Id. Other testimony showed that appellant had threatened to “take some metal to some heads,” and had struck fellow employees with fists and boards without any apparent provocation. Id. He had physically assaulted his fiancée and a former girlfriend when problems in the relationships arose. Id. The court found that all of this evidence supported the jury’s finding of a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. Ellis, 867 P.2d at 1302.
40. See United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996) (dealing with the scope of aggravating factors in the penalty phase of a capital case and the admissible evidence to support such factors).
41. Id. The Davis court did approve of the use of remorselessness as a means of proving future dangerousness, with some restrictions:

While the government may not assert “lack of remorse” as an independent nonstatutory aggravating factor, it may argue [defendant’s] alleged exultation as information probative of [his] future dangerousness, the second nonstatutory factor. . . The government is cautioned however to be careful in its argument since this issue does tread so closely to constitutional protections.

Id. at 946. The exultation occurred upon learning the victim had been killed. As the district court noted, there was no proof “of continuing glee, or boastfulness, or other affirmative words or conduct that would indicate a pervading and continuing lack of remorse.” Id.
B. Lack of Remorse as an Appropriate Sentencing Factor

Some courts generically endorse the lack of remorse as a valid sentencing factor without explaining whether its use is appropriate as an aggravating factor or in response to evidence of mitigation.42 Again, these decisions make no effort to decide the appropriate method of proof for this factor and give no consideration to the potential Fifth Amendment problems.43

C. Lack of Remorse Admissible to Rebut Mitigation Evidence

Courts admitting lack of remorse evidence as rebuttal to defense mitigation evidence do so where the lack of remorse evidence rebuts a specific claim of remorsefulness44 or a defendant’s own penalty-phase testimony seeking leniency, even where the testimony does not claim remorsefulness.45 Here too these decisions make no attempt to decide the appropriate method of proof for this rebuttal factor and give no consideration to the potential Fifth Amendment and Due Process46 problems. Indeed, the cases are silent on what criteria are used to support the contention of lack of remorse—their language does not reveal whether the defendant made an affirmative expression of remorselessness to a psychologist or whether the expert concluded that from silence on that subject matter during a psychological interview.47

42. See People v. Erickson, 513 N.E.2d 367, 380 (Ill. 1987) (holding that “[a] defendant’s [lack of] remorse is a proper subject for consideration at sentencing”) (internal quotations omitted); State v. Hamilton, 681 So. 2d 1217, 1225 (La. 1996) (opining that a “[l]ack of remorse is relevant to the character and propensities of the defendant”) (internal quotations omitted); Bruce v. State, 616 A.2d 392, 410 (Md. 1992) (stating that “[t]he trial judge certainly could have found the issue of lack of remorse relevant to the sentencing’’); Commonwealth v. Chester, 587 A.2d 1367, 1378 (Pa. 1991) (commenting that the statement “[t]hey have not shown one drop of remorse for what they have done, not one[,] [e]ven now . . . .” merely summarized the evidence presented at trial).

43. See, e.g., Bruce, 616 A.2d at 410 (noting that the lack of remorse evidence at issue came from comments made by the defendant after committing the crimes, and not from evidence or silence at the penalty hearing or trial).

44. Walton v. State, 547 So.2d 622, 624-25 (Fla. 1989) (using witness testimony that “Walton never expressed any remorse for his actions” to rebut evidence that Walton had been remorseful); State v. Thompson, 768 S.W.2d 239, 244, 252 (Tenn. 1989) (rebutting testimony by defense’s mental health expert that Thompson seemed remorseful with prosecution’s expert’s report that Thompson “was not remorseful and showed little or no emotion about the crime”).

45. State v. Lundgren, 653 N.E.2d 304, 323 (Ohio 1995) (holding that where defendant testified and ‘justified’ the killing, lack of remorse argument appropriate to assess the weight of the defense mitigation evidence); State v. Lord, 822 P.2d 177, 221 (Wash. 1991) (finding that after defendant testified during penalty phase and denied culpability, lack of remorse was relevant to determining whether the defendant deserved leniency).


47. See Thompson, 768 S.W.2d at 244, 252 (approving admission of government psychological report that defendant “was not remorseful and showed little or no emotion about the crime” without explaining what questions were posed during the interview or what criteria were utilized to reach this conclusion). If the expert is relying on silence, further explication is needed—is it silence in the failure to volunteer information about remorsefulness, or silence when confronted with a question regarding the offense or its impact?
D. Lack of Remorse Evidence/Argument—Not a Comment On Silence

Some courts explicitly endorse the principle that use of a defendant’s silence at penalty trial proceedings is unconstitutional while finding particular comments detailing a lack of remorse as not directed toward, or implicating, the defendant’s silence. On the first point, the California Supreme Court explained that in a penalty trial, “the prosecutor may not comment on defendant’s own failure to take the stand as evidence of his lack of remorse, for such comments are fundamentally unfair, given defendant’s constitutional right to remain silent.”

The problem with this formulation, first, is that it treats comment on silence at trial as the only impermissible violation of Griffin v. California when comment on post-arrest silence is equally forbidden. This refusal to include all post-arrest silence is particularly problematic, as in some circumstances a defendant is willing to plead guilty in exchange for a sentence less than death but that offer has been rejected. The defendant’s continued silence is compelled by the prosecution’s unwillingness to accept a plea, because any attempt to express remorse will be seized upon as an admission and used as a tool to secure a conviction and a death sentence. This Hobson’s choice has been ignored in the decisional law.

Beyond this improper limitation of Griffin is the tendency of courts to parse words and accept language as not commenting on silence when the prosecutor’s argument clearly suggests that the defendant had an obligation to express remorse and, by failing to do so, is therefore guilty of the death penalty. Comments deemed permissible, and not violative of the privilege, include the following:

1) In the case Bates v. Lee, the prosecutor’s closing statement

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48. People v. Ervin, 900 P.2d 506, 537 (Cal. 2000). Cf., State v. Johnson, 360 S.E.2d 317, 319 (S.C. 1987) (holding that a reference made to the defendant’s apparent lack of remorse was error). Where the defendant testified to a lack of memory regarding the crime and the prosecution then argued the defendant’s failure to apologize for the crime’s commission, the South Carolina Court found this to be a denial of the privilege against self-incrimination:

[T]he solicitor’s improper reference to appellant’s lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof. It would be an irreconcilable equivocation for the accused to plead not guilty, present a defense, and simultaneously express remorse for acts he denied committing. Under these circumstances, an apology would have violated appellant’s Fifth Amendment right not to incriminate himself as well as his Sixth Amendment right to present a defense. Comments by the prosecution upon an accused’s failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent.

Id.

49. 380 U.S. 609 (1965). Griffin is analyzed in depth infra, Part IV.A.

50. Doyle v. Ohio, 426 U.S. 610, 611 (1976) (forbidding comment on post-arrest, post-Miranda silence); see also Fletcher v. Weir, 455 U.S. 603, 606 (1982) (limiting use of post-arrest silence to impeachment of a testifying defendant) and Miranda v. Arizona, 384 U.S. 436, 467-68 (1966) (establishing the procedure by which an arestee is advised of his or her Fifth Amendment rights). Doyle also contained a challenge to prosecution questions as to why the defendant “had not told the exculpatory story at the preliminary hearing or any other time prior to the trials.” 426 U.S. at 616, n.6. The Court found it unnecessary to reach this issue, but noted that “[t]hese averments of error present different considerations from those implicated by cross-examining petitioners as defendants as to their silence after receiving Miranda warnings at the time of arrest.” Id.

51. 308 F.3d 411, 421 (4th Cir. 2003).
included remarks such as:

Have you heard any evidence at all that the Defendant is sorry for what he did? Think about that for a minute. Any evidence at all that he's sorry? . . . He was bragging about. . . bragging about throwing this body in the river. Bragging. Is he sorry?

. . . .

When he said to Hal, “It doesn’t bother me. I[t] doesn’t bother me,” was he sorry. When he talked to Gary Shaver, “Chill out. Don’t worry about it. I don’t.”

. . . .

You saw three women get on the stand and cry. You saw [the victim’s mother], and briefly . . . she lost her composure, and she cried. Did the Defendant shed any tears as she cried? Anybody look? Did you see any show of emotion of him as she cried for the loss of her son. [The defendant’s] mother, his own mother got on the stand and cried. Any tears over there? Did you see any? [The defendant’s] sister, who’s done so well. She cried for her brother. Did he? Did he cry for what he’d done to her? For what he’d done to Charlie?52

2) In Ervin, the prosecutor argued the defendant’s “total lack of remorse” as “another reason why factors in aggravation completely overwhelm any mitigation[.]” and that he was “still waiting to hear” any of defendant’s “witnesses say he’s truly sorry.”53

3) In a case54 where the defendant allocuted55 at the penalty trial, and expressed both his difficulty in accepting the guilty verdict as well as his concern that the jury had not properly weighed the evidence,56 the prosecutor responded in closing argument “[i]s that all he can offer us . . . Did he express remorse? Did he explain his version of what happened that night? Did he ask for mercy? Did he ever take responsibility at all for his crimes? Obviously he did none of those things.”57

52. Id. at 421 (holding that this was a comment on the “demeanor of the defendant” in the courtroom, and not on the failure to testify).

53. Ervin, 990 P.2d at 537 (holding that the “prosecutor’s comments regarding defendant’s lack of remorse were unobjectionable, falling short of characterizing defendant’s attitude as an aggravating factor, and avoiding comment on defendant’s own silence”); see also, People v. Crittenden, 885 P.2d 887, 924-25 (Cal. 1994) (asking defendant’s sister whether defendant expressed remorse in any of the letters written to her pretrial “cannot fairly be interpreted to refer to defendant’s failure to testify”).


55. The practice of allocution, accepted in some death penalty jurisdictions, permits the defendant to make a sentencing statement to the jury without cross-examination. See generally, Caren Myers, Encouraging Allocation at Capital Sentencing: A Proposal for Use Immunity, 97 COLUM. L. REV. 787, 788, 806 n.105 (1997).

56. Frye, 959 P.2d at 201.

57. Id. at 255.
While these comments have been accepted by courts that claim to recognize the impermissibility of directly using a defendant’s silence at trial to imply guilt, the Pennsylvania Supreme Court has repeatedly concluded that it is permissible and held that comments on lack of remorse require no Fifth Amendment analysis. That Court has approved a prosecution closing which asked jurors whether they heard “one ounce of remorse” from the defendant by way of mitigation and subsequently labeled him a “murderer,” “torturer” and “beater of children” who is “remorseless [and] concernless.” It is only recently that this Court has acknowledged the applicability of the Fifth Amendment to such comments.

Accepting that the Fifth Amendment has clear and strong application to penalty proceedings, the analysis of whether comments on lack of remorse are indeed comments on silence is rendered problematic by the test nationally utilized for determining when argument does in fact encroach on the privilege against self-incrimination. Courts approving such prosecutorial comment reach that conclusion after applying a restrictive test: whether “the language used [is] manifestly intended to be, or . . . [is] of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.”

58. See Commonwealth v. Lester, 722 A.2d 997, 1009 (Pa. 1998) (approving such comments because “the sentencing phase of trial has a different purpose than the guilt determination phase, and [the] privilege against self-incrimination and the presumption of innocence have no direct application to the latter phase . . .”); see also, Commonwealth v. Ogrod, 839 A.2d 294, 339 (Pa. 2003) (declaring that where defendant testifies to background mitigation evidence and a plea for life imprisonment, prosecutor may respond by arguing that he showed no remorse).

59. Lester, 722 A.2d at 1009. Prior to Ogrod, the Pennsylvania Supreme Courts held that the Fifth Amendment bars use of post-arrest silence to impeach a testifying defendant at a capital sentencing trial. Commonwealth v. Freeman, 827 A.2d 385, 410 (Pa. 2003) (“Notwithstanding the line of authority from this Court relied upon by the Commonwealth, it appears that the United States Supreme Court—the ultimate authority on Fifth Amendment questions—has indicated that the constitutional privilege does apply to the penalty phase of capital trials.”).

60. Commonwealth v. Robinson, 864 A.2d 460, 519 (Pa. 2004) (finding violative of the Fifth Amendment, but harmless error, a prosecution penalty trial closing that the non-testifying defendant, “sits there, ladies and gentlemen, we have not heard any remorse. We have not heard any calling for the victims. He sits there, to some degree, like a sphinx and you have to decide whether to impose life or death in the particular.”). At best, Pennsylvania’s treatment of prosecution use of silence and lack of remorse can be described as inconsistent if slowly moving toward recognition of the Fifth Amendment implications of such comments.

61. See infra Part IV.A. The Supreme Court made clear in Mitchell v. United States, 526 U.S. 314, (1999), that the Fifth Amendment privilege applies at sentencing, and thus must apply at a penalty hearing, which is a sentencing trial. Id. at 327. “The Fifth Amendment by its terms prevents a person from being ‘compelled in any criminal case to be a witness against himself.’ To maintain that sentencing proceedings are not part of ‘any criminal case’ is contrary to the law and to common sense.” Id. (internal citations omitted).

62. United States v. Roberts, 119 F.3d 1006, 1015 (1st Cir. 1997); see also United States v. Lampton, 158 F.3d 251, 260 (5th Cir. 1998) (stating that “[t]he Fifth Amendment prohibits a trial judge, a prosecutor, or a witness from commenting upon a defendant’s failure to testify in a criminal trial”); United States v. Calderon, 127 F.3d 1314, 1338 (11th Cir. 1997) (noting the standard for determining whether a prosecutor has made an impermissible comment on appellant’s right not to testify is whether or not the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify); United States v. Francis, 82 F.3d 77, 78 (4th Cir. 1996) (“The right of a defendant in a criminal trial ‘to remain silent unless he
approach, the Fourth Circuit found no Fifth Amendment implication to arguments such as “[h]ave you heard any evidence at all that the Defendant is sorry for what he did? Think about that for a minute. Any evidence at all that he’s sorry?” and “[the defendant’s] mother, his own mother got on the stand and cried. Any tears over there? Did you see any? [The defendant’s] sister, who’s done so well. She cried for her brother. Did he? Did he cry for what he’d done to her? For what he’d done to Charlie?”

This standard is an erroneous one, as shown in Part IV.B, infra.

E. Lesko and The Penalty-Trial Testifying Defendant

While in many instances the defendant will remain silent at both guilt-innocence and penalty trials, in some circumstances the defendant will speak, either as a witness to mitigating circumstances or in allocution. Where the defendant testifies as to mitigation matters, such as an upbringing in a home with abusive parents, a chronic alcohol dependency, or a religious commitment entered into in

chooses to speak in the unfettered exercise of his own will’ is guaranteed by the Fifth Amendment.”); United States v. Cotnam, 88 F.3d 487, 497 (7th Cir. 1996) (“Direct comment on a defendant’s failure to testify is forbidden by the Fifth Amendment.”); United States v. Atcheson, 94 F.3d 1237, 1246 (9th Cir. 1996) (“It is well established that a prosecutor may not comment on a defendant’s failure to testify.”); United States v. Catlett, 97 F.3d 565, 573 (D.C. Cir. 1996) (noting that it is improper for the prosecutor to comment directly or indirectly on a defendant’s failure to testify); United States v. Jackson, 64 F.3d 1213, 1218 (8th Cir. 1995) (“Permitting comment upon the failure of a defendant to testify constitutes prejudicial error as to the non-testifying defendant.”); United States v. Bond, 22 F.3d 662, 669 (6th Cir. 1994) (“It is axiomatic that a defendant in a criminal trial need not testify or produce any evidence, and that a prosecutor may not comment on the absence of such.”); United States v. McIntyre, 997 F.2d 687, 707 (10th Cir. 1993) (stating that “this court established that a statement is improper if the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify”); United States v. Pitre, 960 F.2d 1112, 1124 (2d Cir. 1992) (“The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt is raised and no inference of any kind may be drawn from the fact that a defendant did not testify.”); Lesko v. Lehman, 925 F.2d 1527, 1544 (3d Cir. 1991) (holding that a prosecutor’s remarks constituted an impermissible comment on the defendant’s failure to testify on the merits).


63. Bates, 308 F.3d at 421.

64. See cases cited supra note 45.
prison, two issues arise: the permissive scope of cross-examination and the right to comment on matters the defendant does not testify to, in particular his/her role in the offense, and remorse for that involvement. Generally, a defendant does not offer such testimony without first securing a ruling in limine that precludes cross-examination beyond the scope of the testimony offered; it is where such cross-examination has been barred that the right to comment adversely on the lack of remorse has been litigated.

The leading case precluding such comment is Lesko v. Lehman. Defendant Lesko, who did not testify at trial, "presented mitigating testimony concerning his deprived childhood and family background. Lesko did not testify as to the merits of the charges against him, and he was not cross-examined by the prosecution." Responding instead in closing argument, the prosecutor told the jurors,

Good character and record. All of the character witnesses limited their testimony to a certain period of time... We heard about John Lesko up to a certain point. And I want you to consider that. John Lesko took the witness stand, and you’ve got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn’t even have the common decency to say I’m sorry for what I did. I don’t want you to put me to death, but I’m not even going to say that I’m sorry.

Overturning the death sentence, the Third Circuit reasoned, without extended analysis, that a capital defendant does not completely waive his Griffin rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him. Without the protection of Griffin, a capital defendant in the penalty phase of his trial could avoid prosecutorial comment about his failure to address the charges against him only at the price of not providing what may be his “life or death” testimony about collateral mitigating circumstances. This is too high a price to require the accused to pay for the maintenance of his Fifth Amendment privilege.

Lesko turned on a series of determinations: the applicability of the Fifth Amendment protection against compelled incrimination to the penalty trial; the susceptibility of the prosecutor’s comments to being equated with a request to draw

65. The legal bases for granting such a motion are analyzed, infra, in the sections discussing the overarching right to present mitigation evidence, § V. D., and the doctrine of scope, § V. F.
66. 925 F.2d at 1541. Lesko is labeled the “leading case” because it was the first nationally to deal with this predicament and has been cited as support for the principle of limited cross-examination of mitigation-testifying defendants.
67. Lesko, 925 F.2d at 1540.
68. 925 F.2d at 1540.
69. Id. at 1542-43.
an adverse inference from silence; and the compelling need to provide the jury with complete mitigation information.\textsuperscript{70}

The holding in \textit{Lesko} has received minimal application. Delaware, which purports to accept its rationale, has twice approved of \textit{Lesko} in principle yet upheld prosecutorial argument noting the lack of remorse for a penalty-trial testifying defendant by finding that the comments were limited and "did not touch upon the charges against [the defendant], nor his failure to testify \textit{at trial}."\textsuperscript{71}

\textbf{F. Summary}

There is no consistency, nationally, in judging the admissibility of lack-of-remorse evidence, determining whether silence equates with lack of remorse, or identifying what comments constitute a reference to the assertion of the privilege. Because of both the susceptibility of such comments to be interpreted by jurors as adverse comment on the failure to testify \textit{and admit guilt}, as well as the interest in avoiding further claims of arbitrariness in the administration of capital punishment, a uniform standard for analyzing Fifth Amendment claims is essential, particularly since recent developments in law confirm the applicability of \textit{Griffin} to penalty trials. That standard, derived from \textit{Griffin}, precludes use of lack of remorse evidence and argument.

\section{IV. The Fifth Amendment and Penalty Trials—The Non-Testifying Defendant}

\textbf{A. The Griffin Evolution}

In \textit{Griffin v. California},\textsuperscript{72} the Court established the rationale for barring prosecutorial comment on a defendant’s silence at trial. In \textit{Griffin}, the Court confronted California’s constitution, which permitted a jury to weigh the defendant’s “failure to explain or deny any fact against him,”\textsuperscript{73} even where the defendant did not testify, and/or a jury instruction\textsuperscript{74} authorizing Griffin’s jury to do

\begin{itemize}
  \item \textsuperscript{70} The \textit{Lesko} court used the facially more stringent test of whether the language “was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify” but concluded, in contrast to the cases cited above (see supra note 62), that the “interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him—indeed, to apologize for his crimes—during his penalty phase testimony, and that the jury could and should punish him for his failure to do so.” \textit{Lesko}, 925 F.2d at 1544.
  \item \textsuperscript{71} \textit{Shelton}, 744 A.2d at 502; \textit{see also} Cabrera v. State, 840 A.2d 1256, 1271 (Del. 2004) (noting that the prosecutor merely repeated the defendant’s allocution, and did not editorialize as to the lack of remorse). The highlighting of the defendant’s own words left the omission of remorse to the jury’s imagining. \textit{Id.} at 1272.
  \item \textsuperscript{72} 380 U.S. 609 (1965).
  \item \textsuperscript{73} At that time, Article I, § 13, of the California Constitution provided that “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.” \textit{Griffin}, 380 U.S. at 609, n.2 (citing CAL. CONST. art. I §13).
  \item \textsuperscript{74} The jury was instructed as follows:
    As to any evidence or facts against him which the defendant can reasonably be expected to
that when he had not testified. Deeming this a form of compelled self-incrimination, the Court explained:

[C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly . . . . 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.75

Griffin addresses only the use of trial silence against the defendant who declines to testify. Its analysis does not lend itself clearly to the question of whether pre-trial (either pre-arrest or post-arrest) silence is equally protected. The Court has not conclusively addressed this and resolved whether there is a right to remain silent pre-arrest (as opposed to a right to not be compelled to speak).76

The Court has found it easier to address use of silence as impeachment evidence, finding it permissible if the silence occurred pre-arrest77 (or post-arrest but pre-Miranda warning).78 Here the analysis makes no reference to penalizing a right (the right to remain silent pre-Miranda) but rather to the lack of a breach of a promise—the promised protection of Miranda warnings had not been denied when those warnings have yet to be administered.79 A second concern of the Court is to preclude perjurious testimony (accepting as a valid premise that the prior silence is contrary to the in-court testimony).80

As to the use of post-arrest pre-Miranda81 silence as substantive evidence of deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Griffin, 380 U.S. at 609.
75. 380 U.S. at 614 (citation omitted).
79. Id. at 606-07 ([W]e have consistently explained Doyle as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him . . . . In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand").
80. See, e.g., Jenkins, 447 U.S. at 238 (noting that once a defendant has elected to testify, the privilege against self-incrimination "cannot be construed to include the right to commit perjury").
81. The emphasis on "pre-Miranda" recognizes that many defendants never receive Miranda warnings or otherwise have an affirmative opportunity to assert their privilege against self-incrimination. Hence, a defendant may be in jail for several months or even years before trial and meet the Fletcher v. Weir criteria.
guilt, the Court has yet to speak in constitutional terms. The lower federal courts have and found it inadmissible.

Although limited in its reach by the Court’s determination that harmless error analysis applies to Griffin claims, the Court’s acceptance of comments on a defendant’s failure to testify where such comment is ‘invited’ by defense argument, the authorization of impeachment of a testifying defendant with pre-arrest silence and post-arrest, pre-Miranda warning silence, and the Court’s refusal to apply a Griffin analysis to prosecutorial comment on a testifying defendant having had the opportunity to hear all witnesses before himself testifying, the core Griffin holding remains intact and vital. The Court has yet to

82. The Court’s response to evidentiary inadmissibility of silence is addressed, infra, at Part VI A.
83. See, e.g., United States v. Moore, 104 F.3d 377, 389 (D.C. Cir. 1997) (barring government use of a defendant’s post-arrest, pre-Miranda silence as evidence of his guilt); United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000) (holding that evidence of post-arrest, pre-Miranda silence was inadmissible, but constituted harmless error in defendant’s case in light of the “overwhelming physical evidence” of his guilt). But see United States v. Hernandez, 948 F.2d 316, 324-25 (7th Cir. 1991) (holding that post-arrest, pre-Miranda silence was inconsequential and had no impact on the jury). Indeed, several Circuits preclude use of pre-arrest silence as substantive evidence of guilt, finding it a breach of the privilege against self-incrimination. See Combs v. Coyle, 205 F.3d 269, 283 (6th Cir.) (“[T]he use of a defendant’s prearrest silence as substantive evidence of guilt violates the Fifth Amendment’s privilege against self-incrimination.”); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (“The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.”); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (“We have found no cases by the United States Supreme Court holding or suggesting that a prearrest statement by a suspect during police interrogation that he is not going to confess can be used by the prosecutor in his case in chief.”); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991), cert. denied, 506 U.S. 971 (1992) (“Whatever the future impact of Jenkins may be, we have found no decision permitting the use of silence, even the silence of a suspect who has been given no Miranda warnings and is entitled to none, as part of the Government’s direct case.”). But see United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (stating that “the government may comment on a defendant’s silence when it occurs after arrest, but before Miranda warnings are given”).
84. See Chapman v. California, 386 U.S. 18, 24 (1967) (holding that “before a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt”).
85. United States v. Robinson, 485 U.S. 25, 27 (1988) (permitting the Government to comment on the availability of opportunity for the defendant to explain his conduct in response to a defense closing argument that claimed the defendant had never been allowed to explain his conduct); Lockett v. Ohio, 438 U. S. 586, 594 (1978) (noting that where defense counsel promised that defendant would testify but defendant did not, no harm occasioned when prosecutor described the evidence as unrebuted).
86. See Jenkins, 447 U.S. at 255 (holding that “the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence”).
87. See Fletcher, 455 U.S. at 607 (holding that the use of post-arrest, pre-Miranda silence by the prosecution to impeach a defendant’s testimony does not violate due process).
88. See Portuondo v. Agard, 529 U.S. 61, 67-68 (2000) (finding that prosecutor’s comments on defendant’s presence at trial and the ability to fabricate that it afforded did not violate Griffin).
rule on the specific application of Griffin to penalty trials. Two holdings approach this question, but neither explicitly resolves it.

The broad pronouncements of Estelle v. Smith\(^{90}\) appear to extend Griffin to penalty trial comment. In Estelle, the Court addressed whether Miranda warnings had to precede a state psychiatric examination of a defendant where the results might\(^{91}\) be utilized at the penalty hearing.

In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made “the deluded instrument of his own conviction,” it protects him as well from being made the “deluded instrument” of his own execution.

We can discern no basis to distinguish between the guilt and penalty phases of respondent’s capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.\(^{92}\)

The breadth of the emphasized language notwithstanding, Estelle and Griffin materially differed in their procedural posture (beyond the difference between trial and sentencing proceedings). Estelle was actually questioned, and his responses used to incriminate,\(^{93}\) while Griffin was incriminated by his silence.\(^{94}\) This distinction was eliminated when affirmative use of silence as sentencing evidence was ruled on in Mitchell v. United States.\(^{95}\)

Mitchell involved sentencing under the United States Sentencing Guidelines\(^{96}\) where the quantity of drugs involved can drastically elevate the sentence imposed.\(^{97}\) At her sentencing proceeding, Ms. Mitchell refused to testify regarding the number of sales she had participated in, instead challenging the credibility of cooperating witnesses who attributed a large number of sales to her.\(^{98}\) The District Court Judge explicitly used Mitchell’s silence as proof of the larger drug quantity, telling her “I held it against you that you didn’t come forward today and tell me that you really

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91. The examination of Smith was for the purpose of assessing competence to proceed. Estelle, 451 U.S. at 456-67. However, the examining psychiatrist was called as a witness by the prosecution at the sentencing hearing, and his testimony became significant because they were relied upon, in part, to establish the aggravating factor of future dangerousness. Id. at 459-60.
92. Id. at 462-63 (emphasis added) (citations omitted).
94. Griffin, 380 U.S. at 609-10.
97. See, e.g., Guideline 2D1.1, U.S.S.G. (increasing sentencing range based upon amount of illegal substance attributable directly, or on grounds of reasonable foreseeability, to the defendant).
98. Mitchell, 526 U.S. at 314.
only did this a couple of times . . . . I’m taking the position that you should come forward and explain your side of this issue.”

Responding, the Court first relied on Estelle to affirm the applicability of the Fifth Amendment privilege against compelled incrimination to all sentencing proceedings. The Court then went further, rejecting any use of silence to advance the Government’s case or justify an enhanced sentence:

The normal rule in a criminal case is that no negative inference from the defendant’s failure to testify is permitted. We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime . . . .

The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. 101

The Court then expressly and unequivocally made Griffin’s prohibition equally applicable to trial and sentencing proceedings:

Unlike a prison disciplinary proceeding, a sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege the same protection in the sentencing phase of “any criminal case” as that which is due in the trial phase of the same case, see Griffin, supra. 102

One could therefore conclude from Mitchell that any comment on a non-testifying defendant’s silence is prohibited at penalty hearings. However, the Court qualified its holding and declined to explicitly bar silence evidence on the issue of remorse:

Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it. 104

99. Id. at 319.

100. Id. at 325 (“Where a sentence has yet to be imposed, however, this Court has already rejected the proposition that ‘incrimination is complete once guilt has been adjudicated,’ and we reject it again today.”) (internal citation omitted).

101. Id. at 327-28, 330 (citation to Griffin omitted).

102. Id. at 328-29.

103. The discrete analysis applied to the defendant who gives partial mitigation testimony at a penalty trial is addressed, separately, infra at Part V.

This comment does not stand in isolation. Immediately preceding it is the injunction that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." Both on the basis of this controlling language, and as a result of the impact of the trilogy of Apprendi, Ring, and Sattazahn, silence may not be used as proof of remorselessness.

B. The Proper Standard for Identifying Comments on Silence

The Griffin standard is clear: it prohibits comments that "suggest" a defendant's silence is evidence of guilt. Indeed, the United States Supreme Court has treated a "prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims" as a Fifth Amendment violation.

Beyond its facial incompatibility with the Griffin "suggests" standard, the lower courts' more stringent "naturally and necessarily" test is an incomplete statement of the historic appellate standard for reviewing self-incrimination claims. Tracing the decisional law to its roots, it is clear that this test is merely only one prong of the standard of review, in effect a per se harm test. The second prong addressed comments that less explicitly adverted to the defendant's silence. The Second Circuit identified both prongs, the latter of which is now omitted without explanation:

[T]he test of improper comment is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify . . . .

It is true, however, that ambiguous language, which indirectly invites the jury's attention to the accused's failure to take the

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105. Id.
106. See infra, Part V.C.
107. See Portuondo, 529 U.S. at 69 ("Griffin prohibited comments that suggest a defendant's silence is 'evidence of guilt'"); see also Robinson, 485 U.S. at 32 ("'Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.'") (quoting Baxter v. Palmigiano, 425 U.S. 308, 319 (1976)).
109. See cases cited supra note 62.
110. For example, United States v. Pitre, 960 F.2d 1112, 1124 (2d Cir. 1992), relies on United States v. Cicale, 691 F.2d 95, 107 (2d Cir. 1982), for the "manifestly intended . . . [or] naturally and necessarily" test. Cicale, in turn, cites to United States v. Araujo, 539 F.2d 287, 291 (2d Cir. 1976) for the same test. Araujo, in turn, quotes the same test but cites as ultimate authority Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955) and United States ex rel. D'Ambrosio v. Fay, 349 F.2d 957, 961 (2d Cir. 1965). Knowles tacitly acknowledges this to be only a partial rendering of the test; D'Ambrosio makes it explicit.
111. D'Ambrosio, 349 F.2d at 961; see also, State v. Conway, 465 P.2d 722, 723 (Ore. App. 1970) ("'If the line between the permissible and the impermissible in this area is not always clear, nevertheless where the intent and the effect of the statement is ambiguous, limiting instructions may suffice to cure any harm'" (quoting U.S. v. Gatto, 299 F. Supp. 697, 703 (E.D. Pa. 1969)) (emphasis added in Conway)).
stand, will, if not cured by prompt instructions, be grounds for setting aside a subsequent conviction.\textsuperscript{112}

Accepting that the \textit{Griffin} proscription against comments on silence extends to penalty trials,\textsuperscript{113} the currently accepted impermissibly restrictive analysis of Fifth Amendment claims involving prosecutorial reference to a defendant's silence must be abandoned. Under the "suggests," "allusion" or "indirectly invites" standard set forth in \textit{D'Ambrosio}, comments on post-arrest\textsuperscript{114} lack of remorse clearly implicate the privilege against compelled self-incrimination.\textsuperscript{115}

\textbf{C. The Apprendi Revolution}

In the non-capital case of \textit{Apprendi v. New Jersey}, the Court initiated what became a revolution in capital case jurisprudence. \textit{Apprendi} involved a New Jersey statute that allowed for enhanced penalties where a "judge finds, by a preponderance of the evidence, that 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.""\textsuperscript{116} Although nominally a sentencing enhancement scheme, the Court deemed this the functional equivalent of an element of the offense, requiring a jury determination and proof beyond a reasonable doubt.\textsuperscript{117} The core holding is explicit: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."\textsuperscript{118}

\textit{Ring} and \textit{Sattazahn} take \textit{Apprendi} into the capital case landscape.\textsuperscript{119} \textit{Ring}

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\item \textsuperscript{112} \textit{D'Ambrosio}, 349 F.2d at 961. Later cases cite to \textit{D'Ambrosio} without mentioning the second prong. \textit{See}, e.g., \textit{U.S. v. Lipton}, 467 F.2d 1161, 1168 (2d Cir. 1972).
\item \textsuperscript{113} \textit{See} discussion \textit{supra} part IV.A. (regarding the clear applicability of \textit{Griffin} to penalty trials).
\item \textsuperscript{114} \textit{See supra} note 48, confirming that \textit{Griffin}'s prohibition extends to post-arrest silence, and not merely to trial silence.
\item \textsuperscript{115} In parallel contexts, the Court has used similar standards for assessing whether juries might misuse evidence or misapprehend essential Constitutional principles. In reviewing jury instructions susceptible to an unconstitutional interpretation, the Court has set as the test "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." \textit{Boye v. Cal.}, 494 U.S. 370, 380 (1990). It is difficult to identify a rationale for having that "reasonable likelihood" test apply to potentially unconstitutional jury instructions while having a more stringent "naturally and necessary" standard for prosecutorial comment on a Constitutional privilege. Each inquiry focuses on whether the average jury might be led to an unconstitutional evaluation of evidence. \textit{Cf.}, \textit{Kelly v. S.C.}, 534 U.S. 246, 253 (2002) (stating that in penalty trials if the prosecution places the defendant's future dangerousness at issue, the defendant is entitled to a jury instruction noting he would be ineligible for parole if given a life sentence; the standard for determining whether the prosecution's evidence implicates future dangerous is whether a jury "reasonably will conclude that [the defendant] presents a risk of violent behavior").
\item \textsuperscript{116} 530 U.S. at 468-69.
\item \textsuperscript{117} \textit{Id.} at 493.
\item \textsuperscript{118} \textit{Id.} at 490.
\item \textsuperscript{119} \textit{See Ring}, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."); \textit{Sattazahn}, 537 U.S. at 111 ("[I]f the existence of any fact ... increases
reconfigures capital penalty hearings into penalty trials. This is because

aggravating circumstances that make a defendant eligible for the death penalty “operate as the ‘functional equivalent of an element of a greater offense.’” That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances”: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly . . . the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.\(^{120}\)

Sattazahn affirmed application of another trial protection, that guaranteeing against being placed twice in jeopardy, to a penalty trial acquittal.\(^{121}\)

Ring and Sattazahn mandate application of Griffin and its analysis to death penalty trials. Although the Court refused to rule on whether silence could be potential proof of lack of remorse, the later cases of Apprendi, Ring, and Sattazahn lead to the conclusion that silence of the defendant cannot be used as proof by the prosecution during a penalty trial where the aggravating factor (remorselessness) need be proved by the Government to increase the potential penalty. For the non-testifying penalty-trial defendant, “factual determinations respecting the circumstances and details of the crime”\(^ {122}\) including the aggravating factor of remorselessness, may not be made in reliance on his/her silence.

V. THE FIFTH AMENDMENT AND PENALTY TRIALS—THE MITIGATION-TESTIFYING DEFENDANT

A. Introduction

Where a defendant testifies to mitigation evidence at the penalty hearing, the calculus has changed but the result cannot differ—silence as to guilt or remorse is impermissible as impeachment evidence or as substantive proof of any aggravating factor. The analysis that leads to this conclusion requires a journey through the

\(^{120}\) Sattazahn, 537 U.S. at 111 (explaining Ring) (internal quotations and citation omitted). The only limitation is that Ring’s rule has been held to not be retroactive. Schriro, 124 S.Ct. 2519, 2526 (2004).

\(^{121}\) Sattazahn, 537 U.S. at 112 (“In the post-Ring world. . . if a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that ‘acquittal’ on the offense of ‘murder plus aggravating circumstance(s).’”). Sattazahn himself did not receive that protection because at his first penalty trial the jury was hung. Id. at 113.

\(^{122}\) Mitchell, 526 U.S. at 328.
history of capital sentencing, comprehension of the doctrine of "constitutional choice," and recognition of the primacy of the right to (and social need and responsibility for) the unfettered presentation of mitigation evidence.

B. McGautha and the Dilemma of Choice

*McGautha v. California* was actually a decision in two cases: McGautha's challenge of California's bifurcated death penalty proceeding for its lack of guidance in penalty-trial deliberations, and the separate challenge by Crampton of Ohio's unitary penalty process, where the jury determined guilt and penalty at a single trial. Crampton's appeal squarely raised the Fifth Amendment dilemma—desirous of testifying only as to sentencing issues, he was precluded from doing so by the determination that taking the witness stand would expose him to cross-examination on his guilt for the underlying charge, the slaying of his wife. The defense of insanity was presented as to that charge.

Crampton relied upon the Court's holding in *Simmons v. United States* that compelling a defendant to choose between not testifying at a pre-trial suppression hearing or testifying there but having that testimony admissible at the subsequent trial was unconstitutional. *Simmons’* analysis was grounded on the dilemma of having to choose between equally important constitutional rights:

[A] defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Responding, the *McGautha* Court cited to a series of cases after *Simmons*,

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124. *Id.* at 185 (asking "whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards").
125. *Id.* ("We granted certiorari in the *Crampton* case limited to that same question and to the further question whether the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was constitutionally permissible.").
126. *Id.* at 211.
127. *Id.* at 191.
130. *Simmons*, 390 U.S. at 393-94 (footnotes omitted).
all of which upheld voluntary guilty pleas entered where (1) a defendant faced a possible death sentence, the death sentence aspect of that crime being declared unconstitutional after the plea was entered;\textsuperscript{132} (2) a confession was obtained that was arguably coerced;\textsuperscript{133} or (3) a state statute had a higher permissible punishment [the death penalty] for persons who went to trial than for those who entered a plea.\textsuperscript{134} From these and other holdings, the Court rejected Crampton’s claim.\textsuperscript{135}

The Court reasoned first that \textit{Simmons} had limited reach:

While in \textit{Simmons} we relieved the defendant of his “waiver” of Fifth Amendment rights made in order to obtain a benefit to which he was ultimately found not constitutionally entitled, in the trilogy we held the defendants bound by “waivers” of rights under the Fifth, Sixth, and Fourteenth Amendments made in order to avoid burdens which, it was ultimately determined, could not constitutionally have been imposed.\textsuperscript{136}

From this point of departure, the Court concluded that criminal defendants often had difficult choices to make, choices that were not unconstitutional.\textsuperscript{137} Separately emphasizing that a defendant who chose to testify could not limit the subject matter of cross-examination or selectively answer questions,\textsuperscript{138} the Court found no difference between a capital sentencing and any other proceeding.

Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant’s sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situations we have described.\textsuperscript{139}

The Court concluded its analysis by minimizing the importance of access to mitigation evidence possessed by the defendant alone.

\textsuperscript{133} McMann v. Richardson, 397 U.S. 759, 771 (1970).
\textsuperscript{134} Parker v. N.C., 397 U.S. 790, 794 (1970).
\textsuperscript{135} \textit{McGautha}, 402 U.S. at 213.
\textsuperscript{136} Id. at 212.
\textsuperscript{137} Id. at 215-16.
\textsuperscript{138} Id. at 215.
\textsuperscript{139} Id. at 216-17.
deprive the jury of a rational basis for fixing sentence. Assuming that in this case there was relevant information solely within petitioner’s knowledge, we do not think the Constitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all.\textsuperscript{140}

\textit{McGautha} may have no remaining validity, as it preceded and does not reflect the revolutions in death penalty jurisprudence, arising first from the 1972 decision\textsuperscript{141} invalidating capital punishment schemes as arbitrary and capricious punishments and thereafter from the resurrection of capital punishment under a regime of strict rules and limitations in \textit{Gregg v. Georgia}\textsuperscript{142} in 1976. Remarkably, or perhaps merely a reflection of the Court’s pre-\textit{Gregg} jurisprudence, the Eighth Amendment is unmentioned in \textit{McGautha}.

\textbf{C. McGautha and Gregg}

Virtually every underpinning of \textit{McGautha} has been called into question. This began with \textit{Furman v. Georgia}\textsuperscript{143} and was made explicit in \textit{Gregg}. The death penalty sentencing procedure was to be treated as different from all other sentencing procedures and required channeled jury discretion.

\textit{Furman} . . . did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice . . . . \textit{Furman} held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary or capricious manner . . . .

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.\textsuperscript{144}

While not mandating bifurcated proceedings, \textit{Gregg} extolled their virtue in providing added protection to a defendant and in ensuring that relevant sentencing material was presented.\textsuperscript{145} \textit{Gregg} also brought the Eighth Amendment’s command for reliable, non-capricious sentencing squarely into capital case jurisprudence\textsuperscript{146} and in some sense foreshadowed the next development in capital sentencing (and

\begin{itemize}
  \item \textsuperscript{140} \textit{Id.} at 220.
  \item \textsuperscript{141} \textit{Furman v. Ga.}, 408 U.S. 238, 239-40, 295 (1972).
  \item \textsuperscript{142} 428 U.S. 153 (1976).
  \item \textsuperscript{143} 408 U.S. 238.
  \item \textsuperscript{144} \textit{Gregg}, 428 U.S. at 188-89.
  \item \textsuperscript{145} \textit{Id.} at 190-91 ("Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer.") (footnotes omitted).
  \item \textsuperscript{146} \textit{Id.} at 188.
\end{itemize}
the ultimate repudiation of *McGautha*), the “vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence.”

**D. McGautha and Mitigation Evidence—The Right to Unfettered Presentation**

First articulated clearly in the plurality holding in *Lockett v. Ohio*, the guiding principle of current (post-*McGautha*) capital case sentencing is simple and unequivocal—a defendant facing the death penalty has the unfettered right to present mitigation evidence. The rationale is founded in the Eighth Amendment: “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”

*Lockett* specifically required that “the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” The corollary to this rule is that a sentencer also may not refuse to consider mitigation evidence.

For *Lockett*, the Ohio statute that restricted mitigation evidence to three discrete categories was unconstitutional. Precluding evidence of positive prison adjustment was equally unconstitutional, as were exclusion of consideration of any non-statutory mitigation evidence and jury instructions that effectively precluded consideration of retardation as evidence of mitigation.

The primacy of mitigation evidence was further underscored by the repudiation of a unanimity requirement for finding mitigating circumstances in

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147. *Id.* at 190. The *Gregg* Court described this as “an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.” *Id.*


149. *Id.* at 608. The plurality in *Lockett* was adopted by the majority in *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982).


151. *Id.* at 604. The terms “record” and “character” also include the defendant’s background. California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (“Evidence about the defendant’s background and character is relevant [as mitigation] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”).


153. The three exclusive potential mitigators were: “(1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. (3) The offense was primarily the product of the offender’s psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.” *Lockett*, 438 U.S. at 607 (quoting OHIO REV. CODE ANN. § 2929.04(B) (1975)).


156. *Penny v. Lynaugh*, 492 U.S. 302, 328 (1989); see also *Stanford v. Ky.*, 492 U.S. 361, 375 (1989) (plurality opinion) (reversing a death sentence because the defendant was prevented from presenting age as a mitigating factor, and holding that execution of a defendant who was under the age of 16 at the time of the commission of the crime constituted cruel and unusual punishment).
Mills v. Maryland and the line of decisions overturning death sentences where an inadequate mitigation investigation had occurred. Mills is particularly significant in holding that jurors must be made to understand that they need not be unanimous as to any mitigating circumstance; rather, if even one juror finds such a mitigating fact he/she is absolutely entitled to give it effect by weighing it against any aggravating factor(s) proved by the prosecution.

Reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

This equation, reaffirming the absolute necessity of giving effect to mitigation evidence, directly counters the McGautha analysis which gave no significant weight to such evidence.

E. McGautha and Current “Unconstitutional Conditions Doctrine” Analysis

The Court has visited the issue of “unconstitutional conditions” repeatedly since McGautha. In McKune v. Lile the Court found no constitutional impediment where inmate participation in a Sexual Abuser Treatment Program is conditioned upon the requirement to disclose prior acts of abuse. In Ohio Adult Parole Auth. v. Woodard the Court found no “unconstitutional choice” or burdening in allowing adverse use of a death row inmate’s silence at a voluntary commutation hearing. In no case has a majority of the Court affirmed the specific McGautha holding permitting a state to force a defendant to choose between penalty hearing testimony and the privilege against self-incrimination.

159. Mills, 486 U.S. at 384.
162. Id. at 288. In Sattazahn, the dissenters, without referencing “unconstitutional conditions” case law, found a due process violation in the majority holding that a life-sentenced inmate, by filing an appeal, could face the death sentence if a new trial was granted:

[If a defendant sentenced to life after a jury deadlock chooses to appeal her underlying conviction, she faces the possibility of death if she is successful on appeal but convicted on retrial. If, on the other hand, the defendant loses her appeal, or chooses to forgo an appeal, the final judgment for life stands . . . .

We have previously declined to interpret the double jeopardy clause in a manner that puts defendants in this bind.

537 U.S. at 126-27.

163. In Woodard, the Court cited McGautha for a different type of choice: “[a] defendant whose motion for acquittal at the close of the Government’s case is denied must then elect whether to stand on his motion or to put on a defense, with the accompanying risk that, in doing so, he will augment the Government’s case against him.” 523 U.S. at 287 (citing McGautha, 402 U.S. at 215). In McKune, only
Rather, the Court has emphasized either the voluntary nature of the proceeding at issue or that the dilemma of choice was attendant to the reduced liberty arising from incarceration. Indeed, in *Woodard* the Court emphasized that

[c]lemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process . . . Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before.

By contrast, the choice at a penalty trial may leave the defendant “worse off than he was before,” i.e., without critical mitigation evidence and thus with an increased risk of receiving a sentence of death. Indeed, if losing government employment or future contracts constitutes impermissible Fifth Amendment compulsion, so it must be where the penalty faced is death.

Read in tandem, *McKune* and *Woodard* neither accept nor conclusively repudiate *McGautha*, although there is explicit concern by some members of the Court in *McKune* over *McGautha*’s continuing validity as it applies to the choice of foregoing mitigation evidence if the price is a complete waiver of the Fifth Amendment privilege against self-incrimination. As intermediate federal courts the plurality accepted that the penalty hearing choice presented to Crampton in *McGautha* was constitutional. *McKune*, 536 U.S. at 42.

164. *Woodard*, 523 U.S. at 284-85 (“We do not think that respondent’s testimony at a clemency interview would be ‘compelled’ within the meaning of the Fifth Amendment. It is difficult to see how a voluntary interview could ‘compel’ respondent to speak.”).

165. *McKune*, 536 U.S. at 40 (“Respondent fails to cite a single case from this Court holding that the denial of discrete prison privileges for refusal to participate in a rehabilitation program amounts to unconstitutional compulsion. Instead, relying on the so-called penalty cases, respondent treats the fact of his incarceration as if it were irrelevant. Those cases, however, involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood.”) (internal citations omitted).


167. Id. at 285.

168. See *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973) (noting that a State cannot make employees waive their right against self-incrimination and any response to the State’s questioning under threat of job termination is inadmissible as evidence); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968) (stating that the petitioner called to testify in front of a grand jury was discharged from office because he refused to waive his constitutional right against self-incrimination, which violated the Fifth Amendment); *Sanitation Men v. Sanitation Comm’r*, 392 U.S. 280, 284-85 (1968) (stating that petitioner-employees were, under the proceedings against them and section 1123 of the New York Charter, forced to choose between giving up their right against self-incrimination or losing their jobs, which violated their Fifth Amendment privilege); *Garrity v. N.J.*, 385 U.S. 493, 497-98, 500 (1967) (stating that under the New Jersey forfeiture-of-office statute, the petitioners had the choice of either losing their jobs or incriminating themselves, therefore their statements were coerced and could not be considered voluntary).

169. *McKune*, 536 U.S. at 42 (accepting that the penalty hearing choice presented to Crampton in *McGautha* was constitutional). The plurality’s decision produced a spirited repudiation in a concurring opinion by Justice O’Connor:
selective defendant testimony. For example, in *United States v. Hearst*\(^{180}\) (the then-infamous Patty Hearst prosecution), Ms. Hearst testified concerning a series of events occurring prior to and after the robbery for which she was on trial but avoided discussing specific criminal conduct.\(^{181}\) Under cross-examination, she asserted her Fifth Amendment privilege forty-two times.\(^{182}\) Rejecting a challenge that the cross-examination exceeded the scope of Hearst's direct, the Ninth Circuit explained that "[n]owhere . . . is there even a suggestion that the waiver and the permissible cross-examination are to be determined by what the defendant actually discussed during his direct testimony. Rather, the focus is on whether the government's questions are 'reasonably related' to the subjects covered by the defendant's testimony."\(^{183}\)

The limited exception is where the defendant testifies to a specific, and in some sense collateral, issue. Illustrative is the case where state law permits a jury to re-assess a determination of a confession's voluntariness, a defendant's testimony on that limited issue should permit neither cross-examination on the underlying crime, nor adverse comment on that silence, during closing argument.\(^{184}\)

The questions under *McGautha* and the collateral doctrine approach to scope are: (1) what are the merits (i.e., relevant facts) of the penalty-trial prosecution case; and (2) is the defense testimony associated with such facts.

Under *Ring*, the inquiry at a penalty trial is limited to a determination of whether the Government has proved the aggravating fact(s) necessary to establish the element of capital murder.\(^{185}\) Under *res judicata* doctrine, guilt is no longer a "disputed fact." The defense has a separate obligation, almost always unrelated to guilt and to the existence of particular aggravating fact—the affirmative presentation and proof of mitigation evidence to support a sentence less than death. Unless the defense is challenging the existence of a particular aggravator, the scope of the defense mitigation trial is clear—the presentation of evidence directed at

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180. 563 F.2d 1331 (9th Cir. 1977).
181. *Id.* at 1338.
182. *Id.*
183. *Id.* at 1340 (applying *Brown*, 356 U.S. at 155-56).
184. Calloway v. Wainwright, 409 F.2d 59, 65 (5th Cir. 1968).

The *Calloway* exception is limited as applied in McGahee v. Massey, 667 F.2d 1357, 1363 (11th Cir. 1982). In *McGahee*, the court stated:

The defendant testified in order to rebut critical testimony given by Kathie Hayes concerning his identity. Kathie Hayes' testimony concerned a main element in the prosecution's case—identity and method of operation; not a collateral issue, such as the voluntariness of a confession.

An attack on the voluntariness of a confession is directed at the circumstances surrounding the making of the inculpating statement (duress, physical force, environment); it does not speak to the merits of the confession. The circumstances are collateral to the substance of the confession. It would be improper for a prosecutor to comment on a defendant's testimony where it had been limited to such a collateral issue. If, however, a defendant addressed the substance of his confession (motive, manner of operation, plan), he would then have testified on the merits and lost the protection afforded by Calloway. McGahee did just that. He testified on the essential element of identity. In so doing, he crossed the bridge into the merits of the case, and left behind him the constitutional protection afforded collateral testimony.

*Id.* at 1357, 1363.
proving mitigation, not at disproving aggragators. Under the “reasonably related” test, a defendant’s silence about the crime itself is not within the scope of the penalty proceeding.

Scope analysis does prove more problematic where the defense is challenging the existence of (as opposed to the weight to be accorded) an aggravating factor. Many aggravators are purely situational and beyond challenge, such as the status

186. This is exemplified in the federal death penalty statute, which lists the following statutory aggravators (most if not all of which are status aggravators or involve application of a legal standard to facts litigated at the guilt-innocence trial:

(c) Aggravating factors for homicide. In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) DEATH DURING COMMISSION OF ANOTHER CRIME.--
(2) PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM.--
(3) PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED.--
(4) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES.-- The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.
(5) GRAVE RISK OF DEATH TO ADDITIONAL PERSONS.-- The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.
(6) HEINOUS, CRUEL, OR DEPRAVED MANNER OF COMMITTING OFFENSE.-- The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.
(7) PROCUREMENT OF OFFENSE BY PAYMENT.-- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
(8) PECUNIARY GAIN.-- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
(9) SUBSTANTIAL PLANNING AND PREMEDITATION.-- The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.
(10) CONVICTION FOR TWO FELONY DRUG OFFENSES.--
(11) VULNERABILITY OF VICTIM.-- The victim was particularly vulnerable due to old age, youth, or infirmity.
(12) CONVICTION FOR SERIOUS FEDERAL DRUG OFFENSES.-- The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.
(13) CONTINUING CRIMINAL ENTERPRISE INVOLVING DRUG SALES TO MINORS.--
(14) HIGH PUBLIC OFFICIALS.-- The defendant committed the offense against [enumerated public officials]...
(15) PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION.-- In the case of an offense under chapter 109A [18 USCS §§ 2241 et seq.] (sexual abuse) or chapter 110 [18 USCS §§ 2251 et seq.] (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation...
(16) MULTIPLE KILLINGS OR ATTEMPTED KILLINGS.-- The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.
of the deceased (a police officer, a child); the defendant's prior record or the nature of the murder itself (as to its heinousness). Others are disputes as to the proper application of a legal standard such as "torture" or "grave risk to others" to the facts as proved at the guilt-innocence trial.

Where an aggravator is factually in dispute (for example, when a defendant claims a lesser role in the crime than that ascribed by the prosecution, or denies being paid by or paying someone to commit the murder), the analysis of scope involves the "collateral" test. If the defendant testifies only as to discrete mitigation evidence (e.g., to being raised by an abusive parent, to having a learning disability, or to having secured a GED while incarcerated), the testimony is indeed collateral to the disputed aggravator and is essential (as in the case of challenging a confession's voluntariness) to a fair resolution of the critical question—whether the presumption of life is overcome and thus, a death sentence is warranted.

The one seeming exception to this is where the defendant seeks to present evidence of residual doubt. This concept, one that proof beyond a reasonable doubt does not equate with proof beyond all doubt and thus can permit an innocent person to be executed, has great resonance with many jurors. Even here, however, the issue of guilt is within the scope of a defendant's cross-examination only if he/she testifies to being innocent (in whole or as to a specific degree of the crime) or presents affirmative evidence of another person's guilt or lesser culpability; if these points are reserved for closing argument, the issue of scope is moot.

The Calloway analysis of whether testifying about a confession's involuntariness is collateral to the issue of guilt directly parallels that of presenting mitigation evidence. "We think that the determination by the jury of the weight to be given to a confession is a collateral issue and such determination does not directly relate to the issue of guilt." Mitigation, as well, does not "directly relate


187. For explorations of the judicial response to claims of residual doubt, and its potential impact on jury deliberations, see Damien P. DeLaney, Better to Let Ten Guilty Men Live: The Presumption of Life-A Principle to Govern Capital Sentencing, 14 CAP. DEF. J. 283, 290-91 (2002). DeLaney argues that a presumption of life imprisonment should be the standard applied in capital sentencing cases because use of the reasonable doubt standard would require the prosecution to meet the burden, beyond a reasonable doubt, of proving the defendant belonged to a smaller subset of defendants deserving of the death penalty, thus reflecting a less arbitrary decision of applying the death penalty. See also Christina S. Pignatelli, Residual Doubt: It's a Life Saver, 13 CAP. DEF. J. 307, 312-14 (2001) (stating that Virginia has not given residual doubt a prominent role in the sentencing phase of trials, but juries have applied residual doubt as a mitigating factor when determining whether to impose a death sentence).


189. Recognizing the possibility of such argument does not 'open the door' to full guilt-focused cross-examination of the defendant who testifies only as to mitigation. Acting on speculation cannot be sufficient to establish that the issue of guilt is no longer collateral at the mitigation evidence phase.

190. Calloway, 409 F.2d at 65.
to the issue of guilt" but assumes/accepts a previous finding of guilt. Under Calloway and under McGautha's scope analysis, other than in cases with affirmative penalty-phase evidence of innocence, there should be no room for either cross-examination of the mitigation-only testifying defendant or comment, in closing, on that defendant's failure to admit guilt or express remorse.

VI. SILENCE AS IRRELEVANT OR UNDULY PREJUDICIAL EVIDENCE

A. "Insolubly Ambiguous" Silence

In United States v. Hale, under its supervisory powers for regulating federal trials, the United States Supreme Court rejected any trial use of a defendant's post-arrest silence (at least silence in the face of questioning) because of its utter lack of evidentiary value. As the Court explained when it rejected proof of silence at a police station interrogation as being inconsistent with a defendant's trial testimony:

[i]n most circumstances silence is so ambiguous that it is of little probative force . . . .

At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence.

Although Hale focuses on the defendant who had received Miranda warnings, its reach is not so limited. As the Court subsequently explained, "silence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation."

These "several explanations" abound, and indeed multiply, in the capital case, both pre-trial and at the penalty trial. Pre-trial, the defendant presumably has been warned by counsel to not discuss his/her case in the jail, given the potential for (and

191. Doyle, 426 U.S. at 617 ("[E]very post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.").
193. Hale, 422 U.S. at 176.
194. Id. at 176-77 (citations omitted).
195. Doyle, 426 U.S. at 618 n.8.
in some jurisdictions prevalence of) jailhouse informants and, at least in federal custody, the interception and tape-recording of all inmate telephone calls. The defendant’s silence with his family may be occasioned by an unwillingness to admit wrong to his (often few) supporters; by retardation, mental illness or emotional deficit; and, in the closed society of jail or prison, the stigma and danger that can accompany an admission of culpability.

Turn now to a defendant’s silence at the penalty hearing itself. Here, silence may be a result of “inherent pressures”—abject fright or shock (having just received a verdict that, at a minimum, will result in confinement in jail for life); actual innocence of some or all charges and the desire to seek appellate review; or an inability to admit guilt before one’s own family or friends, in the face of relentless publicity, or on account of youth or emotional deficits. Indeed, certain emotional deficits, if borne of mental retardation, bar the death penalty absolutely.

Youth (and relative youth) is a particularly telling factor in establishing the ambiguity of silence and its ill-suitedness as a surrogate for remorselessness. For more than a decade the law has recognized the lesser capacity of juveniles to reason and display emotional maturity. This judicial determination is strongly

196. See, e.g., United States v. Johnson, 196 F. Supp. 2d 795, 802-27 (N.D. Iowa 2002) (detailing steps taken by prison informant to elicit information from pre-trial detainee). A Chicago Tribune analysis of 285 capital cases showed that “in Illinois, at least 46 inmates have been sent to Death Row in cases where prosecutors used a jailhouse informant . . . .” Ken Armstrong & Steve Mills, The Inside Informant Series: Tribune Investigative Report, Chi. Trib., Nov. 16, 1999, at NEWS1. That same article reported on a Los Angeles informant who deliberately falsified a confession. Id. The informant “posed as a police officer, prosecutor and bail bondsman to obtain information about a murder suspect he had never met, then falsified jail records to show he had shared a cell with the suspect.” Id. The most recent reversal because of a dishonest informant occurred in Banks v. Dretke, 540 U.S. 668 (2004).

197. Federal Bureau of Prisons regulation number 540.102 provides that:

[t]he Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. The Warden must provide notice to the inmate of the potential for monitoring. Staff may not monitor an inmate’s properly placed call to an attorney. The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.


198. From 1988 to 2000, more murders were committed each year by individuals aged 18 to 24 than in any other age group. In 2000, 50% of all homicides nationally were committed by persons 24 and younger; in that same year, nearly 9% were committed by persons 17 and younger. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Homicide Trends in the U.S: Age Trends, available at http://www.ojp.usdoj.gov/bjs/homicide/tables/age.htm (last visited Nov. 28, 2004).


200. See Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (stating that “there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults” and therefore “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult”). In Roper v. Simmons, 2005 U.S. LEXIS 2200 (U.S. March 1, 2005), the Missouri Supreme Court placed strong reliance on these factors to declare unconstitutional the execution of any person under 18:

[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are
confirmed by recent medical and psychological findings and, regardless of the presence of any degree of retardation, again establishes the ambiguity of silence. Regions of the brain, and brain functions, are not fully developed by age 18 (and often for substantial periods beyond that age), inhibiting or affecting the capacity to engage in "longterm planning, regulation of emotion, impulse control, and the evaluation of risk and reward." 201 This developmental delay, projected by some scientists to persist until age twenty-two, 202 has dual significance. It confirms the ambiguity of silence, as it is an adult model that assumes silence equates with remorselessness and that model has limited relevance or transportability to juveniles; and, to the extent that silence is a sign of juvenile remorselessness, it cannot be presumed to be permanent or even enduring, given the incomplete physiological, cognitive and emotional development of the particular defendant. 203

B. Insolubly Ambiguous: Irrelevant or Unduly Prejudicial

Utilizing a pure evidence-based calculus, being insolubly ambiguous may be argued as being legally irrelevant, i.e., as having no tendency to advance an inquiry precisely because the ambiguity is unresolvable. This is a difficult evidentiary proposition, as evidence need have only some tendency, however slight, to

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201. See generally, Jeffrey Fagan, Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment, 33 N.M. L. Rev. 207, 238 n.182 (2003). Fagan cites to studies showing "the organic bases of functions such as long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward are not fully mature by the end of adolescence. See Patricia Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neuroscience & Biobehavioral Revs. 417 (2000) (reviewing animal and human research on brain maturation during puberty and indicating that "remodelling of the brain" during adolescence occurs among different species)." Id.

202. Dr. Ruben Gur, a neuropsychologist and director of the Brain Behavior Laboratory at the University of Pennsylvania, explains that "[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable . . . . Indeed, age 21 or 22 would be closer to the 'biological' age of maturity." Declaration of Ruben C. Gur, PhD., available at http://www.abanet.org/crimjust/jvjjus/Gur%20afidavit.pdf (last visited Jan. 24, 2005).

203. These deficits or developmental delays are at the heart of arguments made by those seeking the ban on the execution of juveniles. See, e.g., Victor Streib, Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia, 33 N.M. L. Rev. 183 (2003) (stating that "[a]plication of precisely the same assessment method [as in Atkins] to the death penalty for juvenile offenders would result it in precisely the same conclusion"); Fagan, supra note 202, at 235; Pet. for Writ of Cert. at 12-14, Patterson v. Texas, 536 U.S. 984 (2002) (arguing that because of their immaturity, children "are less blameworthy" and, therefore "the punishments for their crimes should be proportionately less than those for a fully competent adult").
establish a fact of consequence, and much ambiguous evidence is admissible, with the jury to resolve the weight (if any) to be attributed to it.

Because remorselessness is but one of numerous interpretations derivable from silence, the diffuseness occasioned by multiple meanings renders any evidentiary value virtually nugatory. But even if conceived of as relevant or, in the words of *Hale*, of "little probative force," the unfair prejudice inherent in reliance on silence so outweighs its probative value as to render it inadmissible under an evidentiary balancing test.

*Hale* recognized as much:

Not only is evidence of silence at the time of arrest generally not very probative of a defendant’s credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant’s previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

At the penalty trial the potential prejudice is greater. Rather than use silence as an inconsistent statement meant to contradict exculpatory testimony, silence will be wielded as affirmative proof of a specific mentality, remorselessness, and simultaneously create an unwarranted and unlawful expectation of the need to admit guilt, responsibility and sorrow as a precondition for receiving a sentence less than death.

C. Other Evidentiary Considerations

Exclusion of this “insolubly ambiguous” and unfairly prejudicial evidence...
does not harm the prosecutor’s cause, give the accused an unfair advantage, or lead to an unreliable adjudication of penalty-trial facts. The prosecution retains the traditional tools for challenging a testifying defendant—impeachment by prior inconsistent statement,209 prior conviction,210 evidence of dishonest character,211 proof of bias,212 and extrinsic impeachment evidence. Indeed, non-silence proof of remorselessness such as a defendant’s brazen statements or conduct may be admissible if relevant to establishing an aggravating factor or if a permissible weighing consideration.

Nor is there a need to grant the prosecution parity to cross-examine a defendant with the same tool (silence) the defense may have to impeach a prosecution witness. Parity has never been the measure of evidentiary principles. In many instances rules of evidence are more protective of a defendant precisely because of the risk of undue and unfair prejudice.213 Not all evidentiary rules favor the defendant, since the Constitution permits courts to admit victim impact evidence214 at penalty trials while many jurisdictions bar defendants from presenting “execution impact”215 evidence or proof that a murder victim’s survivor opposes the death penalty.216

209. See, e.g., FED. R. EVID. 613 (“In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.”).

210. See, e.g., FED. R. EVID. 609 (allowing evidence of prior crimes in certain circumstances to attack credibility of a witness other than the accused); see also McGautha, 402 U.S. at 214-15 (“It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like.”).

211. See, e.g., FED. R. EVID. 608(a) (“The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”).

212. See, e.g., United States v. Abel, 469 U.S. 45, 51 (1984) (stating that it is permissible under the Federal Rules of Evidence to use a witness’s bias to impeach that witness).

213. See, e.g., FED. R. EVID. 609(a) (providing a more restrictive test for using prior convictions of a testifying defendant than for any other category of witness); FED. R. EVID. 404(a) (restricting prosecution’s use of character evidence while allowing criminal defendants to use such evidence as a shield or as a method for attacking the complainant and asserting a defense).

214. Payne v. Tennessee, 501 U.S. 808, 825 (1991) (“We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”).

215. “[E]xecution impact evidence’ . . . informs capital jurors of the effect that a defendant’s execution will have on his or her surviving loved ones.” Wayne A. Logan, When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials, 33 U. Mich. J.L. Reform 1, 5 (Fall 1999 & Winter 2000). Logan notes that “most courts conclude[e] that defendants are not constitutionally entitled to have capital juries consider EIE.” Id. at 32.

216. Courts excluding such testimony rely, without significant analysis, on the general language of Payne, 501 U.S. at 830, n.2 (“[A]dmission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.”) See, e.g., State v. Trostle, 951 P.2d 869, 887-88 (Ariz. 1997) ("Defendant also claims that the judge should have considered requests from the victim's family that he be sentenced to life imprisonment . . . . Such evidence is irrelevant to either the defendant's character or the circumstances of the crime . . . .") Greene v. State, 37 S.W.3d 579, 584-85 (Ark. 2001) (citing Payne and barring such testimony that "would be
D. Evidentiary Considerations and Non-Capital Proceedings

The prohibition on use of silence to infer remorselessness and justify a harsher sentence is indistinguishable between capital and non-capital sentencing contexts when analyzed on purely evidentiary terms. However, this does not repudiate this paper’s analysis; to the contrary, courts are already recognizing the impermissibility of using silence to aggravate a non-capital sentence (the creation of a “penalty”), and instead permitting the relinquishment of silence only to confer a “benefit,” i.e., a sentence lower than would otherwise have been imposed.\(^{124}\) Rather than wreaking havoc or creating a revolution, the evidentiary ban on prosecutorial use of or comment on silence at penalty proceedings comports with current non-capital sentencing practices.\(^{125}\)

VII. SENTENCING AND REMORSELESSNESS—RELIABILITY AND COMMUNITY VALUES

No one can question that silence is not an accurate measure of remorselessness and is not constitutionally admissible at a penalty hearing. Indeed, in a system that accepts as its premise that innocent persons may and can be executed,\(^{217}\) silence is inadmissible precisely because it may be the expression of the truly innocent and no available tool can discern otherwise. To hold otherwise flouts the Due Process reliability requirement that prohibits sentencing on information that “may be erroneous, or may be misinterpreted.”\(^{220}\)

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\(^{124}\) See United States v. Warren, 338 F.3d 258, 264 (3d Cir. 2003) (citing cases holding that “the government may not impose a penalty on a person for asserting his or her Fifth Amendment privilege”). The Warren Court explained that:

Mitchell made clear that a court’s decision to increase a sentence based upon the defendant’s exercise of his or her Fifth Amendment privileges is an unconstitutional “penalty.” 526 U.S. at 329, 119 S.Ct. 1307. Although the treatment of a Safety Valve decrease is an open question in our court, several of our sister Courts of Appeals have held that denying a sentencing reduction under U.S.S.G. § 5C1.2 [sic] constitutes a “denied benefit” rather than a penalty and thus avoids Fifth Amendment implications.

\(^{217}\) Notwithstanding the recognized difference between capital and non-capital proceedings and the need for the most complete sentencing information possible at the former, it cannot be rationally argued that a capital-sentencing defendant should have fewer rights than, or be at an evidentiary disadvantage to, a non-capital sentencing defendant.

\(^{218}\) See Herrera v. Collins, 506 U.S. 390, 393 (1993) (reviewing a prisoner’s claim of actual innocence in a capital case). The Court stated:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But . . . the threshold showing for such an assumed right would necessarily be extraordinarily high.

A. The Community's Right to an Apology

Regardless of the constitutional dilemma, is the community not entitled to an apology? Shouldn't the penalty hearing serve as a restorative act, a commencement of a healing process? An apology can be of particular importance to the victim's survivors (who are themselves victims of the crime of murder) as well as to the community.

There are two problems involved in this issue. First, as explained above, making an apology a component of a capital sentencing trial presumes that every person facing capital sentencing is guilty. For such persons, this conditions the receipt of a sentence less than death upon an admission of guilt, and simultaneously requires the abandonment of the right to appeal and the ultimate search for exoneration.

Second is the nature of the inquiry at penalty trials. The penalty trial is not a determination of culpability, reading that term to mean responsibility for an act/harm; rather, it is intended to identify "death-worthiness." As Professor Crocker explains:

[T]he correct conceptualization of the punishment-phase determination is one that asks about the defendant's deathworthiness, not his culpability. Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant's culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder. Deathworthiness appropriately refocuses the inquiry from whether the defendant is blameworthy—the question resolved at the guilt phase—to whether the defendant is worthy of being sentenced to death—the judgment made at the punishment phase.

Requiring an apology in such circumstances actually punishes the innocent by leaving the person who does not apologize subject to a greater punishment than the guilty person resigned to her/his fate of life imprisonment. Where death is the outcome, the perversity of this exchange cannot be accepted. It cannot be denied

224. Id. at 26-27.
225. An anomaly (if not a second perversity) is to expect an apology at the sentencing stage of proceedings. The roots of American penology lie in the Quaker reforms, which saw confinement in the penitentiary as a means for bringing the convicted person to ultimately repent. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 85 (Little, Brown
that this is a risk in current capital case practice.  

B. The Right to Punish the Remorseless

Courts have traditionally accepted a defendant’s remorselessness as an appropriate consideration at the sentencing stage. The rationale is simple: the person who is remorseless is perceived to be more dangerous, less likely to rehabilitate, and thus a more appropriate candidate for the ultimate sanction, death. Assuming there is non-silence-based proof of this proposition, should it be weighed at a capital sentencing proceeding? Contrary to accepted practice, remorselessness is a demonstrably dubious criterion for determining death-worthiness.

Using remorselessness as a blameworthiness measure at sentencing presumes an offender’s capacity to feel and display remorse. Yet these capacities are not innate but developmental; they are often weak or crippled in juvenile and youthful offenders. These capacities are further diminished by “codes of the street” or and Co. 1971) (“The convict ‘will be compelled to reflect on the error of his ways, to listen to the reproaches of conscience, to the expostulations of religion.’” (quoting GEORGE W. SMITH, A DEFENCE OF THE SYSTEM OF SOLITARY CONFINEMENT OF PRISONERS ADOPTED BY THE STATE OF PENNSYLVANIA 71, 75 (E.G. Dorsey 1833 (1829))). As Edward L. Rubin explains:

From its outset, the penitentiary was conceived as a means of rehabilitation. This was the rationale for relying on confinement, instead of the more familiar sanctions of execution, torture or exile. The two dominant models in the United States were the Auburn system, developed by New York State, and the Pennsylvania system. Both were designed, as David Rothman states, “to separate the offender from all contact with corruption, both within and without its walls.” In the Pennsylvania system, the prisoner was kept in solitary confinement, while in the Auburn system he worked and ate with other prisoners, but was forbidden to converse with them. Thus isolated from corrupting influences, the prisoner was supposed to reflect on the evil of his ways, to read the Bible, and to learn to avoid the sins of idleness by working.

The Inevitability of Rehabilitation, 19 LAW & INEQ. J. 343, 347 (Summer 2001) (footnotes omitted).


227. Zant v. Stephens, 462 U.S. 862, 886 n.22 (1983) (“Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation.”).

228. The term “state” is used deliberately, as there is no basis for finding this to be an immutable condition or trait.

229. The question is posed here without regard to the specifics of capital sentencing procedures, some of which preclude reliance on all but the statutorily-enumerated aggravators. Compare, 42 PA. CONS. STAT. § 9711(d) (2004) (requiring that “[a]ggravating circumstances” in Pennsylvania be limited to the expressly enumerated provisions) with 18 U.S.C. § 3592 (2004) (authorizing jury consideration of enumerated aggravators under the Federal Death Penalty Act and providing that “[t]he jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists”).

230. Duncan, supra note 3, at 1472-73. Duncan states:

[T]he child’s ‘short sadness span’ may render a prolonged display of regret unlikely. . . . A child who does not appreciate the finality of death will communicate less remorse than
fear of opprobrium from one's own family, which remorse (and its concomitant admission of responsibility for the crime and failure toward the family) may generate. These developmental and social influences prevent a conclusive or even reliable determination that a seeming callousness is in fact proof of remorselessness. And even with adults who may be deemed to have reached full emotional and brain development, conduct which appears to manifest remorselessness may actually be no more than a pain-avoidance defense mechanism.  

Remorselessness (even if discernible) has a separate flaw as a sentencing tool, a complete lack of reliability as an indicator of future expressions of remorse or risk of reoffending. Experiencing and expressing remorse often come as delayed reactions, learned responses, consequences of developmental or emotional growth, or through the gradual erosion of defense mechanisms. The initial expression of remorselessness (by words or action) in no way demonstrates chronicity or irrevocability, and for juveniles in particular shows little or no correlation with later criminality.  

Indeed, predictions of "future dangerousness" based upon perceived remorselessness, criminal records, and a defendant's behavior up to and at the time of a capital sentencing proceeding have minimal validity and are in fact refuted by documented post-sentencing behavior. In one particular study that examined the accuracy of expert testimony about a defendant's future dangerousness, post-sentence behavior showed the testimony was inaccurate in 95% of the cases:

Of the total 155 inmates against whom state experts testified, eight (5%) engaged in seriously assaultive behavior. Thirty-one (20%) have no records at all reflecting disciplinary violations. The remaining 75% of inmates committed disciplinary infractions involving conduct not amounting to serious assaults.

authorities expect. And even adolescents, having only recently passed out of childhood, manifest a fear of regression and consequent inhibition of crying; for developmental reasons, they too may show less grief than the system demands.

Id. See also Gur, supra note 202 (addressing the incomplete brain development of teenagers).

231. Duncan, supra note 230, at 1520.  
232. As Professor Duncan elaborates:

Human beings, by nature, seek to avoid the anguish caused by acknowledging our complicity in evil . . . . In our efforts not to know that which will cause us pain, we sometimes resort to the defense mechanism of denial: the disavowal of an unpleasant fact or truth about the world. When we do, we appear to others as lacking remorse and hence, as heinous, but in fact, our bland, unflinching facade may be but the external manifestation of an inner struggle to avoid the knowledge we feel we cannot bear.

Id. at 1472 (footnotes omitted).  
233. Id. at 1521-23.  
234. DEADLY SPECULATION: MISLEADING TEXAS JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS xiv (2004), available at www.texasdefender.org/publications.htm (last visited Jan. 28, 2005). The Texas study "defines 'serious assaultive behavior' as that which results in an injury requiring more than the administration of first aid (i.e. injury requiring more than a bandage)." Id. at viii. This definition is consistent with the Texas Department of Criminal Justice's definition of "serious assault." Id.
A fair response to this criticism may be that remorselessness need not prove future dangerousness to be a justified consideration at capital sentencing; rather, like prior criminal convictions and the manner in which a particular crime was committed, it shows the type of person who committed this offense and thus deserves the ultimate punishment. But even if juries could be instructed to avoid an unreliable use of this evidence (i.e., to not use it to predict future dangerousness and worthy of the ultimate incapacitating sentence), the dilemma remains—what is at the root of this apparent remorselessness—a true hardness of heart; a flawed, interrupted or not-yet complete neurological and emotional development; dissembling; or a perverse attempt at warding off the pain of responsibility? In their own way, remorseless words or demeanor may be as insolubly ambiguous as silence.

And this is particularly so in the cauldron of the capital case penalty trial. The defendant is likely a teenager or in his early twenties, facing a capital murder conviction carrying a sentence of life imprisonment at a minimum. The defendant’s family is present, and all too often has heard only the defendant’s denial of guilt; fellow inmates at the jail or prison where the accused has been detained may well have urged defiance and promoted the chances of acquittal or appellate reversal; and the facts of the crime may be so egregious that the social opprobrium accompanying admission (out of jail or in the closed society of the prison) may be too great to permit a defendant to take responsibility. The result is a perceived (and perhaps flaunted) remorselessness indicative less of a hardened character than a combination of shell-shock, denial and, sometimes, fear.

The paradigmatic illustration is the case of Abdul Malik El-Shabazz. Charged with the rape and strangulation of a six year old committed when he was eighteen, El-Shabazz confessed to police, led them to the body, and provided details known only to the murderer. Nonetheless, at trial (now age twenty), El-Shabazz reacted violently to his own lawyer’s attempt to seek a conviction for an unintentional murder, punching defense counsel in front of the jury. El-Shabazz then testified and denied involvement in the crime, claiming that his confession (shown to the jury on videotape) was coerced. At the penalty hearing, jurors learned that El-Shabazz had been “beaten and burned in jail since his arrest,” apparently because of the age of the victim and the sexual assault perpetrated on her. After testifying in mitigation that “he cared” but making no admission of guilt, the prosecution characterized his behavior and response as remorseless:


236. The initial shell-shock is emerging from pre-trial detentions after several months or years into a public courtroom where one’s fate is being decided in a matter of days (or occasionally hours); the second and more debilitating shock occurs after the guilt-innocence verdict and the rapid commencement of the penalty trial.
"He cares about what?" she asked incredulously. "He didn’t mention Destiny’s name. He didn’t say he was sorry. No remorse, no contrition—nothing. He cares only about himself, and he made that clear... when he put his own pleasure over the value of her life."237

The prosecutor’s argument is compelling, and seemingly represents El-Shabazz’s appearance, demeanor and very words. Yet El-Shabazz’ victimization in prison, age, and thwarted development238 render this conclusion mere conjecture and dubious.239

CONCLUSION

Capital punishment is currently constitutionally acceptable as neither cruel nor unusual. But it carries with it an extraordinary mandate, “to ensure that only the most deserving of execution are put to death.”240 A defendant’s silence provides no such means, and its exploitation risks the paradox of punishing the less deserving—those who are actually innocent of some or all charges, or those whose faculties or social circumstances prevent or impair their ability to accept responsibility for their conduct.

The Fifth Amendment prohibition against compulsory incrimination, as well as Eighth Amendment reliability mandates for death penalty proceedings and Due Process principles, preclude use of a defendant’s silence, directly or by suggestion, to secure a sentence of death. Silence is not a cognate for remorseless, itself an unreliable determinant of who if anyone is deserving of the ultimate punishment. Insolubly ambiguous and constitutionally prohibited, it is a tool that must be removed from the capital sentencing machinery.

238. “El-Shabazz was born addicted to heroin, may have been sexually abused at age 7, and was raised by a mentally ill and paranoid father who kept him from school until age 8 and isolated the boy from any assistance offered by school officials, the Department of Human Services, or the juvenile courts.” Id.
239. After deliberations, the jury was unable to reach a unanimous sentencing verdict. As a result, a mandatory sentence of life imprisonment without parole was imposed. Jacqueline Soteropoulos, Man Who Raped and Murdered Child Gets Life Sentence, PHILA. INQUIRER, June 17, 2004, at B03.
240. Atkins, 536 U.S. at 319.