THE EXTRAORDINARY TRAJECTORY OF *GRIFFIN V. CALIFORNIA*: THE AFTERMATH OF PLAYING FIFTY YEARS OF SCRABBLE WITH THE FIFTH AMENDMENT

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I. THE EARLY YEARS OF *GRIFFIN V. CALIFORNIA*

A judicial opinion by an appellate court is much like a precious baby cradled in the arms of its parents, moments before they kiss it goodbye and set it adrift in a papyrus basket among the reeds of the Nile. As the authors of the opinion gaze lovingly at the newborn creation in their arms, they wonder about its future with worry and excitement, and can only imagine what its progeny might accomplish. If all goes well, this precious new creation may be found by the daughter of the Pharaoh, perhaps raised in the royal court, and may even be used to bring liberty and justice to an entire nation! Then again, it might be torn apart by crocodiles before sundown.

Just like parents gazing into the eyes of their infant, the judges on an appellate court never hope that their handiwork will be the last of its line, and invariably have high hopes for the way in which the logic and the spirit of the opinion will be faithfully applied by future generations of judges to a great range of analogous situations. That is, after all, why appellate courts go to the trouble of explaining the reasoning behind their opinion, and do not merely announce the judgment of the court.

But it is not always easy to foresee where the currents of time will take a judicial opinion, or to imagine the trajectory that will be traced by its progeny. Part of the problem, of course, is that judges do not always agree on the extent to which they are bound to faithfully follow the logic of a judicial opinion where it may lead. Nearly two decades ago, Justice Antonin Scalia of the United States Supreme Court complained of a certain judicial philosophy that regards legal precedents as nuisances to be circumvented by all means necessary to reach the desired result. He noted that some judges see themselves and previous members of the same court as adversaries in a sporting contest, in which

> the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from

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> the rear, until (bravo!) he reaches the goal—good law.[1]

Despite their supposed constraint by the doctrine of *stare decisis*, Justice Scalia observed, judges will sometimes "squint narrowly when they wish to avoid an earlier decision," and say whatever it takes to distinguish cases they regard as unpersuasive.[2] Consequently, he complained, some legal doctrines evolve

> in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays on the board: "No liability for breach of contractual duty without privity"; the next player adds "unless injured party is member of household." And the game continues.[3]

When reading Justice Scalia's portrayal of past and present members of the judiciary as combatants on a football field or in a game of Scrabble, one is irresistibly reminded of the extraordinary trajectory of the Supreme Court's landmark decision in *Griffin v. California*.[4] That ruling, now fifty years old, declared that the Fifth Amendment right against self-incrimination does not merely give the accused the right to refuse to take the witness stand (that much was never in doubt), but also forbids jurors to draw an adverse inference from his silence or to use it against him as evidence of guilt. Such an inference is forbidden, the Court held, because it involves "a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly."[5]

Although the holding in *Griffin* was plain enough, its reasoning raised more questions than it explicitly answered. If the Fifth Amendment forbids penalizing an accused for exercising his right against self-incrimination during his trial, does it likewise protect a defendant who asserted the privilege before trial? What about a civil defendant who invokes the privilege? Even in those cases, using silence as evidence of guilt would surely be a "penalty imposed by courts for exercising a constitutional privilege." Does the logic of *Griffin* apply to those situations as well? For half a century, the Supreme Court has been striving to solve that puzzle in a host of similar contexts. The answer the Court is still developing, as we shall see, is so convoluted that it leaves one wondering whether this peculiar trajectory was essentially dictated by the rationale of that case, and whether it could have been predicted by objective observers.

Hindsight is not always 20/20. When looking back through the sands of time, it is not always possible to have a reliable sense of how the future must have looked to those separated from us by a couple of generations.[6] As luck

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[1] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9 (1997).

[2] *Id.* at 8.

[3] *Id.* at 8-9.

[4] 380 U.S. 609 (1965).

[5] *Id.* at 614.

[6] *Cf.* BACK TO THE FUTURE PART II (Universal Pictures 1989) (two time travelers traveled to October 2015, presumably to find out whether the Advisory Committee accurately foresaw the development of *Griffin* on its fiftieth anniversary).

would have it, however, we have a fairly definite indication of what the likely trajectory of *Griffin* looked like shortly after that case was decided, because it was announced only four years before the publication of the first draft of the Federal Rules of Evidence.[7] Those rules were approved by a distinguished collection of judges, attorneys, and academics on the Evidence Rules Advisory Committee, as well as the Standing Committee on Rules of Practice and Procedure.[8] They perceived that one of their responsibilities was to work out whether the logic of *Griffin* should be extended to other situations in which a privilege is asserted by a party or witness. The Committee agreed that the logic of *Griffin*, faithfully extended to similar contexts, would naturally likewise forbid the drawing of any adverse inference from the valid exercise of the Fifth Amendment privilege by any witness either before or during a trial. The Committee's proposed rule, which would have been Federal Rule of Evidence 513(a), provided:

> **(a) COMMENT OR INFERENCE NOT PERMITTED.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.[9]

The Committee members reasoned that this result was compelled by *Griffin*, to ensure that no privilege would ever be undermined by arguments that might otherwise "mak[e] its assertion costly."[10] They concluded that this principle included a right to assert privilege claims "without the knowledge of the jury," and required instructions, upon request, that no inference might be drawn from such assertions.[11] They reasoned that "[t]he value of a privilege may be greatly depreciated by means other than expressly commenting to a jury upon the fact that it was exercised," and decided that "[d]estruction of the privilege by innuendo can and should be avoided."[12]

In the opinion of the first Advisory Committee on the Federal Rules of Evidence, therefore, the question raised above was exceptionally easy: When would it be permissible, under the logic of *Griffin v. California*, to tell a jury that a party in a civil or criminal case has made a valid exercise of his Fifth Amendment privilege, or to invite the jury to use that fact as evidence of guilt? Never.[13]

This interpretation of *Griffin*, although expansive, was perfectly reasonable

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[7] The Preliminary Draft was published in 1969. 46 F.R.D. 161.

[8] For a list of their names, *see id.* at 162.

[9] In the preliminary draft, this rule was numbered "Rule 5–13." *Id.* at 282. The proposed rule was renumbered Rule 513 before it was approved by the Supreme Court and transmitted to Congress on November 20, 1972. 56 F.R.D. 183, 260.

[10] 56 F.R.D. at 260 (quoting *Griffin*, 380 U.S. at 614).

[11] *Id.* at 260.

[12] *Id.* at 261.

[13] Indeed, Proposed Evidence Rule 513 would have gone much further in two other ways as well, by extending the "no adverse inference" rule to (1) the assertion of all privileges, not merely the Fifth Amendment, and (2) the assertion of any privilege by any witness, even a nonparty, as long as the circumstances might tempt the jury to draw an adverse inference against a party. *Id.* at 260-61. The Committee also cited *Griffin* in concluding that witnesses should be allowed to assert the Fifth Amendment privilege when cross-examined about criminal misconduct relevant to nothing but their general lack of veracity. *Id.* at 269, Rule 608(b) advisory committee's note.

at the time. By the time Rule 513 was transmitted to Congress, only seven years after the decision in *Griffin*, the Supreme Court had already extended the rationale of that case to civil proceedings and penalties,[14] pretrial assertions of the Fifth Amendment,[15] and cases in which a defendant was penalized for not testifying sooner than he did.[16] The Court had also employed similar logic in overturning penalties and disadvantages for the exercise of other constitutional rights.[17] Moreover, Rule 513 was drafted only a few years before the Court ruled that a suspect's post-arrest silence after receiving *Miranda* warnings cannot be used against him at trial, not even to impeach his testimony if he testifies, because those warnings contain an implicit assurance "that silence will carry no penalty."[18] And that was just a few years before the Court stated that "[t]he *Griffin* case stands for the proposition that a defendant must pay *no* court-imposed price for the exercise of his constitutional privilege not to testify."[19] So it was totally unsurprising that the Supreme Court expressed no concerns with proposed Rule 513 when it approved that rule along with the other evidence rules and transmitted them to Congress for its review.[20]

If Federal Rule of Evidence 513 had been adopted, the trajectory of *Griffin* would have been unambiguous and unlimited, at least in federal court, just as it appeared to the Court during the first decade after that case was decided. But although that rule was approved by the Supreme Court, it arrived in Congress, by accident of history, just as the Watergate scandal was erupting. "Amidst claims of executive privilege by President Nixon stirring impassioned resentment in Congress, the privilege provisions in the rules attracted immediate atten-

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[14] Gardner v. Broderick, 392 U.S. 273, 279 (1968) (citing *Griffin*, and holding that a police officer cannot be discharged for refusing to waive his Fifth Amendment privilege before grand jury); Spevack v. Klein, 385 U.S. 511, 515 (1967) (citing *Griffin*, and holding that a lawyer cannot be disbarred for asserting the privilege against self-incrimination); *see also* Lefkowitz v. Turley, 414 U.S. 70, 80 (1973) (citing *Gardner*, and holding that the State may not disqualify businessmen from an award of public contracts based on their refusal to waive Fifth Amendment privilege when summoned before grand jury); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 392 U.S. 280, 284 (1968) (citing *Gardner*, and holding that city workers cannot be dismissed from employment for refusing to waive their Fifth Amendment privilege at municipal hearing).

[15] Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966) (citing *Griffin*, and holding that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation").

[16] Brooks v. Tennessee, 406 U.S. 605, 611 (1972) (citing *Griffin*, and holding that the Fifth Amendment forbids a law which permits a defendant to testify only if he does so before his other witnesses, thus penalizing him because of his decision earlier at the trial to remain silent rather than to be one of the first witnesses in his defense).

[17] *E.g.*, North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (citing *Griffin*, and holding that the Due Process Clause forbids judicial vindictiveness employed to "put a price on an appeal" by increasing sentence of a defendant convicted again after remand); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (collecting examples).

[18] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[19] Carter v. Kentucky, 450 U.S. 288, 301 (1981) (emphasis added).

[20] ORDER APPROVING THE FEDERAL RULES OF EVIDENCE, 56 F.R.D. at 184. Ironically, the Court adopted the evidence rules over the dissent of Justice Douglas—the author of *Griffin*—because of his concern, among others, that the Justices were "so far removed from the trial arena that we have no special insight, no meaningful oversight to contribute." *Id.* at 185.

tion."[21] Congress rejected all of the proposed privilege rules, including Rule 513, electing instead to leave the development of privilege law in the hands of the courts.[22]

As a consequence of these historical developments, the gradual explication of *Griffin* and its progeny has been a fifty-year scrimmage between two warring factions on the Court. On one side of the ball are the Deceased Liberals, who ran up the score and released a dizzying blizzard of expansive Fifth Amendment rulings for about a decade starting in 1965, none of which have yet been technically overruled.[23] At the zenith of that rapid expansion, a young conservative Supreme Court justice complained that the "Thomistic reasoning" of these cases had been "carried from the constitutional provision itself, to the *Griffin* case, to the present case, and where it will stop no one can know."[24] But that was shortly before control of the football fell largely into the hands of the opposing team, the Squinting Conservatives, who have spent the past four decades, in the words of their team captain and star fullback, "distinguishing one prior case on the left, straight-arming another one on the right, [and] high-stepping away from another precedent about to tackle [us] from the rear."[25] As a result of this extraordinary struggle, the aftermath of *Griffin* is a spectacularly chaotic farrago of opinions of such complexity that only one practicing attorney in a thousand can accurately summarize all of them off the top of her head.[26]

We may best illuminate this history by examining an absolutely remarkable contrast. The next section of this Essay will first summarize and examine the legal position that was reflected in proposed Federal Rule of Evidence 513, based on the considered judgment of the Evidence Rules Advisory Committee as to where the logic of *Griffin* would naturally lead. We will then contrast that vision with the state of the law as it has instead been worked out by the Supreme Court over the past half century since that rule was rejected by Congress.[27]

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[21] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 5 (5th ed. 2012).

[22] *Id.*

[23] *See, e.g.*, cases cited *supra* notes 14-19.

[24] *Carter*, 450 U.S. at 310 (Rehnquist, J., dissenting).

[25] Scalia, *supra* note 1. During the same time frame, and as the result of a similar sporting contest, the analogous holding in *North Carolina v. Pearce*, *supra* note 17, has been eroded through the process of "chipping away at that [holding] in a piecemeal fashion," leaving the Court now with the "responsibility to clean up a mess of our making." Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas & Scalia, JJ., dissenting from denial of certiorari).

[26] Think I am exaggerating? See if you can list and summarize all of the leading cases before you read the summary of them in Part II of this Essay. Better yet, see if you can remember and summarize all of them blindfolded *after* you have read this Essay. Indeed, because the Court's precedents in this area are so chaotic and unprincipled that they are nearly impossible to even harmonize, much less memorize, a copy of this Essay will be worth its weight in gold to every attorney who keeps it in her briefcase and takes it with her every time she goes to court.

[27] *See infra* Part II.B. The "law" as it has been developed by the Supreme Court is summarized in the text of that section, and the footnotes contain an analysis of those legal rules. I apologize in advance to my readers for the fact that those footnotes are so lengthy and dense, but the problem is that, through no fault of mine, there is far more nonsense than logic in the rules that have been announced by the Court.

II. THE SCOPE OF *GRIFFIN* AND ITS PROGENY: A CRITICAL QUESTION WITH TWO BREATHTAKINGLY DIFFERENT ANSWERS

If the logic of *Griffin v. California* were faithfully applied to other arguably analogous contexts, when would it be permissible to tell a jury that a party in a civil or criminal case had exercised his Fifth Amendment privilege, or to permit the jury to use that fact as evidence of guilt?

A. LOOKING AHEAD: THE ANSWER PROPOSED BY THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE IN 1969

Never.[28]

B. LOOKING BACK: THE ANSWER THE SUPREME COURT HAS BEEN WORKING ON FOR THE PAST FIFTY YEARS

Sometimes. But not always. It depends on about a dozen variables. And we are still working on the list of those variables, making them up and continuously changing the list as we go along. No, seriously. We really are.

The fundamental problem is that we really cannot quite agree on any of the basics. On the one hand, at least as a general proposition, we have held that the Fifth Amendment forbids "a penalty imposed by courts for exercising a constitutional privilege," because that would diminish the privilege "by making its assertion costly,"[29] and most of us on the Court agree that this rule "prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition."[30] We have also declared that "[t]he *Griffin* case stands for the proposition that a defendant must pay *no* court-imposed price for the exercise of his constitutional privilege not to testify."[31] On the other hand, many of us believe there are grave defects in the reasoning of *Griffin*, and that those flaws are "cause enough to resist its extension" and sufficient reason to conclude that this "mistakenly created constitutional right should not be expanded."[32] And although we have said that *Griffin* was based on the fact that the

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[28] *See supra* notes 9-13 and accompanying text.

[29] Griffin v. California, 380 U.S. 609, 614 (1965).

[30] Mitchell v. United States, 526 U.S. 314, 330 (1999).

[31] Carter v. Kentucky, 450 U.S. 288, 301 (1981) (emphasis added).

[32] *Mitchell*, 526 U.S. at 336-37 (Scalia, J., dissenting—and squinting). This dissent was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas. Their willingness to treat *Griffin* like a virus under quarantine is consistent with Justice Scalia's remarkable confession that he deems himself entitled to engage in an open refusal to follow the reasoning of a precedent even when that precedent is not truly "distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion." Georgia v. McCollum, 505 U.S. 42, 70 (1992) (Scalia, J., dissenting). Then again, when Justice Scalia believes that one of *his* opinions is not being faithfully applied by his colleagues, he will strenuously complain about the Court's "aggressive hostility to precedent that it purports to be applying," Ohio v. Clark, 135 S. Ct. 2175, 2185 (2015) (Scalia, J., concurring in the judgment), or that the Court is subjecting his opinion to "a thousand unprincipled distinctions without ever explicitly overruling" it. Michigan v. Bryant, 562 U.S. 344, 393 (2011) (Scalia,

privilege protects the innocent as well as the guilty[33] because even *innocent* people have "many reasons" for asserting the privilege,[34] we have also stated in complete contradiction that a person's decision to assert the privilege logically and naturally supports the inference that he is guilty,[35] because only guilty people have anything to fear from telling the truth.[36]

As a result of this colossal struggle, our cases have gradually determined that the answer to this critical question depends on a cascading series of about a dozen interlocking distinctions, not one of which was ever foreseen by Nostradamus even on his best days.

First, it depends on whether a defendant's assertion of the Fifth Amendment privilege is used against him in a civil or criminal case.

If it is a *civil* case, can the defendant's silence be used as evidence of his guilt?[37] Maybe, but maybe not. It depends on whether his silence is the only evidence against him. As long as it is technically a civil proceeding—even a

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J., dissenting).

[33] *Carter*, 450 U.S. at 299-300 (the Fifth Amendment privilege, "while sometimes a shelter to the guilty, is often a protection to the innocent") (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)) (internal quotation marks omitted); Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557-58 (1956) (the Fifth Amendment "serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances").

[34] *Carter*, 450 U.S. at 300 n.15 ("there are many reasons unrelated to guilt or innocence for declining to testify"); *see also Griffin*, 380 U.S. at 613 ("[i]t is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him") (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)); United States v. Hale, 422 U.S. 171, 177, 180 (1975) ("evidence of silence at the time of arrest [is] generally not very probative of a defendant's credibility," because "[a]t 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").

[35] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (an adverse inference of a suspect's guilt is "merely a realistic reflection of the evidentiary significance of the choice to remain silent"); *see also* Salinas v. Texas, 133 S. Ct. 2174, 2182 (2013) (plurality opinion) (silence of the accused in response to police questioning is logically "probative of a criminal defendant's guilt"); Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) ("The illogic of the *Griffin* line is plain, for it runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear.").

[36] Brogan v. United States, 522 U.S. 398, 404 (1998) (Scalia, J., majority opinion) (the problems caused by the risk of self-incrimination are "wholly of the guilty suspect's own making," because "[a]n innocent person will not find himself in a similar quandary"). This assumption is of course closely related to Justice Scalia's view that the ability of the police to extract an incriminating statement from a suspect without coercion is "not an evil but an unmitigated good," McNeil v. Wisconsin, 501 U.S. 171, 181 (1991), which would be true if only the guilty made confessions and other incriminating statements, and no innocent man had any reason to assert the Fifth Amendment privilege.

[37] The Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." United States v. Balsys, 524 U.S. 666, 672 (1998) (quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972)) (internal quotation marks omitted); *see also* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it").

prison disciplinary hearing to decide whether he may be placed in punitive segregation for a month—his legitimate refusal to incriminate himself may be used as evidence of his guilt at that civil trial.[38] And we will allow this, even though it will penalize him for exercising his valid constitutional privilege, because we have insisted in criminal cases "the stakes are higher and the State's sole interest is to convict"[39] (although we have routinely insisted in other contexts, in complete contradiction, that obtaining convictions is not the State's sole interest in a criminal case).[40] But use of the defendant's silence as evidence of guilt is forbidden, even in a civil case, if that fact is treated, "standing alone and without regard to the other evidence, . . . as a final admission of guilt."[41] In other words, his silence must be "given no more evidentiary value than [is] warranted by the facts surrounding his case."[42] In a civil case, therefore, the Fifth Amendment requires not that the defendant's silence be excluded from consideration, but only that it be corroborated.[43]

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[38] *Baxter*, 425 U.S. at 318-19.

[39] *Id.* This is one of the most implausible things ever asserted in a Supreme Court opinion. The Court had to say this nonsense in *Baxter* because there was no other imaginable way to distinguish *Griffin*, although this retrospective attempt to limit the logic of that earlier case cannot honestly be reconciled with the fact that the Court had already extended *Griffin* to numerous civil cases and proceedings before *Baxter*, *see* cases cited *supra* note 14. Besides, it is simply absurd in this day and age to categorically assert that the stakes faced by the defendant are always "higher" in a criminal case. A criminal defendant is protected by *Griffin* even if he is prosecuted for a minor misdemeanor with no realistic chance of any jail time (and even if he is already serving a life sentence), but a defendant in a "merely civil" case is not protected even if she is a prisoner facing a significant restriction on her personal liberty (like the defendant in *Baxter*), or a medical doctor defending a class action lawsuit that could destroy her reputation and her career and cost her millions of dollars in punitive damages and drive her into bankruptcy and result in her deportation. Why? Because "the stakes are higher" in a criminal case? "Pure applesauce." King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

[40] The State's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). In no other context has the Court asserted that the "State"—whether the prosecutor or the judicial system—has no interest in a criminal case but the conviction of the accused. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.") Besides, even if the State really did have an especially compelling interest in convicting defendants in *criminal* cases, that would be an utterly illogical basis for tinkering with the rules governing the admissibility of supposed evidence of guilt (like the silence of the accused) to make it easier to prosecute the defendant in a *civil* case, as the Court did in *Baxter*.

[41] *Baxter*, 425 U.S. at 318.

[42] *Id.*

[43] This absurd distinction has absolutely no basis in the logic of the *Griffin* case, where the Court found a violation of the Fifth Amendment even though the jurors were told that the silence of the accused was merely one factor they were entitled, if they wished, to "take into consideration," but did not "by itself warrant an inference of guilt." 380 U.S. at 610. And this distinction is utterly unprecedented as well; although various provisions of the United States Constitution sometimes require the exclusion of certain kinds of evidence, no other provision has ever been interpreted to permit certain evidence to be used only on the condition that it not be the *only* evidence. But this arbitrary nonsense is what the Court had to say in *Baxter* to reach the result it wanted, because there was literally no other way to straight-arm its earlier holdings precluding the imposition of civil penalties on individuals who asserted their Fifth

And what if evidence of a defendant's silence is used against him in a *criminal* trial? Then the answer is still maybe. But now it depends on an entirely different collection of distinctions. (In criminal cases, unlike civil cases, the admissibility of such evidence is always an "all or nothing" affair, and has nothing to do with whether it is corroborated.)

First, it depends on whether the evidence is used against the defendant at trial or at sentencing.[44] If his silence is used against him at the *sentencing* proceeding, then it may be allowed. Or maybe not. It depends on what it is being used to prove. He has an absolute right at sentencing to refuse to give testimony that could subject him to the possibility of a longer sentence, and that refusal cannot be used to justify any adverse inferences about the details of his crime, such as the quantity of the drugs that he sold.[45] But his refusal *may* be used, by itself and without corroboration, to penalize him with a higher sentence than he would otherwise receive and to deny him the chance to obtain leniency, on the grounds that his silence proves his lack of remorse or acceptance of responsibility, and so "his refusal to cooperate suggests he is unrepentant."[46]

And what if the criminal defendant's exercise of his Fifth Amendment privilege is used against him at his *trial*? Then the answer is still maybe. But now it depends on whether we are talking about his constitutionally protected decision to remain silent before or during the trial.

If the defendant's silence *during* a criminal trial is used against him, that would obviously violate the Fifth Amendment, because you simply cannot penalize a man for exercising his constitutional privilege against self-incrimination.[47] That would be intolerable, of course. Indeed, this point is so well settled that the accused has the right to demand that the judge give the jurors an explicit instruction to that effect.[48]

But what if the prosecutor wishes to advise the jurors about the defendant's

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Amendment privilege in civil proceedings. *Compare* cases cited *supra* note 14, *with Baxter*, 425 U.S. at 316-17 (asserting that the key point behind "this line of cases" was to forbid civil penalties that were "automatically" imposed for refusing to waive the protections of the Fifth Amendment).

[44] For some strange reason, the Court routinely refers to these as "the guilt and the penalty phases" of the proceeding. *See, e.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2203 (2015). Nobody still alive today remembers how we got into the habit of referring to the trial as "the *guilt* phase," but you must admit that certainly is a curious way to describe a proceeding to determine the fate of a man presumed to be innocent.

[45] Mitchell v. United States, 526 U.S. 314, 329-31 (1999). This is true not merely after a guilty verdict, but even when the accused has waived his right to a trial by pleading guilty. *Id.* at 321-25. As the result of the sometimes unpredictable vote of Justice Kennedy, who has played for both teams from time to time and who wrote the opinion in *Mitchell*, this 5-4 ruling was the only temporary setback for the Squinting Conservatives in the past four decades.

[46] *Id.* at 339-40 (Scalia, J., dissenting). The majority in *Mitchell* technically purported to leave that question unresolved, *id.* at 330, but nobody has ever denied Justice Scalia's indisputable summary of the way the federal sentencing guidelines are applied every day by every federal district judge all across the nation.

[47] *Griffin*, 380 U.S. at 615. Indeed, even if he only *briefly* exercised his privilege when he declined to be the first defense witness at trial, that fact cannot even justify the more modest penalty of forbidding him from testifying later at the trial. Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972).

[48] Carter v. Kentucky, 450 U.S. 288, 303 (1981).

exercise of his Fifth Amendment privilege when questioned by the police *before* trial? Is that a permissible penalty on the exercise of his constitutional rights? Maybe. It depends on a few things, primarily on whether he chooses to testify at the trial.[49] If he remained silent when questioned by the police, and continued that silence at trial by *declining* to testify, his pretrial silence may be admissible against him as evidence of guilt. Or maybe not. It depends on whether he was in custody and given his *Miranda* warnings at the time he chose to remain silent.

If he was read his *Miranda* rights before he chose to remain silent while in police custody, his silence cannot be used as evidence of his guilt at his criminal trial.[50] And this is true regardless of whether he explicitly "claimed his privilege in the face of accusation" or merely "stood mute,"[51] because that obviously makes no logical difference.

But what if the defendant was not in custody when he exercised his right to remain silent? Could his pretrial silence in the face of police questioning be used as evidence of guilt at his criminal trial? Now the answer does depend on whether he merely stood mute! (Or more precisely, it might depend; we have not yet decided that one for sure.) If he simply *remained mute* in the face of police questioning, and did not explain why he made that decision, his silence can be used against him as evidence of guilt, regardless of whether he had silently intended to exercise his Fifth Amendment privilege.[52] But what if he affirmatively asserts the privilege, and tells the police that he is not answering them because he wishes to exercise his right against self-incrimination? Could that sort of "silence" accompanied by an explicit invocation of the privilege still be used against him at trial? Possibly. We have not yet officially decided that question (although we may have done so inadvertently).[53]

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[49] This is because a defendant's decision to testify might entitle the Government to argue that his pretrial silence should be admissible to impeach his trial testimony. That argument is not possible when the defendant remains silent at trial; in that case, the evidence logically can be used only as substantive evidence of his guilt, or not at all.

[50] Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

[51] *Id.*

[52] Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (plurality opinion). And this is true, the Court concluded, even though a suspect in *custody* is protected by the rule of *Griffin* regardless of whether he claimed the privilege or simply stood mute. The Court insisted, in the plurality opinion by Justice Alito, that the silent suspect in custody is somehow "different," and deserving of greater protection, merely because he is subjected to greater pressure to talk. *Salinas*, 133 S. Ct. at 2180. (Justice Alito's opinion represents the holding of the Court, because the two concurring justices would have decided the case on even broader grounds. *See* Marks v. United States, 430 U.S. 188, 193-94 (1977).) But that distinction is absurd in this context, because footnote 37 in *Miranda* was *only* talking about the rare suspect who does *not* submit to police pressure to talk, and has the wisdom and temerity to remain silent; it is ludicrous to suggest that she somehow requires (much less deserves) more legal protection or a more generous legal standard than a suspect like Mr. Salinas, who remained mute in a noncustodial interrogation, merely because she was subjected to greater coercive pressure *that she successfully resisted!* But Justice Alito had no choice but to say this, because there was no other way to straight-arm footnote 37 from *Miranda*.

[53] In *Salinas*, four justices said the answer to this question is sometimes "no," 133 S. Ct. at 2185-89 (Breyer, J., dissenting), two justices said it was always "yes," *id.* at 2184 (Thomas, J., concurring in the judgment), and the three justices who joined Justices Alito's plurality opinion said they did not need to decide the issue, *id.* at 2179. Inexplicably, however, Justice

On the other hand, what if the criminal defendant *does* testify at his trial? Can his trial testimony be impeached with evidence that he exercised his Fifth Amendment privilege when questioned by the police before trial, to suggest that the credibility of his testimony is undermined by his refusal to share that same story with them? It depends on whether he was in custody, and whether the police read him his "*Miranda* rights"—and whether the police told him anything beyond the bare minimum required by this Court. If the officers were foolish enough to comply with their obligation under *Miranda* to advise him of his right to remain silent before subjecting him to custodial interrogation, then his silence cannot be used against him at trial, not even to impeach his trial testimony, because those warnings contain an implicit assurance "that silence will carry no penalty."[54] But if the police cleverly and improperly questioned a suspect in custody *without* giving him those "required" warnings and he still decided to exercise his constitutional right to remain silent, ironically, we decided more than thirty years ago that the prosecution may use his subsequent silence against him if he testifies at trial, on the theory that his silence in that case would not have been induced by anything the Government told him.[55] And this is true even though this rule creates a perverse incentive for police officers to *never* precede custodial interrogation with the supposedly "required" Miranda warnings![56] But since announcing that rule, we have much more recently insisted that *everyone* has by now heard what our Court has said about that topic "[i]n the modern age

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Alito later asserted—in apparently unwitting contradiction—that he was unconcerned with the objection that police officers could "unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution," because he asserted that such an instruction would "accurately state the law"! *Id.* at 2183. But that is simply not true, unless either (1) the officer is deceiving suspects (by not telling them that this is only true if they remain *entirely* mute), in which case the officer is *not* accurately stating the law; or else (2) the officer *is* telling the truth, which means the Court has unwittingly decided the question that Justice Alito said he would not be deciding!

[54] Doyle v. Ohio, 426 U.S. 610, 618 (1976). The Court based this conclusion on the Due Process Clause of the Fifth and Fourteenth Amendments, and therefore did not need to decide Doyle's separate argument that such a result might also be compelled by *Griffin* and the *other* part of the Fifth Amendment, although the Court later ruled that such cross-examination would not violate the privilege against self-incrimination. Jenkins v. Anderson, 447 U.S. 231, 238 (1980). The holding in *Doyle* is technically still good law, although the Court has expressed open hostility to that case. The last time the Court was called upon to extend *Doyle* to another context, it went out of its way to gratuitously declare: "Although there might be reason to reconsider *Doyle*, we need not do so here." Portuondo v. Agard, 529 U.S. 61, 74 (2000) (Scalia, J., majority opinion).

[55] Fletcher v. Weir, 455 U.S. 603, 605-06 (1982). So the officer *can* testify at trial about the pretrial silence of the accused to impeach his testimony at trial, but *only* if the officer violated his supposed obligation under *Miranda* to warn the suspect about his right to remain silent? So much for the ancient legal principle that no man shall profit from his own wrong. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 345 (1970).

[56] *Fletcher* creates a bizarre incentive for smart police officers to *never* precede custodial interrogation with the supposedly "required" *Miranda* warnings, just in case the defendant exercises his right to remain silent without being told about it, so he can be impeached with that silence if he testifies at trial. If the unwarned suspect starts to talk, on the other hand, he can be quickly interrupted and warned, so that his statements will be admissible at trial. If it is truly that easy in every imaginable case to absolutely circumvent *Doyle*, then *Doyle* may be just about the least important case ever decided by the Court.

of frequently dramatized 'Miranda' warnings,"[57] which raises the interesting possibility that *every* suspect in custody can now claim that he was induced to remain silent by what he heard from "the Government," even if he only got the memo through television, and the warnings were not read to him by the police officer who questioned him. But we have not yet decided that question either, and our precedents give no clear answer either way.[58] Until then, just to be on the safe side, if you are questioned (whether in custody or not) by a police officer who does not read you the required *Miranda* warnings, and you wish to remain silent but to prevent that silence from being used to impeach you at trial, you should first extract the *Miranda* warnings from the officer with the following leading question: "Isn't it true that I have the right to remain silent?"[59] When the officer then truthfully replies that you have such a right, you can then later argue, if need be, that your silence *was* induced by those warnings—even though it was like pulling teeth to pry them out of the officer—and therefore cannot be used against you at trial.[60] But we have not yet decided that question, and our precedents give no clear clue which way that question should be decid-

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[57] Brogan v. United States, 522 U.S. 398, 405 (1998) (Scalia, J., majority opinion); *see also* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[58] In light of the Court's willingness to take judicial notice that every American now knows about the *Miranda* warnings, *Fletcher* has perhaps been overruled *sub silentio*, because now every criminal suspect can plausibly insist—even if he did not receive the *Miranda* warnings and their "implied assurance" directly from the police—that he learned of them (even if only through television) from the Supreme Court of the United States! *Fletcher* says that the protections of *Doyle* are only available in cases in which "the *government* had induced silence by implicitly assuring the defendant that his silence would not be used against him," 455 U.S. at 606 (emphasis added), and there is no obvious reason why the due process analysis in *Doyle* should not be fully applicable to anyone who got that misleading memo, directly or indirectly, from any high-placed governmental authorities, including of course the highest court in the land. Only time will tell whether (1) the forty-year-old protections in *Doyle* now apply only to those defendants who were read a *Miranda* warning by the same officer who questioned them (in which case *Doyle* will eventually apply to nobody and will become a dead letter after enough police officers read this Essay, *see supra* note 56) or (2) they apply to every defendant who has heard about *Miranda*, either directly or indirectly, because of information he received from any source in the "Government" (in which case *Doyle* now applies to everybody, thanks to television, and so *Fletcher* has instead become a dead letter). One way or the other, either *Doyle* or *Fletcher* will eventually drive the other precedent into extinction.

[59] Leading questions are generally forbidden in the courtroom, FED. R. EVID. 611(c), but they are neither forbidden nor unusual in private meetings between police officers and criminal suspects. They just aren't usually used by the suspect on the officer.

[60] I am assuming, and the witness will be hoping, that the officer will simply and truthfully reply: "Yes." If the officer is unusually sagacious (or if he has read this Essay), he will instead smile and reply: "Clever question. Yes, you do have such a right, as the Court already declared in *Miranda*, but the Court has since clarified in *Doyle* that those instructions 'contain no express assurance that silence will carry no penalty,' 426 U.S. at 618, and do so only by implication, and I am telling you right now that your silence can be used against you at trial to dispel any such mistaken implication." The suspect will then reply: "Truly, you have a dizzying intellect." The officer will excitedly exclaim: "Wait till I get going!" (At that point, the smart suspect will then cut off the conversation by requesting a lawyer. Eventually this exchange will become as standard as the Ruy Lopez opening in chess.)

ed.[61]

And finally, what about the third possible case, in which the officer does read a suspect in custody the *Miranda* warnings required by the Supreme Court, but then takes the liberty of adding this little twist: "But if you tell me that you wish to exercise your Fifth Amendment right to remain silent, that silence can be used as evidence against you at trial," thus dispelling any implicit assurance to the contrary?[62] If that suspect remains silent after receiving that sort of "modified *Miranda*" warning, could his silence then be used to impeach him and as evidence of his guilt? Or would that officer in fact be giving the witness false information about his rights under the Fifth Amendment? (Or would his statement, paradoxically, be true—but only because he said it?) It is hard to say. Our most recent case asserts that we have not yet decided those questions, although that same case *may* have unwittingly decided them by accident.[63] We will have to get back to you on that one. As you can see, we are making all this stuff up as we go along. Seriously.

III. CONCLUSION

For those of us who teach law students, and those of us who practice civil

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[61] If and when the Court ever decides such a case, the suspect will of course argue that the case is clearly controlled by *Doyle*, because he can assert that his silence was induced by the "implied assurance" contained in the warnings he extracted from the police officer. The prosecutor will surely argue in response, however, that the case is more properly controlled by *Fletcher*, because the officer did not mention those warnings until asked about them by the suspect, who was evidently so knowledgeable about his rights that there was much less risk of confusion from the ambiguity in the *Miranda* warnings. The prosecutor will also argue that the curious question tends to support the inference that the suspect was aware of the holding in *Doyle* and may have read that opinion, which means he would know that the "implied assurance" in the *Miranda* warnings is a misleading illusion! (At the pretrial argument to exclude that evidence, the prosecutor will seek to ascertain whether the accused read *Doyle* or the Essay you are now reading. And the smart defendant will take the Fifth, because *Doyle* may be the only Supreme Court ruling of all time that logically extends its protections only to those citizens who have never read the opinion.) Who will win that argument? Only time will tell. The Court has not yet told us.

[62] This is the convention in England, where the Police and Criminal Evidence Act of 1984 requires officers questioning anyone (unless he is suspected of terrorism) to tell the suspect: "You do not have to say anything. But it may harm your defence if you do *not* mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence." HOME OFFICE, POLICE AND CRIMINAL EVIDENCE ACT 1984 (PACE) – CODE C: REVISED CODE OF PRACTICE FOR THE DETENTION, TREATMENT, AND QUESTIONING OF PERSONS BY POLICE OFFICERS § 10.5 (May 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364707/PaceCodeC2014.pdf (emphasis added). Yes, this rule really was enacted in the year 1984. (Why does that date sound so familiar?)

[63] It seems safe to say that a suspect who remains silent after receiving that sort of "modified *Miranda* warning," if he chooses to testify at trial, may be impeached with that silence if he testifies at trial, in light of *Jenkins* and *Fletcher*. But what if he remains silent after that warning, expressly invokes his right to remain silent, and does *not* testify at trial either? Could his pretrial silence then be used as evidence of his guilt at such a trial? The Supreme Court claims it has not yet answered that question, but it appears that it may have done so inadvertently. *See supra* note 53.

and criminal litigation, it is tempting to imagine the relative simplicity of the alternate universe we would have inhabited if Congress had adopted Federal Rule of Evidence 513, and if the justices who decided *Griffin v. California* and its earliest progeny were still on the Court. The legacy of that case could then be summarized and taught in a single simple sentence.

Instead, the progeny of *Griffin* is now as diverse as the descendants of Abraham, and entombed in two tortured and tangled lines of precedent, riddled with rules that are utterly nonsensical and arbitrary. Indeed, most of the controlling rules in this context were selected and announced by the Supreme Court with no logical basis whatsoever, solely because they were the *only* way the Court could straight-arm and pretend to be able to distinguish earlier Fifth Amendment rulings that more recent members of the Court really do not like but could not honestly distinguish and have not yet formally overruled. Trying to rationally harmonize all of those distinctions is as futile as trying to make sense of the "story" written in the words on a Scrabble board—or an online essay written by two co-authors locked in deep and violent disagreement, one of whom continuously adds new passages while the other rests in peace.

Not long ago, Justice Antonin Scalia lamented that the Supreme Court was subjecting one of his opinions to "a thousand unprincipled distinctions without ever explicitly overruling" that precedent.[64] His complaint was perhaps a bit overstated in that context, but it is a fairly good summary of the current Court's apparent long-term plans for *Griffin v. California*, which the Court has been systematically dismantling for several decades, largely under the leadership of Justice Scalia himself, with a never-ending wave of distinctions that are based on no "principle" save the struggle to resist the expansion of *Griffin* at all costs. And the end to the battle is nowhere in sight.

The scope of that landmark ruling is now being cabined, cribbed, and confined by a long series of absolutely arbitrary distinctions—saying whatever *must* be said in case after case, no matter how senseless, to avoid the need to follow the logic of that ruling where it otherwise might lead. One cannot help but be reminded of the beleaguered young Supreme Court Justice who once complained, near the height of the excitement over *Griffin*'s early expansion: "[W]here it will stop no one can know."[65] His exasperation was understandable, and his lament was a fair comment on the dizzying pace at which that case was being rapidly stretched by the Court in every direction at the time. But Justice Rehnquist's complaint has now become a perfectly reasonable description of the uncertainty as to how far the Supreme Court will go in its decades-long campaign to narrow the reach of *Griffin,* now that the football is squarely in the control of the Squinting Conservatives. Only time will tell what will remain of that case in another fifty years. At this rate, it will probably be limited to capital

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[64] Michigan v. Bryant, 562 U.S. 344, 393 (2011) (Scalia, J., dissenting). As noted above, Justice Scalia takes a very different view of such situations when the precedent under assault is not one that he wrote, especially if it was an opinion from which he dissented. *See supra* note 32.

[65] Carter v. Kentucky, 450 U.S. 288, 310 (1981) (Rehnquist, J., dissenting).

murder prosecutions.[66] And maybe only in the State of California. Of defendants named Eddie Griffin.

[66] You heard it here first. This sounds like a joke, because of course there is not one word in the *Griffin* opinion to imply that it should be limited to capital cases. But why not? *Griffin* was, after all, a capital murder prosecution. And there is abundant legal precedent for the Supreme Court's "improvised death-is-different jurisprudence," Abdul-Kabir v. Quarterman, 550 U.S. 233, 284 (2007) (Scalia, J., dissenting), which is constantly devising heightened legal protections for defendants facing capital punishment. Besides, there was not one word in the *Griffin* opinion to even hint that it should not apply to civil cases in which defendants make a valid exercise of their Fifth Amendment privilege – but that did not stop the court from retroactively reinterpreting and limiting *Griffin* that way in *Baxter*. *See supra* notes 39-40.