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COMMENTS

PRE-ARREST SILENCE: MINDING THAT GAP BETWEEN FOURTH AMENDMENT STOPS AND FIFTH AMENDMENT CUSTODY

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I. INTRODUCTION

The legal aftermath of the terrorist attacks on the United States on September 11, 2001 has raised countless issues regarding the rights of the criminally accused balanced against the government's interest in gathering intelligence and protecting the nation.[1] A recent incident involving airport security highlighted the tension between the attempt to heighten national security and a citizen's constitutional procedural protections. On July 29, 2002, Ali Khan, an American Muslim official, was detained in an airport for an hour and forty-five minutes because his name and physical description "was a close match" to a person on a no-fly list that the Transportation Security Administration had distributed to airlines.[2] After being questioned in front of other passengers, he was escorted to a private room where two Federal Bureau of Investigation ("FBI") agents informed him that he could cooperate "the easy way or the hard way."[3] Khan chose the "easy way," answered the FBI's questions, and was ultimately released.[4]

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[1] *See generally*, Steven Lubet, *Prosecuting Our 'Enemy Combatants,'* CHI. TRI., June 23, 2002, at C9.

[2] Steve Tetreault, *Muslim Official Alleges Profiling,* LAS VEGAS REV. J., Aug. 7, 2002, at 1B.

[3] *Id.*

[4] Las Vegas FBI special agent Daron Borst said, "After a brief interview, it was

Suppose Khan had preferred to cooperate the "hard way," by refusing to answer questions until he consulted with his lawyer. Many Americans perceive that the United States Constitution grants a "right to remain silent"[5] and, whether or not this notion is correct,[6] Khan's choice to take the hard way—to remain silent—could have potentially haunted him for the remainder of the government's case against him.[7] In many states and federal circuits, a prosecutor may convey to a jury, through cross-examination or closing argument, that in the period before a person is arrested and read his or her *Miranda* warnings,[8] a person's refusal to speak indicates his or her guilt.[9] This inference could weigh heavily in a juror's assessment of a defendant's guilt: had the FBI asked Khan questions about his identity and travel plans, and Khan refused to answer and was subsequently arrested and charged, a reasonable juror could easily infer that Khan must have been guilty or else he would have nothing to hide.[10]

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determined he was not the same person, and he was sent on his way." *Id.*

[5] This right, derived from the Fifth Amendment to the United States Constitution and articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966), has been "embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson v. United States, 530 U.S. 428 , 443 (2000).

[6] The exercise of the right to remain silent under the Fifth Amendment is only constitutionally protected from adverse inference in the period after a suspect is arrested and *Miranda* warnings are read. *See infra* Section III.

[7] This comment addresses the fact that pre-arrest silence can be used as evidence of guilt in criminal prosecutions.

[8] "[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent . . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court . . . . [A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used as evidence against him, this warning is an absolute prerequisite to interrogation." *Miranda,* 384 U.S. at 467-71.

[9] The First, Second, Sixth, Seventh and Tenth Circuits prohibit the substantive use of pre-arrest silence, and the Fifth, Eighth Ninth and Eleventh Circuits allow it. See *infra* notes 109-111, for specific cases citations. Minnesota, Washington, Wisconsin, Ohio, Georgia and Tennessee prohibit substantive use of pre-arrest silence. California and Michigan allow it. *See infra* note 112 (for specific case citations).

[10] A "layman's natural first suggestion would probably be that the resort to [the Fifth Amendment] privilege [to remain silent]. . . is a clear confession of a crime." 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, § 2272, at 426 (John T. McNaughton, ed., rev. ed. 1961). Silence in response to questioning carries the tone of a tacit admission. Even the Federal Rules of Evidence recognize silence as "a statement of which the party has manifested an adoption or belief in its truth." FED. R. EVID. 801(d)(2)(B). According to the

Such refusals to speak fall under the legal umbrella of "pre-arrest silence," because they involve a person suspected of committing a criminal act who chooses not to answer questions, but who has not yet been read his *Miranda* warnings. This comment will focus on the Fifth Amendment privilege against self-incrimination, its related "right to remain silent," and the period after a suspect's movement is restricted by the government, but before the suspect is formally arrested and read his or her *Miranda* rights.[11] It will argue that a suspect's reasonable state of mind should be considered in determining whether a suspect was compelled by law enforcement officers to speak, and thus whether a prosecutor may use evidence of pre-arrest silence.[12] Further, it will argue that this consideration should take into account the reality of police-citizen encounters, such as brief investigative detentions permitted under Fourth Amendment jurisprudence.[13]

In Section II, this comment will provide a brief overview of the development of the Fifth Amendment, starting with its historical origins, continuing with its Warren Court expansion in *Miranda v. Arizona*, and ending with a brief discussion of its modern day parameters. In Section III, this comment will explain the most common arguments opposing and supporting the substantive use of pre-arrest silence. This section will begin by explaining the treatment of pre-arrest silence under the penalty doctrine put forth by *Griffin v. California*,[14] and then discuss the criticism of *Griffin* and the related arguments of why substantive use of pre-arrest silence should be

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Advisory Committee's Notes to Rule 801(d)(2)(B), "when silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue." FED. R. EVID. 801(d)(2)(B) advisory committee's note. *See also* People v. Schicci, No. 5469/99, slip. op. at 5 (N.Y. Sup. Ct. Mar. 2-, 2002), *available at* 2002 N.Y. Slip Op. 50094U, at *5, 2002 N.Y. Misc. LEXIS 413, at **5 (citing People v. DeGeorge, 73 N.Y.2d 614, 619 (N.Y. 1989)) (held that evidence of silence, though "viewed with caution," is admissible if the "defendant's failure to speak is unambiguously consistent with adoption.").

[11] The pre-arrest detention period is crucial to government agents who are trying to get information. Affording detainees the privilege against self-incrimination, particularly the right to remain silent, could devastate the government's ability to collect intelligence. "As secretary of Defense Donald Rumsfeld said of Jose Padilla [a detained terrorist suspect] 'We are not interested in trying him at the moment,' but rather in 'finding out what he knows.'" Lubet, *supra* note 2, at C9.

[12] *See infra* Section V.B.

[13] *See infra* Section V.B. (discussing the reasons for defining compulsion based on the degree to which law enforcement officers intimidate a suspect, regardless of whether the suspect is entitled to *Miranda* warnings).

[14] 380 U.S. 609 (1965).

permitted. In Section IV, this comment will discuss the analyses employed by the Courts of Appeals and state courts. This section attempts to illustrate how the decision as to whether pre-arrest silence should be admitted as substantive evidence relates to whether the court finds that an atmosphere existed in which a person would feel compelled to incriminate herself and whether the person was silent, invoking her Fifth Amendment rights, as a result of this atmosphere. In Section V, this comment will discuss a person's silence during non-arrest, police-citizen encounters, such as brief detentions, and how the intersection of the Fourth and Fifth Amendments create a mismatch between the law, the law's presumed intentions, and the psychological realities of these encounters. It will conclude by arguing that the definition of compulsion for the purposes of admitting or excluding pre-arrest silence should be broad enough to encompass pre-arrest police-citizen encounters, and that the suspect's reasonable state of mind should be considered.

II. A BRIEF HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution states that "No person. . . shall be compelled in any criminal case to be a witness against himself."[15] This clause is "an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights" because courts and scholars have been unable to define the proper scope of the privilege.[16] This is so because the historical roots of the Fifth Amendment have been glossed by the evolution of the law and the realities of modern law enforcement to the extent that courts ambiguously apply the privilege against self-incrimination.[17] This section will trace the development of the right to remain silent from its origins in England to its modern-day role in American society.

A. ORIGINS: THE CRUEL TRILEMMA

In tracing the origins of the clause, some scholars have viewed it as a relic from 17th century efforts to abolish the coercive

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[15] U.S. CONST. amend. V., cl. 3.

[16] Akhil Reed Amar & Renèe B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause,* 93 MICH. L. REV. 857, 857 (1995).

[17] *See id.* at 859-60 ("We must note that an enormous amount of modern criminal law enforcement has been shaped by the Self-Incrimination Clause, as (mis)construed over the years . . . . [T]he vastness of the Self-Incrimination Clause[] sprawl[s] across the *U.S. Reports* into a great many doctrinal corners and crevices . . . .").

questioning practices of Ecclesiastical Courts.[18] These courts would force the accused to take an oath and then face the "cruel trilemma" of incriminating himself, perjuring himself under oath, or being held in contempt of court by refusing to answer in an interrogation.[19] This compulsion to tell the truth was regarded as cruel because of the solemnity associated with the oath in the seventeenth and eighteenth centuries[20]—a solemnity that had the power to torture the spirit of the accused.[21]

The Fifth Amendment was designed to protect the accused from this cruel trilemma.[22] Thus, many Fifth Amendment scholars and judges believe that the clause focused on improper methods of gaining information from criminal suspects rather than affording defendants a right to remain silent;[23] the right "not to be compelled" did not mean the actual right to remain silent, but the right not to be forced to speak.[24]

B. THE RIGHT TO REMAIN SILENT

The privilege against self-incrimination transformed into an officially recognized right to remain silent through the language of case law during the eighteenth and nineteenth centuries.[25] In the twentieth century, the Supreme Court commented on the broad values enveloped by the Fifth Amendment.[26] In *Murphy v. Waterfront*

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[18] *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective* [hereinafter "Alschuler, *Peculiar Privilege II*"], *in* R.H. HELMHOLZ ET. AL, THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 181, 185-90 (1997).

[19] *Id.*

[20] *Id.* at 188 ("It was still a time when questions about whether bread and wine became Christ's body or merely symbolized them were matters over which men willingly fought and died . . . .").

[21] *Id.*

[22] *Id.* at 192.

[23] *Id.* at 192. *See also* Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting) (stating that "compulsion is the focus of the inquiry," and references the practices of the Court of High Commission or Star Chamber that subjected suspects to a "far reaching and deeply probing inquiry" that the suspect refused to answer on "pain of incarceration, banishment or mutilation").

[24] Timothy O'Neill, *Why Miranda Does Not Prevent Confessions; Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 870 (2001).

[25] *See* Alschuler, *Peculiar Privilege II*, *supra* note 19, at 197-201 (explaining judicial opinions throughout the nineteenth century and twentieth century through which right to silence evolved); *see also* Dickerson v. United States, 530 U.S. at 434 (discussing the development of cases leading up to *Miranda v. Arizona*).

[26] In addition to cases mentioned, see also *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (explaining that the invocation of the privilege against self-incrimination must be

Commission,[27] the Court explained that the privilege against self-incrimination:

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a 'fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'[28]

Under this broadened scope of Fifth Amendment rights, the Court projected "the right to remain silent" into the public lexicon[29] with *Miranda v. Arizona*.[30] The Court held that the prosecution must demonstrate the use of procedural safeguards effective to secure the privilege against self-incrimination.[31] *Miranda,* however, did not hold that the right to remain silent was encapsulated by the privilege against self-incrimination.[32] Rather, the phrase "right to remain silent" materialized in the Court's instruction as to what the procedural safeguards should include: "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."[33] Because the Court never discussed the particular guarantees of the Fifth Amendment, but rather discussed the necessity of protecting it in general, the Fifth Amendment's inclusion of the right to remain silent seems to be assumed throughout the Court's opinion.[34]

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given a liberal construction).

[27] 378 U.S. 52 (1964)

[28] *Id.* at 55 (citations omitted).

[29] "[D]ue to the popularity of police and law related television shows and movies, the right to remain silent is one of the best known constitutional rights." Aaron R. Pettit, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in its Case-In-Chief?*, 29 LOY. U. CHI. L.J. 181, 181 (1997).

[30] 384 U.S. 436 (1966)

[31] *Id.* at 444.

[32] *Id.*

[33] *Miranda,* 384 U.S. at 467-68.

[34] In *Miranda,* the Court implicitly derives the right to remain silent as a part of the Fifth Amendment after a discussion of the coercive interrogation practices in seventeenth century England. 384 U.S at 442-43.

C. DEFINING THE SCOPE OF *MIRANDA*

Consistent with the history of the Fifth Amendment,[35] "compulsion was a key element in *Miranda*."[36] *Miranda* asserted that compulsion was present in all cases of in-custody interrogation—"the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[37] But the Court defined vague limits on what constituted custodial interrogation.[38] On the one hand, the Court stated, "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*"[39] On the other hand, the Court noted that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding."[40] The Court made its decision in response to confessions elicited in a "police dominated atmosphere,"[41] but failed to provide guidelines for courts to determine what constitutes such an atmosphere.[42]

The Supreme Court has attempted to define the concept of custodial interrogation in several opinions.[43] In *California v. Beheler*,[44] the Court specified the formality of arrest necessary to constitute 'custody' under *Miranda* by holding that a suspect is not in custody until "there is a 'formal arrest or restraint on freedom of

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[35] *See infra* Section II. (discussing that compulsion was the main concern of the framers of the Fifth Amendment).

[36] Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and* Miranda*'s Concept of Custody*, 1993 U. ILL. L. REV. 379, 387 (1993) ("The element of compulsion . . . was the key to the Miranda decision . . . .").

[37] *Miranda*, 384 U.S. at 455.

[38] Note, *Custodial Engineering: Cleaning Up the Scope of* Miranda *Custody During Coercive* Terry *Stops*, 108 HARV. L. REV. 665, 675 (1995) ("Miranda's own language encouraged this broad application: 'custodial interrogation' potentially comprehended more than station-house interrogation.").

[39] *Miranda*, 384 U.S. at 444 (emphasis added).

[40] *Id.* at 477.

[41] *Id.* at 445.

[42] Richard A. Williamson argues that this is because the decision did not use the familiar term of arrest to define what it meant by "in-custody," "one could argue that that the Court intended to leave open the possibility that a person not under arrest could thus be in custody." Williamson, *supra* note 37, at 389.

[43] *See generally* Note, *supra* note 38, at 674-75 (discussing the development of the "Beheler-Berkemer standard" that clarified the definition of "custody" as a functional arrest.).

[44] 463 U.S. 1121 (1983).

movement' of the degree associated with a formal arrest."[45] In *Minnesota v. Murphy*,[46] the Court held that a man who made incriminating statements in response to questions from his probation officer was not in custody for *Miranda* purposes. Even though the officer "could compel Murphy's attendance and truthful answers,"[47] the Court found Murphy outside the purview of *Miranda*'s procedural protections because Murphy failed to properly invoke his rights and because his regular meetings with the officer should have insulated him from "the psychological intimidation that might overbear his desire to claim the privilege."[48]

In addition to the holdings of *Murphy* and *Beheler,* the Court has stated that in the custody determination, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[49] In construing this objective standard, courts have considered the use of guns, handcuffs, or forcing a suspect into a squad car as placing the suspect in custody.[50] But these guidelines fail to answer whether "*Miranda* purposes"[51] means the point at which a suspect must be given the *Miranda* warnings so that any statement made after the warnings may be included as trial evidence,[52] or whether the right to silence (in other words, the right not to answer questions without being subjected to adverse inference) begins when *Miranda* warnings are given.[53] One interpretation of the right to remain silent is that it is a broad Fifth Amendment right to *be* silent—a further evolution of the privilege against self-incrimination.[54] The other interpretation is consistent with the Fifth

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[45] *Id.* at 1125.

[46] 465 U.S. 420 (1984).

[47] *Id.* at 430.

[48] *Id.* at 433.

[49] Berkemer v. McCarty, 468 U.S. 420 (1984).

[50] *See* Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide,* 63 FORDHAM L. REV. 715, 725-26 n.82-84 (1994) (providing a citation listing cases in which a defendant held in handcuffs and at gunpoint could reasonably think that he was in custody).

[51] In *Minnesota v. Murphy,* the Court discussed the definition of custody "for purposes of receiving *Miranda* protection." *Murphy,* 465 U.S. at 430. Both *Murphy* and *California v. Beheler*, 463 U.S. 1121 (1983), dealt with *Miranda* in terms of whether a suspect's self-incriminating statements should be excluded.

[52] *Miranda v. Arizona* established an exclusionary rule: any statement obtained from a defendant undergoing custodial interrogation who had not been recited his *Miranda* rights may not be used as evidence. 384 U.S. 436, 443 (1966).

[53] *See* United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998).

[54] *E.g.* State v. Easter, 922 P.2d 1285 (Wash. 1996) (en banc) ("An accused's right to

Amendment's history as a solution to the cruel trilemma; the right to silence exists only as a prophylactic tool against self-incrimination in the face of state compulsion.[55]

Since *Miranda,* the Supreme Court has vacillated between these two concepts of the Fifth Amendment.[56] This uncertainty has resulted in confusion about "whether a fact finder may appropriately treat the refusal of a suspect or defendant to speak as one indication of her guilt."[57] The ultimate question resulting from this interpretive discrepancy is what types of interactions place a person in a situation in which she is compelled to incriminate herself, such that *Miranda* rights attach:[58] for example, must the police formally arrest and read *Miranda* warnings to a suspect for the suspect's silence to be protected from adverse inference, or does the presence of state compulsion deserve a separate inquiry?[59] Disparate interpretations of the circumstances under which a prosecutor may constitutionally admit pre-arrest silence as an indication of guilt have resulted in a split among circuits and states.[60]

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silence derives, not from *Miranda*, but from the Fifth Amendment itself.") *See also* Colorado v. Rogers, No. 01-CA0105, 2002 Colo. App. LEXIS 1627, at *12 (Colo. Ct. App. Sept. 12, 2002) (citations omitted) (Agreeing with the court in *Easter* that, "in some circumstances, use of a defendant's pre-arrest silence as substantive evidence of guilt is impermissible, because 'an accused's right to silence derives, not from Miranda, but from the Fifth Amendment itself,' and any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person . . . that person has no choice that will prevent self-incrimination.").

[55] "When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment." Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J. concurring).

[56] Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996) [hereinafter "Alschuler, *Peculiar Privilege I*"]. A different version of this author's article under the same title was published in a later collection of essays. *See* Alschuler, *Peculiar Privilege II, supra* note 19.

[57] *Id.* at 2627.

[58] The Supreme Court has not clearly defined what constitutes compulsion. *See* Amar & Lettow, *supra* note 17, at 865 ("[A]t times, the Justices of the Supreme Court have become engrossed by relatively trivial forms of compulsion; at other times they have zigged and zagged erratically; and at still other times they have turned a blind eye to dangerous compulsion threatening our core concerns").

[59] In *Jenkins,* the Court limited the prohibition of impeachment use of silence that occurs after arrest, as in *Doyle v. Ohio,* 426 U.S. 610 (1976), because such silence is induced by the implicit assurance of *Miranda* warnings that silence will not be used against the accused. *Jenkins*, 447 U.S. at 239-40.

[60] William M. Speek, *Evidence—The Weight of Silence: Determining the Use of Pre-arrest Silence as Substantive Evidence,* 21 AM. J. TRIAL ADVOC. 413, 414 (1997) ("The split

III. THE DEBATE OVER THE SUBSTANTIVE USE OF PRE-ARREST SILENCE AS AN INDICATOR OF GUILT

In constructing the legal arguments for and against substantive use of pre-arrest silence, one can take many analytical paths.[61] A common path that opposes substantive use of pre-arrest silence is based on *Griffin v. California*,[62] and considers that the right to remain silence is a constitutional right that extends to the pre-arrest stage of investigation.[63] A path that permits substantive use of pre-arrest silence draws from the Supreme Court's more recent cases, namely *Jenkins v. Anderson*,[64] in arguing that use of pre-arrest silence to create an inference of guilt should be permitted.[65] First I will discuss the path that relies on *Griffin*, and then I will discuss the path that relies on *Jenkins*.

A. THE *GRIFFIN* APPROACH

The argument for prohibiting prosecutors from using pre-arrest silence as evidence of guilt rests heavily on the interpretation of *Miranda* that posits that the right to remain silent is a broad

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among jurisdictions regarding the use of pre-arrest silence as substantive evidence of guilt is based upon varying views as to the extent of an arrestee's Fifth Amendment rights"). The First, Sixth, Seventh and Tenth Circuits prohibit the substantive use of pre-arrest silence; the Fifth, Eighth, Ninth and Eleventh Circuits allow it. *See infra* notes 109-11 (for specific cases' citations). Minnesota, Washington, Wisconsin, Ohio, Georgia and Tennessee prohibit substantive use of pre-arrest silence; California and Michigan allow it. *See infra* note 111 (for specific case citations).

[61] This comment refrains from exhausting the possible arguments for and against the admissibility of pre-arrest silence. One additional possible argument is that evidence of pre-arrest silence may be more prejudicial than probative, and thus fail the relevance requirement of the Federal Rules of Evidence. *See Combs. v. Coyle*, 205 F.3d. 269, 286 (6th Cir. 2000) (citing Ohio evidentiary rule—equivalent to FED. R. EVID. 403—which states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." OHIO R. EVID. 403.).

[62] 380 U.S. 609 (1965).

[63] *See generally* Jane E. Notz, Note, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009 (1997) (discussing the *Griffin* test and how it is applied).

[64] 447 U.S. 231 (1980).

[65] *See generally* Notz, supra note 63 (note discusses how courts rely on the recent test in *Jenkins v. Anderson*). *See also* Craig W. Strong, Note, *A Contextual Framework for the Admissibility of a Criminal Defendant's Pre-Arrest Silence:* United States v. Oplinger, 79 NEB. L. REV. 448 (2000) (discussing the Fifth and Eleventh Circuits' reliance on *Jenkins*).

constitutional right that extends to the period before arrest.[66] Scholars have presented *Griffin v. California*[67] as *Miranda's* predecessor in the development of the right to remain silent.[68] Under the holding of *Griffin,* a prosecutor may not comment on a defendant's choice not to testify at trial to create an inference of the defendant's guilt.[69] *Griffin* established what is now called the "penalty doctrine,"[70] which forbids "a penalty imposed [on a defendant] by the courts for exercising a constitutional privilege."[71] The penalty doctrine has been viewed as a central tool that ensures that the focus in criminal cases is not on whether the defendant committed the acts of which he is accused, but whether the Government has met its burden to prove its allegations.[72] The Court stretched the penalty doctrine so far as to require judges, upon request by the defense attorney, to instruct juries *not* to make an adverse inference from a defendant's choice not to testify.[73]

Griffin characterized the defendant's failure to testify as "silence."[74] *Griffin*'s judicial descendants extended *Griffin*'s oft-quoted dicta of the case to silence before trial, even though *Griffin* solely dealt with the defendant's decision not to testify at trial:[75] "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."[76]

Courts have indeed extended the spirit of *Griffin* to pre-trial silence.[77] The Supreme Court in *Doyle v. Ohio*[78] meshed the rights

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[66] *E.g.*, State v. Easter, 922 P.2d 1285, 1290 (Wash. 1996) ("The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation."). *See also* Pettit, *supra* note 29, at 191-92 (arguing that *Miranda's* text implies that *Miranda* rights may be extended to a "non-custodial, pre-arrest situation").

[67] 380 U.S. 609 (1965)

[68] *See* Alschuler, *Peculiar Privilege II*, *supra* note 19, at 197-201; *see also* O'Neill, *supra* note 25, at 872 (indicating that *Griffin* was the step before *Miranda* in the development of the right to silence).

[69] *Griffin*, 380 U.S. at 614-15.

[70] Notz, *supra* note 63, at 1012.

[71] *Griffin*, 380 U.S. at 614.

[72] State v. Mitchell, 526 U.S. 314, 330 (1999) (extends *Griffin* by holding that adverse inference regarding a defendant's failure to testify is not permitted in sentencing hearings).

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

[74] *Griffin*, 380 U.S. 614-15.

[75] The First, Seventh and Tenth Circuits extended the holding of *Griffin* to protect pre-arrest silence, even though the *Griffin* holding only applies to silence at trial. *See* discussion *infra* note 108.

[76] *Griffin*, 380 U.S. at 614.

[77] *See* Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-*

recited in *Miranda* warnings with the penalty doctrine in holding that any adverse use, whether substantive or for impeachment, of post-arrest, post-*Miranda* silence violates a defendant's due process rights.[79] The Court explained that while *Miranda* warnings did not expressly assure the adverse use of invoking the right to silence, such assurance was implied, rendering adverse use of silence a violation of the defendant's due process rights.[80]

The underlying assumption of the lower federal and state courts that apply *Griffin* to pre-arrest silence is fairly logical: since *Griffin* prohibits a prosecutor from using a defendant's silence at trial against him, *Griffin* should likewise prohibit a prosecutor from using pre-arrest silence against him.[81] However, *Griffin* has been the target of criticism since its publication, and may be an outdated means of analysis.[82] In his dissent in *Griffin*, Justice Stewart, joined by Justice White, pointed out the majority's broad departure from the original purpose of the Fifth Amendment to protect a defendant from state compulsion by referencing seventeenth century interrogation practices.[83] Because the defendant in *Griffin* chose not to testify, no state compulsion was present and comment on this choice was a "means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness."[84] Moreover, the dissenters called for a return to decisions based on the "lurid realities" behind the enactment of the Fifth Amendment that were a "far cry" from the subject matter of

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Testifying Defendant's Prearrest Silence, 63 BROOK. L. REV. 897, 898 (1997).

[78] 426 U.S. 610 (1976).

[79] The court held that using post-arrest silence to impeach a defendant violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 620. The Fourteenth Amendment applies the rights granted under the Fifth Amendment to the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[80] *Doyle*, 426 U.S. at 618.

[81] Ouska v. Cahill-Masching, 246 F.3d 1036, 1047 (7th Cir. 2001) (Griffin "applies equally to a defendant's silence before trial, and indeed, even before arrest . . . ." (quoting United States *ex. rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987))). *See* Combs v. Coyle, 205 F.3d 269, 282 (6th Cir. 2000) (joining other circuits in deciding that the application of the privilege extends to the pre-arrest period, and thus holding that *Griffin's* penalty doctrine applies to this period); *see also* Notz, *supra* note 64, at 1013-14 (explaining *Griffin* analysis).

[82] Notz, *supra* note 63, at 1011.

[83] *Griffin*, 380 U.S. at 620 (Stewart, J., dissenting).

[84] *Id.* at 622.

Griffin.[85]

Likewise, current Supreme Court justices oppose the extension of *Griffin*, stating that "*Griffin*'s pedigree is. . . dubious" and "out of sync" with the historical understanding that the Fifth Amendment was designed to ban compulsory oaths or torture.[86] In *Portuondo v. Agard*,[87] the Court restricted *Griffin's* penalty doctrine to only apply to comments encouraging inferences of guilt from a defendant's failure to testify; encouraging adverse inferences drawn from the exercise of related constitutional rights—in this case, the rights to be present at trial and confront one's accusers—was held permissible.[88] In addition, the Court limited *Griffin* in *Jenkins v. Anderson*,[89] which is discussed in the next section. Thus, the Court has so undermined *Griffin*'s holding that the penalty doctrine's scope may be limited to the exercise of silence at trial.[90]

B. THE *JENKINS* APPROACH

Commentators that support permitting a prosecutor to use pre-arrest silence as substantive evidence of guilt argue that the interest in preserving the truth-seeking function of trials outweighs the burden on a defendant's Fifth Amendment rights.[91] Presently, the Supreme Court's protection of silence from adverse inference only applies to the time after *Miranda* rights are given.[92] In *Jenkins v. Anderson*,[93]

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[85] "I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds." *Griffin*, 380 U.S. at 620.

[86] Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting). "The illogic of the *Griffin* line is plain, for it runs 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." *Id.*

[87] 529 U.S. 61 (2000).

[88] *Id.* (holding that a prosecutor's comment in closing argument about a defendant's ability to listen to a trial's testimony and tailor his testimony accordingly did not violate the defendant's due process rights). Justice Ginsberg, joined by Justice Souter, grounded their dissent in the penalty doctrine: "The Court today transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." *Id.* at 76-77.

[89] 447 U.S. 231 (1980).

[90] Notz, *supra* note 63, at 1017.

[91] *See* Notz, *supra* note 63, at 1018 (explains how a prosecutor's use of prearrest silence may enhance the reliability of the criminal process). The Court has recognized "the significance of silence in civil cases, stating that that 'failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.'" *Mitchell*, 526 U.S. at 332 (Scalia, J. dissenting) (quoting Baxter v. Palmigiano, 425 U.S. 308, 319 (1976)).

[92] *See infra* discussion in this Section III.B.

[93] 447 U.S. 231 (1980).

the Court held that pre-arrest silence may be admitted on cross-examination to impeach a defendant's credibility.[94] After the defendant maintained self-defense, the prosecutor cross-examined the accused about his failure to turn himself in after he stabbed a man.[95] The prosecutor then commented on his pre-arrest silence in the closing argument.[96] The Court held that the prosecutor's treatment of the defendant's pre-arrest silence was permissible because it was used to impeach the defendant's credibility, a practice the defendant invited by taking the stand.[97]

The *Jenkins* Court put forth a balancing test that tamed the effects of *Griffin*: "In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."[98] Because impeachment on cross-examination enhances the reliability of the criminal process, the Court stated, the Fifth Amendment is not violated when pre-arrest silence is used to impeach a criminal defendant's credibility.[99] The *Jenkins* Court also implicitly undermined the *Griffin* penalty doctrine, stating that the "Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[100]

The Supreme Court commented further on pre-trial silence in *Fletcher v. Weir*[101] in which it held that impeachment use of post-arrest, pre-*Miranda* silence does not offend due process.[102] It distinguished *Doyle v. Ohio*[103] by pointing out that in *Doyle, Miranda* warnings induced the defendant to remain silent, whereas in *Fletcher,*

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[94] *Id.* The *Jenkins* court thus permitted the attack of a defendant's credibility by using evidence pre-arrest silence to contradict the defendant's testimony or otherwise call his credibility into question. Notably, however, the "prosecutor attempted to impeach the petitioner's credibility by suggesting that the petitioner would have spoken out if he had killed in self-defense." *Id.* at 235. Essentially, the prosecutor suggested that the petitioner did not kill in self-defense. This clearly encourages an inference of guilt that may be more prejudicial to the defendant than a mere attack on his credibility as a witness.

[95] *Id.* at 233.

[96] *Id.* at 234.

[97] *Id.*

[98] *Id.* at 238.

[99] *Id.* at 238. The Court, however, declined to address whether pre-arrest silence is privileged under the Fifth Amendment at all. Patrick, *supra* note 77, at 912.

[100] *Jenkins,* 447 U.S. at 238.

[101] 455 U.S. 603 (1982).

[102] *Id.*

[103] 426 U.S. 610 (1976); *see supra* notes 78-80 and accompanying text.

the defendant was not instructed of such a right.[104] This opinion adopts the idea that *Miranda* rights are merely prophylactic against coercive government treatment rather than a restatement of an absolute Fifth Amendment right;[105] the right to remain silent free from adverse inference begins when the government reads a suspect his *Miranda* rights. Consistent with this view, courts have held that in the absence of state compulsion, which is determined based on the formal custody of the accused,[106] pre-arrest silence may be used as substantive evidence of guilt.[107]

IV. THE SPLIT IN CASE LAW: DIFFERING VIEWS OF COMPULSION AND INVOCATION

The lower court cases involving pre-arrest silence have grown in the landscape designed by the Supreme Court, with the broad interpretation of the Fifth Amendment applied through *Griffin* extending in one direction, and the narrow treatment of silence in *Jenkins* extending in another direction. In the federal courts of appeals, the circuits are split; the First, Second, Sixth, Seventh, and Tenth Circuits hold that substantive use of pre-arrest silence violates the Fifth Amendment privilege against self-incrimination,[108] relying

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[104] *Fletcher*, 455 U.S. at 605.

[105] *Miranda* rights have been repeatedly referred to by the Court as "prophylactic" and "not themselves rights protected by the Constitution." Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing New York v. Quarles, 467 U.S. 649, 653 (1984)); Michigan v. Tucker, 417 U.S. 433, 444 (1974). *See also infra* Section II. (explaining the vacillating interpretations of the Fifth Amendment).

[106] *See infra* Section II. (discussing *Beheler v. California*, 463 U.S. 1121 (1983) and *Minnesota v. Murphy*, 465 U.S. 420 (1984) and how custody defines compulsion).

[107] *See* discussion *infra* note 110 (listing cases allowing substantive use of pre-arrest silence).

[108] United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987) (holding that *Griffin* extends to pre-arrest silence when the defendant chooses not to testify and upheld, but distinguished, in *United States v. Bonner*, 302 F.3d 776, 783-84 (7th Cir. 2002)); United States v. Hernandez, 948 F.2d 316 (7th Cir. 1991) (holding that when the prosecution refers to pre-*Miranda* silence in its case-in-chief, that reference demonstrates that those comments were intended as an inference of the defendant's guilt, even when the defendant later takes the stand); Ouska v. Cahill- Masching, 246 F.3d 1036 (7th Cir. 2001) (holding that the substantive use of defendant's pre-arrest silence violated her constitutional rights); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding that admission of evidence of defendant's pre-arrest silence was plain error); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (finding the admission of testimony concerning defendant's silence to be plain error on the grounds that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights to which defendant exercised, citing *Griffin*); United States v. Caro, 637 F.2d 869 (2d Cir. 1981) (stating that "we have found no decision permitting the use of silence, even the silence of a suspect who

principally on *Griffin*.[109] The Fifth, Eighth, Ninth and Eleventh Circuits extend the logic of *Jenkins* to hold that the government may use pre-arrest silence as substantive evidence of guilt.[110] States are similarly split.[111]

Regardless of whether a court decided to admit evidence of pre-arrest silence, courts[112] have made two key inquiries in making their decision: whether the suspect was questioned in a police-dominated atmosphere that would result in compelled testimony, and whether the privilege against self-incrimination was invoked in a reasonable response to such an atmosphere. The logic employed by many of

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has been given no Miranda warnings and is entitled to none, as part of the Government's direct case"); Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) (holding that substantive use of a defendant's pre-arrest silence violates defendant's Fifth Amendment rights).

[109] Combs v. Coyle, 205 F.3d 269, 282 (6th Cir. 2000). *See also* Strong, *supra* note 65, at 457; Patrick, *supra* note 77, at 898 (explains courts' reliance on *Griffin*).

[110] United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991) (comment on pre-arrest silence was harmless error); United States v. Campbell, 223 F.3d 1286 (11th Cir. 2000) (interpreting *Rivera* to hold that a prosecutor may comment on a defendant's pre-arrest, pre-*Miranda* silence without restriction); Vick v. Lockhart, 952 F.2d 999 (8th Cir. 1991) (remanding for a determination of when the defendant received *Miranda* rights, based on the conclusion that pre-*Miranda* silence is not constitutionally protected); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (finding no plain error in admitting pre-arrest silence in the absence of government action on the ground that the fifth amendment does not "preclude evidentiary use about every communication or lack thereof by the defendant which may give rise to an incriminating inference"); United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998) (holding that substantive use of pre-arrest silence is permitted when there is an absence of government compulsion). *See also* Strong, *supra* note 66, at 898 (explains how circuits rely on *Jenkins*).

[111] Many states prohibit substantive use of pre-arrest silence, both for constitutional and evidentiary reasons. *See, e.g.*, Colorado v. Rogers, No. 01-CA0105, 2002 Colo. App. LEXIS 1627 (Colo. Ct. App. Sept. 12, 2002) holding that defendant's response to police was not silence, but stating that using pre-arrest silence to imply guilt is constitutionally impermissible); Frazier v. State, 544 S.E.2d 198 (Ga. App. 2001); Minnesota v. Houseman, No. C1-00-2196, 2001 Minn. App. LEXIS 1130 (Minn. Ct. App. 2001); State v. Geboy, 764 N.E.2d 451 (Ohio Ct. App. 3d Dist. 2001); State v. Haire, No. 01-CA-0105, 2002 Tenn. Crim. App. LEXIS 39 (Tenn. Crim. App. Jan. 22, 2002); State v. Easter, 922 P.2d 1285 (Wash. 1996); State v. Glenn, 628 N.W.2d 438 (Wis. 2001); Lancaster v. Wyoming, 43 P.3d 80 (Wyo. 2002) (holding that use of pre-arrest silence is impermissible, but upholding conviction because prejudicial error did not occur.) Other states allow it. *See, e.g.*, People v. Nesbitt, No. B141286, 2001 Cal. App. Unpub. LEXIS 794, at *37 (Cal. Ct. App. Dec. 12, 2001) (following *Oplinger*); People v. Mitchell, No. 213400, 2001 Mich. App. LEXIS 764 (Mich. Ct. App. May 11, 2001); Martinez v. Texas, No. 07-01-350-CR, 2002 Tex. App. LEXIS 4518 (Tex. App. June 24, 2002).

[112] This statement excludes courts that simply follow precedent by interpreting a higher court's holding to admit or exclude pre-arrest silence as a blanket prohibition or allowance. *E.g.*, Washington v. Raper, No. 47932-6-I, 2002 Wash. App. LEXIS 110 (Wash. Ct. App. Jan. 22, 2002).

these courts[113] follows the Justice Stevens' concurrence in *Jenkins v. Anderson*.[114] Justice Stevens wrote, "the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."[115] He explained, "The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police."[116] Thus, the difference in the cases' outcomes often rests on the courts' differing views of what police-citizen interaction results in a situation in which a reasonable suspect would feel compelled to incriminate herself.[117]

A. COURTS THAT PROHIBIT SUBSTANTIVE USE OF PRE-ARREST SILENCE: BROAD DEFINITIONS OF COMPULSION AND INVOCATION

Courts that prohibited the substantive use of pre-arrest silence did so on the basis of the coercive nature of the police-citizen encounter. For instance, the Sixth Circuit, in joining the Seventh, First, and Tenth Circuits in prohibiting substantive use of pre-arrest silence, stated that "[l]ike those circuits, we believe that 'application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime.'"[118] So while the Sixth Circuit joined the ranks of the courts that prohibited the use of pre-arrest silence, it impliedly limited this prohibition to silence in response to the questioning law enforcement by making its determination based on the factual element of the presence of police investigators.[119] As such, the Sixth Circuit's definition of compulsion included questioning by law enforcement officers.[120] Likewise, in *Ouska v.*

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[113] *E.g., Oplinger*, 150 F.3d. 1061.

[114] 447 U.S. 231.

[115] *Id.* at 241.

[116] *Id.* at 243.

[117] *See generally* Patrick, *supra* note 77 (discussing scenarios that could possibly fall under several different "Coercion Models").

[118] Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (citing Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989)).

[119] People v. Francisco C., 2002 Cal. App. Unpub. LEXIS 4571, at *140 (Cal. Ct. App. Jan. 25, 2002) ("However, *Combs* drew the additional distinction that even assuming the Fifth Amendment was inapplicable to precustody context, the privilege was still applicable to the defendant therein because the court agreed defendant was in custody at the time").

[120] *Combs*, 205 F.3d at 283-84.

Cahill-Masching,[121] the court found that Ouska made a substantial showing that her constitutional rights were violated when the prosecutor commented on her pre-arrest silence that occurred in response to police questioning in a police station.[122] Ouska was in the police station voluntarily and was not under arrest, yet the court found that such a setting triggered Ouska's Fifth Amendment protections.[123]

Similarly, in *State v. Easter,*[124] the defendant refused to answer questions of a police officer.[125] In finding a violation of the defendant's Fifth Amendment rights from the prosecution's substantive use of this silence, the court distinguished this from a previous case that allowed the substantive use of pre-arrest silence where the defendant refused to answer a *civilian's* questions.[126] The state of Georgia, which prohibited substantive use of pre-arrest silence, limited this prohibition to a defendant's silence "in the face of questions by an agent of the State or his failure to come forward when he knew that he was a target of criminal investigation."[127] Therefore, courts that prohibit substantive use of pre-arrest silence as an indicator of guilt seem to condition this prohibition on the fact that the silence was in response to questioning by government agents.

Related to the factual inquiry about the presence of government agents, courts have asked whether the defendant reasonably invoked his right to remain silent in response to questioning.[128] The invocation inquiry calls for an objective determination as to whether the defendant was aware of the right to remain silent having not received *Miranda* warnings.[129] In *Coppola v. Powell,*[130] the First Circuit stressed that Fifth Amendment privileges are privileges that

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[121] 246 F.3d 1036 (7th Cir. 2001).

[122] *Id.* at 1048.

[123] *Id.*

[124] 922 P.2d 1285 (Wash. 1996).

[125] *Id.* at 1287-88.

[126] *Id.* at 1291.

[127] Morrison v. State, 554 S.E.2d 190, 193 (Ga. Ct. App. 2001).

[128] In *Davis v. United States,* 512 U.S. 452 (1994), the Court held that the suspect must clearly and unequivocally invoke his Fifth Amendment rights in order to receive its protection.

[129] *See Easter,* 922 P.2d at 1290-91 ("[A]n accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right regardless of whether it is pre-arrest or post-arrest."); Combs v. Coyle, 205 F.3d at 284 ("A reasonable person in Comb's situation could have believed he was under arrest").

[130] 878 F.2d 1562 (1st Cir. 1989).

must be claimed, even if the attempt to claim the privilege is feeble; "in determining whether the privilege has been invoked, the 'entire context in which the claimant spoke must be considered.'"[131] The Tenth Circuit in *United States v. Burson*[132] interpreted *Griffin's* rule of law to state that "*once a defendant invokes his right to remain silent,* it is impermissible for the prosecution to refer to any Fifth Amendment rights which the defendant exercised."[133] Similarly, the Seventh Circuit in *United States ex. rel. Savory v. Lane*[134] held the substantive use of silence as an indication of guilt impermissible, but relied on the fact that the defendant did not testify to distinguish the case from *Jenkins* and its progeny;[135] by remaining silent before trial and during trial, the right to silence was unequivocally invoked, so the court extended the protection of *Griffin* to the time before trial.[136]

A factor related to the invocation inquiry is that the right to silence is a privilege upon which many rely[137] because of its pervasion of popular culture.[138] For example, in *Coppolla,* the court analyzed the defendant's statement to the police that he would not speak to them without his lawyer.[139] The court found that the defendant invoked his privilege against self-incrimination because the statement indicated that he had knowledge of this privilege.[140] In deciding this, the court mentioned that the defendant had been questioned earlier that day, and knew that his friends were questioned, therefore the defendant likely knew that he had the right not to incriminate himself.[141]

These factual inquiries link to the question of how much police presence amounts to a circumstance described by *Miranda* as one that may result in a statement in violation of the Fifth Amendment.[142] The rule derived from these cases is that, when a suspect is in a situation

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[131] *Id.* at 1565 (quoting *United States v. Goodwin,* 470 F.2d 893, 902 (5th Cir. 1972)).

[132] 952 F.2d 1196 (10th Cir. 1991).

[133] *Id.* at 1201 (emphasis added).

[134] United States *ex. rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).

[135] *Id.* at 1017-18.

[136] *Id.*

[137] *See* discussion *infra* Section V.A. (discussing silence as a right upon which people rely in presence of law enforcement).

[138] *See* Pettit, *supra* note 29, at 181 (mentions the popularity of police and law shows in the media).

[139] Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989).

[140] *Id.*

[141] *Id.*

[142] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

in which he reasonably relies on the right to remain silent and reasonably invokes it in response to a certain level of state pressure, the silence is protected from adverse inference.

B. COURTS THAT ALLOW SUBSTANTIVE USE OF PRE-ARREST SILENCE: NARROW VIEWS OF COMPULSION AND INVOCATION

Even though other courts reached an opposite outcome, their inquiry into the degree of compulsion in a police-citizen encounter was consistent with the cases that hold the inclusion of pre-arrest silence in error. Like the cases that prohibited use of pre-arrest silence, these cases shaped their analysis based on the presence of government agents and whether the suspect invoked his right to silence. In *United States v. Zanabria*,[143] the Fifth Circuit allowed comment on the defendant's pre-arrest silence, because the referenced silence was not asserted in the presence of law enforcement agents:[144] "[t]he fifth amendment . . . does not . . . preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference."[145] The Ninth Circuit applied a narrow concept of how much law enforcement presence may constitute an atmosphere of state compulsion in *United States v. Oplinger*.[146] *Oplinger* emphasized the absence of law enforcement personnel when the defendant refused to answer his employer's questions.[147] Like the aforementioned cases, the *Oplinger* court focused on the presence of state compulsion as the test for invoking Fifth Amendment privileges.[148] But because the defendant's silence occurred prior to the arrival of police, the court found that the defendant was not compelled to speak.[149] Therefore, the defendant was not entitled to the Fifth Amendment protection against self-incrimination that was "intended as a 'limitation on the investigative techniques of the government, not as an individual right against the

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[143] United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996).

[144] The evidence of silence was the defendant's failure to tell authorities that he was in need of financial help and was used to rebut the defendant's duress defense. *Id.* at 593.

[145] *Id.*

[146] United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998); *see also* United States v. Angwin, 263 F.3d 979 (9th Cir. 2001); People v. Nesbitt, No. B141286, 2001 Cal. App. Unpub. LEXIS 794, at *37 (Cal. Ct. App. Dec. 12, 2001).

[147] *Oplinger*, 150 F.3d at 1066.

[148] *Id.*

[149] *Id.* at 1061.

world.'"[150] A recent Ninth Circuit case applying *Oplinger* held that, because the defendant was not yet in custody, the prosecutor's comment on her silence as constituting substantive evidence of her guilt was proper.[151] The defendant faced routine questions from a border patrol agent, but the court held that this was not custody because "special rules apply at the border,"[152] and an act of physical confinement is required for a defendant to be in custody at a border checkpoint.[153] Thus, the analytical difference between cases that have prohibited the substantive use of pre-arrest silence and those that have allowed it is minimal; regardless of the outcome, courts on opposite "sides" of the pre-arrest silence argument base their decisions on facts involving the presence of law enforcement officers.

Like the courts that prohibited substantive use of pre-arrest silence, courts that have permitted its use have inquired as to whether the defendant reasonably invoked his right to remain silent.[154] In *United States v. Rivera,*[155] the court examined the nature of the silence in deciding that comment on the silence was harmless error.[156] The silence at issue was the defendant's failure to protest or react when a customs' officer searched his bags.[157] The court explored whether there was a rational distinction between acting silent and being silent.[158] It recognized that silence does not mean only muteness; it includes the statement of a desire to remain silent but that "there is no definite outer boundary in determining what types of nonverbal conduct or demeanor, whether assertive or nonassertive, a prosecutor may permissibly comment on without running afoul of the dictates of *Miranda.*"[159]

Even though the outcomes of these cases have resulted in a categorization of courts as either permitting substantive evidence of pre-arrest silence or not, a closer look at the factual inquiries that these courts employed indicates that the actual controversy that needs to be resolved by the Supreme Court is not the broad question of

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[150] *Id.* at 1067 (citing United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir.1997)).

[151] *United States v. Angwin,* 263 F.3d 979 (9th Cir. 2001).

[152] *Id.* at 1000 n.6 (quoting United States v. Butler, 249 F.3d 1094, 1098 (9th Cir. 2001)).

[153] *Id.*

[154] *See* Minnesota v. Murphy, 465 U.S. 420 (1984); State v. Millay, 787 A.2d 129 (Me. 2001).

[155] 944 F.2d 1563 (11th Cir. 1991).

[156] *Id.* at 1569.

[157] *Id.*

[158] *Id.*

[159] *Id.*

whether substantive use of pre-arrest silence as an indicator of guilt is definitively in violation of the Constitution. Rather, the Supreme Court must clarify what constitutes a compelling atmosphere, under *Miranda*, that would place a suspect in the position in which he would invoke his or her right to silence regardless of whether he is officially under arrest. Such a delineation, if it is successful in determining whether a person is in a coercive situation,[160] would satisfy both sides of the debate about pre-arrest silence. A compulsion test would prevent adverse inference from silence made by a suspect who is silent in response to the pressure to self-incriminate, and would thus hold consistent with the history of the Fifth Amendment's development.[161] Furthermore, a compulsion test would allow rational inferences to be drawn from highly probative silence that is not in response to pressure from law enforcement.[162]

V. THE DELINEATION OF COMPULSION AND THE INTERSECTION OF FOURTH AND FIFTH AMENDMENTS

In order to determine what sort of state action constitutes compulsion, courts should consider the realities of police practices permitted by the Fourth Amendment.[163] In certain police-citizen encounters, silence may lack any probative value as an indicator of guilt because a person may rely on her right to remain silent.[164] But certain police practices permitted by the Fourth Amendment do not entitle a person to *Miranda* safeguards,[165] and thus, a court may not

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[160] However, defining the constitutional propriety of police conduct without a case-by-case examination may be difficult.

[161] *See infra* Section II.

[162] This would also satisfy those who propose "one global rule of compulsion: reasonable adverse inferences from suspicious silence outside courtrooms need not always be treated as Fifth Amendment 'compulsion.'" Amar & Lettow, *supra* note 16, at 909.

[163] Fourth Amendment law of searches and seizures is the only constitutional restriction placed on law enforcement investigation practices:

> To label any police activity a "search" or a "seizure" within the ambit of the Amendment is to impose . . . restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure" it is subject to no restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974), *excerpted in* RONALD H. ALLEN ET. AL., CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS, AND RELATED AREAS 541 (3d ed. 1995).

[164] *See infra* Section V.

[165] Berkemer v. McCarty, 468 U.S. 420 (1984).

view this person to be in a situation of compulsion.[166] As a result, a defendant's pre-arrest silence would be vulnerable to adverse inference even if it has low probative value of the defendant's guilt. This section will first explain why silence in the presence of law enforcement may have low probative value.[167] Then, it will illustrate why the Fourth and Fifth Amendment conflict by presenting police practices as shaped by Fourth Amendment restrictions and the Fifth Amendment protections granted to a suspect in light of these practices.[168]

A. SILENCE IN THE PRESENCE OF LAW ENFORCEMENT MAY HAVE LOW PROBATIVE VALUE AS AN INDICATOR OF GUILT

Silence in the presence of a law enforcement officer may have a low probative value as an indicator of guilt that would be outweighed by the prejudice to the defendant at trial. When a person is confronted by police, there are many reasons why the person would refuse to speak to the police that have nothing to do with the person's guilt of committing a crime:[169] "it is an unfortunate truth that many people in our society, especially those involved in life on the street, view the police as antagonists rather than protectors and react to police contact with extreme suspicion, distrust, and lack of cooperation."[170] This is especially true given the United States' war on terrorism; police are questioning immigrants at unprecedented rates and racial profiling is inevitably more common.[171] A person may refuse to speak to police simply out of fear and intimidation.[172]

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[166] *See* United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (In allowing substantive use of pre-arrest silence, the court reasoned, "the fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police").

[167] *See infra* Section IV.A.

[168] *See infra* Section IV.B.

[169] Key-El v. State, 709 A.2d 1305, 1315 (Md. 1998) (Raker, J., dissenting).

[170] Notz, *supra* note 64, at 1029 (quoting People v. Conyers, 400 N.E.2d 342, 348 (N.Y. 1980)).

[171] David Hench, *Maine Immigrants React to Increase in Police Scrutiny; Some Take the Police Interviews in Stride as a National Security Necessity. But For Others They Can Be Traumatic,* ME. SUNDAY TELEGRAM, Dec. 9, 2001, at 1A, *available at* 2001 WL 27640534. Ali Khan, the subject of the scenario, recounted that "he felt intimidated and humiliated when questioned near the counter as hundreds of other travelers looked on. . . . . 'I don't want this to happen to another American Muslim,'" he stated. Tetreault, *supra* note 2, at 1B.

[172] Dorcas Gilpatrick, the associate director of the Maine Civil Liberties Union, expressed, "'Many immigrants are intimidated and somewhat frightened when a police officer comes to the door.'" Hench, *supra* note 171, at 1A. *See also* Notz, *supra* note 63, at

A person may refuse to respond to questioning because she may be involved in unrelated transactions, criminal or non-criminal, that she may not want to reveal to the police.[173] A suspect may refuse to respond to questioning because an accomplice or other third-party has intimidated him with threats if he talks to the police.[174] A suspect may refuse to respond in order to protect a friend or family member.[175] Furthermore, the right to silence is a right upon which many would rely; because of the repetition of 'you have the right to remain silent' in the media,[176] silence may appear to provide the only safe harbor from criminal prosecution and conviction.[177]

Thus, the reasons for silence are varied and many of these reasons have nothing to do with guilt associated with committing the specific crime. Nevertheless, a person accused of a crime may invoke her Fifth Amendment rights through silence because she is in an intimidating situation—a police officer may pat down her body searching for weapons,[178] or badger her with questions in a setting that is removed from the public.[179] Despite the invocation through silence, prosecutors may be allowed to use this silence in a way that would suggest that it was a tacit admission of guilt[180] that is more

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1029.

[173] Notz, *supra* note 63, at 1029.

[174] *See Witness Intimidation on the Rise in Drug Cases,* THE RECORD, Aug. 5, 1994, at A14.

[175] Notz, *supra* note 63, at 1029.

[176] "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson v. United States, 530 U.S. 428, 430 (2000); *see also* Pettit, *supra* note 29, at 181.

[177] Philip Key-El v. State, 709 A.2d 1305, 1315 (Md. 1998) (Raker, J. dissenting) (a person's "awareness that he is under no obligation to speak or . . . the knowledge that anything he says might later be used against him at trial" may be reasons why the person would refuse to speak to the police, which renders silence ambiguous). In fact, it is probably in a person's best interest to refuse to answer questions posed by the police in an investigation because police often try to postpone formal arrests in order to accumulate evidence that could be used to convict: "Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury." United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J., concurring). "In criminal cases . . . troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that 'anything you say may be used against you.'" FED. R. EVID. 801(d)(2)(B) advisory committee's note.

[178] Terry v. Ohio, 392 U.S. 1 (1968).

[179] *See infra* Section IV.B.

[180] If the accused testifies, a prosecutor will be permitted to cross-examine her with pre-arrest silence. If she does not testify, a prosecutor will be allowed to use the pre-arrest

prejudicial to the accused than it is probative—and may violate her Fifth Amendment rights.

B. THE COLLISION OF THE FOURTH AND FIFTH AMENDMENTS AT THE *TERRY* STOP[181]

The Fourth Amendment prohibits unreasonable searches and seizures by the government.[182] Seizure of a person occurs "when, 'in view of all of the circumstances surrounding the incident,' a person reasonably believes he or she is not 'free to leave' an encounter with a government official."[183] In *Terry v. Ohio,*[184] the Supreme Court analyzed a type of police activity classified as a "stop and frisk."[185] A *Terry* stop requires a showing of reasonable suspicion[186] that is a lower standard than the probable cause requirement of a traditional search and seizure.[187]

A *Terry* stop is essentially an arrest—a seizure of a person—and the Supreme Court has recognized that, "*Terry* unquestionably involved conduct that would constitute a common-law seizure."[188] Despite this recognition, courts have created a dynamic imaginary line that separates a mere stop from an arrest based on the amount of

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silence to create an adverse inference in the Fifth, Eleventh, and Ninth Circuits. *See infra* Section III (discussing current case law.)

[181] *See generally* Godsey, *supra* note 50.

[182] U.S. CONST. amend. IV.

[183] Seanna Beck, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: Overview of the Fourth Amendment,* 89 GEO. L.J. 1055, 1059 (2001). The "free to leave" test was set forth in *United States v. Mendenhall,* 446 U.S. 544 (1980).

[184] 392 U.S. 1 (1968).

[185] *Id.* at 10.

[186] *Terry* did not articulate the phrase "reasonable suspicion," however, its subsequent cases have interpreted *Terry* to stand for this standard. *See, e.g.,* Illinois v. Wardlow, 528 U.S. 119 (2000).

[187] Wardlow describes the standard as follows:

> "[W]here a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which may be used to assault him. Such a search is a reasonable search under the Fourth Amendment. . . . ."

Terry, 392 U.S. at 30-31.

[188] California v. Hodari D., 499 U.S. 621, 627 n.3 (1991).

force applied by a law enforcement officer.[189] The Supreme Court has dictated that only when a person is formally "under arrest," a concept that does not include *Terry* stops,[190] is a person entitled to *Miranda* safeguards.[191] So even though a *Terry* stop may share many characteristics of an arrest, such as physical touching,[192] guns, handcuffs, the placement of a detainee in a police car,[193] a person may not necessarily refuse to answer an officer's questions free from a juror's potential adverse inference of his or her guilt.

Restrictions on freedom permitted by *Terry* run counter to *Miranda*'s specification that procedural safeguards must be employed if the accused's freedom is deprived in any significant way;[194] an individual "subject to an investigative detention who has merely been 'stopped' within the meaning of the Fourth Amendment may in fact need the protections provided by the *Miranda* safeguards because of the compelling circumstances of the detention."[195] The clash between Fourth and Fifth Amendment values is best exemplified by the fact that the use of guns and handcuffs has been held reasonable to effectuate a *Terry* stop,[196] yet use of guns and handcuffs have also

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[189] Godsey, *supra* note 50, at 725 n.6 (quoting United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) ("discussing the 'multifaceted expansion of *Terry*' to include indicia of force such as handcuffs and weapons which previously had been considered appropriate only for arrests").

[190] Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984).

[191] *Id.*

[192] In exploring what type of police action constitutes the arrest of a suspect, the Court considered that "'[t]here can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest.'" *Hodari D.*, 499 U.S. at 625 (quoting ASHER L. CORNELIUS, THE LAW OF SEARCH AND SEIZURE 163-64 (2d ed. 1930) (footnote omitted)).

[193] Note, *supra* note 38, at 671 (citations omitted) ("Courts have authorized the use of handcuffs, drawn sidearms, and the placement of the detainee on the ground or in a police car during a *Terry* stop. Although this increased force may be necessary for public safety, it may also compel self-incrimination.").

[194] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[195] Williamson, *supra* note 36, at 385.

[196] The Seventh Circuit in *United States v. Tilmon* stated: "Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that an investigative stop is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal, so there is a complex tradeoff involved in any proposal to reduce (or increase) the permissible scope of *Terry* stops." 19 F.3d 1221, 1226 (7th Cir. 1994) (quoting United States v. Serna-Banneto, 842 F.2d 965, 968 (7th Cir. 1988)). In addition, in *United States v. Perdue*, the court wrote: "The use of guns in connection with a stop is permissible where the police reasonably believe the

been held to constitute "custody" that would entitle a suspect to *Miranda* protections.[197] As one scholar explains:

> [T]he extent of the force recently permitted in *Terry* stops has spot-lighted th[e] possibility of compulsion. Though not challenging the basic equation—that Fourth Amendment force translates into Fifth Amendment compulsion—some courts have tolerated far less force under the Fifth Amendment than they have tolerated under the Fourth. The increased level of force in *Terry* stops thus implicates *Miranda* without violating the Fourth Amendment limits on a proper stop.[198]

Even without guns and handcuffs, a *Terry* stop that involves mere frisks may be intrusive and intimidating enough to prevent a person from speaking to the police.[199] A stop and frisk incident in which a police officer may search the outer clothing of a person in public is hardly a "petty indignity"[200] and "[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[201] Thus, a person intimidated and humiliated by such a search may choose not to respond to police questioning with the understanding that what he says "may be used against him in a court of law."[202] He or she may experience the compulsion that *Miranda* specifically intends to deflect.[203]

This problem extends beyond the technical *Terry* stop, which focuses on a police officer's interest in ensuring that a suspect does not have a weapon, to other investigative encounters. The Supreme Court has held that the Fourth Amendment allows police officers to question individuals in airports and other public places and search their belongings, "so long as a reasonable person would understand that he or she could refuse to cooperate"[204] (or take the hard way, as

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weapons are necessary for protection." 8 F.3d 1455, 1462 (10th Cir. 1993). *See also* Godsey, *supra* note 50, at 716 (explaining how in the late 1980s and early 1990s, federal courts dramatically expanded the level of force that police officers may use in certain *Terry* encounters). See *id.* at 728 n.98-733 n.126, for examples of cases that have developed *Terry*.

[197] *See infra* Section II.C.

[198] Note, *supra* note 38, at 672.

[199] Even though ideally a *Terry* stop is "pointed and brief" and "far from the prolonged interrogations described in *Miranda,*" and intended to "confirm or dispel the particular suspicions of the officer making the stop," the reality may differ. *Id.* at 673.

[200] Terry v. Ohio, 392 U.S. 1, 16-17 (1968).

[201] *Id.*

[202] *See* Philip Key-El v. State, 709 A.2d 1305, 1315 (Md. 1998) (Raker, J., dissenting); *see also* discussion *infra* notes 169, 177.

[203] *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

[204] *See* Florida v. Bostick, 501 U.S. 429, 431 (1991).

opposed to the easy way).[205] But in *Florida v. Bostick*,[206] the Court reversed a finding that that a suspect would have felt free to refuse to cooperate where armed police questioned a suspect and asked to search his belongings from the aisle of a moving bus.[207] *Bostick*'s dissent touched upon the situation's implication for pre-arrest silence:

> [T]he issue is . . . whether such a passenger—without being apprised of his rights—would have felt free to terminate the antecedent encounter with the police. Unlike the majority, I have no doubt that the answer to the question is no . . . [The passenger] could have remained seated while obstinately refusing to respond to the officers' questioning. But in light of the intimidating show of authority that the officers made upon boarding the bus, respondent reasonably could have believed that such behavior would only arouse the officers' suspicions and intensify their interrogations.[208]

Had the passenger refused to answer the police officers' questions, many courts may have permitted a prosecutor to use the suspicion-arousing silence to convince a jury to infer the defendant's guilt. So even though a person may not feel free to leave the intimidating presence of a police officer, he or she is left with no legally prudent option but to cooperate with the police.[209] This may be a type of compelled testimony that *Miranda* sought to diminish.

Considering the many reasons why a person may not want to respond to police inquiries,[210] and considering that cases determining the admissibility of pre-arrest silence inquire as to whether the atmosphere when the accused invoked his right to silence was police dominated,[211] the protection of silence from adverse inference should be extended to detentions even though the Court has rendered them to be out of the purview of the procedural protection of *Miranda*.[212]

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[205] *See infra* Section I.

[206] *Bostick*, 501 U.S. 429.

[207] *Id.* at 439-40.

[208] *Id.* at 447 (Marshall, J., dissenting).

[209] Some courts have found that this is the type of situation that violates a defendant's Fifth Amendment rights. As explained in *Colorado v. Rogers*, "'any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's pre-arrest speech and silence may be used against that person . . . that person has no choice that will prevent self-incrimination.'" Colorado v. Rogers, No. 01-CA0105, 2002 Colo. App. LEXIS 1627, at *13 (Colo. Ct. App. Sept. 12, 2002) (quoting State v. Fencl, 325 N.W.2d 703, 711 (Wis. 1982)).

[210] *See* discussion *infra* Section V.A.

[211] *See* discussion *infra* Section III. (discussing *Miranda* and police domination).

[212] Berkemer v. McCarty, 468 U.S. 420 (1984). *See also* Note, *supra* note 38, at 668 ("Unlike the Fifth Amendment, which regulates all police-civilian interactions, *Miranda* does not apply to some potentially coercive situations. According to the original understanding of the decision, the *Miranda* warning is required only prior to interrogation

The solution, however, is not necessarily to require police officers to give a suspect *Miranda* warnings before every instance of questioning or frisking. Reciting *Miranda* warnings is time-consuming and may encumber an on-the-scene investigation.[213] Furthermore, the mere recital of the warning may formalize a police-citizen interaction, which "may discourage citizens from cooperating with the police."[214]

A proper solution may be to create a means of evaluating police-citizen encounters in a way that integrates Fourth and Fifth Amendment values. The concept of custody under *Miranda* "is predicated upon the belief that significant custodial restraints produce, in the mind of the suspect, a form of prohibited compulsion. The suspect's state of mind, real or attributed, provides the factual predicate for the assumption that compulsion exists when a suspect is in custody."[215] However, under Fourth Amendment values, particularly those governing the issue of whether the suspect experienced a *Terry*-type detention or instead was arrested, "the real or attributed state of mind of the suspect is not important . . . . When a seizure has occurred and the issue is whether the seizure is a nonarrest detention or a de facto arrest, the suspect's state of mind is irrelevant to the advancement of legitimate Fourth amendment values."[216] Courts instead look at other factors such as the length and scope of the detention, to determine whether a detention was actually an arrest.[217]

In defining compulsion for the purposes of admitting or excluding pre-arrest silence, the suspect's state of mind should be taken into consideration and applied to brief detentions that are technically "pre-arrest" but share characteristics of a formal arrest. The result of this connection between Fourth and Fifth Amendment values would prevent adverse inference from silence that a person invoked, or reasonably would have invoked, as an exercise of his Fifth Amendment right, regardless of whether he was formally arrested. Rather than using the recitation of *Miranda* rights as the bright line that differentiates protected silence from unprotected

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when the subject is in custody or is suffering from significant deprivations of freedom").

[213] Note, *supra* note 38, at 678.

[214] *Id.* (quoting George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 933 (1985)).

[215] Williamson, *supra* note 36, at 404.

[216] *Id.*

[217] *See* Note, *supra* note 38, at 671.

silence, the Court should examine how a reasonable person under the circumstances would have viewed his or her position at the time of the police-citizen encounter.

V. CONCLUSION

The right to remain silent may be more aligned with its historical origins if it is viewed as the right not to answer.[218] Such a right is designed to release a suspect from compelled self-incrimination.[219] Many courts have forbidden the substantive use of pre-arrest silence to create an inference of guilt based on the *Griffin* penalty doctrine, which assumes that the right to silence exists beyond circumstances of compulsion.[220] These courts often turn their decisions based on the presence of a police dominated atmosphere, or whether a reasonable person would feel compelled to incriminate himself so as to invoke his right to silence.[221] Thus, rather than halt the protection from adverse inference based on silence at the moment of *Miranda* rights, the courts should protect silence based on whether a reasonable person would feel dominated by police and would desire to invoke his Fifth Amendment rights. Not only would this approach match up with the logic employed by the lower courts,[222] it would address the problem of police interactions permitted by the Fourth Amendment that place a suspect out of range of *Miranda* protections even though a reasonable person may be compelled to incriminate himself.[223] Rather than adopting a rule that would sweepingly bar or permit the substantive use of pre-arrest silence in any circumstance, the consideration of the reasonable suspect's state of mind in brief detentions would be a practical solution to the circuit split that would be consistent with the historical development of the Fifth Amendment.

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[218] *See* discussion *infra* Section II.

[219] *Id.*

[220] *See* discussion *infra* Section III.A.

[221] *See* discussion *infra* Section IV.

[222] *Id.*

[223] *See* discussion *infra* Section V.