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Silence Should Not Speak Louder Than Words: The Use of Pre-Arrest, Pre-Miranda Silence as Substantive Evidence of Guilt

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SILENCE SHOULD NOT SPEAK LOUDER THAN WORDS: THE USE OF PRE-ARREST, PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT

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Introduction

On January 11, 2013, the Supreme Court granted certiorari in *Salinas v. Texas*, a case in which the Texas Court of Criminal Appeals, the highest court for criminal cases in Texas, held that the Fifth Amendment right against compelled self-incrimination did not extend to a defendant's pre-arrest, pre-*Miranda* silence.[1] In 1992, Houston police officers discovered two homicide victims and their investigation led to defendant Genovevo Salinas.[2] Salinas did not respond in the face of questioning that purportedly connected him to the murders.[3] The Texas Court of Criminal Appeals held that, at the defendant's trial in the 230th District Court, the prosecution could comment on the defendant's pre-arrest, pre-*Miranda* silence, even though the defendant did not testify.[4] The issue certified to the Supreme Court was "[w]hether or under what circumstances the Fifth Amendment's Self-incrimination Clause protects a defendant's

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[1] Salinas v. State, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012), *cert. granted*, Salinas v. Texas, 133 S. Ct. 928 (U.S. Jan. 11, 2013) (No. 12–246). Genovevo Salinas was convicted of murder and appealed the use of his silence as substantive evidence of his guilt at trial. The Texas Court of Criminal Appeals found that Salinas' interaction with police officers was not compelled in the pre-arrest, pre-*Miranda* circumstances and therefore the Fifth Amendment did not apply to statements he had allegedly made to officers because such statements were not *compelled* self-incrimination. *Id.*

[2] *Id.*

[3] Petition for Writ of Certiorari, Salinas v. Texas, No. 12-246, WL 3645103, at *5 (2012). The prosecutor commented on the defendant's silence and insinuated that an innocent man would immediately dispel having any connection to the crime.

> "The police asked the defendant if a shotgun recovered from his home would match casings found by the bodies at the crime scene, to which defendant did not respond. The police officer testified that he wouldn't answer that question . . . You know, if you asked somebody - there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question."

[4] *Salinas*, 369 S.W.3d at 179.

refusal to answer police questioning before he has been arrested or read his *Miranda* rights."[5] In the state case, the court wrestled with the federal constitutional right against self-incrimination encompassed in the Fifth Amendment.[6]

Even though *Miranda*[7] warnings should normally precede custodial interrogation and inform a defendant of his right to remain silent in the face of that interrogation, government attorneys, as well as state prosecutors, argue that a defendant's pre-arrest, pre-*Miranda*[8] silence during informal, non-custodial encounters with law enforcement demonstrates substantive evidence his guilt.[9] The use of this silence presents a unique problem as it is distinct from any other type of silence the Supreme Court has addressed before. In *Doyle v. Ohio*, the Supreme Court grappled with the issue of whether post-arrest, post-*Miranda* silence could be used for impeachment.[10] There, the Court held that the defendant's silence following arrest and receipt of the *Miranda* warnings carries an implied assurance that it will not be used against him.[11] Prosecutors were therefore barred from commenting on such silence.[12] In *Griffin v. California*, the Supreme Court further prohibited the use of post-*Miranda* silence to impeach a defendant on his decision not to testify at trial.[13] There, the prosecution directly addressed the defendant's silence during his trial, which led to his first-degree murder conviction.[14] The Supreme Court

[5] Petition for Writ of Certiorari, *supra* note 3.
[6] U.S. CONST. amend. V; TEX. CONST. art I, § 10 ("[The accused] shall not be compelled to give evidence against himself . . .").
[7] *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *see infra* Part I-B.
[8] The term "pre-arrest, pre-*Miranda*" refers to the period before a suspect has been arrested and received his *Miranda* warnings.
[9] Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 21 (2008) ("The syllogism goes as follows: major premise - Innocent people proclaim their innocence in response to an accusation; minor premise - Defendant failed to respond to an officer's accusation that he killed his wife; conclusion - Defendant is guilty of killing his wife. This syllogism is the basis upon which courts and lawmakers allow a defendant's silence to be admitted into evidence as proof of guilt.").
[10] Doyle v. Ohio, 426 U.S. 610, 618 (1976).
[11] *Id.* at 614 ("It cuts down on the privilege by making its assertion costly.").
[12] *Id.*
[13] Griffin v. California, 380 U.S. 609, 615 (1965).
[14] *Id.*

held that the Fifth Amendment forbid prosecutors from commenting at trial on the accused's refusal to testify, because a "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws."[15] Yet, a defendant's pre-arrest, pre-*Miranda* silence is inherently distinct from cases like *Doyle* and *Griffin* where, like in *Salinas*, the defendant does not testify and the prosecutor does not seek to impeach the defendant with the silence, but rather presents the silence as substantive evidence for the jury to consider when weighing the defendant's guilt.

The Supreme Court's grant of certiorari in *Salinas v. Texas* represents the first step in clarifying the issue of whether pre-arrest, pre-*Miranda* silence may be used as substantive evidence of a defendant's guilt. It follows many years of conflict and divergent opinions from the United States Circuit Courts of Appeals.[16] Several circuits hold that using pre-arrest silence as substantive evidence of guilt violates the privilege against self-incrimination; several others hold that it does not; and some address the use of post-arrest silence in the same discussion.[17]

This Comment recommends that the Supreme Court in *Salinas v. Texas* adopt the rule of law announced by the First, Sixth, Seventh, and Tenth Circuits, which all hold that the government may not use pre-arrest, pre-*Miranda* silence in its case-in-chief because the use of

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[15] *Id*. at 614.

[16] The Supreme Court has previously rejected certiorari in numerous cases presenting this very issue. *See* United States v. Ashley, 664 F.3d 602 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1651 (2012). It is possible the Supreme Court did not take certiorari because *Ashley* was not viewed as the "perfect" case to decide the issue, due to the fact that no new information was provided by the admission of Ashley's silence and the Eleventh Circuit ruled that it was harmless error. *Ashley*, 664 F.3d at 605. The circuit court explained: "We need not take any position regarding the split in order to resolve the case before us. Even assuming *arguendo* that the government impermissibly used Ashley's pre-arrest, pre–*Miranda* silence, the error was harmless, because the evidence shows, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 604. *See also* United States v. Calise, 996 F.2d 1019 (9th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989), *cert. denied*, 493 U.S. 969 (1989).

[17] *See infra* Part I-C-2.

such silence violates a defendant's right to remain silent.[18] These holdings recognize that while *Miranda* warnings provide additional protection to defendants, they do not create and are not necessary to the existence of the right to remain silent. Part I-A will explore the development of the Fifth Amendment right against self-incrimination, Part I-B will discuss the pioneer case of the debate, *Miranda v. Arizona*,[19] Part I-C will discuss exceptions to *Miranda*, Part I-D-1 will address the relevant Supreme Court holdings on the issue of silence and Part I-D-2 will discuss the current circuit split regarding the use of a defendant' pre-*Miranda* silence as substantive evidence in a prosecutor's case-in-chief to prove a defendant's guilt. Part II will then argue that, in light of the Court's tendency to exclude this evidence in factually similar cases, the Supreme Court should follow in the footsteps of the Seventh Circuit in *United States* ex rel. *Savory v. Lane*[20] by interpreting this silence according to the *Griffin v. California* precedent.[21] Part III will conclude that it is unconstitutional to allow the use of a defendant's pre-arrest, pre-*Miranda* silence to be used against him at trial as substantive evidence of his guilt as it is contrary to the Fifth Amendment and will urge for a reversal of the Texas Court of Criminal Appeals' decision in *Salinas v. Texas.*

I. Historical Background

A. Fifth Amendment History

One of the most fundamental rights incorporated into the Bill of Rights is the Fifth Amendment, which provides in relevant part that "[n]o person . . . shall be compelled in any

[18] Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (1987).
[19] Miranda v. Arizona, 384 U.S. 436 (1966).
[20] United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (1987) (relying upon *Griffin* to conclude that a defendant's pre-arrest, pre-*Miranda* silence could not be used as direct evidence of guilt because the right to remain silent attaches before the adversarial proceedings even begin).
[21] Griffin v. California, 380 U.S. 609, 613–15 (1965) (holding that a defendant should not be penalized for exercising a constitutional privilege, and thus, a defendant's choice not to testify at trial cannot be used against the defendant as evidence of guilt either by the prosecutor in closing argument or the court in jury instructions).

criminal case to be a witness against himself."[22] It is more than likely that most people in the United States have heard about *Miranda v. Arizona*, a case interpreting the Fifth Amendment that has since become embedded into American law, politics, and culture.[23] Anyone who has seen a movie about crime, or watched police television dramas, knows that a defendant has the right to remain silent when arrested.[24] Even if people are unaware that *Miranda* stems from the Fifth Amendment, they generally know that, if they are arrested and questioned by the police, they have the right to remain silent and to request a lawyer.[25] This basic right is such a fundamental element of our justice system, so universally well known, that even children are indoctrinated into understanding its meaning at a young age.[26]

To begin the discussion about the protections of the Fifth Amendment, it is helpful to look back to its inception. English common law laid the foundation for the American right against self-incrimination.[27] Dating back to thirteenth century England, Pope Innocent III

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[22] U.S. CONST. amend. V.

[23] Laurie Magid, *The* Miranda *Debate: Questions Past, Present, and Future A Review of the* Miranda *Debate: Law, Justice, and Policing, Edited by Richard A. Leo and George C. Thomas III*, 36 HOUS. L. REV. 1251, 1314 n. 6 (1999) ("The *Miranda* decision is so well known that it has spawned an entire lexicon of new words and phrases: '*Miranda* warnings,' '*Miranda* rights, '*Miranda* waivers,' 'to Mirandize,' and to 'get *Miranda*'d.'").

[24] *See* Joshua A. Engel, *Frequent Fliers at the Court: The Supreme Court Begins to Take the Experience of Criminal Defendants into Account in* Miranda *Cases*, 7 SETON HALL CIRCUIT REV. 303, 340 n. 25 (2011) (citing United States v. Harris, 515 F.3d 1307, 1311 (D.C. Cir. 2008) ("As every television viewer knows, an officer ordinarily may not interrogate a suspect who is in custody without informing her of her *Miranda* rights."); United States v. DeNoyer, 811 F.2d 436, 439 n.4 (8th Cir. 1987) (noting that term "*Miranda* Warnings" "is commonly used, both in court and in television shows, to describe the ritual prescribed in *Miranda v. Arizona"*); United States v. Lacy, No. 2:09-CR-45 TS, 2010 WL 1451344, at *2 (D. Utah, Apr. 8, 2010) (defendant testified "that he was very aware of his *Miranda* rights because of television"); Russell Dean Covey, Miranda *and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761, 761 (2007) ("Not only did television make the *Miranda* warnings famous, its adoption of *Miranda* as an icon of criminal procedure may be main the reason *Miranda* is good law today.")).

[25] *Id.* (citing THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING xv (Richard A. Leo & George C. Thomas III eds., 1998) (reporting that 64.5% of parolees in one study demonstrated their knowledge of the Miranda warnings by correctly answering eleven or twelve out of twelve test questions)).

[26] *See* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1000 (2001) (suggesting that schoolchildren are more familiar with the *Miranda* warnings than they are with Lincoln's Gettysburg Address).

[27] JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 267–70 (John T. McNaughton rev. ed., 1961).

authorized the use of an oath *de veritate dicenda* in the religious trials of the era.[28] The oath required the defendant to swear that he would truthfully answer all questions, which was used to force self-incrimination.[29] If the person did not swear the oath, he would be found guilty. Yet if he answered and denied the charges, he was convicted of perjury.[30]

Ironically, the absence of a right against self-incrimination in early English law's served to enshrine it as a primary right in American jurisprudence. In the seventeenth century, the Star Chamber Court of England used the *de veritate dicenda* oath to create the oath *ex officio*.[31] The oath was a weapon, used as coercion, persecution and forcible self-incrimination.[32] The oath was to be given by the accused prior to questioning by the Star Chamber, made to answer questions truthfully.[33] But after John Lilburn was whipped in 1837 as a result of his famous refusal to participate in the Star Chamber Oath to face charges for heresy and sedition, the resulting public outcry led to the abolition of the oath.[34]

As a response to these abuses, the common law right against self-incrimination evolved from the maxim, *nemo tenetur seipsum prodere*, which means "no man shall be compelled to criminate himself."[35] Also establishing the groundwork for the right was the theory that a defendant is always faced with a "cruel trilemma," which prompted the need for protection.[36] Officers create the predicament of the "cruel trilemma" where a prisoner must choose between

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[28] Leonard Levy, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 431 (1968).
[29] Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1346 (1959).
[30] *Id.*
[31] Mary A. Shein, *The Privilege Against Self-Incrimination Under Seige:* Asherman v. Meachum, 59 BROOK. L. REV. 503, 503 (1993) (noting history of state abuse behind drafting of privilege); LEVY, *supra* note 28, at 272–81.
[32] *Id.*
[33] 8 WIGMORE, *supra* note 27.
[34] Jan Martin Rybnicek, *Damned If You Do, Damned If You Don't?: The Absence of A Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-*Miranda *Silence*, 19 GEO. MASON U. CIV. RTS. L.J. 405, 410 (2009)
[35] *See* John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 71 (1891).
[36] *See* Andrew J. M. Bentz, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 VA. L. REV. 897, 899-900 (2012) ("The cruel trilemma is the decision a defendant would face if forced to choose between maintaining her silence and being held in contempt of court, or speaking and thereby either perjuring or incriminating herself."); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55 (1964).

testifying and either perjuring or incriminating himself, or remaining silent and being held in contempt of court.[37]

From this rich history, the American privilege against self-incrimination developed during the settlement of the nation's thirteen colonies.[38] The Founding Fathers of America appreciated the British common law right to remain silent that existed to protect the individual from the aggressive inquisitorial examinations by religious institutions.[39] Before the privilege was incorporated into the Constitution by way of the Bill of Rights in 1791, it appeared in early versions America's governing documents.[40] From this, the Framers thus relied on this history of abuse, the common law privilege that they left behind in England, and their early governing documents when constructing the Fifth Amendment as it exists today, preserving one's autonomy in prosecutions.[41] The Supreme Court recognized the remarkable evolution of the right and commented in a late 19th century case, *Bram v. United States*, that the "maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."[42]

The Fifth Amendment evolved as a result of the Founder's concern for the possibility of

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[37] See, e.g., Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 694-95 (1968) (discussing the cruel trilemma).

[38] Ullmann v. United States, 350 U.S. 422, 446 (1956) ("The Framers . . . created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself. A long history and a deep sentiment lay behind this decision. Some of those who came to these shores were Puritans who had known the hated oath ex officio used both by the Star Chamber and the High Commission.").

[39] Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre*-Miranda *Silence*, 98 VA. L. REV. 897, 909 (2012) (citing A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, WITH SPECIAL REFERENCE TO FRANCE 79-84 (John Simpson trans., 1914)).

[40] Congress ratified the Bill of Rights in 1791, including the Fifth Amendment privilege against self-incrimination. *See* U.S. Const. amend. V. Before that, a version of the right was included in Virginia's Declaration of Rights in 1776, which was drafted by George Mason three weeks before the Declaration of Independence. James Madison used the Virginia Declaration of Rights as a model for drafting the Bill of Rights. United States v. Hubbell, 530 U.S. 27, 52 (2000).

[41] MCCORMICK ON EVIDENCE 248 (1972) (explaining that the privilege was adopted by the drafters of the Bill of Rights "not only (as) an answer to numerous instances of colonial misrule but (as) a shield against 'the evils that lurk(ed) in the shadows of a new and untried sovereignty.").

[42] Bram v. United States, 168 U.S. 532, 545 (1897).

an overwhelming and oppressive government and to protect the citizens of the fledgling nation.[43] The rights contained in the Fifth Amendment represent five distinct liberties that the Framers intended as safeguards from the abuses of authority they had left in England.[44] With regard to the self-incrimination provision specifically, the Supreme Court has explained that two of the policy concerns underlying the privilege were a commitment to the adversarial system of justice and a desire to protect the innocent rather than punish the guilty.[45] These are especially relevant to the Court's determination in *Salinas v. Texas*, for in the pre-arrest, pre-*Miranda* silence context, both of these values are implicated and jeopardized.[46]

In the early twentieth century leading up to *Miranda v. Arizona*, the Supreme Court explored numerous cases regarding confessions obtained through the use of force and thereby set the standards for considering whether those confessions were given voluntarily without force or coercion.[47] In *Counselman v. Hitchcock*, the Supreme Court explained that a defendant has the privilege against testifying under oath and making incriminating statements against himself at trial.[48] Such compelled confessions were a violation of the Fifth Amendment's right against self-incrimination.[49] Five years later, the Supreme Court refined the voluntariness test by holding that involuntary confessions were inadmissible as evidence under the Fifth Amendment in *Bram*

[43] Aktil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).
[44] *See* Ralph Rossum, "SELF-INCRIMINATION": THE ORIGINAL INTENT, IN THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 273, 278 (Eugene W. Hickok, Jr. ed., 1991). These include: the right to be indicted by an impartial Grand Jury before being tried for a federal criminal offense, the right to be free from multiple prosecutions or punishments for a single criminal offense, the right to remain silent when prosecuted for a criminal offense, the right to have personal liberties protected by due process of law, and the right to receive just compensation when the government takes private property for public use.
[45] S*ee* Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964) (listing the purposes of the privilege).
[46] *See* Jane Elinor Notz, *Prearrest Silence As Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009, 1020 (1997) (". . . Allowing prosecutorial use of such silence as evidence of guilt would favor the state in its competition against the individual. If a defendant knows that her prearrest silence may be used against her at trial, she is more likely to speak with the police earlier. On [protecting the innocent], a defendant may remain silent not because she is guilty, but because she is shy, afraid, or inarticulate.").
[47] Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false.").
[48] Counselman v. Hitchcock, 142 U.S. 547 (1892).
[49] *Id.* at 586.

v. United States.[50] There, the Court embraced the factor of "voluntariness" as the key to whether an admission violated Fifth Amendment due process.[51] With the decision in *Brown v. Mississipp*i, the trend of considering voluntariness continued.[52] The *Brown* Court concluded that a defendant's confession that was extracted by police violence through whippings and torture could not be entered as evidence as it violated the Fifth Amendment, made applicable to the state by the due process clause of the Fourteenth Amendment.[53] *Spano v. New York* represented the movement of the Court's jurisprudence away from the amorphous "voluntariness" standard, the former touchstone for determining whether police violated due process standards when eliciting confessions, towards the modern rule in *Miranda v. Arizona*.[54] There, the Court focused less on extraneous factors such as meals provided to the accused, and more on whether the accused had access to legal counsel when judging the admissibility of confessions.[55]

While the 1964 case *Escobedo v. Illinois* introduced the right to counsel in the pre-indictment stage as a limit on interrogation, it was also a step towards *Miranda*.[56] Justice Goldberg, writing for the majority, held that the admission into evidence of statements made in the course of a custodial interrogation and after a suspect had requested but was denied counsel, was a violation of his right to counsel under the Sixth Amendment, even if the suspect voluntarily made the statements.[57] Relevant to the current analysis, the Court abandoned the traditional due process, voluntary-involuntary test for confessions and instead held that where a suspect is denied a lawyer and is not informed "of his absolute constitutional right to remain

[50] Bram v. United States, 168 U.S. 532 (1897) ("A confession can never be in evidence where prisoner has been influenced by any threat or promise, human minds under pressure.").
[51] *Id.* at 542.
[52] Brown v. Mississippi, 297 U.S. 278 (1936).
[53] *Id.* at 287.
[54] Spano v. New York, 360 U.S. 315 (1959).
[55] *Id.* at 324.
[56] Escobedo v. Illinois, 378 U.S. 478 (1968).
[57] *Id.* at 490–91.

silent," it is a violation of the Sixth Amendment.[58] Two short years later, the Supreme Court clarified whether the Fifth Amendment as well protected these rights in *Miranda v. Arizona*.

B. Arriving at *Miranda*

In 1966, the Supreme Court issued its landmark decision in *Miranda v. Arizona*,[59] which dramatically changed the manner in which custodial interrogations took place in America. *Miranda* would soon become, by the Supreme Court's own acknowledgement, one of the most well known criminal justice decisions in American jurisprudence.[60] The *Miranda* Court held that the "Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."[61] The Court emphasized that state legislatures could write laws that had different standards,[62] but suggested that jurisdictions use the warning: "You have the right to remain silent. Anything you say or do can and will be held against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you."[63]

When the Supreme Court decided *Miranda v. Arizona* in 1966, the Justices limited the holding to confessions obtained through abusive police tactics during custodial interrogation.[64] Two years prior, the Court's holding in *Escobedo v. Illinois* had failed to address the issue of admissibility of improperly obtained confessions.[65] The *Miranda* case was a consolidation of previous cases in which each defendant provided inculpatory statements to police offers while

[58] *Id.* at 491.
[59] Miranda v. Arizona, 384 U.S. 436, 479 (1966).
[60] *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").
[61] *Id.* at 468.
[62] *Id*. at 467.
[63] *Id*. at 479.
[64] *Id.*
[65] Escobedo v. Illinois, 378 U.S. 478 (1968).

unaware of their constitutional rights to remain silent.[66] The man who would become the namesake of the right, Ernesto Miranda, had been arrested and interrogated for two hours regarding a kidnapping and rape.[67] After reciting a dense history of the Fifth Amendment and contemporary abuses of police power, the Court held that it was necessary to have a safeguard to prevent against compelled confessions.[68]

Chief Justice Earl Warren wrote for the majority and found that Ernesto Miranda had been subjected to questioning in a "police-dominated atmosphere . . . cut off from the outside world . . . without full warnings of [his] constitutional rights."[69] The Court ruled that "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,"[70] and a person in custody "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[71] 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."[72]

Justice Harlan's dissent, joined by Justices Stewart and White, firmly stated that *Miranda* was a poorly crafted decision by constitutional law standards and the severity of the mistake in constitutional law was incalculable.[73] Justice Clark wrote a separate dissent, which recommended a "totality of the circumstances" approach, a standard where the state would have the burden to prove that, in light of all factors, the confession was clearly made voluntarily.[74]

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[66] *Miranda*, 384 U.S. at 440 ("We dealt with certain phases of this problem recently in *Escobedo v. Illinois* . . . There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney.").
[67] *Id*. at 491–92.
[68] *Id.* at 460–61.
[69] *Id*. at 445.
[70] *Id.* at 467–68.
[71] *Id.* at 471.
[72] *Miranda*, 384 U.S. at 471 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).
[73] *Id.* at 504 (Harlan J., dissenting).
[74] *Id*. at 501–03 (Clark, J., dissenting).

Miranda mandated that statements made by criminal suspects in custody could not be used unless police officers first gave a warning to the suspect.[75] These warnings, now colloquially known as "*Miranda* warnings," were thought to be necessary to inform a defendant of his rights in the inherently coercive atmosphere during interrogation.[76] A police officer is not required to inform a suspect of his *Miranda* rights until the police interrogation begins.[77] A criminal defendant must be both in custody and subjected to interrogation for *Miranda* to apply.[78] Yet the doctrine does require that a person in custody be advised that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[79]

Miranda announced that when a defendant is subjected to custodial interrogation, his statements are inadmissible as substantive proof of his guilt unless he voluntarily and knowingly waives his rights after the police advise him of his rights.[80] This ambition to fully inform suspects of their rights made *Miranda* the seminal Fifth Amendment decision it is because the Court stopped interpreting confessions under Due Process claims and instead shifted squarely into a Fifth Amendment analysis, where the very act of improper questioning of a suspect would be a constitutional violation, no matter if the confession was voluntary.[81]

As ground breaking as *Miranda* was, almost immediately, it was met with heavy resistance by Congress[82] and sparked tension with other Supreme Court Justices.[83] At the time

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[75] *Id.* at 444.
[76] *Id.* at 444–45.
[77] *Id*.
[78] Stansbury v. California, 511 U.S. 318, 322 (1994).
[79] *Miranda*, 384 U.S. at 479.
[80] *Id.* at 468.
[81] 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, 2 (2005).
[82] *See* 18 U.S.C. § 3501(a) (1968).

of the Court's decision, no state had ever compelled adherence to any rule comparable to *Miranda*, as most states still applied a standard that analyzed the voluntariness of a defendant's confession.[84] As a result, most politicians and police officers condemned the *Miranda* decision as a judicially crafted vehicle to allow criminals avoid prosecution for their crimes.[85]

Intent on superseding *Miranda* legislatively, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 two years after *Miranda*.[86] Under Section 3501 of the Act, the statute made the admissibility of confessions turn on an analysis of voluntariness.[87] Government agents were therefore allowed to ignore *Miranda*'s admonition to read warnings to a defendant upon his arrest.[88] The statute directed federal trial judges to admit statements of criminal defendants if they were made voluntarily, without any regard to whether the defendant had received his *Miranda* warnings.[89] Voluntariness depended on such things as: the time between arrest and arraignment, whether the defendant knew the crime for which he had been arrested, whether he had been told that he did not have to talk to the police and that any statement could be used against him, whether the defendant knew prior to questioning that he had the right to the assistance of counsel, and whether he actually had the assistance of counsel

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[83] *Miranda*, 384 U.S. at 504 (Harlan J., dissenting); *id*. at 501–03 (Clark, J., dissenting); *see* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 976 (2012) ("In his dissenting opinions and public speeches, Judge Burger had left no doubt that he was quite unhappy with the Warren Court's criminal procedure rulings–and equally unhappy with the liberal judges on his own court.").

[84] *Id*. at 464–65 (majority opinion) ("The voluntariness doctrine in the state cases . . . indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.").

[85] Russell Dean Covey, Miranda *and the Media: Tracing the Cultural Evolution of A Constitutional Revolution*, 10 CHAP. L. REV. 761, 786 (2007) ("Beginning with President Nixon's election in 1968, however, the *Miranda* era gave way to a post-*Miranda* period characterized by an increasing backlash against the Warren Court agenda. In the post-*Miranda* world, *Miranda* was targeted by critics and reactionaries and became an icon of the law's perceived tenderness toward criminals.)"

[86] *See generally* 42 U.S.C. § 3711 (1968).

[87] *See* Dickerson v. United States, 530 U.S. 428, 433–34 (2000) (discussing the history of the law governing the admissibility of confessions).

[88] *Id.* at 436 ("Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda.*").

[89] *Id*. at 436.

during questioning.[90] But, the "presence or absence of any of" these factors "need not be conclusive on the issue of voluntariness of the confession."[91] Because Section 3501 was an Act of Congress, it applied only to federal prosecutions and prosecutions in the District of Columbia, so individual states were still free to follow the *Miranda* approach instead.[92]

The statute was nevertheless all but forgotten about in the following years.[93] Although he signed the bill into law, President Lyndon B. Johnson was unhappy with the prospect of losing *Miranda*'s protections and directed the FBI to continue informing suspects of their rights.[94] Even Attorney General Ramsey Clark instructed prosecutors to only offer into evidence confessions obtained under *Miranda*'s guidelines.[95] After President Richard Nixon was elected following a campaign heavily focused on combatting crime, his Attorney General, John Mitchell, directed federal prosecutors and agents to follow the *Miranda* rules, but to also use Section 3501 to help obtain the admission of confessions.[96] While the Department of Justice generally viewed Section 3501 as constitutional, the Department's sporadic enforcement of it in the circuits over the years left the Courts free to use *Miranda* instead.[97]

The constitutionality of the Act was not ruled upon until nearly 30 years later in *Dickerson v. United States*, where the Court confronted the fight over *Miranda* and chose the proper standard to apply to confessions.[98] There, the defendant was charged with conspiracy to

[90] *Id.* (citing 18 U.S.C. § 3501 (1968)).
[91] 18 U.S.C. § 3501 (1968).
[92] *Dickerson*, 530 U.S. at 447; *see* 18 U.S.C. § 3501(a), (c).
[93] Michael Edmund O'Neill, *Undoing* Miranda, 2000 B.Y.U. L. REV. 185, 234 (2000) (describing the history of the Act's enforcement through the Presidencies of Johnson to Clinton).
[94] *Id.*
[95] *Id.*
[96] Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 199 (1999).
[97] *See* Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) ("The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda* " issues that might be entirely irrelevant under federal law.").
[98] *Dickerson*, 530 U.S. at 447.

commit bank robbery and other offenses and the district court granted a motion to suppress the defendant's statement to the Federal Bureau of Investigation because he had not received his *Miranda* warnings, and the Fourth Circuit reversed because his statement was voluntary.[99] Chief Justice Rehnquist, writing for the 7-2 majority, held that *Miranda*'s warnings-based approach to determining the admissibility of a statement made by accused during custodial interrogation was constitutionally based, and could not be overruled by a legislative act.[100] In reaching this conclusion, Rehnquist hearkened back to the history before and after *Miranda* with a survey of the privilege against self-incrimination, dating back to English common law.[101] Rehnquist concluded that Congress has the authority to pass statutes to protect the right against coercive self-incrimination, but warned that such legislation must be at least as effective in informing individuals of their rights as *Miranda*.[102]

Justice Scalia, joined by Justice Thomas, explaining in dissent that the "judgment convert[ed] *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[103] Scalia believed that there was no support in history or precedent that a violation of the privilege against compelled-self incrimination would result from a violation of *Miranda*.[104] Furthermore, he argued that the majority opinion never explicitly stated that *Miranda* was required by the constitution.[105] Scalia also disagreed with the argument that *Miranda* should be preserved

[99] *Id.*
[100] *Id.* at 437.
[101] *Id.* at 433.
[102] *Id.*
[103] *Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting) ("*Miranda* rights are not themselves rights protected by the Constitution.").
[104] *Id.* at 451.
[105] *Id.* at 446 ("The Court need only go beyond its carefully couched iterations that "*Miranda* is a constitutional decision," . . . that "*Miranda* is constitutionally based," that *Miranda* has "constitutional underpinnings," and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it.").

simply because the decision is well known.[106] Hence, Scalia argued that the Supreme Court should have had no problem with admitting it made a mistake in eliminating the voluntariness standard for confessions.[107]

C. Exceptions to *Miranda*

The Supreme Court's shifting attitudes regarding the scope of the Fifth Amendment have led to a diverse range of case law, both analogous and distinctive, that the Court can reflect on guidance in *Salinas v. Texas*. Even though *Dickerson* saved *Miranda* from being case aside in 2000, the Supreme Court had already carved out numerous exceptions to *Miranda*'s requirements in string of precedent after *Miranda.*[108] Three years after Omnibus Crime Control Act was first enacted, the Supreme Court created an exception where confessions taken in violation of *Miranda* could be used at trial for impeachment in *Harris v. New York*.[109] The Court held that a statement which was inadmissible against the defendant in the prosecution's case in chief because defendant had not been advised of his rights to counsel and to remain silent prior to making statement but which otherwise satisfied legal standards of trustworthiness was properly usable for impeachment purposes to attack credibility of defendant's trial testimony.[110] On its face, *Harris* cuts down *Miranda*'s power because police could potentially be incentivized to violate *Miranda* since any improper statement could nevertheless be admissible if the defendant testified.

The rise and fall of *Miranda* continued in *New York v. Quarles*, where the Court held that *Miranda* warnings could be dispensed with all together if there was a concern for public safety

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[106] *Id.* at 464.
[107] *Id*.
[108] *Id.* (explaining that these Justices in Supreme Court history each played a prominent role in the downsizing and dismantling of *Miranda*: Chief Justice Burger with *Harris v. New York*, 401 U.S. 222 (1971), and Justice Rehnquist with in Michigan v. Tucker, 417 U.S. 433 (1974)).
[109] Harris v. New York, 401 U.S. 222 (1971).
[110] *Id.* at 224–225.

that justifies immediate questioning.[111] In that case, a woman who claimed she had just been raped said her attacker had just entered a supermarket with a gun.[112] When the defendant was apprehended, the police handcuffed him and then asked him where the gun was before *Miranda* warnings were issued, to which he responded "the gun is over there."[113] The Court created a narrow exception to *Miranda* and concluded that the need for answers to questions in situations posing a threat to pubic safety outweighed the need for *Miranda* warnings.[114] Broadly construed, the two exceptions in *Harris* and *Quarles* could swallow up much of the *Miranda* rule.

The Supreme Court further cut down the strength and influence of *Miranda* through a series of cases dealing with the definition of custody,[115] interrogation,[116] and waiver of *Miranda*.[117] In one such case, *Oregon v. Mathiason*, the Supreme Court was faced with the issue of whether a defendant's inculpatory statements were admissible under *Miranda* when he voluntarily turned himself in at a police station, and when police had not yet Mirandized him and told him that he was not under arrest.[118] The Court held that the statements made at the police station were admissible even though the defendant made them before police warned him of his constitutional rights, because while police did question the defendant in a police station, his freedom of movement was not curtailed in any significant way—he voluntarily went to the

[111] New York v. Quarles, 467 U.S. 649 (1984).
[112] *Id.* at 652.
[113] *Id.*
[114] *Id.* at 658.
[115] Berkemer v. McCarty, 468 U.S. 420, 438 (1984) (roadside questioning of a motorist detained pursuant to a traffic stop is temporary and brief, therefore it does not constitute custodial interrogation for the purposes of the doctrine enunciated in *Miranda*).
[116] *See* Oregon v. Mathiason, 429 U.S. 492 (1977) (per curium) (restating that *Miranda* applies only to custodial interrogation); Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (holding that a defendant is not interrogated unless expressly questioned or the functionally equivalent, including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response"). *But see* Missouri v. Seibert, 542 U.S. 600 (2004) (holding that Missouri's practice of interrogating suspects without reading them a *Miranda* warning, then reading them a *Miranda* warning and asking them to repeat their confession is unconstitutional.).
[117] North Carolina v. Butler, 441 U.S. 369 (1979) (holding that a waiver of *Miranda* rights may be implied through the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver).
[118] *Mathiason*, 429 U.S. at 493–94.

police.[119] The *Mathiason* Court noted that while the police interview with the defendant might have been coercive, "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'"[120] Thus, police officers are not required to administer *Miranda* warnings to everyone whom they question.[121] Nor are warnings required simply when questioning takes place in a station house, or because the questioned person is a suspect.[122] Rather, *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody.[123]

The Supreme Court further attempted to minimize the potential negative impact of *Miranda* exclusions on effective law enforcement with *Oregon v. Elstad*.[124] There, the Court addressed *Miranda* in the context of confessions that were "fruits of the poisonous tree."[125] Justice O'Connor, writing for the majority, explained that *Miranda* is a prophylactic device intended to protect the defendant's Fifth Amendment rights, but errors in administering the warnings should not lead to the same consequences as infringement on the Fifth Amendment itself.[126] The defendant in *Elstad* made several incriminating statements to police officers about

[119] *Id*. at 495.
[120] *Id*.
[121] *See* Stansbury v. California, 511 U.S. 318, at 324 (1994) (per curiam). ("Nor is the requirement of warnings to be imposed simply because ... the questioned person is one whom the police suspect.").
[122] *Mathiason*, 429 U.S. at 495; *see* Minnesota v. Murphy, 465 U.S. 420, 431 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in non-custodial settings, and the probation officer's knowledge and intent have no bearing on the outcome of this case.").
[123] *Id.* ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.").
[124] Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").
[125] *Id.* "Fruits of the poisonous tree" is an expression representing evidence obtained illegally that is usually applied as an exclusionary rule in the context of searches and seizures under the Fourth Amendment. Wong Sun v. United States, 371 U.S. 471 (1963).
[126] *Elstad*, 470 U.S. at 309.

a burglary after he was taken into custody, but prior to being read his *Miranda* rights.[127] When his rights were eventually read to him, however, he waived them, providing statements that the government then used against him at trial.[128] Justice O'Connor explained that it did not matter whether the police failed to give *Miranda* warnings before the defendant's first confession, so long as the eventual confession was not coerced.[129] It is important to note that even though the defendant's subsequent, post-*Miranda* waiver statements were admissible, the Court held that the unwarned original admission must be suppressed.[130]

D. The Use of Silence

1. Supreme Court Precedent

The current discord among the circuit courts primarily stems from the differing interpretations of the Fifth Amendment's protection against self-incriminating statements. The jurisdictions that that have ruled on the admission of pre-arrest, pre-*Miranda* silence as evidence of guilt usually do so by employing an extension or curtailment of Supreme Court precedent from *Griffin v. California*,[131] *Doyle v. Ohio*,[132] *Fletcher v. Weir*,[133] and *Jenkins v. Anderson*.[134] *Jenkins* and *Fletcher* represent the law of pre-*Miranda* silence as it relates to impeachment only. *Doyle and Wainright* addressed post-*Miranda* silence as it relates to both impeachment and evidence of guilt.[135] In these prior decisions, the question of pre-arrest, pre-*Miranda* silence has

[127] *Id.* at 298.
[128] *Id*. at 318.
[129] *Id*.
[130] *Id*.
[131] Griffin v. California, 380 U.S. 609 (1965) (holding that a prosecutor's reference in closing argument to defendant's exercising his right to refuse to testify, and instruction allowing jury to consider it, violated the right against self-incrimination).
[132] Doyle v. Ohio, 426 U.S. 610 (1976) (holding that a defendant's silence in response to a *Miranda* warning cannot be used against him).
[133] Fletcher v. Weir, 455 U.S. 603, 607 (1982) (holding that post-arrest, pre-*Miranda* silence can be used to impeach a testifying defendant).
[134] Jenkins v. Anderson, 447 U.S. 231 (1980) (holding that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility).
[135] *See supra* notes 189–191 and accompanying text.

evaded review. *Salinas v. Texas* raises this issue squarely and thrusts into the current and uncertain state of pre-*Miranda* jurisprudence.

The Federal Rules of Evidence distinguish between the use of silence for impeachment and as substantive evidence.[136] Impeachment is justified on the ground that when a defendant chooses to testify, he waives his privilege against self-incrimination.[137] Under the Rules of Evidence, if a defendant testifies to a statement that is inconsistent with one he made earlier, his credibility can be impeached by the introduction of his prior inconsistent statement.[138] If the defendant's prior statement was made under oath or at a prior hearing or deposition, the statement can be admitted as substantive evidence.[139]

a. Silence at Trial

Over the last half a century, the Supreme Court has been prolific in the area of law regarding silence in various criminal prosecutions. The Court has ruled on the use of post-arrest, pre-*Miranda* silence used for both impeachment and substantive evidence.[140] The most promising case for Genovevo Salinas, *Griffin v. California*, involved a prosecutor who expressly asked the jury to draw a negative inference from the defendant's choice not to take the witnesses stand.[141] The defendant was charged with murdering a friend who he had been with the night before.[142] The prosecutor remarked that the jury should consider the evidence that the defendant did not try to disclaim the prosecution's theory as evidence of guilt in light of the fact that he would have been the last person to see the decedent alive and would be in the best position to

[136] If the prior inconsistent statement of an available witness is used as substantive evidence, the prior statement must have been made under oath and at a prior hearing or deposition. FED. R. EVID. 801(d)(1)(A). Yet if the prior statement is offered only to impeach the defendant's credibility, the requirements for the oath and hearing are not necessary. FED. R. EVID. 613.
[137] *See* Notz, *supra* note 46, at 1023.
[138] FED. R. EVID. 613.
[139] FED. R. EVID. 801(d)(1)(A).
[140] *See* Fletcher v. Weir, 455 U.S. 603 (1982); Jenkins v. Anderson, 447 U.S. 231 (1980).
[141] Griffin v. California, 380 US 609 (1965).
[142] *Id.*

explain how the night ended, if he were innocent.[143] The Court applied this right even before the defendant's arrest, reasoning that *Miranda* warnings are additional protections, but are not necessary to the existence of the right against self-incrimination.[144] The Court ultimately found that the trial court had violated the self-incrimination clause of the Fifth Amendment and reversed his conviction.[145] The Court did not address the government's use of a defendant's silence at his arrest for impeachment but it did, however, create a bright line rule that a defendant's silence as a result of his refusal to testify could not be submitted as evidence against him because it violated the Fifth Amendment.[146]

The Supreme Court later applied *Doyle* to determine that the government's use of a defendant's post-arrest and post-*Miranda* silence as substantive evidence to contradict his insanity plea violated due process.[147] David Greenfield was arrested for sexual battery and he was read his rights on three separate occasions before he even reached the police station.[148] He stated that he understood his rights and asked for an attorney.[149] At trial, the defendant pled not guilty by reason of insanity.[150] The prosecutors, in part by questioning the officers about the defendant's demeanor during questioning, and through closing argument, told the jury that the defendant's silence proved he was sane enough to understand his rights and to exercise them.[151] The defendant was sentenced to life in prison.[152] The Supreme Court held that the government violated the defendant's due process rights when the prosecutor used the defendant's post-arrest,

[143] *Id*. at 610–11.
[144] *Id*. at 614.
[145] *Id.*
[146] *Id.* at 614–15.
[147] Wainwright v. Greenfield, 474 U.S. 284 (1986).
[148] *Id*. at 286.
[149] *Id*.
[150] *Id*. at 287.
[151] *Id*.
[152] *Id*. at 286–87.

post-*Miranda* silence for either impeachment or case-in-chief purposes.[153] Specifically, the Court stated that the *Miranda* warnings include an implicit promise that a defendant's silence will not be used against him and thus could not be used to contradict the defendant's sanity.[154]

b. Silence Arising After Both an Arrest and the Receipt of a Miranda Warning, for Impeachment and Substantive Evidence

Ten years after *Miranda*, the Supreme Court addressed a case with comparable facts to *Salinas*, where the issue arose whether a defendant's post-arrest, post-*Miranda* silence could be used for impeachment purposes if the defendant testified at trial.[155] In *Doyle v. Ohio*, the defendants were charged with selling marijuana to an undercover informant.[156] At trial, the defendants testified that the informant framed them and the prosecution impeached them on cross-examination by questioning why they failed to tell their exculpatory story after they had been arrested and given *Miranda* warnings.[157] The majority opinion, written by Justice Powell, announced that that such use was impermissible, explaining that prosecutors are not allowed to comment on a defendant's silence to impeach any testimony he may give at trial if the silence arose after officers had read him his *Miranda* rights.[158] The Court explained that the silence could not be used even for impeachment purposes because, "while . . . the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[159] It would therefore be "fundamentally unfair and a deprivation of due process" to allow the use of the warned arrestee's silence to be used even for

[153] *Wainwright*, 474 U.S. at 295.
[154] *Id.*
[155] Doyle v. Ohio, 426 U.S. 610 (1976).
[156] *Id.* at 611.
[157] *Id.*
[158] *Id.* at 618.
[159] *Id.* ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights).

impeaching an explanation first offered at trial.[160] Furthermore, the Court cautioned that the silence after Miranda is inherently ambiguous because it may just be due to the *Miranda* warning's admonition itself.[161] The Court prohibited the use of post-*Miranda* silence to impeach a defendant as it violated the Due Process Clause of the Fourteenth Amendment.[162]

In *Doyle v. Ohio*, the Court announced an exception to an exception to the general rule that a defendant's silence cannot be used for any purpose, and prohibited impeachment with a defendant's post-arrest, post-*Miranda* silence.[163] However, the Court evaluated this case under due process grounds, and not Fifth Amendment. But relevant to the analysis here is the Court's belief that, even though the defendant was not compelled in anyway to speak or stay silent, his decision to remain silent was induced by *Miranda* warnings. This could also apply to a defendant who has not been arrested but is unresponsive during police contact because anything he might say would be incriminating.

c. Silence Arising Prior to Arrest and Receipt of a *Miranda* warning

In 1980, the Supreme Court cautiously approached the issue of pre-arrest, pre-*Miranda* silence, but deliberately left the question unanswered. The *Jenkins v. Anderson* decision addressed the issue of pre-arrest, pre-*Miranda* silence only for impeachment purposes.[164] There, the Court allowed the prosecution to use pre-arrest, pre-*Miranda* silence to impeach a defendant's credibility when he testifies at trial.[165] The defendant in *Jenkins* stabbed a man to death and fled the scene of the crime, only to be apprehended two weeks later.[166] At trial, the

[160] *Id.*
[161] *Doyle*, 426 U.S. at 617.
[162] *Id.* at 618.
[163] *Id.* at 617.
[164] Jenkins v. Anderson, 447 U.S. 231, 240–41 (1980).
[165] *Id*. at 231.
[166] *Id*. at 232.

defendant asserted that he acted in self-defense.[167] The prosecutor then questioned the defendant as to why he did not explain to the arresting officers that he acted in self-defense.[168] The prosecution subsequently used this silence in summation to argue that the defendant would have immediately reported this claim of self-defense when authorities approached him if he had, in fact, acted in self-defense.[169] The defendant was convicted of manslaughter and the Supreme Court granted certiorari on the issue of whether the prosecutor's commentary on his silence was a violation of the defendant's Fifth Amendment.[170] The ruling in *Jenkins* was limited to impeachment use of pre-arrest, pre-*Miranda* silence.[171] The *Jenkins* holding in some ways can be characterized as incomplete, as it does not address the Fifth Amendment rights of a defendant who never takes the stand, and whether this pre-arrest silence is privileged in any situation.

First, the Court in *Jenkins* stated that the rule outlined in *Griffin* that a prosecutor could comment on a defendant exercising his right to remain silent at trial did not apply because, Jenkins voluntarily chose to testify in his own defense.[172] Under a constitutional analysis, the Court found that the Fifth Amendment, as applied to the States through the Fourteenth Amendment, did not protect the defendant in that case because impeachment with pre-arrest silence "follow[ed] the defendant's own decision to cast aside his cloak of silence and advance[d] the truth-finding function of the criminal trial."[173] Moreover, the Court said that, because the police had not read the defendant his *Miranda* rights, *Doyle*'s estoppel theory,[174] did not

[167] *Id*. at 233.
[168] *Id.* at 234.
[169] *Id.* at 235.
[170] *Jenkins*, 447 U.S. at 238.
[171] *Id.* at 241.
[172] *Id.* at 235.
[173] *Id.* at 238.
[174] Doyle v. Ohio, 426 U.S. 610, 620 (1976) (Stevens, J., dissenting) ("If (a) the defendant is advised that he may remain silent, and (b) he does remain silent, then we (c) presume that his decision was made in reliance on the advice, and (d) conclude that it is unfair in certain cases, though not others, to use his silence to impeach his trial testimony.").

apply.[175] The Court held that the defendant's pre-arrest silence could be used against him for impeachment purposes, as no governmental action induced the defendant to remain silent before his arrest, but made clear that state courts were free to outlaw the practice through their own Rules of Evidence.[176] The Court reached its ruling since a defendant who takes the stand makes a decision "to cast aside his cloak of silence and advance the truth-finding function of the criminal trial."[177] The Court also held that the use of the silence to impeach his credibility did not deny him fundamental fairness guaranteed by the Fourteenth Amendment.[178] Neither the *Doyle* nor *Jenkins* decisions, however, decided the issue of whether pre-arrest, pre-*Miranda* silence is admissible where the defendant does not testify, and cast aside his "cloak of silence."

d. Silence Arising After an Arrest But Before the Receipt of a *Miranda* Warning

In a case with substantially similar facts to *Jenkins*, the *Fletcher* Court held that the impeachment use of a defendant's post-arrest, pre-*Miranda* silence did not violate due process.[179] In *Fletcher v. Weir*, the Court was faced with the question of whether the Fifth Amendment precluded the use of such silence for impeachment during cross-examination about post-arrest silence when a defendant willingly takes the stand.[180] At trial for murder charges stemming from a stabbing, Fletcher took the stand in his own defense and claimed he acted in self-defense.[181] Similar to the defendant in *Jenkins*, Fletcher fled the scene of the crime and only offered his exculpatory story for the first time on the stand.[182] But unlike the defendant in *Jenkins*, here the

[175] *Jenkins*, 447 U.S. at 240.
[176] *Id*. at 240–41 ("Our decision today does not force any state court to allow impeachment through the use of pre-arrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative then prejudicial. We merely conclude that the use of pre-arrest silence to impeach a defendant's credibility does not violate the Constitution.").
[177] *Id*. at 238.
[178] *Id.* at 239.
[179] Fletcher v. Weir, 455 U.S. 603, 607 (1982).
[180] *Id.* at 603.
[181] *Id*.
[182] *Id.*

defendant was silent prior to receiving his *Miranda* warnings, but after he was arrested.[183] The prosecution, on cross-examination, inquired why he never offered the explanation before.[184] The defense argued that the arrest triggered the defendant's right to remain silent, and therefore the prosecutor's questioning of the defendant's ulterior motive for silence violated his Fifth Amendment right against self-incrimination.[185] The Court did not agree and plainly stated that courts that had been improperly extending *Doyle* beyond its scope to protect a defendant's silence during the period immediately after his arrest but before *Miranda* warnings were issued.[186] The Court concluded that in the absence of the affirmative assurances embodied in *Miranda*, it is not improper for the state to permit the cross-examination.[187]

2. Circuit Split Regarding the Evidentiary Use of Pre-Arrest, Pre-*Miranda* Silence

Although the *Miranda* decision established that a defendant has the right to remain silent, it has not provided any more definitive guidance on the current subject. Despite the proliferation of Supreme Court cases about the use of a defendant's silence at trial, the courts are split on the constitutionality of admitting pre-arrest, pre-*Miranda* silence as substantive evidence of guilt.

Additionally, stemming from the deep confusion over the limits of the Fifth Amendment and the reach of *Miranda* protection in the federal courts, the circuit courts are split on whether the government can use post-arrest silence in its case in chief, where the defendant has not been given *Miranda* warnings.[188] Because the Supreme Court would likely need to address these

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[183] *Id*.
[184] *Id*. at 603–04.
[185] *Fletcher*, 455 U.S. at 605.
[186] *Id.* at 606.
[187] *Id.* at 607.
[188] The First, Seventh, Ninth, and District of Columbia Circuits have each held that post-arrest, pre-*Miranda* silence is inadmissible at trial as evidence of guilt. These Circuits emphasize that the Fifth Amendment right is inherent and does not need to be triggered by the issuance of the *Miranda* warning to have effect. United States v. Velarde-Gomez, 269 F.3d 1023, 1036 (9th Cir. 2001) (the use of "pre-arrest silence as substantive evidence of guilt does not violate the privilege against self-incrimination"); s*ee also* United States v. Moore, 104 F.3d 377, 385–90 (D.C. Cir.

distinct issues separately, this Comment will only address the split regarding pre-arrest, pre-*Miranda* silence.

Turning to the topic of this Comment, four courts of appeals allow the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt.[189] The Ninth and D.C. Circuits only allow the use of pre-arrest, pre-*Miranda* silence.[190] Alternatively, the First, Sixth, Seventh, and Tenth Circuits prohibit the prosecution from using any pre-*Miranda* silence as evidence of guilt.[191] The circuits that prohibit this evidence rely primarily on the theory enunciated in *Griffin v. California*, namely that commenting on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," which the Fifth Amendment outlaws.[192] The Court of Appeals for the Second Circuit has also indicated that pre-*Miranda* silence is likely not admissible.[193] These cases generally hinge on whether the prosecution introduces the defendant's silence solely for impeachment purposes or as substantive evidence of guilt.

In *Coppola v. Powell*, the First Circuit reached the conclusion that a defendant's pre-

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1997); Coppola v. Powell, 878 F.2d 1562, 1564 (1st Cir. 1989); United States v. Hernandez, 948 F.2d 316, 322–23 (7th Cir. 1991). The Third Circuit has addressed post-arrest silence but has held that any Due Process violation that may have existed from the use of silence at trial was harmless. *See* Virgin Islands v. Martinez, 620 F.3d 321 (3d Cir. 2010) (explaining that the trial record was unhelpful in determining the propriety of the cross-examination of defendant but that any violation as to his post-arrest silence was harmless).

[189] *See* United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); United States v. Frazier, 408 F.3d 1102 (8th Cir. 2005); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Love, 767 F.2d 1052 (4th Cir. 1985).

[190] *See* United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001) (en banc); United States v. Moore, 104 F.3d 377 (1997).

[191] United States v. Burson, 952 F.2d 1196, 1200–01 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992) (holding that the admission into evidence of the agents' testimony concerning Burson's silence was plain error); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987) (the right to remain silent is a constitutional right to say nothing about the allegations against oneself, and though *Miranda* warnings can provide additional protection, they are not necessary to the existence of the right); Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (holding that Fifth Amendment applies in pre-arrest setting and "that the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the . . . privilege against Self Incrimination"); Coppola v. Powell, 878 F.2d 1562, 1568 (holding that it was not harmless error for the prosecutor to comment on defendant's refusal to confess or answer questions without a lawyer present, as he was relying on his Fifth Amendment guarantee).

[192] Griffin v. California, 380 U.S. 609, 615(1965).

[193] *See* United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (stating that it was "not confident that [*Jenkins v. Anderson*, 447 U.S. 231 (1980),] permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief").

arrest, pre-*Miranda* silence should not be used as substantive evidence of guilt, and the court's reasoning is representative of the line of cases that precede and succeed it.[194] In this case, the police went to the defendant's home in an attempt to investigate a recent rape.[195] Before he was arrested or Mirandized, the defendant stated, "I grew up on the streets of Providence, Rhode Island. And if you think I'm going confess to you, you're crazy."[196] At trial, the prosecution introduced this statement in a ploy to have the jurors infer that an innocent person would not object to speaking to police to clear his name.[197] The petitioner was convicted and, on appeal, the First Circuit found that the district court erred in admitting the silence.[198] The court held that the petitioner's statement was a clear invocation of his Fifth Amendment right to silence and therefore the admission was in violation of his right against self-incrimination and that the error was not "harmless beyond a reasonable doubt."[199]

In *United States ex rel. Savory v. Lane*, the defendant refused to talk in a non-custodial setting about murders with which he was later charged, which was used against him at trial.[200] The Illinois Appellate Court found such use to be inappropriate on appeal, but nonetheless deemed the error as harmless beyond a reasonable doubt.[201] The Seventh Circuit[202] held that the right to remain silent is a constitutional right to say nothing about the allegations against oneself, and though *Miranda* warnings can provide additional protection, they are not necessary to the existence of the right.[203] The court specifically drew comparison to *Griffin*, even though the

[194] *Coppola*, 878 F.2d at 1568.
[195] *Id.* at 1563.
[196] *Id.*
[197] *Id*. at 1568.
[198] *Id*.
[199] *Id.*
[200] United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987).
[201] *Id*. at 1016.
[202] *Id*. at 1012. The defendant first filed a writ of habeas corpus, which was denied by the District Court for the Northern District of Illinois.
[203] *Id*. at 1018.

silence in that case happened at trial and was not the product of out of court questioning, and found that the right applied equally to the defendant's silence before trial and arrest.[204]

In *United States v. Hernandez*, the defendant objected to the prosecution's use of his post-arrest, pre-*Miranda* silence in the case against him.[205] The trial court admitted the evidence of the silence.[206] Relying on *Savory v. Lane*, the Seventh Circuit determined that the government could not use a defendant's pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief.[207] The court concluded, however, that the admission of testimony concerning the defendant's post-arrest silence was harmless error beyond a reasonable doubt.[208]

The Tenth Circuit similarly does not allow the prosecution to comment on a defendant's pre-arrest silence.[209] In *United States v. Burson*, I.R.S. agents testified at trial about the defendant's refusal to answer questions about his finances prior to his arrest for tax evasion.[210] The court relied on the legal principle announced in *Griffin*, using the rule to prevent the prosecution from commenting on any Fifth Amendment right the defendant had chosen to exercise.[211] The court interpreted the *Griffin* precedent to mean that any comment on silence during trial is inappropriate, even though the exact language of *Griffin* is limited to prohibiting commentary on a defendant's failure to take the stand and testify in in his own defense.[212]

By contrast, the Fourth[213] and Eleventh[214] Circuits have found that admitting a defendant's pre-arrest, pre-*Miranda* silence for use in the prosecution's case-in-chief is not a

[204] *Id.* at 1017.
[205] United States v. Hernandez, 948 F.2d 316, 322 (7th Cir. 1991).
[206] *Id.*
[207] *Id.* at 322–23.
[208] *Id*. at 324.
[209] United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991).
[210] *Id.* at 1203.
[211] *Id.* at 1201.
[212] *See* Griffin v. California, 380 U.S. 609, 615 (1965).
[213] United States v. Quinn, 359 F.3d 666, 678 (4th Cir. 2004).
[214] United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Carter, 760 F.2d 1568, 1577 (11th Cir. 1985).

constitutional violation. While not going as far, the Third Circuit[215] indicated it would agree with these sister circuits and would permit the government to use such silence as substantive evidence of guilt if the issue presented itself in the future. These courts reason that the protections against self-incrimination do not apply before a suspect is arrested and has been given *Miranda* warnings because there is no official compulsion to speak and the Fifth Amendment does not protect in such a situation.[216]

These circuits cumulatively held that, because the government had not yet implicitly assured the defendant that his silence would not be used against him, it was admissible since *Miranda* was not required at that point.[217] Notwithstanding the fact that *Miranda*'s purpose was to restore the balance of power between a suspect and police in custodial interrogations by informing defendants of their rights, judges with particularly strong views on individual rights believe *Miranda* to be a prophylactic device to overprotect a citizen's constitutional right not to incriminate oneself.[218]

The Eleventh Circuit similarly holds that the prosecution does not violate the Fifth

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[215] While the Third Circuit has not addressed the exact issue, one district court in the Third Circuit has suggested that pre-*Miranda* silence may be admissible. *See* Whitney v. Horn, No. 99-1993, 2008 U.S. Dist. LEXIS 87910, at *38 (E.D. Pa. Oct. 30, 2008) (saying there is no protection for "a defendant from references to his pre-*Miranda* silence immediately following his arrest").

[216] *See* Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring) ("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.").

[217] *See* United States v. Rivera, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991) (the defendant wanted the Judge to declare a mistrial when the government commented on her silence; United States v. Love, 767 F.2d 1052 (1985) (where three defendants sought a mistrial from their drug conspiracy conviction when the district court admitted testimony of a law enforcement agent concerning the defendants' silence at the drug drop-off site on the night of their arrest). The court held that "even if she was in custody at that time, the government could comment on her silence as she viewed the officer's inspection of a suitcase obtained from her because she had not yet been given her *Miranda* warnings). Both *Love* and *Rivera* depended on the Supreme Court's decision in *Fletcher v. Weir*. Yet, these Circuits diverge on whether there is a constitutional difference between using silence as evidence of guilt and using the same silence to impeach a testifying defendant.

[218] *See* Edwards v. Arizona, 451 U.S. 477, 492 (1981) (Powell, J., concurring); Michigan v. Tucker, 417 U.S. 433, 444 (1974) ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'").

Amendment by commenting on a defendant's pre-arrest silence.[219] Three defendants were arrested for a multitude of drug offenses upon entering Miami from a trip to Colombia after a customs agent found cocaine in their suitcases.[220] While the customs agent discovered the cocaine hidden in the false bottom of the suitcases and in false aerosol hairspray cans, the defendants, one of whom plead guilty prior to trial, showed no surprise or reaction at all during the encounter, and explicitly testified that nothing was said during the search and that one of the defendants had a "dead pan" reaction, expressionless demeanor.[221] Government counsel used the two defendants' pre-arrest, pre-*Miranda* silence to insinuate that they were guilty and that they made a prior agreement made to stay quiet if their plan was foiled.[222] By relying on *Jenkins*[223] and *Fletcher*,[224] the court immediately dismissed the argument that silence either before or after arrest but prior to *Miranda* warnings was improper.[225] The Eleventh Circuit took the position that *Miranda* warnings were necessary to trigger the protections of the Fifth Amendment.[226]

In *United States v. Zanabria*,[227] the Fifth Circuit allowed the prosecution to comment on a defendant's pre-arrest, pre-*Miranda* silence.[228] The prosecution presented a customs agent that testified that the defendant never mentioned an exculpatory story prior to trial where his wife

[219] United States v. Rivera, 944 F.2d 1568 (11th Cir. 1991).
[220] *Id.* at 1565–66.
[221] *Id.* at 1565.
[222] *Id.* at 1568.
[223] *See* Jenkins v. Anderson, 447 U.S. 231, 235 (1980) (allowing the use of pre-arrest, pre-*Miranda* silence for impeachment purposes if the defendant takes the stand in his own defense).
[224] *See* Fletcher v. Weir, 455 U.S. 603, 609 (1982) (holding that post-arrest, pre-*Miranda* silence is permissible to impeach a defendant on cross-examination who takes the stand in his own defense).
[225] *Rivera*, 944 F.2d at 1567–68 (citing *Jenkins*, 447 U.S. at 231; *Fletcher*, 445 U.S. at 603 ("We note initially that some of Inspector Schor's testimony, even if construed as comments on Vila's silence, do not raise constitutional difficulties. The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings . . . In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given.")).
[226] *Id.* at 1568.
[227] United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996).
[228] *But see* United States v. Ashley, 664 F.3d 602, 604 n.6 (5th Cir. 2011) ("This court has taken the position that the prosecution can use a non-testifying defendant's pre-arrest silence as long as the silence is not induced by, or a response to, the actions of a government agent. Other circuits have interpreted *Zanabria* as our fully endorsing use of pre-arrest, pre-*Miranda* silence, but the issue is unresolved until this court is faced with a case in which silence is induced by, or is a response to, government action.") (internal citations and quotations omitted)).

testified in his defense.[229] Post-*Zanabria* cases[230] have also held that "a prosecutor's reference to a non-testifying defendant's pre-arrest silence does not violate the privilege against self-incrimination if the defendant's silence is not induced by, or a response to, the actions of the government."[231]

Notwithstanding these circuits that do not find a constitutional violation, the Supreme Court's silence precedence discussed in Part I-D-1 suggests that pre-arrest, pre-*Miranda* silence is inadmissible and contrary to the intent of the Fifth Amendment, and as, such should be excluded from comment by prosecutors or other introductions as evidence of guilt. The reasoning of *United States ex rel. Savory v. Lane* should influence the Supreme Court's ultimate decision in *Salinas*, as the Seventh Circuit there correctly excluded such evidence.[232] In that case, the court recognized that since that the defendant relied on his right to remain silent, Illinois' argument that the use of his silence to imply guilt did not present a constitutional issue was "nothing short of incredible, given the language of our Constitution and the interpretation it has been consistently given."[233] The Court swiftly rejected the applicability of the *Jenkins* and *Fletcher* as well, as those cases dealt with silence used for impeachment only.[234]

3. State Courts

State courts have not reached consistent results on the admissibility of such silence. Although the majority of courts to face the issue have ruled that the prosecution may not

[229] *Zanabria*, 74 F.3d at 593.
[230] Combs v. Coyle, 205 F.3d 269, 282–83 (6th Cir. 2000) *cert. denied*, 531 U.S. 1035 (2000) (the use of defendant's pre-arrest silence as substantive evidence of guilt violates Fifth Amendment privilege against self-incrimination).
[231] United States v. Elashyi, 554 F.3d 480, 506 (5th Cir. 2008); *see* United States v. Salinas, 480 F.3d 750 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 487 (2007).
[232] United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987).
[233] *Id.*
[234] *Id.*

introduce pre-arrest, pre-*Miranda* silence during its case-in-chief,[235] these courts usually discuss the implications of such silence under their own state constitutions and rules of evidence. Some Courts find that this silence does not implicate the Fifth Amendment.[236] Therefore, the state court split is not addressed here as it is outside the scope of this Comment.[237] .

4. *Salinas v. Texas* in the Supreme Court

Thirty-three years ago, the Supreme Court explicitly stated in *Jenkins v. Anderson* that it was declining to address whether the use of a defendant's pre-arrest, pre-*Miranda* silence would violate the Fifth Amendment.[238] In 2013, the Supreme Court finally granted certification in *Salinas v. Texas*, deciding to rule on the circuit split regarding this very issue.[239] The defendant-subject of the case is Genovevo Salinas, a man who was questioned about the murder of two brothers in 1992.[240] Salinas cooperated with police and answered questions for almost an hour, but looked down at the floor and stayed silent instead of answering a question as to whether a

[235] The states that exclude pre-*Miranda* silence do so because their state constitutions require it. *See, e.g.*, Nelson v. State, 691 P.2d 1056, 1059 (Alaska Ct. App. 1984) ("We, therefore, conclude that under Article 1, § 9 of the Alaska Constitution, a person who is under arrest for a crime cannot normally be impeached by the fact that he was silent following his arrest."); People v. Jacobs, 204 Cal. Rptr. 849 (Cal. Ct. App. 1984) ("We hold that under the circumstances of this case questioning appellant on cross-examination about his silence occurring both during and following his arrest violated appellant's privilege against self-incrimination under California Constitution, article I, section 15."); Lee v. State, 422 So. 2d 928, 930 (Fla. Ct. App. 1982) ("[T]he right to remain silent is entitled to greater protection in our state than that required by the United States Supreme Court."); Key-El v. State, 709 A.2d 1305, 1311 (Md. 1998) (holding pre-arrest silence admissible under Fifth Amendment); State v. Davis, 686 P.2d 1143, 1146 (Wash. Ct. App. 1984) ("There is no logic in protecting a defendant advised of his rights and not an unadvised defendant. Both defendants are exercising the same constitutional right."). Other state courts have excluded silence evidence under the Fifth Amendment. *See, e.g.*, Commonwealth v. Turner, 454 A.2d 537, 539 (Pa. 1982) ("[W]e do not think it sufficiently probative of an inconsistency with [a defendant's] in-court testimony to warrant allowance of any reference at trial to the silence."); State v. Graves, 27 S.W.3d 806, 811–12 (Mo. Ct. App. 2000) (admission of evidence was harmless); People v. Quintana, 665 P.2d 605, 609–10 (Colo. 1983) (evidence was not relevant under state evidentiary rule).

[236] State v. Leecan, 198 Conn. 517 (1986); State v. Kinder, 942 S.W.2d 313 (Mo. 1996); State v. Helgeson, 303 N.W.2d 342 (N.D. 1981).

[237] *See* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 138 (2001) (reviewing state court cases decided on state constitutional grounds); Petition for Writ of Certiorari, Ashley v. United States, 11-931, 2012 WL 249648, at *17 (2012).

[238] Jenkins v. Anderson, 447 U.S. 231, 236 n.2 (1980) (explaining in dicta that "Our decision today does not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment")

[239] Salinas v. Texas, 133 S. Ct. 928 (2013).

[240] Salinas v. State, 369 S.W.3d 176, 177 (Tex. Crim. App. 2012), *cert. granted*, 133 S. Ct. 928 (U.S. Jan. 11, 2013) (No. 12–246.)

shotgun recovered from his home would match shells found at the crime scene.[241] He was later charged with murder after a witness told the police Salinas had confessed to murdering the victims.[242] After managing to evade arrest for over 15 years, he was captured in 2007 eventually tried for murder.[243] In an extremely brief opinion, the Texas Court of Criminal Appeals acknowledged that neither it nor the Supreme Court had decided the issue at bar.[244] When deciding the case, the lower Court of Appeals of Texas, Houston [245] relied on Justice Stevens' concurrence in *Jenkins*, and on appeal, the Texas Court of Criminal Appeals agreed with that approach.[246] In *Jenkins*, Justice Stevens explained that the privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent even when he is under no official compulsion to speak.[247] The *Salinas* court used that argument undermine the reasoning of the Fifth Amendment by concluding that the pre-arrest, pre-*Miranda* silence was not protected by the Fifth Amendment because it was not compelled.[248]

The Supreme Court heard oral argument in *Salinas v. Texas* on April 17, 2013.[249] The Petitioner's argument relied on a broad interpretation of the rule announced in *Griffin v. California* that prevents the government from arguing that a defendant's guilt may be surmised by his silence because an innocent person would deny law enforcement's accusations. Similarly, in footnote 37 in *Miranda*, the Supreme Court said that if a suspect in custody invokes his right

[241] *Id*.
[242] *Id.*
[243] *Id.* Salinas' first trial resulted in a deadlocked jury, but he was later convicted and sentenced to 20 years at a retrial in 2011.
[244] *Id.* at 178.
[245] Salinas v. State, 368 S.W.3d 550, 557 (Tex. App. 2011).
[246] *Salinas*, 369 S.W.3d at 179.
[247] *Id.* at 179 n.12 & 17 (citing *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring) ("We recognize that the facts of *Jenkins* differ from the instant case. We nonetheless find the reasoning in Justice Stevens' concurrence to be relevant and persuasive.")).
[248] *Id.*
[249] Transcript of Oral Argument at 26, Salinas v. Texas, 133 S. Ct. 928 (2013) (No. 12-246).

to remain silent, that fact may not be used as evidence against him.[250] The petitioner urged that because Americans know they have a right to remain silent, to allow the government to make insinuations based on silence in a non-custodial setting merely creates a trap for the unwary that do not know that the police will use their silence as evidence of guilt.[251]

Alternatively, the Respondent's case rested on a narrow interpretation of the Fifth Amendment based on the facts of the case. Respondent requested a ruling where, absent an unambiguous invocation of the right to remain silent, a defendant's failure to answer a question during a noncustodial, voluntary interview should not be protected by the Fifth Amendment, for it reveals the defendant's guilty conscience.[252] The Respondent also offered that silence used in a noncustodial setting is voluntary in the sense that the defendant can say he does not want to answer anymore questions. This would be enough to invoke the privilege against self-incrimination,[253] but silence alone might have many explanations, including that the suspect could be contemplating an exculpatory story in his head, or is expressing momentary shock that the police know more information and have evidence than the suspect initially thought.[254]

The Justices expressed considerable skepticism to both arguments.[255] Worried about the prosecutor using such silence, Justice Sotomayor stated that silence as an admission of guilt is "such a radical position."[256] The Justice stated "it's a little scary to me that an unanswered question is evidence of guilt." On the other hand, Justice Scalia posed that mere silence would indicate that the suspect did not want to speak so the evidence would not be probative. The

[250] Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1968) ("The prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.").
[251] Transcript of Oral Argument at 59, Salinas v. Texas, 133 S. Ct. 928 (2013) (No. 12-246).
[252] *Id.* at 30.
[253] *Id.* at 48.
[254] *Id.*
[255] Editorial, *The Right to Remain Silent*, N.Y. TIMES, April 20, 2013, http://www.nytimes.com/2013/04/21/opinion/sunday/the-right-to-remain-silent.html?_r=0 ("
[256] Transcript of Oral Argument at 48, Salinas v. Texas, 133 S. Ct. 928 (2013) (No. 12-246).

Respondent countered that silence could indicate that the suspect is having difficulty crafting an exculpatory response and that he is worried about the questions.[257]

Much of the argument also focused on whether the protection against self-incrimination requires an affirmative invocation of the right to remain silent in this context.[258] To require an invocation of the privilege against self-incrimination mistakenly assumes that this provision of the Fifth Amendment is procedurally analogous to other non-self-executing rights. For example, a defendant who wishes to have counsel present during custodial interrogation must ask for counsel and the officers must have a lawyer be brought to the stationhouse to satisfy the Fifth Amendment right to counsel during questioning.[259] Similarly, the Sixth Amendment provides the right to "assistance of counsel" before trial.[260] A defendant must ask for a lawyer if he desires one, although the right to counsel will default to the appointment of one by the court if the defendant does not request one.[261] Securing counsel thus involves the actions of other people. Similarly, a defendant has the right to a trial by jury for a felony under the Sixth Amendment.[262] But if the defendant wishes to waive this right, he must do so in writing with the court's approval and government consent.[263] A defendant who seeks pre-trial release has the right to prove that he should be granted bail.[264] A defendant also has the right to ask the court

[257] *Id.* at 34.
[258] *See* Transcript of Oral Argument at 22, Salinas v. Texas, 133 S. Ct. 928 (2013) (No. 12-246).
[259] Edwards v. Arizona, 451 U.S. 477 (1981) (holding that after defendant invoked his right to have counsel present during custodial interrogation, he had not waived his right by showing only that he responded to police-initiated interrogation after being again advised of his rights).
[260] U.S. CONST. amend. VI; *see* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding the right to assistance of counsel to be fundamental).
[261] *See* Massiah v. United States, 377 U.S. 201, 205 (1964) (holding that once criminal proceedings have begun, the defendant has the right to have a lawyer present during questioning and the government cannot bypass the lawyer and try to elicit statements from the defendant); Gideon v. Wainwright, 372 U.S. 335, 83 (1962) (requiring the appointment of counsel for indigent defendants charged with state crime).
[262] U.S. CONST. amend. VII; *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the fundamental right applies to the states through the due process clause of the Fourteenth Amendment).
[263] FED. R. CRIM. P. 23(e).
[264] U.S. CONST. amend. VIII (prohibiting excessive bail set in pre-trial detention); *but see* Bail Reform Act, codified at 18 U.S.C § 3141–3143. The default position of the Bail Reform Act is that the release of a person on his or her

for permission to represent himself in a criminal proceeding *pro-se*.[265] These rights are not self-executing, as permission from the court or the involvement of another party is inherently needed to carry out these rights. The government's argument is therefore undermined by the fact that the right to remain silent exists even with the lack of any resources in any given moment, for remaining silent is in fact the exercise of the right that is protected. Intuitively so, the privilege against self-incrimination during pre-arrest, pre-*Miranda* questioning does not and should not require a communication from the suspect.

II. Analysis

In *Salinas v. Texas*, the question remains as to the proper, constitutional treatment of pre-arrest, pre-*Miranda* silence that defendants like Mr. Salinas appear to invoke.[266] Respecting the right to remain silent in these situations comports with the policy considerations outlined in *Miranda v. Arizona* and the Supreme Court's Fifth Amendment precedence on the self-incrimination clause and right to remain silent. The right to remain silent should only be subjected to prosecutorial comment if such comment falls within the exceptions that the Court has already carved out. In the absence of such an exception, the Court should look to its past precedent for guidance. This Comment has discussed the evolution of Fifth Amendment jurisprudence that the Court can rely on in *Salinas* to find that the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt is unconstitutional.

As comprehensive as the Supreme Court's silence precedent is, some cases are easily distinguishable from *Salinas v. Texas* and warrant addressing first. *Doyle*, *Jenkins*, and *Fletcher*

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personal recognizance or an unsecured appearance bond is appropriate unless such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community. §3142(b).

[265] Faretta v. California, 422 U.S. 806 (1975) (holding that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense).

[266] Salinas v. State, 369 S.W.3d 176, 177 (Tex. Ct. Crim. App. 2012), *cert. granted*, Salinas v. Texas, 133 S. Ct. 928 (U.S. Jan. 11, 2013) (No. 12–246).

analyze silence for impeachment and are not determinative as to whether silence as substantive evidence of guilt is appropriate.[267] *Jenkins* permits pre-arrest, pre-*Miranda* silence to impeach a defendant's testimony at trial.[268] The *Jenkins* holding was born out of evidentiary law on impeachment, where anyone who takes the witness stand puts his own credibility at issue and is subject to impeachment.[269] In *Salinas*, Mr. Salinas did not testify, nonetheless, the prosecution used his pre-arrest, pre-*Miranda* silence as substantive evidence. Although the *Jenkins* decision represents a more liberal treatment of silence, the holding does not require a contrary result than what is presently suggested.[270] The *Jenkins* Court's respect for the legitimacy of impeachment practice encouraged their approval of the use of the silence—a consideration not present in *Salinas* because Mr. Salinas did not testify and his silence was not used to impeach him.[271]

In *Doyle v. Ohio*, the Court barred a prosecutor from using a defendant's post-arrest, post-*Miranda* silence for impeachment.[272] The prosecutor in *Doyle* impeached the defendant's exculpatory story that was told for the first time at trial by cross-examining him on his failure to have told the story after receiving *Miranda* warnings.[273] The Court noted the implicit guarantees of *Miranda* warnings encourage the defendant to remain silent and thus estop comment on post-*Miranda* silence.[274] While similar concerns arise in the pre-*Miranda* context–the defendant's familiarly with the right to remain silent causing him to stay silent–*Salinas* is unique from *Doyle*.[275] Because Mr. Salinas' silence occurring before *Miranda* warnings, he never received

[267] Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam); Jenkins v. Anderson, 447 U.S. 231 (1980); Doyle v. Ohio, 426 U.S. 610 (1976).
[268] *Jenkins*, 447 U.S. at 240.
[269] *Id.*; *see* Harris v. New York, 401 U.S. 222, 225 (1971) (holding that credibility can be impeached by use of an earlier inadmissible conflicting statement).
[270] Salinas v. State, 369 S.W.3d 176 (Tex. Crim. App. 2012).
[271] *Id.* at 177.
[272] *Doyle*, 426 U.S. at 620.
[273] *Id.* at 611.
[274] *Id.* at 618.
[275] *Salinas*, 369 S.W.3d at 177.

the implicit guarantees that were discussed in *Doyle*.[276] Therefore, the Court's holding in *Doyle* is inapplicable to the Petitioner's argument in *Salinas*, and this Comment's suggestion, that pre arrest, pre-*Miranda* silence should be protected under the Fifth Amendment and not simply as a result of the recitation of *Miranda* warnings.[277]

Although *Fletcher v. Weir* found no violation of the Fifth Amendment when the testifying defendant was cross-examined on his post-arrest, pre-*Miranda* silence, the decision was likewise based on impeachment law.[278] Even though the Court found that the defendant was not protected until *Miranda* warnings were issued, the Court did not discuss silence being used as substantive evidence; therefore, the holding does not speak to the present issue.[279]

When following the Supreme Court's other holding on silence to its logical conclusion, the Court must find that *Salinas* falls on equal ground with *Griffin v. California* and extend that holding to prohibit the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt.[280] There are, however, key differences between *Salinas,* involving pre-arrest, pre-*Miranda* silence and *Griffin*, involving post-arrest, post-*Miranda* silence. *Griffin*'s broad holding stated that a prosecutor could not comment on a defendant's choice not to testify that trial, a form of post-arrest, post-*Miranda* silence.[281] The prosecutor asked the jury to infer from the defendant's refusal to take the stand that he was guilty because an innocent person would have denied a false accusation.[282] Without this prohibition, either decision the defendant in *Griffin* made, to answer the state's questions and possibly incriminate himself, or remain silent and be harmed by implication, forced him to become a witness against himself.

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[276] *Id.*
[277] Brief for Petitioner, Salinas v. Texas, No. 12-246, WL 633595, at *28 (2013).
[278] *Fletcher*, 455 U.S. at 607.
[279] *Id.* at 605–07.
[280] Griffin v. California, 380 U.S. 609 (1965).
[281] *Id.* at 614.
[282] *Id.* at 611.

The *Salinas* Court can draw an analogy between *Griffin* and *Salinas* because Mr. Salinas faced the same predicament that the Court ruled unconstitutional in *Griffin*. Although Mr. Salinas had not been *Mirandized* during the questioning that resulted in his silence, unlike the defendant in *Griffin*, the difference is irrelevant.[283] The *Griffin* rule did not evolve from a concern of coercion to speak, but rather the worry that a witness is unable to prevent himself from providing the government with evidence to use against him if he exercises his right not to testify.[284] That reasoning is directly relevant to the situation presented in *Salinas*, where a suspect who remains silent is unwillingly giving the government evidence against him in the process. The Seventh Circuit recognized this in *Savory v. Lane* when it eliminated the distinction between pre and post-*Miranda* silence and prohibited both at trial.[285] It relied on *Griffin*'s rule that silence should not be evidence of guilt at trial and thus, found that silence in investigatory questioning could not be used since there is a "a constitutional right to say nothing at all about the allegations."[286]

Although the Supreme Court has already heavily limited the scope of *Miranda*'s protections,[287] it should recognize in *Salinas* that criminal procedure rules still weigh in favor of protecting primary rights against government power in criminal cases.[288] The Fifth Amendment "serves as a protection to the innocent as well as the guilty."[289] *Miranda* itself did not limit the right to remain silent solely at trial or custodial questioning.[290] The right to remain silent applies

[283] *Salinas*, 369 S.W.3d at 177.
[284] *Griffin*, 380 U.S. at 615.
[285] United States *ex rel* Savory v. Lane, 832 F.2d 1017–1018 (7th Cir. 1987) (citing *id.*).
[286] *Id.*
[287] *See supra* Part I-C.
[288] *See* Leonard Levy, ORIGINS OF THE FIFTH AMENDMENT 431–32 (1968).
[289] *See* Ullman v. United States, 350 U.S. 422, 427–28 (1956).
[290] Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("Today, then, there 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.").

even in the absence of custodial interrogation.[291] Regardless if an individual has been arrested or not, the principle remains the same: "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer."[292] This does not negate the power of the *Miranda* warning and its admonition to remain silent–rather it reinforces the notion that even without *Miranda* warnings, a suspect should be able to remain silent by relying on the Fifth Amendment privilege against self-incrimination, a privilege that is merely alerted to arrestees in *Miranda* warnings as a precaution against compelled confessions.

In his concurring opinion in *Jenkins*, Justice Stevens suggested that the key to analyzing the right against self-incrimination is whether the person was under an official compulsion to speak.[293] If the Court in *Salinas* allows prosecutors to use silence as evidence of guilt, it would force suspects to speak during questioning, producing another type of a compelled confession that has long-since been banned by the Court.[294] When an officer asks an individual, who may or may not know he is a suspect, about potential criminal activity, the situation presents the person with two options: to speak–which is generally ill-advised by defense attorneys–[295]or to stay silent. If silence can then be used as evidence of guilt, it creates a punishment for exercising the right not to incriminate oneself and a compulsion to speak. Invoking *Miranda* rights during later custodial interrogation would be futile, for the *Miranda* protections afforded to a suspect are cut down if they are administered after a suspect has already incriminated himself in the process

[291] Berkemer v. McCarty, 468 U.S. 420 (1984) (holding that people who are subjected to a traffic stop are not in custody and thus do not need to respond to police questioning).
[292] Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969); *see* United States v. Drayton, 536 U.S. 194, 197 (2002) (recognizing the "right not to cooperate" with law enforcement).
[293] Jenkins v. Anderson, 447 U.S. 231, 241–42 (1980) (Stevens, J., concurring).
[294] Rogers v. Richmond, 365 U.S. 534 (1961) (falsely threatening to arrest defendant's ailing wife for questioning); Spano v. New York, 360 U.S. 315 (1959) (using defendant's childhood friend to pressure defendant with false appeals to his sympathy); Brown v. Mississippi, 297 U.S. 278 (1936) (beating and hanging the accused).
[295] *See* Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part) ("Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").

of remaining silent. This double-edged sword cannot be constitutionally permissible as it is a variation of the "cruel trilemma" already abolished with the adoption of the Fifth Amendment.

The burden of prosecution at trial, to prove an offense beyond a reasonable doubt, rests with the state instead of with the defendant.[296] But, if prosecutors can use silence in the face of accusatory questions as a sign of guilt, then the burden shifts to the suspect in making the government's case and impairs the privilege. This practice turns a back to the interests protected in the Fifth Amendment and implicitly condones officers questioning suspects before formerly placing them under arrest, to purposely to circumvent *Miranda*'s protections.

Because the impetus behind a defendant's silence can be ambiguous, the *Salinas* Court may opt for a compromise to allow the use of pre-arrest, pre-*Miranda* silence in situations if Court deems the defendant's silence to be a tacit response to questioning that proves guilt, rather than an invocation of the right to remain silent and reliance on *Miranda* warnings. The analysis of similar Fourth and Fifth Amendment suppression issues in federal courts makes it likely such a consideration would be undertaken through a motion to suppress, or a possible preliminary hearing in front of a magistrate judge, where the defendant would bear the burden of proof in showing a violation of rights causing the necessity for the suppression of evidence.[297] Unfortunately, such a test would create administrative problems and open the floodgates to a variety of permutations where the defendant's motive for remaining silent is unclear. The

[296] *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940) ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors ....")).

[297] FED. R. CRIM. P. 12(b)(3)(C) (requiring a motion to suppress evidence to be made before trial). Physical evidence, confessions and statements are commonly subject to exclusion. The proponent of motion to suppress has burden of establishing that his own Fourth Amendment rights were violated by challenged search or seizure. U.S. CONST. amend. IV; FED. R. CRIM. P. 41(e). However, once illegal governmental activities have come to light and the defendant has gone forward with some specific evidence demonstrating a taint, the government has the ultimate burden of showing that its evidence was not tainted by such illegality. Alderman v. U.S., 394 U.S. 165 (1969). A motion to suppress a statement by the defendant may be made on various grounds under the Fifth Amendment, such as failure to properly advise the defendant of his or her rights, Miranda v. Arizona, 384 U.S. 436 (1966), or failure to bring the defendant before a magistrate judge without unreasonable delay. FED. R. CRIM. P. 5(e).

motivation behind a suspect's choice to remain silent can be a result of a multitude of factors, including his likely familiarity with the popular *Miranda* warnings and the Fifth Amendment.[298] An added difficulty arises when deciding from whose perspective silence should be evaluated. To view the silence from law enforcement's perception would certainly pose a significant burden to defendants wishing to rebut the presumption of guilt. To avoid this quagmire,[299] a more tenable standard would forbid the use of pre-arrest, pre-*Miranda* silence, making an invocation of the right unnecessary.

In resolving the circuit split, the Supreme Court should easily be able to refute the reasoning of the courts that decline to protect un-*Mirandized* silence.[300] The Fifth Amendment's protections cannot turn on when law enforcement chooses to read a list of judicially created statements that were merely intended to protect a substantive right. To argue that the right does not manifest until warnings are given would nullify the privilege against self-incrimination, which existed in American jurisprudence long before *Miranda v. Arizona* was decided in 1966.[301] Thus, the recitation of the *Miranda* warning does not invoke the privileges and protections of the Fifth Amendment, for the right innately exist through the Bill of Rights.[302] *Miranda* warnings inform unaware defendants of their rights and safeguard the core

[298] *See* Transcript of Oral Argument at 19, Salinas v. Texas, 133 S. Ct. 928 (2013) (No. 12-246). Jeffrey Fisher, attorney for Petitioner stated: "Remember, people in this setting generally don't have lawyers. They don't have a right to lawyers. What does the layperson know? The layperson knows, I have a right to remain silent. That's what the layperson knows. The layperson doesn't know I have to say some sort of magic words. And the police, believe me, aren't going to tell him that he [must]."

[299] Regardless of the perspective, all parties involved would bear a heavy burden in evaluating silence, similar to the burden of interpreting "testimonial" statements in *Crawford v. Washington*. 541 U.S. 36, 59 (2004). *Crawford* involved hearsay statements made by one unavailable witness involved in a crime against another participant during a police interrogation. *Id.* at 54. The Court held that these statements were inadmissible absent the defendant's ability to confront his accuser under the Sixth Amendment. *Id.* at 55. The dilemma stemmed from confusion of the meaning of the critical term "testimonial," because the Court did not provide a general definition. *See* Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005) (discussing the impact and uncertainty of *Crawford*).

[300] *See* United States v. Frazier, 408 F.3d 1102 (8th Cir. 2005); United States v Zanabria, 74 F3d 590 (5th Cir. 1996); United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997); United States v Rivera, 944 F2d 1563 (11th Cir. 1991).

[301] *See infra* Part I-B.

[302] U.S. Const. amend. V.

constitutional right protected by the self-incrimination clause by counterbalancing a suspect's natural inclination to speak to officers in intimidating situations.[303] The warnings do not trigger the force of the Fifth Amendment; they merely recite the existence of a right that is present regardless of whether a warning is given.[304]

Finally, the justification that prosecutorial comment on pre-arrest, pre-*Miranda* silence is indicative of guilt is fundamentally flawed. The Court has already held that silence during and after arrest is ambiguous and irrelevant to establish guilt.[305] Silence is no more probative of guilt because it takes place before a suspect is read his *Miranda* rights.[306] People may honestly believe that they have the right to remain silent when confronted with pre-arrest questioning, so it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence.

III. Conclusion

The Fifth Amendment protects against compelled confessions and self-incrimination—a liberty that is rooted in American Jurisprudence. The Supreme Court has protected these inalienable rights in the mass of cases leading up to and since the seminal decision, *Miranda v. Arizona*. The trend of using pre-arrest, pre-*Miranda* silence as substantive evidence of guilt causes an egregious constitutional violation. Looking forward to the pending case, I hope that the Supreme Court will appreciate the implications of this practice that has been jeopardizing defendant's rights and finally strike down the constitutionally offensive practice with its forthcoming decision in *Salinas v. Texas*.

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[303] See J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) ("Any police interview of an individual suspected of a crime has 'coercive aspects to it."); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (describing the "procedural safeguards" required by *Miranda* as "not themselves rights protected by the Constitution but . . . measures to insure that the right against compulsory self-incrimination was protected").

[304] *Miranda*, 384 U.S. at 468 ("For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.").

[305] Doyle v. Ohio, 426 U.S. 610, 617 (1976).

[306] Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (discussing non-incriminating reasons why a defendant might remain silent).

The *Salinas* Court has the unique ability to make a vast impact on criminal procedure and reinforce the goals of Fifth Amendment jurisprudence. In light of the rich history behind the evolution and interpretation of the privilege, this Comment predicts that the *Salinas* Court will therefore reverse the decision of the Texas Court of Criminal Appeals. In doing so, the Court would join the circuits that recognize that the Fifth Amendment protects the right to remain silent during pre-arrest, pre-*Miranda* questioning.

This Comment argues that the privilege against self-incrimination is invoked immediately whenever an individual is faced with investigatory questioning by law enforcement for the right innately exists through the Bill of Rights. A clear rule that pre-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt would ensure that defendants are not manipulated into forfeiting their constitutional rights. When faced with police questioning, one should be abled to exercise the right to remain silent without the worry that his silence will be held against him at trial. Such a decision would not require an upheaval of precedent, rather it would clearly support the Court's prior decisions, including *Miranda v. Arizona*, that protect the citizen against compelled confessions and self-incrimination, which is the heart of the Fifth Amendment. Moreover, law enforcement and the prosecution would not be disadvantaged by such a rule. If a defendant testifies in his own defense, prosecutors may still validly impeach the defendant's testimony with pre-arrest silence, as allowed in *Jenkins v. Anderson*.

But if the Court allows the use of this silence, the Court will divest citizens of the protections supposedly afforded by one of the most important constitutional protections we have as— "No person . . . shall be compelled in any criminal case to be a witness against himself," and sanction the use of compelled confessions, untethering the Fifth Amendment from the very

purpose for which it was enacted.[307] Unless this practice is ruled unconstitutional, the threat remains that this silence represents an implicit confession and defendants like Genovevo Salinas will be convicted based on prejudicial evidence that the jury should never considered.

[307] U.S. CONST. amend. V.