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The Incriminating Sound of Silence: A Need for Protection of Post-Arrest, Pre-*Miranda* Silence

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COMMENT*

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I. INTRODUCTION

The right to remain silent is a well-known constitutional right in the United States, in large part because of the pervasive presence of *Miranda* warnings in crime dramas on television and in the media.[1] However, it is unlikely that the average lay person's understanding of the right to remain silent extends much beyond a general awareness that it exists. Some of the not-so-obvious aspects of the right to silence include its purpose—particularly, to facilitate the privilege against self-incrimination[2]—and its protections, including the right to not have that silence used against the individual at trial.[3] One of the biggest complexities of the right to remain silent, troubling lay persons as well as experienced attorneys, is determining *when* the right is activated.

It is apparent that defendants have the right to remain silent once they are informed of their *Miranda* rights because the right is expressly stated in the warnings. However, the clarity disappears when discussing silence prior to *Miranda* warnings. Federal circuit courts have faced the issue of post-arrest, pre-*Miranda* silence for decades yet continue to diverge sharply in their opinions.[4] Some, like the Eighth Circuit, take a restrictive view of the right to remain silent, and the Fifth Amendment in general, and permit the prosecution to use evidence of a defendant's post-arrest, pre-*Miranda* silence in any way it chooses—including to prove the defendant's guilt.[5] Other circuits, reading the Fifth Amendment broadly, find that the right to remain silent begins as early as arrest. As a result, these circuits forbid the prosecution from using post-arrest, pre-*Miranda* silence during its case-in-chief because such use would violate the defendant's Fifth Amendment rights.[6]

The divide among circuit courts is particularly problematic because of its substantial effect on criminal defendants. For instance, the current lack of consistency prevents arrestees from knowing how to protect their innocence at the time of arrest. Courts should consistently apply constitutional rules throughout the United States. The rules regarding the right to remain silent are constitutional because the right stems from the Fifth Amendment's privilege against self-incrimination, and thus, courts must uniformly apply the right to remain silent.

1. *See* Adam M. Hapner, Comment, *You Have the Right To Remain Silent, but Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After* Salinas v. Texas, 66 FLA. L. REV. 1763, 1775 (2014).
2. *See infra* Part II.
3. *See* Griffin v. California, 380 U.S. 609 (1965).
4. *See infra* Part IV.
5. *See infra* section IV.A.
6. *See infra* section IV.B.

This Comment will argue that a defendant's right to remain silent under the Fifth Amendment includes silence occurring after arrest but before receipt of the *Miranda* warnings. The Supreme Court should grant certiorari to definitively resolve this circuit split and prevent the further violation of defendants' rights by prosecutors' use of post-arrest, pre-*Miranda* silence to prove guilt. Part II of this Comment will provide an overview of the source and creation of the Fifth Amendment's Self-Incrimination Clause and the development of the right to silence prior to *Miranda v. Arizona* in 1966. Part III will discuss the two types of pre-*Miranda* silence that the Supreme Court has addressed. The first type permits pre-arrest silence to be used as substantive evidence of guilt and, consequently, to impeach a defendant. The second type permits post-arrest, pre-*Miranda* silence solely to impeach a defendant. Part IV will discuss the various viewpoints surrounding the circuit court split on the use of post-arrest, pre-*Miranda* silence during the prosecution's case-in-chief. Part V will argue that the right to remain silent encompasses post-arrest, pre-*Miranda* silence and, as a result, prevents the prosecution from using such silence as substantive evidence of guilt against defendants. Part VI will conclude with a discussion of *Berghuis v. Thompkins* and the issues that the Supreme Court's unclear opinion poses for the protection of post-arrest, pre-*Miranda* silence.

II. HISTORICAL ORIGINS OF THE RIGHT TO REMAIN SILENT

To understand the conflict surrounding the right to remain silent, it is necessary to examine the roots of the privilege against self-incrimination, starting when the conflict arose centuries ago in England and culminating with the United States Supreme Court's decision in *Miranda v. Arizona*.[7] Some scholars argue that the theory against self-incrimination, and in turn the right to remain silent, was established in English ecclesiastical courts.[8] Ecclesiastical courts in England operated on the inquisitorial system of justice beginning as early as the thirteenth century.[9] The inquisitorial system is unique in comparison to English and American courts today because it forced

7. Miranda v. Arizona, 384 U.S. 436 (1966).

8. *See, e.g.*, Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 218 (1998) (discussing Leonard W. Levy's account of the historical origins of the Fifth Amendment in Levy's book, *Origins of the Fifth Amendment: The Right Against Self-Incrimination*).

9. *See* Kristen Tolan, *The Fear of Foreign Prosecution Is Beyond the Scope of the Fifth Amendment Privilege Against Self-Incrimination: The Supreme Court Finalized the Debate in* United States v. Balsys, 77 U. DET. MERCY L. REV. 197, 198 (1999).

criminal defendants to self-incriminate.[10] To facilitate this practice, ecclesiastical courts administered the oath ex officio, which compelled defendants to answer questions fully and truthfully and, therefore, to admit culpability.[11] Alleged wrongdoers could not, without severe repercussions, refuse to take the oath.[12] This produced a "cruel trilemma" of sorts when alleged wrongdoers were confronted with the oath because their only options were to (1) tell the truth and incriminate themselves; (2) lie and be accused of perjury; or (3) stay silent and be punished with a presumption of guilt—or worse, be killed.[13]

In response to the introduction of the oath and its severe consequences, advocates for another system of law enforcement, the accusatorial system, quickly grew in number.[14] Accusatorial criminal justice focuses on testimony by witnesses as opposed to testimony exclusively by the accused.[15] Arguments in favor of an accusatorial system were spearheaded by an opposition to the oath ex officio and premised on the maxim *nemo tenetur prodere seipsum*, meaning no man is bound to accuse himself.[16]

Despite consistent protests, the inquisitorial system and the oath ex officio continued to dominate criminal justice in ecclesiastical courts.[17] It was not until the seventeenth century that accusatorial system advocates in England gained some headway. In 1637, John Lilburne asserted the privilege against self-incrimination as a defense in his criminal trial after refusing to take the oath.[18] Lilburne, a fierce advocate for the accusatorial system, claimed throughout his proceedings that "no man's conscience ought to be racked by oaths imposed, to

10. *See* Slater Elza, *The Interplay Between Civil and Criminal Law*, 91 ADVOCATE: STATE BAR LITIG. SECTION REP., Summer 2020, at 185.
11. *See* Garcia, *supra* note 8, at 218. Making this process even more callous is the fact that alleged wrongdoers were not informed of the crime that they were accused of until after the oath ex officio was administered. Elza, *supra* note 10.
12. *See* Garcia, *supra* note 8, at 219. England's Court of High Commission created a rule to ensure that defendants took the oath. The pro confesso rule stated that a failure to answer all questions truthfully and accurately was tantamount to an admission of guilt. *Id.* The Commission believed this rule only targeted the guilty because of an assumption that the truth would not hurt the innocent. *Id.*
13. *Cf.* Murphy v. Waterfront Comm'n, 378 U.S. 53, 55 (1964) (discussing the cruel trilemma of self-accusation, perjury, and contempt as a supporting basis for the Fifth Amendment's privilege against self-incrimination).
14. *See* Tolan, *supra* note 9.
15. *See* Elza, *supra* note 10.
16. Tolan, *supra* note 9 (noting the death of John Lambert in 1537 after he refused to answer questions under the oath).
17. *See id.*
18. *See generally* Miranda v. Arizona, 384 U.S. 436, 459 (1966); Garcia, *supra* note 8, at 219; Tolan, *supra* note 9, at 199. Tolan's account records the year of the Lilburne trial as 1649, as opposed to Chief Justice Warren's date of 1637 in *Miranda*. The inconsistency likely is because Lilburne was tried four times in total. Garcia, *supra* note 8, at 219.

answer to questions concerning himself in matters criminal, or pretended to be so."[19] Lilburne's trial sparked Parliament's eradication of the oath and the recognition of the privilege against self-incrimination in English ecclesiastical and common law courts.[20]

Acceptance of the principle that no man should be bound to accuse himself made its way to the colonies. In 1791, Congress incorporated this principle into the United States Constitution by way of the Fifth Amendment's Self-Incrimination Clause.[21] The Fifth Amendment reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[22] The primary evil the Framers intended to prevent was the encroachment on civil liberties, particularly the use of torture to coerce criminal confessions.[23] Although not explicit, the exclusion of involuntary confessions was grounded in the choice to enforce criminal laws under an accusatorial system—"a system in which the State must establish guilt by evidence independently and freely secured."[24]

Despite the clear source of the Fifth Amendment's Self-Incrimination Clause, ambiguity has continually surrounded its application. A discussion of two landmark cases will help to lay a foundation for why the right to remain silent exists at the time of arrest, regardless of the receipt of *Miranda* warnings, and thus prevents the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt.[25] The Fifth Amendment has always encompassed the right to refuse to testify against oneself at trial. However, the consequence of exercising this right was not determined until *Griffin v. California*.[26] In *Griffin*, the

19. *Miranda*, 384 U.S. at 459 (citing THE LEVELLER TRACTS 1647–1653, at 454 (William Haller & Godfrey Davies eds., 1944)).
20. *See generally id.*; Garcia, *supra* note 8, at 220; Tolan, *supra* note 9, at 199.
21. *See Miranda*, 384 U.S. at 459; Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047, 1062 (2017).
22. U.S. CONST. amend. V.
23. *See* Ullmann v. United States, 350 U.S. 422, 447–49 (1956) (Douglas, J., dissenting) ("[T]he Fifth Amendment was written in part to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will.").
24. Cynthia Picou, Miranda *and* Escobedo*: Warren v. Burger Court Decisions on 5th Amendment Rights*, 4 S.U. L. REV. 175, 177 (1977) (quoting Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).
25. It is important to note that many Supreme Court decisions beyond the two cases discussed in this Comment played important roles in the development of and explanation for Fifth Amendment jurisprudence. For instance, *Brown v. Mississippi*, 297 U.S. 278 (1936), and *Malloy v. Hogan*, 378 U.S. 1 (1964), extended the privilege against self-incrimination to state criminal defendants. *See* Frank R. Herrmann & Brownlow M. Speer, *Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack*, 35 AM. J. CRIM. L. 1, 12 (2007). However, a discussion of every Fifth Amendment case is impractical and unnecessary for the purposes of this Comment.
26. Griffin v. California, 380 U.S. 609 (1965).

defendant, on trial for murder, exercised his Fifth Amendment right and did not testify at trial. The prosecutor made multiple suggestive comments to the jury regarding the defendant's failure to testify. The defendant was convicted of first-degree murder and sentenced to death.

After granting certiorari, the Supreme Court held that the prosecutor's comments regarding the defendant's refusal to testify at trial violated the defendant's Fifth Amendment privilege against self-incrimination.[27] The Court reasoned that allowing such comments would "cut[ ] down on the privilege by making its assertion costly,"[28] thus defeating the main purpose of the right. Additionally, the Supreme Court held that instructing juries to use a defendant's refusal to testify as evidence of guilt violated the Self-Incrimination Clause.[29] As a consequence, prosecutors and judges are forbidden from punishing defendants for exercising their constitutional right against self-incrimination by insinuating that their silence is an admission of guilt.

In 1966, just one year after *Griffin*, the Supreme Court confirmed in a groundbreaking decision that the Fifth Amendment's Self-Incrimination Clause prohibited compelled confessions beyond the courtroom walls.[30] In *Miranda v. Arizona*, the Court made clear that defendants can exercise the Fifth Amendment's privilege against self-incrimination in police custodial interrogations.[31] In order to restrain the "inherently compelling pressures" of custodial interrogations and provide defendants a "full opportunity to exercise the privilege against self-incrimination,"[32] the *Miranda* Court stated that police must, among other things, notify defendants of their right to remain silent and not answer questions.[33] As a result of this decision, any statements made

27. *Id.* at 615. The Court also noted that allowing comments on a defendant's failure to testify is a "remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Id.* at 614 (citation omitted) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

28. *Id.* at 614; *see also* Robin B. Murphy, *Silence as Self-Incrimination After* Salinas v. Texas, 102 ILL. B.J. 184, 185 (2014) ("[The prosecution's] comments, and the judge's silent acceptance, [resulted in] a penalty for exercising a constitutional right . . . .").

29. *Griffin*, 380 U.S. at 615.

30. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

31. *Id.* (reasoning that the privilege should also be available in custodial interrogations, despite the abandonment of physical coercion, because custodial interrogations by police still present a cause for alarm).

32. *Id.*

33. *Id.* In addition to notifying individuals in custody of their right to remain silent, police must also explain that they have a right to counsel and that "anything said

by defendants who were not informed of or did not voluntarily waive their *Miranda* rights are inadmissible at trial.[34] Further, the Court cited *Griffin* and stated that at trial, the prosecution is barred from taking advantage of a defendant's silence during a custodial interrogation, as it would penalize the exercise of a constitutional right.[35]

III. SILENCE PRIOR TO *MIRANDA* WARNINGS

It is clear from *Miranda* and *Griffin* that defendants have a right to remain silent during custodial interrogations and at trial and that prosecutors may not use defendants' silence against them. However, a defendant who remains silent prior to receiving their *Miranda* warnings is not always afforded the same protection. The level of protection sometimes depends on the prosecution's purpose for offering the evidence of silence; the prosecutor may offer it for impeachment purposes or to show a defendant's guilt in their case-in-chief.

A. Pre-Arrest Silence as Substantive Evidence of Guilt

A common example of pre-arrest silence arises when an individual voluntarily goes to the police station for an interview. Because the individual is free to leave at any time, the interview is considered noncustodial in nature. In *Salinas v. Texas*, Salinas, a murder suspect, voluntarily went to the police station for an interview.[36] Both Salinas and the police agreed that the interview was noncustodial and Salinas was not read his *Miranda* rights.[37] Salinas answered the police officer's questions for almost the entire hour-long interview, but when a question arose regarding a potential ballistics test comparing Salinas's shotgun to the shells from the crime scene, Salinas remained silent.[38] A few days after the interview, police charged Salinas with murder.[39] At trial, the prosecution commented on Salinas's silence fol-

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can and will be used against the individual in court." *Id.* at 469. Beside the purposes described in the text above, the *Miranda* warnings also inform individuals in custody of the consequences of waiving their right to remain silent.

34. *Id.* at 474 ("[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."); *see* Geoffrey B. Fehling, Note, Verdugo*, Where'd You Go?:* Stoot v. City of Everett *and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 491 (2011).

35. *Miranda*, 384 U.S. at 468 n.37; *see also* Wainwright v. Greenfield, 474 U.S. 284 (1986) (reiterating that the prosecution cannot use a defendant's post-*Miranda* silence as evidence of guilt in its case-in-chief).

36. Salinas v. Texas, 570 U.S. 178, 182 (2013).

37. *Id.*

38. *Id.* Instead of answering the question, Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.*

39. *Id.* Immediately following the interview, Salinas was arrested on traffic violation charges that were soon dismissed. After receiving information that Salinas con-

lowing the ballistics question to suggest his guilt, and the jury found Salinas guilty.[40] Salinas appealed, maintaining that comments regarding his pre-arrest silence during the prosecution's case-in-chief violated his Fifth Amendment rights.[41]

The Supreme Court disagreed with Salinas's argument. A plurality of justices found the prosecution's use of Salinas's pre-arrest silence as evidence of guilt in its case-in-chief was permitted because Salinas failed to expressly and timely assert the privilege—a requirement that the Court refers to as the "express invocation requirement."[42] Justice Alito, writing for the plurality, explained that there are only two recognized exceptions to the express invocation requirement and a precustodial interview is not one of them.[43] Salinas did not retain his Fifth Amendment right to remain silent because he did not state during his noncustodial interview that he was exercising that right by declining to answer.[44] Therefore, the Court held that Salinas had no Fifth Amendment claim.[45]

In a concurrence, Justice Thomas also found no Fifth Amendment violation but for another reason.[46] Justice Thomas stated that even if Salinas had expressly invoked the privilege during his interview, there would be no violation because the prosecution's comments at trial did not compel Salinas's self-incriminatory testimony, the only protection guaranteed by the Fifth Amendment.[47] Under either viewpoint, it remains clear that the prosecution can use a defendant's silence or refusal to answer questions prior to arrest as evidence of guilt in its case-in-chief.

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fessed to the killings, police charged Salinas with murder, but he had already fled town. Police were unable to locate and arrest Salinas on the murder charges for another fourteen years.

40. *Id.*
41. *Id.* at 182–83.
42. *Id.* at 183–84; *see also* discussion *infra* section V.D (discussing the express invocation requirement stemming from *Berghuis v. Thompkins*, 560 U.S. 370 (2010)).
43. *Salinas*, 570 U.S. at 184 (explaining that the two recognized exceptions to the express invocation requirement are reserved for criminal defendants at trial and suspects in an "unwarned custodial interrogation").
44. *Id.* at 191.
45. *Id.* It is important to note that the plurality failed to decide the true issue posed by Salinas, namely, "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Id.* at 183. Justice Alito concluded that they could not reach that question because Salinas never attempted to invoke the privilege. As a result, the Court based its decision against Salinas on his failure to assert the privilege. *Id.* at 191.
46. *Id.* at 191–92 (Thomas, J., concurring).
47. *Id.* at 192 (Thomas, J., concurring) ("Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony."); *see also* Murphy, *supra* note 28, at 186 (discussing Justice Thomas's concurring opinion).

B. Post-Arrest, Pre-*Miranda* Silence for Impeachment Purposes

The protection of a defendant's post-arrest, pre-*Miranda* silence has raised further debate, which the Supreme Court resolved, to some extent, in *Fletcher v. Weir*.[48] The defendant, Weir, got into a fight at a nightclub and stabbed another patron who later died from the wounds.[49] Weir did not provide any explanation or defense at arrest.[50] Weir took the stand at trial and claimed that the stabbing was done in self-defense and accidental, but on cross-examination, the prosecution questioned why Weir did not state this defense when police arrested him.[51] The jury subsequently convicted Weir of manslaughter.[52]

On appeal, Weir contested the prosecution's use of his post-arrest silence for purposes of impeachment, and the Sixth Circuit held that "a defendant cannot be impeached by use of his post-arrest silence even if no *Miranda* warnings had been given."[53] The Supreme Court reversed, stating that it does not "violate[ ] due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand."[54] The Court reached this decision by distinguishing *Weir* from *Doyle v. Ohio*.[55] In *Doyle*, the Court held that use of a defendant's post-*Miranda* silence for impeachment purposes violates the Fifth Amendment.[56] The Court stated that it is "fundamentally unfair" to introduce post-*Miranda* silence for impeachment purposes because the *Miranda* warnings convey an implicit promise that "silence will carry no penalty."[57] The chief difference between *Weir* and *Doyle*, the Court noted, is that Doyle's silence occurred after the police had informed him of his *Miranda* rights whereas Weir's silence occurred beforehand.[58]

48. Fletcher v. Weir, 455 U.S. 603 (1982).

49. *Id.*

50. *Id.* at 603.

51. *Id.* at 603–04.

52. *Id.* at 604.

53. *Id.* at 604 (citing Weir v. Fletcher, 658 F.2d 1126, 1130 (6th Cir. 1981)).

54. *Id.* at 607.

55. *Id.* at 604–06; Doyle v. Ohio, 426 U.S. 610 (1976) (holding that the prosecution cannot use a defendant's post-*Miranda* silence for impeachment purposes).

56. *Weir*, 455 U.S. at 605.

57. *Id.* (quoting *Doyle*, 426 U.S. at 618).

58. *Id.*; *see also* Megan E. Wamsley, Comment, *You [Might] Have the Right To Remain Silent: Examining the* Miranda *Problem (*United States v. Wright*, 777 F.3d 769 (5th Cir. 2015))*, 84 U. CIN. L. REV. 923, 929 (2016) (reasoning that the admissibility of pre-*Miranda* silence as impeachment evidence could be inferred from the Court's ban on post-*Miranda* silence as evidence of impeachment in *Doyle*).

IV. CIRCUIT COURT SPLIT: POST-ARREST, PRE-*MIRANDA* SILENCE AS EVIDENCE OF GUILT

Though the Supreme Court is clear regarding the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence for impeachment purposes, the Court has yet to resolve whether the prosecution can use post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief. Decades-long, harsh disagreement on this issue among circuit courts adds to the confusion,[59] yet the Supreme Court has been extremely reluctant to address the issue despite numerous writs of certiorari.[60]

A. Circuit Courts Allowing Use of Post-Arrest, Pre-*Miranda* Silence as Evidence of Guilt

The Fourth Circuit, Eighth Circuit, and Eleventh Circuit are among the federal circuit courts of appeals that permit the prosecution to introduce a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief. The Eighth Circuit held in *United States v. Frazier* that post-arrest, pre-*Miranda* silence can be used as substantive evidence of guilt.[61] There, state troopers searched Frazier's U-Haul at a gas station off of Interstate 80 in Nebraska.[62] Behind furniture, state troopers found boxes containing controlled substances.[63] They subsequently arrested Frazier and took him to the state patrol office for an interview where he was then read his *Miranda* rights.[64] During its case-in-chief at trial, the prosecution introduced evidence of Frazier's reaction, or lack thereof, when the officers informed Frazier of his arrest for the possession of drugs. In particular, the prosecution suggested that Frazier's failure to show emotion or provide any explanation suggested his guilt.[65]

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59. *Compare* United States v. Frazier, 408 F.3d 1102 (8th Cir. 2005) (holding use of a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt does not violate a defendant's Fifth Amendment rights), *with* United States v. Whitehead, 200 F.3d 634 (9th Cir. 2000) (holding use of a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt violates a defendant's Fifth Amendment right to silence).
60. *See, e.g.*, Palacios-Solis v. United States, 141 S. Ct. 162 (2020) (denying certiorari); Osuna-Zepeda v. United States, 547 U.S. 1056 (2006) (denying certiorari); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991) (addressing the issue in 1991); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (addressing the issue in 1985).
61. *Frazier*, 408 F.3d at 1111.
62. *Id.* at 1107.
63. *Id.*
64. *Id.*
65. *Id.* at 1109; *see also* Marc Scott Hennes, Note, *Manipulating* Miranda*:* United States v. Frazier *and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda *Silence*, 92 CORNELL L. REV. 1013, 1031 (2007) ("[T]he prosecutor argued that Frazier's silence in response to the discovery of the drugs was a significant factor that

Frazier appealed the prosecution's use of this silence, arguing that it violated his right against self-incrimination.[66] The Eighth Circuit reframed the inquiry as whether Frazier was under "government-imposed compulsion to speak" during and immediately after his arrest.[67] The court concluded that Frazier was not under compulsion to speak at this time; as a result, his Fifth Amendment rights were not violated.[68] The circuit court's reasoning appears to be based on a single line from *Weir*: "[A]n arrest by itself is not governmental action that implicitly induces a defendant to remain silent."[69] The Eighth Circuit confirmed its holding in *Frazier* just a few months later in *United States v. Osuna-Zepeda*.[70] Again, the court relied on the same statement from *Weir* without providing additional analysis.[71]

The Eighth Circuit is not the only federal circuit court to rely on *Weir* in this way. The Fourth Circuit erroneously interpreted *Weir*'s precedent to conclude that a defendant's silence is admissible as substantive evidence if they have not yet received their *Miranda* warnings at the time of such silence. In *United States v. Love*, the Fourth Circuit stated that, in *Weir*, the Supreme Court permitted "testimony concerning a defendant's silence where the defendant has not 'received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.'"[72] This interpretation fails to recognize that the silence in *Weir* was used solely to impeach the defen-

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should lead the jury to conclude that Frazier lied about not knowing that drugs were hidden in the truck.").

66. *Frazier*, 408 F.3d at 1109.

67. *Id.* at 1110–11 ("The crux of our inquiry today is to determine at what point a defendant is under 'official compulsion to speak' because silence in the face of such compulsion constitutes a 'statement' for purposes of a Fifth Amendment inquiry."); *see also* Hennes, *supra* note 65 (discussing the court's reframing of the inquiry posed by Frazier on appeal to reach its desired conclusion).

68. *Frazier*, 408 F.3d at 1111.

69. *Id.* (citing Fletcher v. Weir, 455 U.S. 603, 606 (1982)). It is interesting to note that the Eighth Circuit expressly acknowledges that the Supreme Court's holding in *Weir* is confined to the prosecution's use of a defendant's silence for impeachment purposes. The court does not see this as limiting. Instead, it chooses to unilaterally extend *Weir* to use of such silence to prove guilt without providing any further analysis than this one line.

70. United States v. Osuna-Zepeda, 416 F.3d 838 (8th Cir. 2005). In *Osuna-Zepeda*, police arrested the defendant outside of a Target store for the possession of a controlled substance and took him into Target's security room to search his person. During its case-in-chief at trial, the prosecution questioned the officer regarding Osuna-Zepeda's reaction in the Target security room following his arrest but before he received his *Miranda* rights. The officer testified that Osuna-Zepeda made no statements during this time. *Id.* at 840–41.

71. *Id.* at 844.

72. United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (quoting Fletcher v. Weir, 455 U.S. 603, 605 (1982)).

dant's testimony—not to prove the defendant's guilt.[73] Nevertheless, the Fourth Circuit continually cites *Love* when permitting the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt.[74]

In authorizing the use of post-arrest, pre-*Miranda* silence as evidence of guilt, the Eleventh Circuit boldly conceded that it went "a step further" than the Supreme Court.[75] The Eleventh Circuit based its decision in *United States v. Wilchcombe* on its previous statement in *United States v. Rivera*: "[T]he government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given."[76] The Eleventh Circuit has continued to uphold its precedent set forth in *Rivera* and *Wilchcombe* despite acknowledgement of the deeply entrenched circuit court split on the issue.[77]

B. Circuit Courts Prohibiting Use of Post-Arrest, Pre-*Miranda* Silence as Evidence of Guilt

In contrast to the Fourth, Eighth, and Eleventh Circuit Courts, which hold that a defendant's right to remain silent is not protected under the Fifth Amendment until the receipt of *Miranda* warnings, the Seventh, Ninth, and D.C. Circuit Courts find that the right to silence is activated much sooner. These federal appellate courts have held that the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief violates a defendant's Fifth Amendment rights. However, there are two differing viewpoints among these courts regarding the extent of the right to remain silent prior to the receipt of *Miranda* warnings.

The Ninth Circuit's holding in *United States v. Whitehead*[78] exemplifies the first view on this side of the post-arrest, pre-*Miranda* si-

73. *See* Herrmann & Speer, *supra* note 25, at 17–19 (noting how the Fourth Circuit, unlike the Eighth Circuit, failed to recognize that *Weir* dealt with the use of silence to impeach a defendant rather than as substantive evidence of guilt); *see also supra* note 69 and accompanying text (discussing the Eighth Circuit's recognition that the Supreme Court's holding in *Weir* was confined to the use of silence for impeachment purposes).

74. *See, e.g.*, United States v. Cornwell, 418 F. App'x 224, 227 (4th Cir. 2011) (finding no Fifth Amendment violation when the prosecution entered video footage into evidence to show the defendant's post-arrest, pre-*Miranda* silence).

75. United States v. Wilchcombe, 838 F.3d 1179, 1190 (11th Cir. 2016).

76. *Id.* at 1194 (quoting United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991)). The Eleventh Circuit offers little, if any, analysis to support its conclusion in *Rivera*. This may be in part because the record was unclear about whether the defendant had been placed in custody. Therefore, the circuit court made two definitive statements. First, pre-arrest silence can be used as evidence of guilt. Second, post-arrest, pre-*Miranda* silence can also be used as evidence of guilt. *See Rivera*, 944 F.2d at 1567–68.

77. *See, e.g.*, United States v. Cabezas-Montano, 949 F.3d 567 (11th Cir. 2020).

78. United States v. Whitehead, 200 F.3d 634 (9th Cir. 2000).

lence debate. In *Whitehead*, the court found that the prosecutor's comments regarding the defendant's post-arrest silence violated the defendant's Fifth Amendment rights, regardless of when *Miranda* warnings were given.[79] The Ninth Circuit explained its reasoning one year later in *United States v. Velarde-Gomez*.[80] The court pointed out that "the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves."[81] Furthermore, since *Miranda* warnings are merely a "prophylactic" safeguard against self-incrimination,[82] the Ninth Circuit determined that "a right to remain silent in the face of government questioning" exists as soon as the individual is in police custody.[83] Thus, post-arrest, pre-*Miranda* silence cannot be discussed during the prosecution's case-in-chief.[84]

In *Velarde-Gomez*, the defendant did not respond when the police confronted him about the drugs found in his car, and the court frequently specifies that Velarde-Gomez's silence occurred in the face of questioning.[85] This suggests that the Ninth Circuit believes evidence must show that the self-incriminating silence was prompted by law enforcement action for the Fifth Amendment's protections against compelled self-incrimination to apply—Velarde-Gomez's right to silence was only triggered once he was questioned. Therefore, the critical inquiry seems to be whether there was any confrontation or questioning after arrest, notwithstanding the receipt of *Miranda* warnings. In *Velarde-Gomez*, the defendant was already arrested at the time of confrontation. Thus, his silence was protected and could not be used against him at trial.

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79. *Id.* at 636–39. The defendant was silent after he was taken into custody but before he was given his *Miranda* warnings, and the trial court allowed the prosecution to use this silence to demonstrate the defendant's knowledge of the drugs concealed in his car and, therefore, his guilt. Though the court of appeals found that the trial court erred when it admitted this evidence, Whitehead did not sufficiently demonstrate that the error affected the outcome and the error did not involve substantial rights. Therefore, the court did not reverse the lower court's verdict. *Id.* at 639–40.

80. United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001). In *Velarde-Gomez*, the prosecution commented on the defendant's "lack of response" during its case-in-chief. The Ninth Circuit made clear that evidence of a lack of response is the same as evidence of silence for Fifth Amendment purposes. *Id.* at 1031.

81. *Id.* at 1029.

82. *Id.* (citing Doyle v. Ohio, 426 U.S. 610, 617 (1976)).

83. *Id.* The Ninth Circuit also cites the *Miranda* Court's statement regarding silence in the face of questioning: "The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966)).

84. *Id.* at 1032.

85. *Id.* at 1030–31; *see id.* at 1029 ("silent in the face of government questioning"); *id.* at 1030 ("pre-*Miranda* questioning"); *id.* at 1031 ("silent in the face of confrontation"); *id.* at 1032 ("silence in the face of questioning").

The D.C. Circuit arguably takes a more liberal view of the Fifth Amendment right against self-incrimination, finding that the right to pretrial silence exists at all times after a defendant is in custody, even if there has been no questioning.[86] In *United States v. Moore*,[87] the prosecution made multiple comments regarding the defendant's failure to react or make a statement when police officers found guns and drugs in his car.[88] The D.C. Circuit held that mention of such post-custody silence violated the defendant's Fifth Amendment rights.[89] Since the Supreme Court has not yet explicitly ruled on post-arrest, pre-*Miranda* silence, the circuit court began its analysis with a discussion of *Griffin* and *Miranda* and reasoned that those cases clearly hold that a defendant's silence, starting at least at the time of custodial interrogation, cannot be used as evidence of guilt due to the Fifth Amendment privilege against self-incrimination.[90]

The D.C. Circuit Court went on to say that actual questioning, such as in a custodial interrogation, is not the firm starting point for the right to pretrial silence.[91] The distinction between use of silence for impeachment purposes and use of silence as substantive evidence of guilt was determinative to the court's decision. The D.C. Circuit rejected the government's argument that *Doyle* stands for the proposition that all pre-*Miranda* silence is unprotected.[92] Judge Sentelle, writing for the majority, explained that "*Doyle* is an exception to an exception to the general rule":

> The general rule regarding a defendant's silence is that it cannot be used. The defendant's testifying creates an exception allowing the testimony to be used for the purpose of impeachment. The presence of the *Miranda* warning before

86. *See* United States v. Moore, 104 F.3d 377, 385–89 (D.C. Cir. 1997) ("[C]ustody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*."). The D.C. Circuit Court used the term "custody" rather than "arrest" because though in police custody, it is unclear whether the defendant in *Moore* was actually under arrest at the time of his silence. The D.C. Circuit's holding in *Moore* still supports the proposition that post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt because any post-arrest silence would be post-custody silence as well.

87. *Id.*

88. *Id.* at 384. The prosecution argued that if Moore was really innocent and had not known about the drugs, he would have made comments such as to that effect or at the very least shown some surprise. *Id.*

89. *Id.* at 385.

90. *Id.*

91. *Id.* (noting that no Supreme Court case, including *Miranda*, has suggested that questioning is the triggering event for the right to remain silent).

92. *Id.* at 386 ("[T]he *Doyle* Court noted that even 'the State does not suggest petitioners' silence could be used as evidence of guilt,' but only contended that it was necessary for cross-examination and impeachment of 'petitioners' exculpatory story.'" (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976))).

> the silence causes an estoppel that restores to the defendant the protection against the use of the silence.[93]

By this reasoning, the D.C. Circuit determined that the receipt of *Miranda* warnings is only significant as to whether silence can be used to impeach a defendant's testimony if he takes the stand at trial.[94] The D.C. Circuit makes clear in *Moore* that custody, rather than the receipt of *Miranda* warnings, marks the beginning of a defendant's right to remain silent.[95] Implicitly, the D.C. Circuit refused to create another exception to the general rule (on top of the impeachment exception from *Doyle* and *Weir*) to allow use of a defendant's post-custody, pre-*Miranda* silence as substantive evidence of guilt.

The D.C. Circuit arguably goes a step farther than the Ninth Circuit by extending the right to remain silent to the first moment a defendant is in custody, regardless of whether the defendant's silence is a response to government questioning. The Seventh Circuit also prohibits use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt but does so with less scrutiny than the Ninth Circuit and D.C. Circuit.[96] Despite the nuances and difference in application, all three courts stand for the proposition that the prosecution cannot introduce post-arrest, pre-*Miranda* silence as evidence of the defendant's guilt.

V. ANALYSIS

The issue presented in these cases is straightforward: can the prosecution use evidence that a defendant remained silent after arrest but before receipt of their *Miranda* warnings as substantive evidence of guilt?[97] Still, circuit courts have been unable to agree on a resolution for decades, leading to a variety of viewpoints on both sides of the is-

93. *Id.* at 387; *see also* David S. Romantz, *"You Have the Right To Remain Silent": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt*, 38 IND. L. REV. 1, 34 n.180 (2005) (discussing Judge Sentelle's "exception to an exception to the general rule" analysis).

94. *Moore*, 104 F.3d at 386 ("It is plain that the significance of the *Miranda* warnings in establishing the ability of the prosecution to use the defendant's silence is limited to impeachment.").

95. *Id.* at 385. It is important to note, again, that the D.C. Circuit held that the right to remain silent is triggered when a defendant is in custody, not on arrest. While typically these two events happen almost simultaneously, the facts in *Moore* show that a person can be in custody before they are officially under arrest. *See id.* at 388–89. However, because custody would occur prior to, if not contemporaneous with, arrest, the D.C. Circuit's holding in *Moore* supports the proposition that post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt.

96. *See* United States v. Hernandez, 948 F.2d 316, 322–25 (7th Cir. 1991) (finding that introduction of post-arrest, pre-*Miranda* silence as evidence of guilt is a constitutional violation although the error was harmless); *see also* Hennes, *supra* note 65, at 1028–30 (noting that the Seventh Circuit's decision in *Hernandez* is substantially similar to the D.C. Circuit's conclusion in *Moore*).

97. Silence includes a failure to react or make a statement.

sue.[98] In light of the harsh divide among circuit courts, the Supreme Court compounds this problem by continuously refusing to provide a clear answer that can be applied uniformly across the country.[99] Instead, the current circuit court split on this issue produces vast inconsistencies in how post-arrest silence is treated, which ignites many problems. Mainly, the difference in circuit court interpretation results in a complete failure to provide any semblance of clarity regarding how an arrestee should act and respond at the time of arrest until receipt of their *Miranda* warnings in order to protect their innocence.

The Supreme Court should grant certiorari to a case posing the issue of post-arrest, pre-*Miranda* silence as substantive evidence of guilt in order to create a nationally uniform rule and resolve these problems. Furthermore, this Comment proposes that the correct resolution is to affirmatively hold that a defendant's right to remain silent commences at the time of arrest rather than at the receipt of their *Miranda* warnings. The following arguments support such an interpretation.

A. *Miranda* as a Mere Reminder

Many circuit courts that permit prosecutorial use of post-arrest, pre-*Miranda* silence rely on the proposition that the *Miranda* warnings mark the beginning of the privilege against self-incrimination, including the right to remain silent.[100] However, this argument is flawed in two ways. First, the Fifth Amendment, not *Miranda*, is at the heart of the right to remain silent. For the Fifth Amendment's privilege against self-incrimination to carry any weight, it is necessary to also provide a right to remain silent.[101] The two go hand in hand: no doubt one of the best ways to avoid self-incrimination is to remain silent. Limits on the right to remain silent are direct limits on the right to prevent self-incrimination. If an individual is penalized whether they remain silent or not, they are compelled to be a witness against themselves, and it is illogical to conclude that some sort of trigger is required before the Fifth Amendment's protections are activated. Thus, courts must read the right to remain silent as an implicit

98. *See supra* Part IV.

99. *See* cases cited *supra* note 60 (listing just a few instances in which the Supreme Court denied certiorari to cases involving post-arrest, pre-*Miranda* silence as substantive evidence of guilt).

100. *See* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).

101. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2625 (1996) ("The privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." (quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966))).

yet inherent right within the Fifth Amendment's privilege against self-incrimination.[102]

Second, it is both questionable and problematic that the *Miranda* warnings, created 175 years after the enactment of the Fifth Amendment, are necessary for the right to remain silent. The fact that the *Miranda* warnings require police to expressly inform defendants of their right to silence in no way suggests that the *Miranda* Court intended these warnings to be the definitive starting point of Fifth Amendment rights.[103] The most reasonable reading of *Miranda* suggests the Supreme Court created a notification procedure for a vulnerable time to protect rights that already existed.[104] The *Miranda* Court supplied multiple statements supporting the notion that the *Miranda* warnings are just a reminder of a pre-existing right to remain silent—not the beginning of it. Most telling is the Supreme Court's statement that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in *all* settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[105] While the Court made clear that custodial interrogations were one such setting, the Court did not exclude other post-arrest settings prior to a custodial interrogation. Additionally, the *Miranda* Court reinforced the idea that the purpose of the warnings is to be a safeguard, ensuring individuals in inherently coercive situations like custodial interrogations make a conscious decision about whether to waive the privilege by reminding individuals of their rights beforehand.[106]

If the *Miranda* warnings serve as merely a reminder, it necessarily follows that they cannot be the source of or the starting point for an individual's Fifth Amendment rights, including the right to remain silent. Although the Supreme Court in 1966 intended to protect the Fifth Amendment rights in certain situations, the Court's language in *Miranda* has led to confusion as to whether the right to remain silent exists between the time of arrest and the receipt of the *Miranda* warnings.[107]

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102. *See id.* (discussing a reading of the Fifth Amendment that "afford[s] defendants and suspects a right to remain silent").
103. *See supra* note 91 and accompanying text.
104. *See* Wamsley, *supra* note 58, at 935 (discussing the unintended consequences of *Miranda*, particularly "an unclear timing issue about when [the Fifth Amendment] should be applicable").
105. *Miranda*, 384 U.S. at 467 (emphasis added).
106. *See* Donald P. Judges & Stephen J. Cribari, Response, *Speaking of Silence: A Reply to* Making Defendants Speak, 94 MINN. L. REV. HEADNOTES 11, 23 (2009) (pointing out that *Miranda* was an acknowledgement of what the Court had been missing for decades—that the right to silence in inherently coercive situations, like custodial interrogations, was "meaningless" without warning individuals of their options under the Fifth Amendment).
107. *See* Wamsley, *supra* note 58, at 934.

B. Silence as Compulsion

One argument put forth by the Eighth Circuit in support of admitting post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief rests on the use of the word "compelled" in the Fifth Amendment.[108] The Eighth Circuit argues that Fifth Amendment rights are not triggered until a defendant is under official compulsion to speak, and according to the circuit court, this does not exist until custodial interrogation.[109] However, the Eight Circuit's argument in *Frazier* was rather conclusory in nature and failed to examine what "compulsion" really means.[110]

Over the years, many courts have tried to provide guidance in determining when an investigator has *compelled* a statement. The "test of voluntariness" is one method courts use to distinguish whether a confession was voluntary or involuntary. The test of voluntariness asks whether the confession was a "product of an essentially free and unconstrained choice by its maker."[111] It is important to note that this test analyzes whether a confession should be excluded under the Due Process Clause of the Fourteenth Amendment rather than the Fifth Amendment.[112] However, the justifications for the test are analogous to those for the Fifth Amendment's privilege against self-incrimination. Mainly, the methods and practices used to coerce involuntary confessions go against the values of the accusatorial system—that the prosecution must prove the defendant's guilt with its own freely obtained evidence.[113] Similarly, the Fifth Amendment is founded on the

108. This is a sound argument in theory, as one must assume the word "compelled" was used purposefully in the Fifth Amendment. *See* U.S. CONST. amend. V. However, the argument likely encompasses only a narrow and outdated vision of what compulsion may entail.

109. *See, e.g.*, United States v. Frazier, 408 F.3d 1102, 1110 (8th Cir. 2005) ("The crux of our inquiry today is to determine at what point a defendant is under 'official compulsion to speak' because silence in the face of such compulsion constitutes a 'statement' for purposes of a Fifth Amendment inquiry.").

110. The Eighth Circuit's analysis in *Frazier* regarding compulsion went as follows: "[T]he more precise issue is whether Frazier was under any compulsion to speak at the time of his silence. He was not. Although Frazier was under arrest, there was no governmental action at that point inducing his silence. Thus he was under no government-imposed compulsion to speak." *Id.* at 1111.

111. Picou, *supra* note 24 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). The Second Circuit provided a similar standard for the Fifth Amendment in *United States v. Familetti*, 878 F.3d 53 (2d Cir. 2017). In *Familetti*, the Second Circuit stated that "'[I]nterrogation practices' . . . may 'disable an individual from making *a free and rational choice about speaking*,' negating the constitutional force of subsequent *Miranda* warnings." *Familetti*, 878 F.3d at 58 (emphasis added) (quoting Missouri v. Seibert, 542 U.S. 600, 611 (2004)).

112. *See* Picou, *supra* note 24, at 176–78.

113. *Id.* at 177.

accusatorial system and, consequently, bans statements made under compulsion.[114]

Another attempt to define compulsion focuses on what compulsion is *not*—mere causation.[115] For example, statements made during the prosecution's case-in-chief might cause the defendant to take the stand. However, the causation in this scenario is not enough to say that the defendant was *compelled* to testify because the defendant still retained a choice that was likely influenced by a potential personal benefit.[116] On the contrary, suffering a penalty for refusing to answer or make a statement may be enough to infer compulsion.[117]

The question then remains as to whether an arrest is enough to compel a defendant to speak, thereby triggering Fifth Amendment protections. While, initially, this question may seem arbitrary because the issue of post-arrest, pre-*Miranda* silence deals with the lack of a statement, this is not the case. In some jurisdictions, the mere fact that a defendant said nothing when police informed them of their charges upon arrest can be used against the defendant at trial as evidence of guilt.[118] The only way to combat such a proposition by the prosecution would be for the defendant to make some statement showing anger or confusion about the arrest, as opposed to staying silent. To determine whether a defendant's silence is protected, it is necessary to decide whether a defendant's statement is compelled under the Fifth Amendment in jurisdictions where post-arrest, pre-*Miranda* silence is permitted as substantive evidence of guilt.

This Comment urges the Supreme Court to find that this situation does, in fact, compel the defendant to make some statement to defend themself in order to avoid harsh consequences, particularly the use of the defendant's silence as evidence of guilt in the prosecution's case-in-chief. Under the voluntary test, the inquiry to determine compulsion is whether or not the statement is a result of a free and unconstrained choice. Here, a statement evidencing surprise or confusion cannot be the result of a free choice if the defendant knows that the absence of such a statement will result in an inference of guilt. The looming penalty will control how the defendant responds.

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114. *See supra* Part II; *see also* George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 821 (1995) (reviewing JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)) ("Fifth Amendment compulsion is roughly coextensive with coercion and with common law involuntariness.").

115. *See* Thomas, *supra* note 114, at 820–21.

116. *See id.* at 820.

117. *See id.* at 821.

118. *See, e.g.*, United States v. Frazier, 408 F.3d 1102 (8th Cir. 2005) (allowing the prosecution to introduce evidence that the defendant did not show any anger or surprise after police told him that he was under arrest for suspicion of narcotics).

Additionally, the interactions involved in an arrest—including notification of charges or questions regarding incriminating evidence—provide more than mere causation for a defendant's subsequent statement when silence would result in an implication of guilt. For instance, when police find incriminating evidence in an individual's car, the individual has no logical choice but to act surprised or produce an explanation if they are in a jurisdiction that does not recognize a pre-*Miranda* right to remain silent. Again, the only other option—remaining silent and facing a severe penalty when the prosecution introduces evidence of such silence to suggest their guilt at trial—is not a viable one. Thus, the nature of this exchange reinforces the fact that the defendant is under compulsion to speak when arrested and confronted with charges, incriminating evidence, or questions before they have been read their *Miranda* warnings, which will afford them the Fifth Amendment right to remain silent and not have that silence used against them at trial.

The argument against the "cruel trilemma," which advanced the creation of the privilege against self-incrimination in England centuries ago, also supports the right to remain silent in post-arrest, pre-*Miranda* situations today. Using the above example, if police confront the individual at the time of arrest after finding drugs in their car, the person faces only self-penalizing options. If the person remains silent, the prosecution can use such silence to imply knowledge of the drugs and, therefore, suggest guilt in its case-in-chief. However, if the individual asserts that they did not know about the drugs, the prosecution could impeach them. Moreover, if the individual admits to knowledge of the drugs, they are, in essence, admitting their guilt. Whichever option the defendant chooses, they will be incriminating themself—a modern version of the cruel trilemma and the exact circumstance the Fifth Amendment rights are designed to protect against.[119] Therefore, it is correct to conclude that a person's right to remain silent extends the post-arrest, pre-*Miranda* timeframe.

C. Policy Justifications for Prohibiting Post-Arrest, Pre-*Miranda* Silence in the Prosecution's Case-in-Chief

Arguing a defendant's guilt using evidence that the defendant remained silent in the face of arrest prior to receiving their *Miranda* warnings is problematic on several important policy grounds. First, the Fifth Amendment, from which the right to remain silent is derived, was not meant to further just one specific purpose and should

119. *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1032 (9th Cir. 2001) (applying a similar catch-22 argument).

be construed broadly.[120] The Supreme Court has noted the complexity of the Fifth Amendment's Self-Incrimination Clause and acknowledged that the privilege against self-incrimination was "founded on a complex of values."[121] Moreover, the Court prescribes the overarching goal of these values: to respect individuals, mainly by forcing the government to prove defendants' guilt using its own freely obtained evidence.[122]

Interpreting the right to remain silent in accord with the broad purpose of the Fifth Amendment inevitably leads to the conclusion that when in police custody, an individual's choice to stay silent must not lead to negative consequences in any situation where the individual's choice to speak could be self-incriminating. This protection encompasses situations after arrest—even if police have not yet recited the *Miranda* warnings. Anything contrary to allowing Fifth Amendment protections in post-arrest, pre-*Miranda* situations would effectively conflict with the purpose that the Supreme Court has given to the privilege.

The second policy justification is centered around the Fifth Amendment's effect on law enforcement. As a result of the Supreme Court's holding in *Miranda*, law enforcement officers are required to inform individuals of their right to remain silent, among other things, before engaging in any custodial interrogation.[123] Currently, in the Seventh, Ninth, and D.C. Circuits' jurisdictions, the exact timing of the *Miranda* warnings prior to custodial interrogation (for example, contemporaneous with arrest or hours later before beginning a custodial interrogation) is not of significant concern to police officers or the prosecution because silence at any point after arrest cannot be used against the defendant at trial to suggest guilt.

Conversely, law enforcement officers in the Fourth, Eighth, and Eleventh Circuits' jurisdictions are disincentivized from informing defendants of their *Miranda* rights simultaneously with, or soon after, arrest.[124] A police officer likely will be aware of, and use to their advantage, the fact that *Miranda* warnings, rather than arrest, are the

120. *See* United States v. Familetti, 878 F.2d 53, 58 (2d Cir. 2017) ("[T]he 'interrogation environment' is not to be construed so narrowly as to defeat *Miranda*'s purpose . . . ." (quoting Rhode Island v. Innis, 446 U.S. 291, 299 (1980))).

121. Miranda v. Arizona, 384 U.S. 436, 460 (1966); *accord* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55–56 (1964) (discussing the values underlying the privilege against self-incrimination).

122. *See Miranda*, 384 U.S. at 460.

123. *Id.* at 467.

124. *See* Steven D. Clymer, *Are Police Free To Disregard* Miranda, 112 YALE L.J. 447 (2002) (discussing the incentives for law enforcement to disregard the requirements of *Miranda* in order to achieve certain results, such as delaying *Miranda* warnings in order to use a defendant's silence to impeach them at trial); Hennes, *supra* note 65, at 1036.

trigger for Fifth Amendment protections for silence. Delaying the *Miranda* warnings increases the period during which a defendant's silence will be admissible to prove guilt.[125] The more time between arrest and *Miranda* warnings, the higher the chances are that the defendant's silence will occur in an incriminating situation. The Supreme Court must acknowledge and respond to this incentive to withhold *Miranda* warnings to obtain incriminating silence in jurisdictions where the courts permit use of post-arrest, pre-*Miranda* silence as evidence of guilt. A failure to do so will only multiply the inequities arising from this unconstitutional interpretation of the right to remain silent.

In addition to law enforcement's exploitation of interpretations allowing use of post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief, this alternate view generates confusion for criminal defendants. The right to remain silent is one of the most well-known constitutional rights in the United States because of its presence in every crime drama on television,[126] where *Miranda* warnings are typically recited contemporaneously with an arrest. As a result, a typical defendant is already aware of their right to silence when they are arrested and believes that the right is in effect. This may make the *Miranda* reminder seem redundant for most defendants. Whether or not that is true, a problem does arise when individuals assume that their right to silence begins at arrest, because in reality, police do not always recite *Miranda* at that time.[127] Thus, the gap in time between arrest and *Miranda* warnings will continue to subject many individuals to a high risk of self-incrimination until a nationally uniform rule is put in place to guarantee the right to silence at arrest.

D. The Confusion of *Berghuis v. Thompkins* on Post-Arrest, Pre-*Miranda* Silence

The Supreme Court itself compounded the need for clarity on the issue of post-arrest, pre-*Miranda* silence with its holding in *Berghuis v. Thompkins*, which sowed additional confusion regarding the prosecution's use of such silence in its case-in-chief.[128] In this case, police arrested Thompkins on suspicion of murder.[129] Before beginning the interrogation, the police informed Thompkins of his *Miranda* rights, but Thompkins refused to sign the form evidencing that he understood his rights. Thompkins remained almost completely silent throughout

125. *See* Hennes, *supra* note 65, at 1036–37.

126. *See* Hapner, *supra* note 1.

127. *See, e.g.*, Fletcher v. Weir, 455 U.S. 603 (1982); United States v. Frazier, 408 F.3d 1102, 1107 (8th Cir. 2005).

128. Berghuis v. Thompkins, 560 U.S. 370 (2010).

129. *Id.* at 374.

the interrogation.[130] Nearly three hours into the interrogation, a police officer asked Thompkins whether he prayed to God for forgiveness for shooting the victim. Thompkins answered, "Yes."[131] The trial court admitted Thompkins's statement into evidence over his objection that it violated his Fifth Amendment right to remain silent.[132]

On appeal, the Supreme Court found that remaining silent for a prolonged period of time, like Thompkins during his interrogation, was insufficient to invoke the right to remain silent.[133] Instead, the Court held that a defendant must unambiguously invoke his *Miranda* right to remain silent.[134] Because Thompkins's silence alone was insufficient to invoke the right unambiguously, his response to the officer's question hours into the interrogation operated as a waiver of his right.[135]

The Court's creation of the unambiguous invocation requirement in *Thompkins* has only led to more questions. For purposes of this Comment, *Thompkins* raises the issue of whether the right to remain silent after arrest but prior to *Miranda* warnings is an automatic, self-executing right or if a defendant must clearly and verbally invoke their right to remain silent at the time of arrest to avoid adverse consequences at trial.[136]

At the very least, a requirement that individuals must speak to claim their right to remain silent is counterintuitive.[137] This requirement is troubling, particularly in a pre-*Miranda* situation, because it requires the arrestee to not only know that they have a right to re-

130. *Id.* at 375.
131. *Id.* at 376.
132. *Id.* Thompkins based his argument on the principle that he invoked his right to remain silent by not speaking for a sufficient period of time and did not waive his right by speaking two hours and forty-five minutes into the interrogation.
133. *Id.* at 380–81; *see also* Lauren Gottesman, Note, *Protecting Juveniles' Right To Remain Silent: Dangers of the* Thompkins *Rule and Recommendations for Reform*, 34 CARDOZO L. REV. 2031, 2044 (2013) ("In this five–four decision, the Court created a new, bright-line rule: an accused must affirmatively invoke his right to silence—his silence alone is insufficient." (footnote omitted)).
134. *Thompkins*, 560 U.S. at 381–82. The Court provides examples of statements that would be sufficient to meet the unambiguous invocation requirement, such as "I want to remain silent" and "I do not want to talk to police." The Court also repeatedly refers to the right in *Thompkins* as the "*Miranda* right to remain silent." This is likely because Thompkins purportedly claimed his right to remain silent after receiving his *Miranda* warnings and given an opportunity to expressly invoke the right. *Id.* at 382.
135. *Id.* at 388–89.
136. *See* Harvey Gee, *Invoking the Right to Counsel and Right To Remain Silent: It's Just Not That Clear*, 32 MISS. C.L. REV. 69, 77 (2013) (noting it is unclear whether *Thompkins*'s unambiguous invocation standard applies to pre-waiver situations).
137. *See Thompkins*, 560 U.S. at 391 (Sotomayor, J., dissenting); Charles Weisselberg & Stephanos Bibas, *The Right To Remain Silent*, 159 U. PA. L. REV. PENNUMBRA 69, 71 (2010).

main silent but also know how to appropriately invoke that right. Moreover, federal circuit court opinions after *Thompkins* reveal that application of the unambiguous invocation rule is unpredictable.[138] What is adequate in one jurisdiction to invoke the right is not always adequate in another jurisdiction.[139] The wide variety of things that must go right for an arrestee to sufficiently invoke their right to silence decreases the chances that their post-arrest, pre-*Miranda* silence will be protected and not used against them in court.

However, it may be possible to distinguish *Thompkins* to prevent the express invocation requirement from applying to post-arrest, pre-*Miranda* silence situations. The principal difference is that *Thompkins* involved post-*Miranda* silence. The open-ended question of which situations the express invocation rule applies to has not gone unnoticed by the Supreme Court. The Court arguably admitted that its holding in *Thompkins* applied only to post-*Miranda* silence, thereby excluding pre-*Miranda* situations, when it later asserted that *Thompkins* applies in the "context of post-*Miranda* silence."[140]

The Supreme Court reasoned that an unambiguous invocation of the right to remain silent after the receipt of *Miranda* warnings is required because the defendant has "full comprehension of the rights to remain silent and request an attorney."[141] In contrast, a defendant does not always have the same comprehension of their right to remain silent before they receive their *Miranda* warnings. This disparity presents another reason the right to silence in post-arrest, pre-*Miranda* situations should not require express and unambiguous invocation.

However, it is possible that this is a distinction without a difference, as the Supreme Court stated that the context of *Salinas*—pre-arrest silence—was "closely related" to *Thompkins*'s post-*Miranda* silence.[142] If the Court determines that these two seemingly distinct points in time are sufficiently related, it is possible that the Court will refuse to find a meaningful difference between post-arrest, pre-*Miranda* silence and *Thompkins*'s post-*Miranda* silence for invoking the right to silence. Whatever the outcome, *Thompkins* raises important questions for the treatment of post-arrest, pre-*Miranda* silence that

138. *See* Gottesman, *supra* note 133, at 2045–46.

139. *Compare* Hurd v. Terhune, 619 F.3d 1080, 1088–89 (9th Cir. 2010) (responding "no" and "I don't want to do that" to officers' request to reenact an event were sufficient to invoke the defendant's right to remain silent even though he never said he wanted to remain silent), *with* United States v. Plugh, 648 F.3d 118, 125 (2d Cir. 2011) (refusing to waive one's right to silence is insufficient to meet the unambiguous invocation requirement).

140. Salinas v. Texas, 570 U.S. 178, 188 (2013).

141. *Thompkins,* 560 U.S. at 382.

142. *Salinas*, 570 U.S. at 188.

the Supreme Court must necessarily address in conjunction with the main issue.

VI. CONCLUSION

To some, it may appear that the Supreme Court's consistent refusal to provide clarity to criminal defendants, police officers, defense attorneys, and prosecutors regarding the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt indicates the issue's unimportance. However, the exact opposite is true. The use of post-arrest, pre-*Miranda* silence in a prosecution's case-in-chief as evidence of the defendant's guilt is of utmost importance because it is a clear violation of the defendant's Fifth Amendment right to remain silent and privilege against self-incrimination.

This Comment argues that a criminal defendant's right to remain silent commences at the time of arrest rather than at the receipt of *Miranda* warnings. This interpretation is consistent with the fact that *Miranda* is merely a reminder of the right to remain silent, not the trigger, and thus has no bearing on when the right is activated. Moreover, the Eighth Circuit's argument that the *Miranda* warnings signify the requisite compulsion to trigger the right to silence is misguided. In fact, an analysis of what constitutes compulsion shows that defendants are compelled to speak at arrest if they are in a jurisdiction that allows post-arrest, pre-*Miranda* silence as evidence of guilt because there is a lack of free choice and harsh penalties.

A contrary interpretation of the right to silence would lead to undesirable consequences, such as law enforcement officers postponing *Miranda* warnings as long as possible to increase the chances that a defendant's silence after arrest may be used as incriminating evidence. Additionally, the Supreme Court must consider the effect on the average person who believes that their right to remain silent exists automatically as soon as they are arrested. Finding otherwise would penalize defendants and go against the main purpose of the Fifth Amendment's privilege against self-incrimination: to protect individuals' civil liberties by forcing the government to prove defendants' guilt by its own freely obtained evidence. Accordingly, it is crucial for the Supreme Court to hear this issue and prohibit such use of post-arrest, pre-*Miranda* silence as a violation of the Fifth Amendment right to remain silent.