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Toward the Constitutional Protection of a Non-Testifying Defendant's Prearrest Silence

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TOWARD THE CONSTITUTIONAL PROTECTION OF A NON-TESTIFYING DEFENDANT'S PREARREST SILENCE

INTRODUCTION

Consider this prototypical scenario. Police investigators arrive at the home of John Doe to ask him what he knows about a recent string of burglaries in his neighborhood. The investigators remind Doe of his prior burglary convictions, and ask him if he was in the neighborhood on the nights in question. Doe says to the investigators: "I don't have to tell you anything. I'm not afraid of you, don't think I'm scared of you guys." A week later, investigators make another visit to Doe's home and ask him if he has been keeping out of trouble recently. They also ask whether he was with Mr. X, a local convicted burglar and Doe's sometime friend, on the nights in question. Doe tells the investigators: "I don't have a lawyer and I'm not talking to you guys."

Doe is later arrested and charged with the burglaries, and does not take the stand at trial. During direct examination, both of the investigators who spoke to Doe at his home tell the court that Doe refused to talk to them before he was arrested. During closing argument, the prosecutor comments on Doe's refusal to speak to the police prior to his arrest. Doe is convicted by a jury, and appeals on grounds that the admission of evidence of his "prearrest silence" violated his Fifth Amendment right against self-incrimination.

You are a Ninth Circuit Judge hearing the appeal.[1] Does your decision to reverse the conviction turn on whether Doe himself believed that he was invoking his privilege against self-incrimination? Whether Doe used certain words to invoke

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[1] In *United States v. Thompson*, 82 F.3d 849 (9th Cir. 1996), the Ninth Circuit declined to find comment on a defendant's prearrest silence plain error "because of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue." *Id.* at 856.

it and not others? Are you reluctant to apply Fifth Amendment principles at all because the silence at issue occurred before Doe had been arrested and read his Miranda rights?

The United States Supreme Court has expressly declined to address whether the Fifth Amendment right against self-incrimination[2] prohibits the State from using evidence of a non-testifying defendant's prearrest silence in its case-in-chief.[3] However, circuit courts are split on this question, with both sides of the split relying on Supreme Court precedent to either prohibit or permit this trial practice.

The First, Seventh and Tenth Circuits have held that the use of a non-testifying defendant's prearrest silence violates the Fifth Amendment right against self-incrimination.[4] Similarly, the Second Circuit assumed, without deciding, that prearrest silence cannot be used in the prosecution's case-in-chief but found any assumed error to be harmless.[5] These circuits consistently rely on the seminal case of *Griffin v. California*,[6] where the United States Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[7] Under the *Griffin* facts, however, the Supreme Court merely prohibited comment on the accused's silence occuring at trial, not before arrest. Therefore, the First, Seventh and Tenth Circuits' protection of prearrest silence from the prosecution's case-in-chief is not required by the *Griffin* holding.

More recently, the Eleventh and Fifth Circuits have ruled that comment on prearrest silence is constitutional.[8] The Elev-

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[2] The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[3] Jenkins v. Anderson, 447 U.S. 231, 236 n.2 (1980). The case-in-chief is that part of the trial in which the party with the initial burden of proof presents evidence and after which that party rests. *See* J. WIGMORE, EVIDENCE § 1866, at 655 (Chadbourn rev. ed. 1976).

[4] *See, e.g.*, United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

[5] United States v. Caro, 637 F.2d 869, 874-76 (2d Cir. 1981).

[6] 380 U.S. 609 (1965).

[7] *Id.* at 615.

[8] United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).

enth Circuit relies on *Jenkins v. Anderson*,[9] where the United States Supreme Court held that a prosecutor may use a testifying defendant's prearrest silence to impeach him.[10] Similarly, the Fifth Circuit recently held that where the defendant's silence is "neither induced by nor a response to any action by a governmental agent," the Fifth Amendment is inapplicable.[11]

The Eleventh and Fifth Circuits have improperly extended the holding and reasoning of *Jenkins* to circumstances where defendants have availed themselves of the constitutional right not to testify at trial. Such an extension ignores the pervasive federal and state evidentiary rules that distinguish between comment on privileged silence to impeach a defendant's testimony, and comment on a defendant's silence as substantive evidence of guilt in the prosecution's case-in-chief.[12] These circuits fundamentally misconstrue the explicit reasoning behind the *Jenkins* Court's unwillingness to extend protection to a testifying defendant's prearrest silence: "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."[13] Where a defendant chooses not to testify, the *Jenkins* holding should not apply.

This Note will advocate the exclusion from the prosecution's case-in-chief of all silence occuring during any prearrest investigation by a state agent on the grounds that such silence is privileged under the self-incrimination clause of the Fifth Amendment to the United States Consitution. Part I of this Note outlines and contextualizes the constitutional development of a defendant's right to silence and reviews the Court's rationale for protecting a defendant's silence in contexts analogous to the circumstances at issue in this Note. Part II summarizes the circuit court decisions which have applied Supreme Court precedent to the prearrest setting. Part III

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[9] 447 U.S. 231 (1980).

[10] *Id.* at 240-41.

[11] *Zanabria*, 74 F.3d at 593.

[12] As discussed *infra*, courts "generally assume that privileged silence cannot be used [in the Prosecution's case-in-chief] to establish guilt, but are more willing to permit impeachment use of privileged silence." Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 192 (1984).

[13] *Jenkins*, 447 U.S. at 239.

concludes that the most closely analogous Supreme Court holdings suggest that a non-testifying defendant's prearrest silence is as protected from the prosecution's case-in-chief as if the silence had occurred following arrest and the reading of *Miranda* rights. Finally, Part IV of this Note suggests that while prearrest silence occurring during contact with a state agent should be constitutionally protected from the prosecution's case-in-chief, prearrest silence not resulting from contact with law enforcement should remain subject to applicable federal and state evidentiary rules.[14]

I. THE DEVELOPMENT OF THE PROTECTION OF SILENCE

A. *The Purpose of the Self-Incrimination Clause*

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself."[15] When judging the impact of state action on the privilege against self-incrimination, it is important first to understand the purposes underlying the clause.[16] However, there is a well-recognized lack of consensus on the policies behind this Fifth Amendment right.[17] Nevertheless, the Supreme Court in *Murphy v. Waterfront Commission*[18] listed a number of the reasons for the privilege that will be helpful for purposes of this Note:

> [the privilege] reflects many of our fundamental values and most

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[14] In *Jenkins* the court removed from the ambit of Constitutional mandate the issue of impeachment use of prearrest silence. The Court, however, stated that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." *Id.* at 240. Likewise, this Note advocates only Constitutional protection of prearrest silence arising during contact with a state agent.

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

[16] *See infra* text accompanying notes 25-29.

[17] Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 848-52 (uncertainty surrounding the reasons for privilege's original enactment and the present policies justifying its continued application). *See also* Grano, CONFESSIONS, TRUTH, AND THE LAW 129-36 (1993) (*Miranda* court "erred, at least from a historical perspective, in perceiving an 'intimate connection' between the privilege . . . and the [historically distinct] issues pertaining to the admissibility of extrajudicial confessions").

[18] 378 U.S. 52 (1964).

> noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' our distrust of self-depracatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'[19]

Over time, the United States Supreme Court has developed analytical models to give form to these aspirations. Application of the Court's analytical models to the prearrest setting demonstrates that these Fifth Amendment policies are thwarted when the government is permitted to use a defendant's silence occuring before arrest as substantive evidence of guilt at trial.

B. Griffin v. California *and the Analytical Models*

In *Griffin v. California*,[20] the Court addressed the constitutionality of a California statute that permitted the government to use a defendant's failure to testify as substantive evidence of guilt in a state prosecution.[21] The defendant, who was being tried for murder, chose not to testify at his trial.[22] During closing arguments, the prosecutor commented on the defendant's refusal to testify.[23] The Court held that, where a

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

[20] 380 U.S. 609 (1965).

[21] *Id.* at 613.

[22] *Id.* at 609.

[23] *Id.* at 610. The prosecutor stated:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her. . . . He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. . . . He would know whether he beat her or mistreated her. . . . These things he has not seen fit to take the stand and deny or explain. . . . Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Id. at 611.

defendant exercises his Fifth Amendment right not to testify at trial, the self-incrimination clause "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[24]

As justification for its holding, the *Griffin* Court broadly reasoned that "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[25]

1. Impermissible-Burden Analysis

In declaring evidentiary use of a defendant's failure to take the stand unconstitutional, the *Griffin* Court articulated what has come to be known as the "impermissible-burden" approach to Fifth Amendment analysis.[26] The thrust of this analytical model is that a defendant's constitutional right not to testify at trial is rendered hollow—is impermissibly burdened—"when the court solemnizes the silence of the accused into evidence againt him."[27]

Following *Griffin*, the Court has applied a balancing test to determine whether a particular burden is impermissible and therefore unconstitutional. If burdening the trial choice to testify or not to testify[28] "impairs to an appreciable extent any of the policies behind the rights involved,"[29] and if a legitimate government interest is not advanced sufficiently to warrant the degree of impairment, then the burden on the constitutional right is unconstitutional.[30]

The *Griffin* Court applied a burden analysis to the right to

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[24] *Id.* at 615.

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

[26] Poulin, *supra* note 12, at 205. *See* Jenkins v. Anderson, 447 U.S. at 238 (1980) ("[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice.").

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

[28] Under the Fifth Amendment, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." Harris v. New York, 401 U.S. 222, 225 (1971).

[29] McGautha v. California, 402 U.S. 183, 213 (1971).

[30] Jenkins v. Anderson, 447 U.S. 231, 238 (1980).

remain silent at trial and concluded that state action—comment on the exercise of the right—impermissibly burdened the defendant's constitutional privilege against self-incrimination.[31] However, because the Supreme Court has never acknowledged that the privilege against self-incrimination attaches to the prearrest choice of silence,[32] an analysis of the constitutionality of prosecutorial comment on prearrest silence must take into account two variations of the impermissible-burden test. If the prearrest choice of silence does not constitute an exercise of a constitutional privilege, then burden analysis must necessarily remain focused on the defendant's choice of trial silence ("Impermissible-Burden Test I").[33] Under this test, the focus of burden inquiry remains temporally identical to the inquiry in *Griffin*: whether the constitutional right to trial silence is impermissibly burdened when the state is permitted to comment on a defendant's non-privileged prearrest refusal to speak to law enforcement.

On the other hand, if the prearrest choice not to speak to law enforcement does indeed represent an exercise of the constitutional privilege, then burden analysis may additionally focus on whether the prearrest choice of silence is impermissibly burdened ("Impermissible-Burden Test II"). Under this test, the question posed is not temporally, but rather analytically identical to the question posed in *Griffin*: whether the state's use of a defendant's exercise of a constitutional privilege as substantive evidence of guilt impermissibly burdens the exercise of the privilege.

However, if prearrest silence is not privileged, it is unlikely that the Court will declare prosecutorial comment on prearrest silence an unconstitutional burden on the right to trial silence. The case of *McGautha v. California*[34] illustrates the difficulty of proving an unconstitutional burden under Impermissible-Burden Test I.

In *McGautha*, a defendant challenged the constitutionality of the single-verdict procedure to which he had been subjected

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

[32] *Jenkins*, 447 U.S. at 236 n.2.

[33] The Court has made clear that impermissible-burden analysis will be applied only to a burdened *constitutional* right. South Dakota v. Neville, 459 U.S. 553, 560 (1983).

[34] 402 U.S. at 213.

at his capital murder trial.[35] He contended that where guilt and punishment are to be determined by a jury at a single trial, the desire to address the jury on punishment unduly encourages waiver of his privilege to remain silent at trial on the issue of guilt.[36] The Court disagreed, holding that the fact that the threat of the death penalty may persuade a defendant to become a witness did not mean that the single-verdict procedure unconstitutionally burdened the defendant's right not to testify.[37]

Because there was no constitutional right to a bifurcated trial, the *McGautha* Court applied burden analysis only to the burdened constitutional right—namely, trial silence.[38] The Court acknowledged that a defendant who wishes to save his own life may be persuaded to forgo his right to remain silent in order to testify as to sentencing in the event of a conviction.[39] Nevertheless, the Court concluded that the state's insistence on a single trial scheme did not unconstitutionally burden the right to trial silence. As Part IV of this Note demonstrates, evidentiary use of non-privileged prearrest silence is similarly unlikely to be deemed an impermissible burden on a defendant's right not to take the stand at trial.[40]

2. Coercion Analysis

The flip side of the impermissible-burden model is coercion analysis. In his dissent in *Adamson v. California*,[41] Justice Murphy used the coercion model to evaluate the California Constitution's provision, later held unconstitutional in *Griffin*, that permitted the Government to comment on a defendant's failure to testify. He stated:

> [S]uch a provision [permitting comment on the failure to testify] compels a defendant to be a witness against himself in one of two ways: 1. If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters

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[35] *Id.* at 213, 214.
[36] *Id.*
[37] *Id.* at 236.
[38] *Id.* at 238.
[39] *McGautha*, 402 U.S. at 238.
[40] *See infra* Part IV.
[41] 332 U.S. 46, 124 (1947).

> which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. *And silence can be as effective in this situation as oral statements.* 2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In that case, his testimony on cross-examination is the result of the coercive pressure of the privision rather than his own volition.[42]

The Court has addressed coerced testimony in two conceptually distinct ways. The first ("Coercion Model I") is exemplified by Justice Murphy's formulation in the *Adamson* dissent recounted above. This model focuses on whether the defendant's choice to remain silent at trial was coerced.[43] The second coercion model ("Coercion Model II"), on the other hand, focuses on whether the defendant's statement or silence occurring before trial was coerced and therefore inadmissible as trial evidence.

There is strong indication, however, that Coercion Model I has been subsumed by the impermissible-burden analysis. For instance, when the California statute at issue in *Adamson* was finally overruled in *Griffin*, the Court did not hold that evidentiary use of a defendant's choice not to testify amounted to coerced self-accusation. Instead, the Court ruled that the statute was an unconstitutional "penalty for asserting a constitutional privilege."[44] Fifteen years later, in *Jenkins v. Anderson*,[45] the Court held that impeachment use of prearrest silence did not violate the Fifth Amendment right not to testify at trial.[46] However, the Court relied on impermissible-burden analysis and did not refer to Justice Murphy's coercion analysis.[47]

Coercion Model II, because it focuses on the degree of

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[42] *Id.* (emphasis added).

[43] *Id.* at 123.

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

[45] 447 U.S. 231 (1980).

[46] *Id.* at 238.

[47] *Id. See infra* text accompanying notes 85-102 for a discussion of *Jenkins*. Because "[t]he Court . . . is not likely to hold that the threat of using pre-trial silence as evidence is unconstitutional coercion [to testify] . . . it is important to understand that even if a burden does not rise to the level of compulsion, it may nevertheless be constitutionally impermissible." Poulin, *supra* note 12, at 207-08. Indeed, *Griffin* demonstrates that a burden on the Fifth Amendment privilege may be impermissible even though it does not constitute coercion.

coercion occurring before trial, has greater applicability to the prearrest silence at issue in this Note. It may be argued, that if the accused's silence during pre-trial questioning can be used later as a statement supporting his guilt, and if his pre-trial speech can also be used against him, then any statement, either affirmative or by silence, is compelled.[48] Therefore, "otherwise voluntary statements should be excluded because the defendant had no choice but to provide incriminating testimonial evidence."[49] This "double-bind" view of compulsion, in which you are "damned if you do, damned if you don't," is the essence of the dilemma described in Justice Murphy's dissent in *Adamson*.[50] However, the development of the Court's coercion analysis demonstrates a much narrower construction of compulsion.

a. *Coerced Pre-Trial Statements*

Garrity v. New Jersey[51] presents an example of inadmissibly coerced pre-trial statements. The case arose when several police officers questioned during an investigation of illegal activity were advised that their answers might be used against them in later criminal proceedings, and that they could refuse to answer questions that would evoke self-incriminating responses.[52] However, each officer was also warned that those who refused to answer might lose their jobs.[53] The officers answered the questions, and the government later used their statements to convict them.[54] The Court held that the statements were a product of coercion, were not voluntary, and should not have been admitted into evidence at the officers' criminal trial.[55]

However, *Miranda v. Arizona*[56] and its subsequent interpretation by the Court has dramatically limited the application

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[48] Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 467-68 (1964).

[49] Poulin, *supra* note 12, at 220.

[50] *See supra* text accompanying note 42.

[51] 385 U.S. 493 (1967).

[52] *Id.* at 494.

[53] *Id.*

[54] *Id.* at 495.

[55] *Id.* at 497-500.

[56] 384 U.S. 436 (1966).

of Coercion Model II to pre-trial statements.[57] In *Harris v. New York*,[58] the Court noted that *Miranda* allows the government to use custodial statements against the defendant as substantive evidence of guilt. By advising the defendant of his Miranda rights, the police alleviate the element of compulsion that might otherwise preclude using any statements made in custody as evidence in the accused's trial.[59] Furthermore, the *Harris* Court concluded that even if custodial statements are obtained in violation of *Miranda*, the statements may be used for impeachment purposes.[60] As a matter of constitutional law, therefore, pre-trial statements made to police following the reading of Miranda rights are not deemed coerced.

b. *Pre-trial silence:* Doyle v. Ohio *and estoppel analysis*

The Court has also been reluctant to characterize pre-trial silence as unconstitutionally coerced. In *Doyle v. Ohio*,[61] the Court for the first time invoked constitutional principles[62] to prohibit the use of a defendant's postarrest, pre-trial silence.[63] However, the Court departed from traditional impermissible-

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[57] *Miranda* requires that a person in custody be advised that "he 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." *Id.* at 479.

[58] 401 U.S. 222, 224 (1971).

[59] *Id.* at 224.

[60] *Id.* at 225-26

[61] 426 U.S. 610 (1976).

[62] One year before its ruling in *Doyle v. Ohio*, the Court did strike down the trial use of a defendant's post arrest, pre-trial silence in *United States v. Hale*, 422 U.S. 171 (1975). However, the Court relied only on its supervisory powers and not on constitutional principles. *Id.* at 176. In *Hale*, police arrested the defendant and advised him of his right to remain silent, which he then exercised. *Id.* at 174. When the defendant testified at trial, the prosecutor cross-examined him on his postarrest silence. *Id.* The Court held that the defendant's silence after his arrest and the reading of his Miranda rights was not admissible to impeach him because his silence was not sufficiently probative of the credibility of his in-court testimony. In refusing to rely on constitutional grounds to strike down such state action, the *Hale* Court side-stepped the issue of whether impeachment use of a defendant's postarrest silence impermissibly burdens his choice to remain silent at trial (Impermissible-Burden Test I); whether such use impermissibly coerces him to take the stand and explain himself (Coercion Model I); or whether his postarrest was the product of governmental coercion (Coercion Model II).

[63] *Doyle*, 426 U.S. at 617-18.

burden and coercion analyses.[64] As will be demonstrated, such inconsistency has left lower courts with little guidance on the analytical framework to apply to prearrest silence.[65]

In *Doyle,* the Court addressed the constitutionality of the State's use of post-Miranda, pre-trial silence to impeach a testifying defendant in state criminal proceedings.[66] The *Doyle* defendants were arrested together and charged with selling ten pounds of marijuana to a local convicted drug offender and narcotics bureau informant.[67] Shortly after the alleged drug purchase, a narcotics agent arrested the defendants and gave them Miranda warnings.[68]

At trial, both defendants testified that the informant had framed them.[69] They claimed that the arrangement had been for the informant to sell the defendants the ten pounds of marijuana, but when they had changed their minds, the informant grew angry, threw the money in the defendants' car, and took all ten pounds of the marijuana away with him.[70] During cross-examination, the prosecutor asked the defendants why they had not told the frame-up story to the agent when he arrested them.[71]

The United States Supreme Court declared that the State's attempt to impeach a defendant with his silence following the administration of Miranda warnings was fundamentally unfair and a violation of due process.[72] The Court rea-

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[64] *Id.*

[65] As one commentator has noted: "The [Supreme Court] cases . . . lack any clear analysis of the constitutional basis for admitting or excluding such evidence [of prior silence] from the case-in-chief." Poulin, *supra* note 12, at 197.

[66] *Doyle*, 426 U.S. at 611.

[67] *Id.*

[68] *Id.* at 612.

[69] *Id.* at 613.

[70] *Id.*

[71] *Doyle*, 426 U.S. at 613. During cross-examination of one of the defendants, the line of questioning was as follows:

> Q: . . . And I assume you told him all about what happened to you?
> A: No.
> Q: . . . Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why didn't you tell him?
> Q: . . . But in any event you didn't bother to tell Mr. Beamer anything about this?
> A: No, sir.

Id. at 613-14.

[72] *Id.* at 618. Prior to *Doyle's* holding that impeachment use of post-Miranda

soned that "silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every postarrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[73]

Dissenting in *Doyle*, Justice Stevens criticized the majority's due process rationale as an estoppel analysis.[74] By informing a defendant of his right to remain silent, the government is deemed estopped from using that silence against the defendant later as evidence of his guilt.[75] Embedded in the Miranda warnings, Justice Stevens' estoppel theory asserts, is an inducement to remain silent by way of an unstated promise by the government that the defendant's silence will not be used against him.

Justice Stevens' estoppel theory of *Doyle* was further reinforced—and limited—in *Fletcher v. Weir*.[76] Police arrested Weir and charged him with a homicide that occurred in a fight outside a bar. After Weir was arrested but before police read him the Miranda warnings, Weir remained silent.[77] At trial, Weir testified that he had killed in self-defense, and the prosecutor attempted to impeach him with his postarrest silence.[78] The Court ruled that this impeachment did not violate due process because Weir had not yet been told his rights at the time he remained silent. "In the absence of the sort of affirmative assurances embodied in the Miranda warnings," impeachment use of postarrest silence did not violate due process of

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silence violates the due process clause of the fourteenth amendment, the *Miranda* Court declared that case-in-chief use of post-Miranda silence is prohibited under the Fifth Amendment privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 468 n.37. *See infra* text accompanying notes 281-82.

[73] *Doyle*, 426 U.S. at 617.

[74] Justice Stevens wrote:

> [t]he Court's due process rationale has some of the characteristics of an estoppel theory. . . . The key to the Court's analysis is apparently a concern that the *Miranda* warning, which is intended to increase the probability that a person's response to police questioning will be intelligent and voluntary, will actually be deceptive unless we require the State to honor an unstated promise not to use the accused's silence against him.

Id. at 620-21.

[75] *Id.*

[76] 455 U.S. 603 (1982) (per curiam).

[77] *Id.* at 604.

[78] *Id.* at 603-04.

law.[79]

On the heals of *Doyle, Fletcher* established that when a previously silent defendant decides to take the stand at trial, his due process rights are implicated only if the government attempts to impeach him with the silence that occurred after the reading of Miranda rights. As a matter of constitutional law, therefore, use of a defendant's prearrest silence does not violate his due process rights, because the government "induces" a defendant to remain silent only when an officer actually reads the Miranda warnings to the defendant.

However, more important for purposes of this Note is the fact that *Fletcher*, like *Doyle*, failed to evaluate the Fifth Amendment implications of using the postarrest, pre-trial silence. Thus, in declaring on due process grounds that post-Miranda silence is protected by virtue of the government's "implicit . . . assurance . . . to any person who receives the warnings . . . that silence will carry no penalty,"[80] the *Doyle* Court provided no guidance in analyzing whether a defendant's constitutional privilege against self-incrimination is also impermissibly burdened by the admission into evidence of such silence.

Doyle's due process analysis, on the other hand, presents a useful analogy to Coercion Model II. Although the *Miranda* warnings do not explicitly assure the arrestee that his silence will carry no penalty,[81] the Court deemed the impeachment use of the defendant's silence "fundamentally unfair" because such assurances are implicit.[82] The *Doyle* defendant, though not coerced or compelled to silence, was induced to remain silent by governmental action. Prearrest silence, it will be shown, may also be induced by governmental action under Coercion Model II.[83] Where a defendant's prearrest silence occurs during contact with law enforcement, it should be inadmissible in the prosecution's case-in-chief on the grounds that the individual had no responsive option other than to provide

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[79] *Id.* at 607.

[80] *Id.* at 618.

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

[82] *Id.*

[83] *See supra* text accompanying notes 48-50 for an introduction to Coercion Model II; *see infra* text accompanying notes 229-78 for an explanation of Coerion Model II as applied to prearrest questioning by police.

testimonial incrimination.[84]

C. Jenkins v. Anderson *and Prearrest Silence*

In *Jenkins v. Anderson*,[85] the Court for the first time applied to the prearrest setting the constitutional test enunciated in *Griffin*. The *Jenkins* defendant stabbed and killed Doyle Redding on August 13, 1974, but was not apprehended until he turned himself in to governmental authorities approximately two weeks later.[86]

At his trial for first-degree murder, the defendant testified that he had killed in self-defense.[87] He claimed that his sister and brother-in-law were robbed by Redding on August 12, 1974. Because the defendant was nearby when the robbery occurred, he followed Redding a short distance and reported his whereabouts to the police.[88] He testified that the next day he encountered Redding, who accused him of reporting the robbery to the police.[89] The defendant stated that Redding attacked him with a knife, and that after a brief struggle, he was able to break away from Redding.[90]

On cross-examination, the defendant admitted that during the struggle he had tried "'to push that knife in [Redding] as far as [I] could,'" but maintained that he had acted solely in self-defense.[91] The prosecutor questioned the defendant about the fact that he waited two weeks to surrender to the police, thereby attempting to impeach his credibility by suggesting that he would have contacted the police immediately if he had acted in self-defense.[92] The defendant was convicted of man-

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[84] *See infra* text accompanying notes 229-78.
[85] 447 U.S. 231 (1980).
[86] *Id.* at 232.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 232-33.
[90] *Jenkins*, 447 U.S. at 233.
[91] *Id.* at 233.
[92] *Id.* at 233. The line of questioning was as follows:
Q: And I suppose you waited for the Police to tell them what happened?
A: No, I didn't.
Q: You didn't?
A: No.
Q: I see. And how long was it after this day that you were arrested, or that you were taken into custody?

slaughter, and the Supreme Court granted certiorari on the question of the impeachment use of prearrest silence.

The Court held that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.[93] The Court stated that it need not reach the issue "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment" because "even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent", impeachment use of the silence would be permitted.[94]

The Court then assumed without deciding that the defendant's prearrest silence was indeed privileged under the Fifth Amendment and validated the government's use of that silence to impeach the defendant.[95] Applying the impermissible-burden balancing test, the Court reasoned that any burden on the assumed constitutional right to remain silent before arrest was outweighed by the important role of cross-examination in our legal system. "Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."[96]

The *Jenkins* Court declined to address whether, or to what extent, prearrest silence is privileged under the Fifth Amendment at all.[97] Consequently, it is important to understand that an analysis of the constitutionality of prosecutorial comment on such silence must take into account two variations of the impermissible-burden test. If prearrest silence is privi-

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Id.

During closing argument, the prosecutor again referred to the defendant's prearrest silence. The prosecutor noted that the defendant had "waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody." *Id.* at 234.

[93] *Id.* at 238.

[94] *Id.* at 236 n.2. As discussed *infra*, the *Jenkins* Court relied on *Raffel v. United States*, 271 U.S. 494 (1926), which permitted the impeachment use of otherwise privileged silence. Prior to *Jenkins*, *Raffel* was thought by many (including Justice Stevens and Justice Marshall) to have been thoroughly discredited. Reliance on *Raffel* enabled the Court to sidestep the issue whether the *Jenkins* defendant's silence was actually an "invocation of the Fifth Amendment right to remain silent" entitling it to protection, since "*Raffel* clearly permits impeachment" in any event. *See Jenkins*, 447 U.S. at 236 n.2.

[95] *Id.* at 238.

[96] *Id.*

[97] *Id.* at 236 n.2.

leged, then the focus of the impermissible-burden test is on whether the constitutional right to remain silent before arrest is impermissibly burdened by the later use of such silence as evidence of guilt at trial (Impermissible-Burden Test II).[83]

On the other hand, if prearrest silence is not privileged silence under the Fifth Amendment, then the impermissible-burden test must focus on the choice to remain silent at trial (Impermissible-Burden Test I).[99] Under such circumstances, the constitutional question is whether the constitutional right not to testify at trial is impermissibly burdened when the State comments on a defendant's non-privileged prearrest refusal to speak to law enforcement agents.

The *Jenkins* holding and reasoning left a number of questions unanswered and as a result left lower courts with an unclear roadmap for future prearrest issues. For example, how does the reasoning of *Jenkins* affect the Fifth Amendment rights of a defendant who chooses never to take the stand? Is a defendant's prearrest silence categorically "privileged" under the Fifth Amendment and merely waived when he decides to take the stand and expose himself to the impeachment use of his prearrest silence? Is prearrest silence sometimes privileged and sometimes not?

The *Jenkins* Court commenced its rejection of the due process claim by noting that "in this case, no governmental action induced petitioner to remain silent before arrest."[100] Indeed, the *Jenkins* defendant had no contact with law enforcement during the two weeks between the stabbing and his ar-

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[83] *See infra* notes 283-314 and accompanying text for the application of Impermissible-Burden Test II to prearrest choice of silence.

[99] In *South Dakota v. Neville*, 459 U.S. 553, 560 (1983), the Court made clear that impermissible-burden analysis will be applied only to a burdened *constitutional* right. See infra text accompanying notes 331-346 for the application of Impermissible-Burden Test I to the trial choice of silence.

[100] *Jenkins*, 447 U.S. at 240. The *Jenkins* Court held that a defendant's right to due process is not violated by the impeachment use of pre-arrest silence. The Court reasoned that "the failure to speak occurred before the petitioner was taken into custody and given Miranda warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case." *Id.* Two years later, in *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court added the final nail to the coffin of *Doyle*'s due process rationale by limiting due process analysis to the use of post-*Miranda* silence. *See supra* text accompanying notes 76-79. For this reason, this Note proceeds on the assumption that the government's use of prearrest silence does not violate due process of law, either in its case-in-chief or for impeachment purposes.

rest. His arrest came only after he surrendered to the police. In the majority of cases confronting the issue of prearrest silence since the *Jenkins* decision, however, the arrest has followed attempted questioning by police investigators, during which the defendant has remained silent.[101] Under such circumstances, Coercion Model II demonstrates that the Fifth Amendment privilege is indeed implicated because in the prearrest setting the individual has no responsive option other than to provide incriminating testimonial evidence.[102]

II. THE CIRCUIT COURT DECISIONS FOLLOWING *JENKINS*

Six months after the *Jenkins* ruling, Judge Friendly of the Second Circuit was confronted with the novel issue of the use of prearrest silence in the prosecution's case-in-chief.[103] Recognizing that the untested Supreme Court ruling in *Jenkins* did not expressly permit the use of prearrest silence as part of the Government's direct case, the Second Circuit chose to await the "future impact of *Jenkins*" before ruling on the constitutionality of the practice.[104] Recently, the Ninth Circuit in *United States v. Thompson*[105] exercised similar caution when it declined to find prosecutorial comment on a defendant's prearrest silence plain error because of the circuit split.[106]

Sandwiched between these cautious decisions, however, are fifteen years of circuit rulings falling into two categories: those which hold disingenously that Supreme Court precedent

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[101] After *Jenkins*, the question of the constitutionality of prosecutorial comment on prearrest silence has been addressed by the circuits most often when the silence occurs during contact with law enforcement. *See, e.g.*, United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991). *But see, e.g.*, United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996) (court permits prosecutorial comment on prearrest silence which occurred both before and after defendant's contact with law enforcement).

[102] *See infra* text accompanying notes 229-78 for an explanation of Coercion Model II as applied to prearrest questioning by law enforcement.

[103] United States v. Caro, 637 F.2d 869 (2d Cir. 1981).

[104] The Second Circuit assumed *arguendo* that evidentiary use of prearrest silence was constitutional error, but ruled that such error was harmless beyond a reasonable doubt. *Id.* at 876.

[105] 82 F.3d 849 (9th Cir. 1996).

[106] *Id.* at 856.

clearly forbids such practice, and those which declare without analysis that prearrest silence is not protected by the Fifth Amendment. Of the five circuits which have decided this issue, three conclude that evidentiary use of prearrest silence violates the Fifth Amendment, while two circuits hold that such use is constitutional.[107]

A. *Prearrest Silence Protected from Case-in-Chief*

In *Savory v. Lane*,[108] the Seventh Circuit reviewed a habeas petitioner's claim that the State prosecution's comment on his refusal to talk to the police before he was arrested violated his constitutional rights.[109] On the morning of January 18, 1977, two acquaintances of the defendant were murdered in their home.[110] A week after the murders, police asked to interview the defendant. At trial, the state presented evidence that in response to the police request, the defendant had said that "he didn't want to talk about it, he didn't want to make any statements."[111]

Relying on *Griffin*, which held that the prosecutor may not invite an inference of guilt from an accused's failure to take the stand,[112] the court found the reference to the defendant's prearrest silence "to be of constitutional magnitude."[113] Ultimately, however, the court deemed the error harmless beyond a reasonable doubt in light of the overwhelming evidence against him.[114]

The court commenced its constitutional analysis by rea-

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[107] The First, Seventh and Tenth Circuits hold that evidentiary use of prearrest silence is unconstitutional, *see infra* text accompanying notes 108-46 for a discussion of *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987). The Eleventh and Fifth Circuits hold that evidentiary use of prearrest silence is constitutional, *see infra* text accompanying notes 147-85 for a discussion of United States v. Carter, 760 F.2d 1568 (11th Cir. 1985); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996).

[108] 832 F.2d 1011 (7th Cir. 1987).

[109] *Id.* at 1017.

[110] *Id.* at 1012.

[111] *Id.* at 1015.

[112] *See infra* text accompanying notes 20-25.

[113] *Savory*, 832 F.2d at 1018.

[114] *Id.* at 1019.

soning that "because appellant did not take the stand . . . the problem involves the application of *Griffin v. California*"[115] rather than "*Jenkins v. Anderson* . . . [which] is distinguishable . . . [because in *Jenkins*] the government used the defendant's silence to impeach his trial testimony."[116]

The court provided little analysis as to why *Jenkins* was not the controlling precedent, since it dealt with prearrest silence, and *Griffin* distinguishable. Although the court conceded that "*Griffin* involved governmental use of the defendant's silence at trial" rather than before arrest, it concluded that "we do not believe [this factor] make[s] a difference" because "[t]he right to remain silent . . . attaches before the institution of formal adversary proceedings."[117] However, as proof of this proposition, the court merely quoted the Fifth Amendment to the Constitution.[118] In light of the fact that the Supreme Court in *Jenkins* expressly declined to address whether prearrest silence is privileged under the Fifth Amendment,[119] the *Savory* court's conclusory statement, even if supportable, is not a very useful analysis.

Worse still, this statement is both essentially meaningless and potentially misleading. A person has a "right to remain silent" at any time, before, during, or after arrest.[120] The important question, instead, is whether the Constitution protects the person from an unfavorable inference that might be drawn at trial from that silence—whenever the silence may have occurred. The Unites States Supreme Court has crafted a Fifth Amendment test to aid in answering this question: the impermissible-burden test. The *Savory* Court assumed that prearrest silence is privileged and facilely applied the *Griffin* holding while ignoring the test developed by *Griffin* and its progeny. The Seventh Circuit thus failed to provide convincing groundwork for an otherwise proper result.

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[115] *Id.* at 1017 (citation omitted).

[116] *Id* (citation omitted).

[117] *Id.*

[118] *Savory*, 832 F.2d at 1017.

[119] *Jenkins*, 447 U.S. at 236 n.2.

[120] For example, prior to the Court's *Miranda* decision, every arrestee had a "right to remain silent" during police interrogation. Not until the Court's decision, however, was it established that there is a constitutionally guaranteed immunity from incriminating inferences that might be drawn from that right. *See* Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966).

Like the Seventh Circuit in *Savory*, the First and Tenth Circuits rely on *Griffin v. California* to protect prearrest silence but provide scarce justification for extending the *Griffin* holding to the prearrest setting.[121] In *United States v. Burson*,[122] the prosecution was permitted to introduce into evidence the testimony of two Internal Revenue Service ("IRS") criminal investigators concerning defendant Burson's prearrest silence.[123] The investigators testified that they arrived at Burson's residence about two and one-half years prior to his indictment and told him they would like to talk to him in connection with an investigation of a business associate.[124] Specifically, the investigators told Burson that they wished to find out the extent of his knowledge of the associate and whether they had any financial dealings together.[125] Burson indicated he was too busy, and an appointment was made for two days later.[126] When the investigators arrived at Burson's residence on the appointed day, Burson was carrying a tape recorder and "began interrogating the agents concerning their armament and authority."[127] The agents then left because "it was apparent that he would not cooperate . . . or answer [their] questions."[128]

The Tenth Circuit ruled that admission into evidence of the agents' testimony was plain constitutional error and declared it immaterial that Burson was neither in custody during the attempted questioning nor advised of his privilege against self-incrimination.[129] Burson had effectively invoked the privilege because "Mr. Burson knew he was being interrogated as part of a criminal investigation . . . [w]hat is important is that Mr. Burson clearly was not going to answer any of the agents'

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[121] The First Circuit, for example, declared that the right against self-incrimination "is not limited to persons in custody or charged with a crime," Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989), and cited the Seventh Circuit's *Savory* decision as primary authority. *Id.*

[122] 952 F.2d 1196 (10th Cir. 1991).

[123] *Id.* at 1200.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Burson*, 952 F.2d at 1200.

[128] *Id.*

[129] *Id.* at 1200-01.

questions."[130] Ultimately, the Court determined the error to be harmless because it was clear beyond a reasonable doubt that the jury would have returned a guilty verdict even in the absence of the impermissible evidence.[131]

In *Coppola v. Powell*,[132] the First Circuit ruled that a defendant's prearrest statement to police that he would not confess constituted an invocation of the Fifth Amendment privilege against self-incrimination and was improperly admitted into the prosecution's case-in-chief.[133] In addition, the Court reversed the trial court's conviction because the erroneous admission of the statement could not be deemed harmless.[134]

Coppola arose from the following facts. Shortly after midnight, a woman was raped by a man who had broken into her home while she was sleeping.[135] After the man left, the woman called the police.[136] When the police arrived at the woman's home, she gave them a detailed description of her assailant. She also mentioned seeing a " 'little dark foreign car' parked on the road across from her house."[137] An officer who had seen a small burgundy compact car heading away from the area at 12:52 a.m. identified the first three digits of the car's license plate. This information led the police to defendant Coppola, who was questioned by state and local officers shortly after 2:30 a.m. that evening.[138]

Three days later, two state troopers returned to Coppola's home.[139] When asked "if he'd be willing to talk to us," Coppola replied: "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."[140] Six weeks later, Coppola was charged and tried for rape. The trial judge allowed the trooper to testify as

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[130] *Id.*
[131] *Id.* at 1201.
[132] 878 F.2d 1562 (1st Cir. 1989).
[133] *Id.* at 1563.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Coppola*, 878 F.2d at 1563.
[138] *Id.*
[139] *Id.*
[140] *Id.*

to what Coppola had said, as well as to his "bragging tone of voice."[141]

In affirming the trial court's conviction, the New Hampshire Supreme Court interpreted Coppola's statement as follows:

> A more significant flaw, however, infecting each of the defendant's line of reasoning, is the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent. If he had couched his refusal in terms of speech versus silence, it might be arguable that he was claiming a constitutional warrant for his action. But his statement cannot be read as a mere assertion that he, unlike a bumpkin, would not talk; he claimed, rather, that the police were crazy to think that someone of his sophistication would confess. *By describing his choice as a refusal to confess, he implied that he had done something to confess about. It was this implication that took the defendant's retort outside the realm of allusions to the Fifth Amendment and affirmatively indicated his consciousness of guilt.*[142]

In reversing the conviction, the First Circuit forcefully criticized the highest state court's characterization of Copolla's statements as a "taunt to the police" and a "defiant remark."[143] Even if the statements were a "defiant remark," the Court observed that this fact would be irrelevant,[144] because the Supreme Court has long held that the invocation of the privilege against self-incrimination does not turn on a person's choice of words, but rather the ' "entire context in which the claimant spoke must be considered." '[145] Holding otherwise, the First Circuit observed, would amount to "a rule of evidence whereby an inference of consciousness of guilt will trump a Fifth Amendment claim of the privilege."[146]

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[141] *Id.* at 1564.

[142] *Coppola*, 878 F.2d at 1564 (emphasis added).

[143] *Id.* at 1566.

[144] *Id.*

[145] *Id.* at 1565 (citing United States v. Goodwin, 470 F.2d at 902). The court relied on the principle articulated by the United States Supreme Court, which stated that "[i]t is agreed by all that a claim of the [Fifth Amendment] privilege does not require any special combination of words." Quinn v. United States, 349 U.S. 155, 162 (1955).

[146] *Coppola*, 878 F.2d at 1566.

B. *Prearrest Silence Not Protected from the Case-in-Chief*

The Constitution does not prohibit evidentiary use of prearrest silence in the Eleventh and Fifth Circuits. In *United States v. Carter*[147] the Eleventh Circuit relied on *Jenkins* and ruled that the Government may comment on a defendant's silence if it occurred prior to the time he was arrested and given Miranda warnings.[148]

In *Carter*, the United States Customs officials in Miami detected on radar a suspicious aircraft heading in the direction of the United States from the Bahamas.[149] As it was getting dark, the aircraft landed on a secluded, unlit airstrip.[150] By the time federal agents arrived on the scene, the aircraft had been locked up and abandoned.[151] During the search of the aircraft, the agents discovered traces of marijuana. In addition, they discovered a passport in the name of Kevin Sheehy, a bottle of insulin, and some syringes.[152]

Defendant Sheehy chose not to testify at trial. However, a Customs agent testified about a telephone coversation he had with Sheehy several weeks after the aircraft was discovered.[153] During the conversation, Sheehy said that he knew the agent had his passport and insulin.[154] When the agent asked Sheehy if he could explain why those items were in the aircraft, Sheehy told him that he did not want to answer any more questions without an attorney.[155]

On appeal, the Eleventh Circuit rejected Sheehy's claim that this testimony constituted an "impermissible statement about his pre[-]arrest silence."[156] Citing *Jenkins*, the court declared that "there is no question that in certain circumstances it is permissible for a prosecutor to comment on a defendant's pre[-]arrest silence."[157] However, the Court failed to mention

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[147] 760 F.2d 1568 (11th Cir. 1985).
[148] *Id.* at 1577.
[149] *Id.* at 1571-72.
[150] *Id.* at 1572.
[151] *Id.*
[152] *Carter*, 760 F.2d at 1577.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Carter*, 760 F.2d at 1577.

that the circumstances in *Jenkins* involved prosecutorial use of prearrest silence for impeachment rather than as substantive evidence of guilt. Because "Sheehy was not in custody at the time the conversation took place . . . we hold that [the Customs agent's] testimony in no way infringed upon Sheehy's constitutional right to remain silent."[158]

Later, in *United States v. Rivera*,[159] the Eleventh Circuit relied on *Jenkins* to rule that the Government may comment on a defendant's silence if it occurred prior to the time she was arrested and given Miranda warnings.[160] Defendants Vila and Rivera arrived at Miami International Airport on a flight from Barranquilla, Colombia.[161] Because the two were young, spoke English without an accent, and were arriving from a source country for cocaine, a Customs inspector approached them after they had retrieved their luggage and asked to see their passports, customs declarations, and airplane tickets.[162]

At trial, the inspector testified about defendant Vila's demeanor in the custom's line. He stated that when he initially began to question her at the luggage carousel, she was "fairly deadpan," expressionless, and without any visible signs of nervousness about being questioned.[163] The inspector then opened one of the suitcases, noticed a false bottom, pierced it with a screwdriver, and discovered cocaine.[164] The inspector testified that defendant Vila again "expressed no reaction or protest" during this inspection.[165] The prosecution later invited the jury to infer that Vila's "deadpan" expression was inconsistent with the reaction of a traveler with no knowledge that her luggage contained contraband.[166]

As a preliminary matter, the Eleventh Circuit expressed uncertainty as to whether references to nonverbal conduct or demeanor are even comments on silence.[167] The Court noted that "there are difficult levels of gradation between types of

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[158] *Id.*
[159] 944 F.2d 1563 (11th Cir. 1991).
[160] *Id.* at 1568.
[161] *Id.* at 1565.
[162] *Id.*
[163] *Id.* at 1567.
[164] *Rivera*, 944 F.2d at 1567,
[165] *Id.*
[166] *Id.* at 1568.
[167] *Id.* at 1568-69.

human behavior that constitute a purely physical act and behavior that is soley a communication,"[168] and that comment on a defendant's actions are not prohibited by the Fifth Amendment.[169] The court then held that even if construed as comment on the defendant's silence, the inspector's testimony did "not raise constitutional difficulties."[170]

Citing *Jenkins*, the court stated that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his Miranda warnings."[171] However, the court made no mention of the fact that the silence in *Jenkins* was used for impeachment rather than as substantive evidence of guilt.

Recently, the Eleventh Circuit put an end to any confusion over the constitutional status of an individual's prearrest silence when it stated that "the law of this circuit is settled that evidence of pre-Miranda silence is admissible in the government's case-in-chief as substantive proof of guilt."[172]

Similarly, the Fifth Circuit in *United States v. Zanabria*[173] recently relied on *Jenkins* to conclude that prearrest silence is not protected from the prosecution's case-in-chief.[174] In *Zanabria*, the defendant was arrested after nearly three kilos of cocaine were found in his luggage during an airport customs search.[175] His defense was that his actions were the product of duress.[176] Although the defendant did not testify at his trial, his wife testified that she and her husband had been in a financial bind, which required that they borrow money from an unidentified third party.[177] When this party began to make threats against their young daughter, the defendant had engaged in the importation of cocaine to raise funds to pay off the debt to the lender.[178]

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[168] *Id.* at 1569.

[169] *See infra* text accompanying notes 224-28 for a discussion of the Supreme Court's distinction between testimonial and non-testimonial evidence.

[170] *Rivera*, 944 F.2d at 1567-68.

[171] *Id.* at 1568.

[172] United States v. Tenorio, 69 F.3d 1103, 1108 (1995).

[173] 74 F.3d 590 (5th Cir. 1996).

[174] *Id.* at 593.

[175] *Id.* at 592.

[176] *Id.*

[177] *Id.*

[178] *Zanabria*, 74 F.3d at 592.

The arresting Customs officer testified that prior to the defendant's arrest he said nothing about threats against his daughter or that he needed any kind of help.[179] During closing argument, the prosecutor used this testimony to rebut the duress defense by noting that the alleged threats had never been reported to American or Columbian authorities.[180] Relying on dictum from the Supreme Court's *Jenkins* decision,[181] the Fifth Circuit held that admission of evidence of the defendant's prearrest silence did not violate the Fifth Amendment because "the silence at issue was neither induced by nor a response to any action by a government agent."[182]

In *Zanabria*, there was evidentiary use of two distinct silent events. The first was the prosecutorial comment on the defendant's silence that occurred before the defendant had any contact with the authorities. The second was testimony regarding the defendant's silence when confronted by the custom's officer.[183] The *Zanabria* court, however, did not distinguish between these two silent events or analyze them separately. To the Fifth Circuit, then, prearrest silence is not protected by the privilege against self-incrimination, regardless of the context in which the silence arises.

The above survey of the circuits' treatment of evidentiary use of prearrest silence demonstrates the uncertainty surrounding its constitutional status. Part III of this Note will demonstrate that any analysis of the question of Fifth Amendment protection of a defendant's prearrest silence must consider the circumstances in which the silence occurs if the reasoning is to be consistent with basic tenets of Fifth Amendment jurisprudence. Applying these tenets, it will conclude that prearrest silence of the sort found in the prototype discussed in the Introduction,[184] where John Doe is confronted

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[179] *Id.* at 593.

[180] *Id.*

[181] The *Zanabria* court relied on *Jenkins*, where the Court stated that impeaching a defendant with his pre-arrest silence was not fundamentally unfair and violation of due process because "no governmental action induced petitioner to remain silent before arrest." Jenkins v. Anderson, 447 U.S. 231, 240 (1980). The *Zanabria* court, however, used this dicta to defeat a Fifth Amendment, rather than a due process, claim. *Zanabria*, 74 F.3d at 593.

[182] *Id.*, 74 F.3d at 593.

[183] *Zanabria*, 74 F.3d at 593.

[184] *See supra*, Introduction, for a description of the prototypical scenario.

by police and indicates his unwillingness to speak or answer questions, should be protected from the prosecution's case-in-chief.[185] Part IV will then argue that the prearrest silence of the sort confronted by the Supreme Court in *Jenkins*, where the defendant has no contact with law enforcement prior to arrest, is not protected from comment during the prosecution's case-in-chief. Such silence is not privileged under the Fifth Amendment because the context in which it occurs lacks the threshhold element of state action that the Constitution requires.[186]

III. ANALYSIS

A. *The Rule of* Jenkins *is Limited to Impeachment Use of Silence*

In *Jenkins v. Anderson*,[187] the United States Supreme Court ruled that impeachment use of prearrest silence does not violate the self-incrimination clause of the Fifth Amendment.[188] To the extent that the Eleventh and Fifth Circuits' holdings were the result of a mechanical application of *Jenkins* to circumstances where the defendant chooses not to testify, the *Rivera*[189] and *Zanabria*[190] decisions were wrongly decided.

To successfully argue that a precedent is distinguishable and that reliance on it without additional analysis is erroneous, the point of distinction must be material. There are three separate grounds—systemic, textual, and precedential—for concluding that impeachment use of silence presents a materially different issue from evidentiary use of such silence and that a reflexive extension of the *Jenkins* holding to a non-testifying defendant is erroneous.

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[185] *See infra* text accompanying notes 222-314.
[186] *See infra* text accompanying notes 315-46.
[187] 447 U.S. 231 (1980).
[188] *Id.* at 238.
[189] United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).
[190] United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996).

1. Systemic

Federal and state evidentiary rules are replete with examples of the disparate standards of admissibility accorded evidence used, on the one hand, to impeach a defendant's testimony, and evidence used to establish guilt in the prosecution's case-in-chief on the other. Specifically, evidence that may be inadmissible in the direct case on grounds of irrelevance or undue prejudice may be admissible to impeach a testifying defendant or as rebuttal evidence once a defendant chooses to testify.

In its impeachment opinions, the Supreme Court has long affirmed the constitutionality of this double-standard and has justified its widespread use on "waiver" and "credibility-testing" grounds. The Court has stated, for example, that if a defendant waives the right to remain silent at trial, he "cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination."[191] This waiver theory permits states to develop their own evidentiary rules defining the extent to which otherwise excluded evidence may be permitted to rebut a defendant's testimony.[192]

Likewise, the Court has allowed impeachment of the defendant with illegally seized evidence if the defendant "opens the door" during direct, and, in some instances, even cross-examination. On the understanding that once a defendant testifies, his credibility is indisputably in issue,[193] the Court has allowed this otherwise inadmissible evidence to test the defendant's credibility.[194] In stark contrast, however, the

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[191] Crampton v. Ohio, decided with McGautha v. California, 402 U.S. 183, 215 (1971) (citing Brown v. Walker, 161 U.S. 591, 597-98 (1896)).

[192] The Court has on rare occasions exercised its supervisory powers to reverse a trial court's determination of the proper scope of cross-examination. In *Agnello v. United States*, 269 U.S. 20, (1925), for example, the prosecutor had impeached the defendant with evidence that was excluded from the government's direct case because it had been seized in violation of the defendant's Fourth Amendment rights. In finding the impeachment use unconstitutional, the Court rejected the state's argument that the defendant had waived protection against use of the evidence. The Court observed that the impeachable testimony was elicited only in the course of cross-examination, and nothing the defendant testified to during direct examination could be taken as justifying cross-examination about the illegally seized evidence. *Id.* at 35.

[193] J. WIGMORE, supra note 3, § 2276, at 463-69.

[194] In a series of controversial decisions which effectively overruled *Agnello*,

Court has committed itself to the position that evidence illegally obtained by law enforcement is nearly always inadmissible in the prosecution's case-in-chief.[195] Because of the pervasive doctrinal distinction between admissibility for impeachment and admissibility for substantive evidence of guilt, the Eleventh and Fifth Circuits' unreasoned application of the *Jenkins* rule was unjustified.

2. Textual

The language of the *Jenkins* decision—the decision on which the Eleventh and Fifth Circuits rely—expressly refers to the special circumstance of impeachment evidence. The Court began its analysis by observing:

> The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *In this case, of course, the petitioner did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.*[196]

The Court closed its discussion of the Fifth Amendment claim with this brief paragraph, which includes the case holding:

> Thus impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. *We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibilty.*[197]

Similarly, the Court concluded its consideration of the due

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supra note 192, the Court opened the scope of cross-examination to allow the prosecution to bring in evidence not clearly associated with the subject of direct examination. In *United States v. Havens*, 446 U.S. 620 (1980), for example, the Court permitted illegally seized evidence to be used to impeach statements elicited from the defendant only on cross-examination. *Id.* at 628. Similarly, in *Harris v. New York*, 401 U.S. 222 (1971), statements obtained in violation of *Miranda* were admissible impeachment evidence once the defendant gave inconsistent testimony. *Id.* at 225.

[195] *See* Mapp v. Ohio, 367 U.S. 643 (1961); *see generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[196] Jenkins v. Anderson, 447 U.S. 231, 237 (1980) (citation omitted) (emphasis added).

[197] *Id.* (emphasis added).

process claim with the following words:

> In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given Miranda warnings. Consequently, the fundamental unfairness present in Doyle is not present in this case. *We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.*[198]

Because the language of the holding expressly confines *Jenkins* to impeachment use of prearrest silence, the same case can hardly be said to stand for the proposition that evidentiary use of such silence is permissible.

3. Precedential

There exists important Supreme Court precedent to guide the Eleventh and Fifth Circuit to the conclusion that a Fifth Amendment rule for impeachment use of evidence may not be the rule for use in the Government's case-in-chief. More importantly, such precedent is cited by the *Jenkins* Court as justification for allowing impeachment by prearrest silence.

The *Jenkins* Court referred to its decision in *Harris v. New York*,[199] where the Court held that a statement taken in violation of *Miranda* may be used to impeach a defendant's credibility.[200] Such an illegally obtained statement, however, would have been deemed presumptively compelled under *Miranda* and therefore inadmissible in the case-in-chief.[201] The *Jenkins* Court quoted the *Harris* Court's reasoning:

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.[202]

Most significant, however, was the *Jenkins* Court's express reliance on the case of *Raffel v. United States*,[203] where for the first time the Court evaluated the use of prior silence as an

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[198] *Id.* at 240 (emphasis added).
[199] 401 U.S. 222 (1971), discussed in text, *supra*, accompanying notes 56-60.
[200] *Id.* at 225.
[201] Miranda v. Arizona, 384 U.S. 436, 461 (1966).
[202] *Jenkins*, 447 U.S. at 238 (quoting *Harris*, 401 U.S. at 225 (1971)).
[203] 271 U.S. 494 (1926).

impeachment device. Defendant Raffel failed to testify at his first trial.[204] After a hung jury, the defendant was faced with the same charges in a second criminal trial.[205] The defendant took the stand in his own defense in the second trial, and the trial court permitted the prosecution to cross-examine the defendant about his failure to take the stand during the first trial.[206] The Supreme Court in *Raffel* assumed that Raffel's silence at his first trial was not admissible in the government's case-in-chief during the second trial, but held that the defendant had waived protection against its use because he testified at the second trial.[207] The Court concluded that "the safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do."[208]

The silence at issue in *Raffel* was characterized by the *Jenkins* Court as "prior silence," and "inquiry into prior silence was proper" because when defendant Raffel chose to testify, the privileged status of the silence was waived.[209] The *Jenkins* Court's reliance on *Raffel*'s waiver analysis was express and unconditional. Indeed, the Court declared that it need not consider "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment . . . because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent."[210]

Despite the *Jenkins* Court's express refusal to address this question,[211] the Eleventh and Fifth Circuits construed *Jenkins* to mean that prearrest silence is not protected by the Fifth Amendment. While the Supreme Court has not yet passed on the holding that these circuits reached, it is clear that reliance on *Jenkins* was erroneous.

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[204] *Id.* at 495.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 497.
[208] *Raffel*, 271 U.S. at 499.
[209] *Jenkins*, 447 U.S. at 236.
[210] *Id.* at 236 n. 2.
[211] *Id.*

B. *The Fifth Amendment Prohibits Evidentiary Use of Prearrest Silence*

Of course, demonstrating that the *Jenkins* rule is inapposite when a defendant chooses not to testify does not demonstrate that the Fifth Amendment in fact forbids using prearrest silence in the case-in-chief. Under *Griffin* and its progeny, the protection of silence depends on whether state action impermissibly burdens the constitutional right not "to be a witness against [one]self."[212]

However, the Supreme Court has never explicitly stated that there is a constitutional right to remain silent before arrest.[213] Because the waiver analysis of *Raffel v. United States*[214] permitted impeachment use of prearrest silence in any event, the *Jenkins* Court expressly declined to address "whether or to what extent prearrest silence may be protected by the Fifth Amendment."[215] Determination of this question, however, is a critical threshhold matter. If choosing to remain silent before arrest is found to be an exercise of a constitutional privilege, then prohibiting an inference of guilt from such exercise follows logically from *Griffin v. California*,[216] as the First, Seventh, and Tenth Circuits have concluded. This logical extension will be demonstrated through the application of *Griffin*'s impermissible-burden analysis to the prearrest choice of silence.[217]

On the other hand, if choosing to remain silent before arrest is found not to be an exercise of a constitutional privilege,[218] then the fact of prearrest silence is to be treated like

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

[213] *See supra* text accompanying notes 93-96. The closest the Court has come to enunciating such a prearrest right is its holding in *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court stated that the privilege against self-incrimination is jeopardized "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning" *Id.* at 478. The Court further defined the notion of deprived freedom as "all settings in which their freedom of action is curtailed." *Id.* at 467. In a prearrest, non-custodial interrogation, of course, the questionee is free to leave.

[214] 271 U.S. 494 (1926).

[215] *Jenkins*, 447 U.S. at 236, n.2.

[216] For a review of *Griffin* and impermissible-burden analysis, see *supra* notes 20-27.

[217] See *infra* text accompanying notes 283-314 for a discussion of impermissible-burden analysis as applied to *privileged* pre-arrest silence.

[218] Justice Stevens has argued this perspective. In his *Jenkins* concurrence, he

any other piece of evidence.[219] Evidence of prearrest silence would be constitutionally[220] protected from the prosecution's case-in-chief only if such evidence were found to impermissibly burden the constitutional right not to take the stand at trial. Meeting this requirement, as will be demonstrated in Part IV, would be much more difficult and in any event not likely to be codified into a constitutional rule.[221]

1. The Privilege Attaches to Prearrest Silence

The Supreme Court has indicated that it will apply general Fifth Amendment principles in order to determine whether a given statement is within the reach of the privilege against self-incrimination.[222] To be within the scope of the privilege, two elements must be present: testimonial evidence and compulsion.[223]

a. Testimonial Evidence

The Court draws a distinction between "testimonial" and "real or physical evidence" for purposes of the privilege against self-incrimination, and has determined that the privilege is a bar only to compelling "communications" or "testimony."[224]

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explained that he would not have relied on *Raffle*'s waiver analysis to justify permitting impeachment with pre-arrest silence, because such reliance incorrectly implies that Fifth Amendment principles are applicable to a pre-custody context. *Jenkins*, 447 U.S. at 241. In Stevens's view, "[w]hen a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment." *Id.* at 243-44.

[219] The Court has made clear that *Griffin*'s impermissible-burden test is applied only to burdened *constitutional* rights. South Dakota v. Neville, 459 U.S. 553 (1983) ("The specific rule of *Griffin* is thus inapplicable" because "unlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood test").

[220] Of course, in the event the Constitution does not protect pre-arrest silence from the prosecution's case-in-chief, such silence might still be subject to an exclusionary rule under applicable evidentiary law.

[221] *See infra*, Part IV, text accompanying notes 331-46 for the application of Impermissible-Burden Test I to the trial choice of silence.

[222] South Dakota v. Neville, 459 U.S. 553, 560 (1983).

[223] *Id.* at 561-62; *see also* Pennsylvania v. Muniz, 496 U.S. 582, 590 (1990).

[224] *Muniz*, 496 U.S. at 591. Under this dichotomy, a suspect can be compelled to participate in a lineup and to repeat phrases provided by the police, because it

The critical test of the testimonial character of evidence is whether the communication elicited will be relied on by the state "as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it."[225] Furthermore, this definition "applies to both verbal and nonverbal conduct; nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another."[226]

In fact, treating a defendant's prior silence as testimony has a long pedigree in the doctrine of "assenting silence." The doctrine holds that an individual's silence in the face of accusations of crime made in his hearing, provided he had the opportunity to respond, may be used as a tacit admission of the truth of the facts contained in the statement.[227]

Silence in the face of police questioning, then, like a nod or head shake,[228] clearly meets the threshhold requirement that the act be testimonial in character. If found to be elicited through compulsion, the silence is privileged under the Fifth Amendment.

b. Coercion Model II

The Court has long held that "the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege."[229] This coercion requirement comes directly from the language of the privilege, which commands that no person "shall be compelled in

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is deemed "compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." United States v. Wade, 388 U.S. 218, 222 (1967). Similarly, the state may force a person suspected of drunk driving to submit to a drug test. Schmerber v. California, 384 U.S. 757 (1966).

[225] *Muniz*, 496 U.S. at 594-95 (quoting Doe v. United States, 487 U.S. 201 (1988) (quoting 8 WIGMORE § 2265 at 386)).

[226] *Muniz*, 496 U.S. at 595 n. 9; *Schmerber*, 384 U.S. at 761 n. 5 ("[a] nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words").

[227] *See* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185. *See also* 3A J. WIGMORE,*supra* note 3, § 1042, at 1056 (failure to state a fact when it would have been natural to assert it constitutes an assertion of the nonexistence of the fact).

[228] *See supra* note 226.

[229] South Dakota v. Neville, 459 U.S. 553, 562 (1983) (citation omitted).

any criminal case to be a witness against himself."[230] Of course, a literal reading of the privilege refers to a situation in which the government actually seeks to force a defendant to testify at his criminal trial.[231] However, rather than requiring a showing of actual compulsion to incriminate oneself, the Court instead prohibits the state from unduly penalizing "privileged silence."[232]

Privileged silence, in turn, is silence that arises in circumstances where there are "inherently compelling pressures" to speak and incriminate oneself.[233] Applying this less-than literal reading of the Fifth Amendment, the Court has extended the privilege to various settings, such as grand jury proceedings,[234] civil proceedings,[235] congressional investigations,[236] juvenile proceedings,[237] subpoenaed witnesses,[238] and custodial silence.[239]

The prearrest silence in the prototype scenario given in the Introduction of this Note is privileged because any response to police questioning amounts to compulsion under Coercion Model II.[240] The situation entails the requisite "in-

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

[231] It has been argued that since the Supreme Court has never held that prosecutorial uses of silence amount to "compulsion," direct comment upon silence should be allowed, even where, as in *Griffin*, the silence is an exercise of the Fifth Amendment privilege. *See* Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841 (1980).

[232] See *supra* text accompanying notes 20-27, and *infra* text accompanying notes 281-82, for examples of Court prohibiting prosecutorial comment on silence without characterizing prosecutorial action as compulsion.

[233] Miranda v. Arizona, 384 U.S. 436, 467 (1966). In *Miranda*, the Court ruled that the privilege against self-incrimination extended into custodial interrogations and that such interrogations needed additional procedural safeguards because "without [them] the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*

[234] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[235] McCarthy v. Arndstein, 266 U.S. 34 (1924).

[236] Watkins v. United States, 354 U.S. 178 (1957).

[237] *In re* Gault, 387 U.S. 1 (1967).

[238] Malloy v. Hogan, 378 U.S. 1 (1964).

[239] *Miranda*, 384 U.S. at 467.

[240] See *supra* text accompanying notes 47-50 for a review of Coercion Model II. This view of coercion was first articulated by Justice Murphy's dissent in *Adamson v. California*, 332 U.S. 46 (1947) and applied to the choice to remain silent at trial. *See supra notes* 41-43.

herently compelling pressures"[241] because the state has put the individual in a position in which, regardless of his response, he is compelled to provide the state with incriminating testimonial evidence. Specifically, John Doe's prearrest speech is testimonial. Further, there is no constitutional bar prohibiting the substantive use of his speech against him at trial.[242] His prearrest silence is also testimonial.[243] If the silence is admissible in the prosecution's case-in-chief, then during prearrest questioning the state has compelled Doe to provide incriminating testimonial evidence.[244]

This state-imposed "catch-22" is comparable to the purported "cruel trilemma of self-accusation, perjury or contempt"[245] which the Court has cited when justifying the application of the Fifth Amendment privilege to custodial interrogations. The case of *Miranda v. Arizona*[246] and its later explanation by the Court is instructive in demonstrating this point.

Miranda requires police officers to adopt certain procedures before conducting a custodial interrogation.[247] Specifically, officers must tell the arrestee that she has the right to remain silent, that she has a right to an attorney, and that

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[241] *Miranda*, 384 U.S. at 467.

[242] This proposition is so fundamental to the function of law enforcement as to be axiomatic. The *Miranda* Court emphasized that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, 384 U.S. at 478. While a defendant's statements made prior to custody may be excluded under evidentiary law as hearsay, most states maintain either codified or judicially constructed exceptions to the hearsay rule which permit the admission of incriminating pre-arrest statements as long as there exists trustworthy grounds for presuming that the statements were in fact made.

[243] *See supra* text accompany notes 224-28.

[244] *See* Poulin, *supra* note 12, at 218-19. Justice Murphy first articulated this coercion model when, in dissent, he argued that comment on the refusal to testify at trial violated the Fifth Amendment. *See supra* text accompanying note 42. When the Court finally adopted Murphy's position in *Griffin*, it made no reference to Murphy's coercion model.

[245] *See supra* text accompanying note 19.

[246] 384 U.S. 436 (1966).

[247] *Id.* at 479. The *Miranda* warnings need not be read to a suspect during the type of non-custodial interrogation at issue in this Note. The majority of Courts have concluded that police questioning "on the street," in a public place or in a person's office or home is not "custodial." Wayne R. LaFave & Jerold H. Israel, CRIMINAL PROCEDURE §6.6(e),(f) (2d ed. 1992).

anything she says may be used against her later.[248] Before promulgating these procedural rules, the *Miranda* Court first addressed "whether the privilege is fully applicable during a period of custodial interrogation."[249] The Court wanted it understood that the newly required Miranda warnings did not broaden the scope of the Fifth Amendment, but rather guaranteed its enforcement.[250] Finding recourse in the "complex of values" underlying the privilege against self-incrimination,[251] the *Miranda* Court declared that "we are satisfied that the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning."[252]

Later, in *Pennsylvania v. Muniz*,[253] the Court declared that the Fifth Amendment privilege is primarily designed to prevent the "cruel trilemma of self-accusation, perjury, or contempt" found in an inquisitorial system of criminal justice.[254] Further, the Court acknowledged that custodial interrogations present different choices from the historic cruel trilemma, but "despite these differences," the *Miranda* Court had properly found the privilege applicable because the custodial setting "raises similar concerns."[255] The Court specified the differences:

> During custodial interrogation, the pressure on the suspect to respond flows not from the threat of contempt sanctions, but rather from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Moreover, false testimony does not give rise directly to sanctions (either religious sanctions for lying under oath or prosecutions for perjury), but only indirectly (false testimony might itself prove incriminating, either because it links

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[248] *Id.*

[249] *Miranda*, 384 U.S. at 460 (1966).

[250] This point was underscored later in *Roberts v. United States*, 445 U.S. 552, 560 (1980), where the Court stated that "the right to silence described in those [*Miranda*] warnings derives from the Fifth Amendment and adds nothing to it."

[251] *Miranda*, 384 U.S. at 461, (citing Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52, 55-57 n.5 (1964) and its enumeration of the various policies behind privilege). See *supra* text accompanying note 19 for *Murphy's* list of these policies.

[252] *Miranda*, 384 U.S. at 461.

[253] 496 U.S. 582 (1990).

[254] *Id.* at 595.

[255] *Id.* at 596-97.

(albeit falsely) the suspect to the crime or because the prosecution might later prove at trial that the suspect lied to the police, giving rise to an inference of guilty conscience).[256]

Thus the *Muniz* Court found that the custodial interrogee faces three choices, each of which is so unattractive that the choice amounts to a cruel trilemma. He can respond honestly to the questions, but that would be self-incrimination. He can lie, but this may expose him to an inference of a guilty conscience. Finally, he can remain silent. Even though there is no modern contempt sanction for remaining silent, prong three is not a way out of the "trilemma," because, according to the *Miranda* Court, a person might be unable to resist the pressure to speak. As analyzed by the Court, of course, this final prong—the choice of silence—presents no negative consequences, and thus there is no trilemma (or even dilemma).[257] Rather, the *Miranda* Court believed that, due to pressure by law enforcement, the choice of remaining silent might not be exercised unless the arrestee is affirmatively and clearly told he has the right to do so by way of the Miranda warnings.

In contrast, the non-custodial questionee faces an actual dilemma. Like the custodial interrogee, the prearrest interrogee can choose to speak and incriminate himself. Also like the custodial interrogee, he can choose to remain silent without facing the contempt sanctions originally contemplated by the privilege.[258] Unlike the custodial interrogee, the prearrest questionee faces a true dilemma[259] because negative consequences attach regardless of whether he chooses to speak or to remain silent; the negative consequence is involuntarily to provide incriminating testimonial evidence.

The effect of not applying Coercion Model II to prearrest silence is to put a person whom the government does not have probable cause to arrest in a far more compulsive situation

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[256] *Id.* at 597 (1990).

[257] As analyzed under Coercion Model II, however, the custodial interrogee faces the same trilemma as a prearrest questionee: if he chooses to remain silent, he is forced to incriminate himself by providing testimonial silence. The *Miranda* Court resolved this trilemma by holding that the Court may not use the privileged silence at trial. *Miranda*, 384 U.S. at 468 n.37.

[258] 496 U.S. at 597.

[259] To the extent that the Court has charitably replaced the original "perjury" prong with a modernized "inference of guilty conscience" prong, the prearrest questionee also faces a "trilemma".

than he would face under "official compulsion." Under the Supreme Court's protective holdings in *Miranda v. Arizona* and *Doyle v. Ohio*, a custodial interrogee is never forced into the Coercion Model's "catch-22" whereby he must provide incriminating testimonial evidence, because these cases prohibit the state from using post-Miranda silence against the individual at trial.[260] A prearrest questionee, on the other hand, absent Coercion Model-based protection from inculpatory inferences at trial, is inescapably "compelled to be a witness against [him]self" when he decides not to answer police questions before arrest.

Application to the prearrest setting of Coercion Model II's "double bind" definition of compulsion represents a departure from the "inherently compelling pressures" analysis employed by the *Miranda* Court. Indeed, if prearrest silence were analyzed only under the *Miranda* approach, the requisite level of compulsion would not likely be categorically present in all prearrest questioning. Instead, under an "inherently compelling pressures" analysis, any given application of the privilege against self-incrimination to the prearrest setting would likely entail a difficult case-by-case inquiry.

Indeed, it was on these grounds that the *Miranda* Court exempted non-custodial questioning from its conclusion that the Fifth Amendment attached to the "informal compulsion" of custodial interrogations.[261] The Court noted that "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present" in the non-custodial context.[262]

Nevertheless, replacing Miranda's "inherently compelling pressures" approach in the prearrest setting with the analysis exemplified by Coercion Model II has a number of virtues. First, application of Coercion Model II has the virtue of pre-

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[260] See *supra* text accompanying notes 61-73 for a discussion of the protection from impeachment use of silence under *Doyle v. Ohio*, 426 U.S. 610 (1976); see infra text accompanying notes 281-82 for a discussion of the protection from evidentiary use of silence under *Miranda v. Arizona*, 384 U.S. 436 (1966).

[261] *Miranda*, 384 U.S. at 461.

[262] *Id.* at 477-78. Under *Miranda*'s "inherently compelling pressures" test, for instance, the Court has concluded that the privilege does not attach to court-imposed probation interviews because such a setting, unlike a custodial one, does not "convey to the [individual] a message that he has no choice but to submit to the officer's will and to confess." Minnesota v. Murphy, 465 U.S. 420, 420 (1984).

venting a true dilemma and thus, unlike the "inherently compelling pressures" analysis, serves a purpose originally contemplated by the privilege.[263] Second, Coercion Model II is firmly grounded in the Supreme Court's contemporary Fifth Amendment jurisprudence. The case of *South Dakota v. Neville*[264] illustrates this point.

In *Neville*, the Court observed that Fifth Amendment concerns may arise when the government provides an individual no responsive option other than to provide testimonial incrimination. The *Neville* Court considered the constitutionality of a state statute that permitted the admission into evidence of a suspect's refusal to submit to a blood-alcohol test.[265] The Court stated that *Griffin*'s impermissible-burden test did not apply because there is "no constitutional right to refuse to take a blood-alcohol test."[266] Instead, "general Fifth Amendment principles" controlled the inquiry, requiring the presence of testimonial evidence and coercion.[267] Finally, the Court assumed that refusal to submit to the test was testimonial, and rested its decision soley on coercion analysis.[268]

The *Neville* Court ruled that there was no unconstitutional coercion.[269] It began its analysis by noting that seventeen years earlier, in *Schmerber v. California*,[270] the Court had upheld the constitutionality of compelling a drunk driving suspect to submit to a blood-alcohol test on the grounds that such a test was non-testimonial evidence.[271] The statute at issue in *Neville*, the Court observed, gave the suspect a choice either to submit and incriminate himself with non-testimonial evidence, or to refuse and to have his testimonial refusal admitted against him.[272] The Court reasoned that there is no coercion when the state could have constitutionally compelled him to

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[263] *Muniz*, 496 U.S. at 596.

[264] 459 U.S. 553 (1983).

[265] *Id.* at 564.

[266] *Id.* at 560 n.10.

[267] *Id.* at 560.

[268] *Id.* at 563. The Court chose not to ground its decision in the lack of testimonial evidence because "the distinction between real evidence . . . and communications or testimony . . . is not readily drawn in many cases." *Id.*

[269] 459 U.S at 564.

[270] 384 U.S. 757 (1966).

[271] 459 U.S. at 560.

[272] *Id.*

take the test and thereby provide non-testimonial evidence.[273] This was not "a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice."[274]

The *Neville* Court made clear that the suspect could have taken the test without providing testimonial evidence or sacrificing any constitutional right. Importantly, however, the decision suggests that if the state provides an individual only with an option "that it had no right to compel"—namely, to provide testimonial statements or silence—Fifth Amendment concerns are raised.[275]

The Court has not adopted Coercion Model II to prohibit the evidentiary use of silence, but rather has applied impermissible-burden or due process analyses to prohibit governmental use of "privileged" silence.[276] It is important to reiterate, therefore, that Coercion Model II has been employed here not to establish conclusively that prosecutorial comment on prearrest silence is prohibited by the Fifth Amendment. Rather, the model is used to answer the threshhold question expressly left open in *Jenkins*—whether the Fifth Amendment privilege is even applicable "when a citizen is under no official compulsion whatever."[277]

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[273] *Id.* at 564.

[274] *Id.* at 563-64.

[275] Professor Barbara Snyder takes a different view of *Neville*. She states that "[b]ecause the Court concluded that requiring the defendant in *Neville* to make such a choice did not constitute compulsion, forcing a defendant to choose between incriminating himself by speaking or incriminating himself by remaining silent likewise is not compulsion." Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 315-16 (1988). Professor Snyder seems to ignore the express reasoning in *Neville:* that the option of submitting to the test could be constitutionally compelled. This is more than dicta, as is evidenced by the Court's later interpretation of the *Neville* reasoning: "[i]n South Dakota v. Neville, we held that since submission to a blood test could itself be compelled, a State's decision to permit a suspect to refuse to take the test but then to comment upon that refusal at trial did not "compel" the suspect to incriminate himself and hence did not violate the privilege." Pennsylvania v. Muniz, 496 U.S. 582, 604 n.19 (citations omitted) (1990). In contrast, because the police can neither constitutionally compel a prearrest questionee to speak nor to remain silent, drawing a negative inference from either amounts to compulsion under Coercion Model II.

[276] *See supra* text accompanying notes 247-52; *see infra* text accompanying notes 281-83.

[277] *Jenkins*, 447 U.S. at 243-45 (1980) (Stevens, J., concurring).

The Court has explained that there must be a "testimonial" and "compulsion" component to trigger the Fifth Amendment privilege.[278] Because a prearrest questionee's silence is testimonial and because his silence is coerced under Coercion Model II, both components are present in the context of prearrest questioning by law enforcement. Under *Griffin* and *Jenkins*, the question then is whether this privileged prearrest silence is impermissibly burdened when the prosecution is permitted to comment on it at trial.

2. Privileged Prearrest Silence is Impermissibly Burdened by Prosecutorial Comment at Trial

The First, Seventh and Tenth Circuits concluded without analysis that prearrest silence is privileged.[279] The Courts then concluded without analysis that case-in-chief use of such silence is prohibited under the rule of *Griffin v. California*.[280] Even without additional analysis, this second conclusion was justified, because following *Griffin*, the Supreme Court has never permitted prosecutorial comment on privileged silence.

There is strong indication that the Court itself regards *Griffin* to support the broad rule that the Fifth Amendment forbids direct comment on privileged silence, rather than the narrower rule that the Fifth Amendment forbids direct comment on the right not to take the witness stand. For example, after finding that the Fifth Amendment privilege against self-incrimination attaches to the custodial setting, the *Miranda* Court forthwith ruled that the prosecution may not use this privileged silence as substantive evidence of guilt at trial.[281] In a footnote, the Court remarked:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*[282]

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[278] *Neville*, 459 U.S. at 560.

[279] See *supra* text accompanying notes 110-51 for a review of these Circuit decisions.

[280] 380 U.S. 609 (1965).

[281] *Miranda*, 384 U.S. at 468 n.37.

[282] *Id.* (citation omitted) (emphasis added).

The *Miranda* Court did not apply *Griffin*'s impermissible-burden analysis to explain exactly why prosecutorial comment on newly privileged custodial silence is an unconstitutional burden on the exercise of the privilege. The *Miranda* Court merely cited *Griffin* for this proposition. Therefore, it may be reasonably interpreted from the Court's own use of *Griffin* that an unconstitutional burden is presumed when the state's burdensome action is conceptually identical to the burden prohibited by *Griffin*—namely, direct comment on the individual's exercise of privileged silence. Because of the *Miranda* Court's use of the *Griffin* holding, the First, Seventh, and Tenth Circuits were justified in concluding that direct comment on privileged prearrest silence is an impermissible burden on a constitutional right.

a. *Application of Impermissible-Burden Test to Privileged Prearrest Silence*

While neither the *Miranda* Court nor the circuits actually applied the impermissible-burden balancing test to silence that had been deemed "privileged," application of the burden analysis indeed demonstrates that the substantive use of privileged prearrest silence does impermissibly burden the constitutional right not be a witness against oneself. The case of *Jenkins v. Anderson*[283] is a useful starting point for this discussion.

The *Jenkins* Court applied impermissible-burden analysis to the prosecutorial use of prearrest silence *arguendo*.[284] The Court concluded that even if prearrest silence were construed as an invocation of the Fifth Amendment privilege, impeachment use of the silence did not represent an impermissible burden on the assumed constitutional right.[285] The Court noted that the test required the balancing of two considerations: (1) the nature and extent of the burden; and (2) the "legitimacy of the challenged governmental practice."[286]

The *Jenkins* Court did not analyze the nature and extent of the burden on the assumed constitutional right (prong one),

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[283] 447 U.S. 231 (1980).
[284] *Id.* at 238.
[285] *Id.*
[286] *Id.*

but instead laconically reasoned that comment on prearrest silence was permissible because of the legitimate truth-testing function of cross-examination (prong two).[287] Because the Court did not inquire into prong one—the burden—the Court provided no guidance as to what policies behind the privilege might be compromised by substantive use of privileged silence in the case-in-chief. Therefore, unclear is this: absent the apparently dispostive importance of the state's truth-testing interest during cross-examination, what might be a countervailing legitimate government interest in burdening the prearrest exercise of the privilege?

i. Legitimacy of Substantive Use of Prearrest Silence

The government cleary has an interest in presenting evidence from which a jury may conclude the defendant's guilt beyond a reasonable doubt. This interest is legitimate when the inculpatory evidence is admissible under the applicable evidentiary rules and does not violate a constitutional mandate.[288] Assuming that use of privileged prearrest silence as substantive evidence of guilt is legitimate under the applicable evidentiary law, the fact remains that the constitutional legitimacy of such trial practice is an open question. Indeed, absent a bright-line rule such as the judicially recognized state interest in impeaching a defendant's credibility through cross-examination,[289] the question of the constitutional legitimacy of the case-in-chief use of privileged prearrest silence is a circular one. One cannot adequately "balance" the burden on a constitutional right against the "legitimacy of the governmental practice" if the legitimacy of the practice depends on whether the action in question—comment on the prearrest exercise of the privilege—violates the constitution.

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[287] The *Jenkins* Court succinctly reasoned that "once a defendant decides to testify, '[t]he interests of the other party [the state] and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.' " *Jenkins*, 447 U.S. at 238 (quoting Brown v. United States, 356 U.S. 148, 156 (1958)). This is so because "such impeachment on cross-examination . . . advances the truth-finding function of the criminal trial." *Jenkins*, 447 U.S. at 238.

[288] 29 AM. JUR. 2D *Evidence* § 251 (1967).

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

This conundrum perhaps explains why the rule of *Griffin v. California*[290] was not originally articulated as a balancing test. Writing for the majority, Justice Douglas instead articulated a bright-line rule that the prosecution must not comment on a defendant's exercise of the privilege at trial.[291] In reaching its decision, the Court focused on the burden such comment imposes on the choice not to testify.[292] As to the challenged governmental practice, the Court crisply concluded it was illegitimate: "It is a penalty imposed by Courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[293]

If the *Griffin* Court had applied the balancing test later articulated in *Jenkins v. Anderson*,[294] rather than establishing the base rule that guilt may not be constitutionally inferred from the exercise of the privilege, the Court would have faced the same insoluble circularity: (1) evidentiary use of the refusal to testify represents some burden on the privilege, and (2) the Government's interest in using this evidence is illegitimate because such state action violates the Fifth Amendment.

ii. Burden on the Prearrest Exercise of the Privilege

Analysis must now turn to prong one, the more demonstrable prong of the balancing test: "whether a constitutional right has been burdened impermissibly."[295] Under this prong, the question is whether state action "impairs to an appreciable

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[290] 380 U.S. 609 (1965).

[291] *Id.* at 615.

[292] The *Griffin* Court noted that not every man, "however honest," would willingly take the witness stand because of "excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Griffin*, 380 U.S. at 613 (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)). The privilege against self-incrimination, therefore,

> in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in somee degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him.

Griffin, 380 U.S. at 613 (quoting Wilson, 149 U.S. at 66).

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

[294] 447 U.S. at 238 (1980).

[295] *Jenkins*, 477 U.S. at 238.

extent any of the policies behind the rights involved."[296] The policies motivating the constitutionally stated right not to "be compelled in any criminal case to be a witness against [one]self"[297] are multiple, and were stated at length in Murphy v. Waterfront Commission.[298]

In revisiting the policies underlying the privilege since the *Murphy* decision, the Court has stated that of foremost importance is prohibiting the historic "cruel trilemma of self-accusation, perjury, or contempt" or its modern counterpart, the dilemma of self-accusation or "false statements . . . giving rise to an inference of guilty conscience."[299]

When the state uses the fact of privileged prearrest silence against the defendant, the trilemma posed by Coercion Model II is imposed on the prearrest choice: self-accusation by affirmative statement, self-accusation by silence, or an inference of guilty conscience by false statements. Indeed, this trilemma is arguably more burdensome than the one originally envisioned when contempt sanctions for silence existed. The prearrest questionee, after all, does not have the option to choose contempt sanctions over becoming a witness against himself. The state gives him no choice in the prearrest setting: he *must* be a witness against himself. Similarly, the prearrest questionee's trilemma is more burdensome than the choice facing the custodial questionee, because, under *Miranda*, the custodial questionee can exercise silence without any negative inference at trial.[300]

The Court has stated that the privilege against self-incrimination reflects "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses."[301] However, if a state's proffered evidence is silence rather than an affirmative statement, the protection against involuntary and compelled statements is hollow.

As Professor Ann Poulin points out, "a defendant makes an affirmative statement at a specific point in time, and a court can evaluate the circumstances under which the state-

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[296] McGautha v. California, 402 U.S. 183, 213 (1971).
[297] U.S. CONST. amend. V.
[298] 378 U.S. 52 (1964). *See infra* text accompanying note 20.
[299] Pennsylvania v. Muniz, 496 U.S. 582, 596-97 (1990).
[300] *Miranda*, 384 U.S. at 468 n.37.
[301] *Murphy*, 378 U.S. at 55.

ment was given."[302] However, prearrest silence may arise over a protracted period of contact with law enforcement.[303] Because silence shows resistance to attempts to undermine an individual's will, silence can be too easily dismissed as a voluntary act rather than as compelled. Indeed, "it seems impossible to assess whether silence is voluntary."[304] Since the determination of whether prearrest silence is voluntary at a given time may be impossible, "permitting any evidentiary use of silence would undermine the fundamental Fifth Amendment policy against coercion."[305]

In addition, the Court has stated that the privilege reflects "our sense of fair play which dictates 'a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load,' "[306] rather than requiring the individual to provide the government with testimonial evidence that the state was unable to procure by its own devices. While the state may compel the defendant to provide incriminating physical evidence, the Court has emphatically, and colorfully, articulated the defendant's right not to cooperate testimonially. In *Watts v. Indiana*,[307] for example, Justice Jackson observed in his dissent that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[308] According to Professor Poulin, "[e]ven if the defendant is not confronting police interrogation, the usual legal advice has been to make no statement."[309]

On good advice from the Supreme Court, then, a defendant may choose to remain silent in the prearrest setting. It would violate the "state-individual balance" if the state is then per-

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[302] Poulin, *supra* note 12, at 212.

[303] In *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), discussed *supra*, text accompanying notes 122-31, the defendant remained silent during the two and one-half years between his initial contact with IRS criminal investigators and his ultimate indictment. His initial silence was in response to the investigators request for information about an associate under investigation. *Id.* at 1200. It appears impossible to properly gauge the degree of "coercion" or "involuntariness" of the subsequent two and one-half years of "silence."

[304] *Id.*

[305] Poulin, *supra* note 12, at 212.

[306] *Murphy*, 378 U.S. at 55 (citation omitted).

[307] 338 U.S. 49 (1949).

[308] *Id.* at 59.

[309] Poulin, *supra* note 12 at 197 n.28.

mitted to recast a defendant's privileged silence into testimonial evidence and "substitute it for the testimonial admission that the government was unable to obtain . . . ."[310]

Finally, if a defendant's prearrest silence can be constitutionally admitted against him, the state enjoys unrestrained control over when and how its constitutional obligations will commence. After all, the Court has emphasized that "there is no constitutional right to be arrested" and that law enforcement "[is] under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause."[311] Therefore, the police, provided their questioning is not custodial and does not "otherwise deprive [the defendant of] his freedom of action in any significant way,"[312] can constitutionally prolong prearrest interrogation in order to evade the *Miranda* and *Doyle* protections that arrest of the defendant would trigger. Arming the police with a device which permits the state to later recast a defendant's prolonged prearrest refusal to "cooperate" into evidence against him tips the "state-individual balance" dramatically in the state's favor.

Neither the *Miranda* nor the *Jenkins* Court actually weighed the impact of state action on these Fifth Amendment policies. Indeed, the *Miranda* Court did not even mention the impermissible-burden analysis, but instead simply cited *Griffin* for the proposition that substantive use of newly privileged custodial silence was categorically unconstitutional.[313] This is perhaps because the Court found the substantial nature of the state's penalty to be obvious. As demonstrated, however, the use of a defendant's privileged prearrest silence as evidence of guilt against him offends basic policies underlying the privilege. In addition, there is no discernable legitimate reason for the state to use privileged silence as a substitute for the damning testimony that it was unable to obtain.[314] Accordingly, privileged prearrest silence is unconstitutionally burdened when the state is permitted to comment on it at trial.

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[310] Poulin, *supra* note 12, at 211.
[311] Hoffa v. United States, 385 U.S. 293 (1966).
[312] *Miranda*, 384 U.S. at 477.
[313] *Miranda*, 384 U.S. at 468, n.37.
[314] *See supra* text accompanying notes 288-94.

IV. TOWARD A CONTEXTUAL FRAMEWORK FOR DISTINGUISHING PRIVILEGED FROM NON-PRIVILEGED PREARREST SILENCE

Part III of this Note argued that prearrest silence of the sort in the prototype scenario,[315] where John Doe is confronted by state agents and indicates his unwillingness to speak or answer questions, is privileged silence by virtue of Coercion Model II.[316] Part III further argued that prosecutorial comment on privileged prearrest silence violates the Fifth Amendment privilege against self-incrimination because such comment impermissibly burdens the right not to be a witness against oneself in the prearrest setting.[317]

Assuming the Supreme Court eventually recognizes that some instances of prearrest silence are constitutionally privileged under Coercion Model II, it does not necessarily follow that all silence occurring before arrest is privileged. Furthermore, the distinction between privileged and non-privileged prearrest silence has important implications for potential criminal defendants and their attorneys. As will be demonstrated, the Court's current approach to Fifth Amendment impermissible-burden analysis suggests that any prearrest silence deemed "non-privileged" will very likely remain constitutionally unprotected from the prosecution's case-in-chief.

A. *Prearrest Silence Not Resulting from Contact with Law Enforcement is not Privileged*

The factual circumstances of *Jenkins v. Anderson*[318] is an example of silence not arising out of contact with law enforcement. As was previously discussed,[319] the *Jenkins* defendant claimed at trial that he killed the victim in self-defense.[320] In addition, during the two weeks between the killing and his

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[315] The prototype scenario begins this Note.

[316] *See supra* text accopanying notes 240-78, for a review of coercion analysis as applied to prearrest silence.

[317] *See supra* text accompanying notes 288-314 for a review of impermissible burden analysis as applied to privileged prearrest silence.

[318] 447 U.S. 231 (1980).

[319] *See supra* text accompanying notes 85-102 for a complete discussion of *Jenkins*.

[320] *Jenkins*, 447 U.S. at 233.

arrest, he had no contact with law enforcement.[321] During cross-examination, the prosecution questioned the defendant about the fact that he waited two weeks to surrender to the police, thereby attempting to impeach his credibility by suggesting that he would have contacted the police immediately if he had acted in self-defense.[322]

The *Jenkins* Court expressly declined to address whether prearrest silence is privileged, but permitted prosecutorial use of a defendant's silence where a defendant chose to testify at trial.[323] Nevertheless, even if the *Jenkins* defendant had not testified at trial, the state action doctrine suggests that the Supreme Court would not extend the Fifth Amendment privilege against self-incrimination to the *Jenkins* defendant's prearrest silence.

It is axiomatic that the commands of the Constitution are directed at governmental entities and that state action is a prerequisite to the assertion of rights contained in the Fifth Amendment.[324] The United States Supreme Court has stated:

> Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause of the Fourteenth Amendment . . . [furthermore, t]here is obviously no reason to require more in the way of a "voluntariness" inquiry in the [Fifth Amendment] waiver context than in the Fourteenth Amendment confession context. *The sole concern of the Fifth Amendment . . . is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess [or incriminate oneself] emanating from sources other than official coercion."*[325]

A defendant who has no contact with law enforcement prior to his arrest might nevertheless argue that prosecutorial use of his prearrest "failure to come forward" satisfies the state action requirement. For example, such a defendant might claim that the choice not to come forward was induced by state action in the sense that he feared the consequences that the state might impose on him if he volunteered information. Simi-

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[321] *Id.*
[322] *Id.*
[323] *Id.* at 238.
[324] Colorado v. Connelly, 479 U.S. 157, 169-70 (1988).
[325] *Id.* at 165 (citations omitted) (emphasis added).

larly, he might claim that he knew that state agents were investigating the crime in question and this investigation prevented him from coming forward because he was afraid to admit his knowledge, however innocent, of the crime.

Under these approaches, however, the defendant's reasons for not coming forward more likely result from his own actions or knowledge of facts relating to the crime rather than from any intervening act on the part of the state. Any pressure to be silent under such circumstances is best characterized as "moral and psychological pressure[] to confess emanating from sources other than offical coercion."[326]

Alternatively, a defendant who has no contact with law enforcement prior to his arrest might argue that the state action requirement is met by the trial court's later decision to admit into evidence his incriminating prearrest "failure to come forward." However, the Court has rejected this argument for the presence of state action where the alleged state coercion is temporally separated from testimonial evidence sought to be excluded.[327]

The Court explained:

> The difficulty with [this] approach is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession [or incriminating statements or silence] by a defendant, on the other. The flaw in [this] constitutional argument is that it would . . . require that courts [] divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct [at the time of the statement or silence] coerced his decision.[328]

If a defendant has no contact with law enforcement prior to his arrest, it follows from the Court's state action jurisprudence that the privilege against self-incrimination does not attach to the prearrest choice to remain silent.

At first blush, it may appear strange that the *Jenkins* Court did not simply rule that prosecutorial comment on the defendant's prearrest silence was constitutionally permissible by virtue of the absence of state action compelling the choice of silence in the prearrest setting. Indeed, while the *Jenkins*

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[326] *Id.* at 170.
[327] *Id.* at 165-66.
[328] *Id.*

Court alluded to the state action doctrine in its rejection of the defendant's due process claim,[329] the Court did not even refer to the state action doctrine in its discussion of the defendant's Fifth Amendment claim. The likely reason the Court did not rely on the state action doctrine in *Jenkins*, however, is that prosecutorial comment on non-privileged prearrest silence could still be unconstitutional by virtue of Impermissible-Burden Test I.[330]

B. *Application of Impermissible-Burden Test I: Non-Privileged Silence*

As demonstrated, prearrest silence not arising out of contact with law enforcement is not privileged under the Fifth Amendment because the prearrest choice to speak or to remain silent is not compelled by a state actor.[331] If the silence is not privileged, the state is constitutionally barred from commenting on it only if this prearrest evidence[332] impermissibly burdens the defendant's right not to take the stand at trial (Impermissible-Burden Test I). This shift in focus from the prearrest choice of silence to the trial choice of silence is mandated by the Court, which has unambiguously held that burden analysis applies only to burdened constitutional rights.[333] In addition, this shift in focus has enormous implications regarding the likelihood of a finding of a constitutional violation. Application of an impermissible-burden analysis to non-privileged prearrest silence demonstrates this point.

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[329] Commencing its rejection of the defendant's due process claim, the *Jenkins* Court noted that "in this case, no governmental action induced petitioner to remain silent before arrest." *Jenkins*, 447 U.S. at 240.

[330] *See supra* text accompanying notes 26-40 for an introduction of Impermissible-Burden Test I.

[331] *See supra* text accompanying notes 324-28.

[332] Where pre arrest silence is not privileged, the silence itself has no special constitutional status and will be subjected to traditional admissibility scrutiny under applicable evidentiary law. *See Jenkins*, 447 U.S. at 240 (after declining to find pre-arrest silence privileged, the Court stated that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial").

[333] South Dakota v. Neville, 459 U.S. 553 (1983).

i. Burden on the Exercise of the Right to Trial Silence

Consider this scenario. Defendant John Doe's prearrest silence is not constitutionally privileged. However, he has a constitutional right to remain silent at trial. Doe learns from his attorney that his prearrest silence may be admitted against him at trial under applicable evidentiary rules. Realizing the prejudicial effect that the prosecution's comment on his prearrest silence may have on the jury, Doe decides that he should testify at trial in order to explain to the jury why he remained silent before arrest.

From this scenario we may conclude that Doe's constitutional right not to testify at trial was burdened, perhaps impermissibly. He feels the need to explain himself because of the inculpatory evidence of his prearrest silence. However, the Court has made clear that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' "[334]

The United States Supreme Court has expressly rejected the notion "that the mere force of evidence is compulsion of the sort forbidden by the privilege."[335] Indeed, all inculpatory evidence is prejudicial. The state has no interest in presenting only a flattering image of the defendant, nor is it required to do so. Once inculpatory evidence is admitted under applicable evidentiary law, it will often have the effect of discouraging the defendant's constitutional right to trial silence. The fact that the defendant may be persuaded to speak at trial in order to counter the state's damning evidence is merely a definition of the adversarial process. Prearrest silence, like any damning evidence, encourages the defendant to forgo his constitutional right to trial silence.

Under Impermissible-Burden Test I, analysis must focus on whether burdening the defendant's choice of trial silence impairs to an appreciable extent any of the policies of the rights involved.[336] However, at trial, the defendant does not

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[334] *Jenkins*, 447 U.S. at 236 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)).

[335] McGautha v. California, 402 U.S. 183, 213 (1971).

[336] *Jenkins*, 447 U.S. at 236.

face the cruel trilemma of self-accusation, perjury, or contempt. *Griffin* resolved the trilemma by forbidding any negative inference to be drawn from trial silence. Likewise, the fair state-individual balance is maintained, because, under *Griffin*, the state is not permitted to turn a defendant's trial silence into the testimonial admission that it was unable to obtain from its own efforts.

Finally, the fear that the silence was coerced or involuntary evaporates when burden analysis focuses on silence at trial. At trial, every criminal defendant is privileged not only to remain silent, but also to testify in his own defense.[337] It is the duty of the defendant's attorney to inform him of this fact. The judge, jury, and general public see the defendant in the courtroom and may observe if his trial silence is due to physical compulsion exerted by the state. Even in the event that the defendant's choice of silence at trial was morally or psychologically compelled through blackmail or threats on the part of the state, the remedy for such a violation would properly be a retrial of the defendant and criminal sanctions against the threateners. The fact that some cases may exist where state agents have threatened the defendant into not testifying surely does not mean that the defendant's trial choice is always compelled.

If prearrest silence is found not to be privileged and is used by the prosecution as inculpatory evidence, then the burden on the right to trial silence is analytically equivalent to the burden that always exists when the defendant decides not to testify in the face of inculpatory evidence against him.

ii. Legitimacy of Comment on Non-Privileged Prearrest Silence

The state has an interest in presenting inculpatory evidence from which a jury may conclude the defendant's guilt beyond a reasonable doubt. As previously noted, this interest is legitimate when the evidence is admissible under applicable evidentiary law and does not violate a constitutional mandate.[338] If prearrest silence is not privileged under the Fifth

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[337] *See* Harris v. New York, 401 U.S. 222, 225 (1971).

[338] 29 AM. JUR. 2D *Evidence* § 251 (1967).

Amendment, then using the fact of such silence is at least facially legitimate because evidentiary law generally permits such evidence. The Federal Rules of Evidence will be used as a model in demonstrating this point.

In general, a declarant's out-of-court statement is inadmissible as hearsay if it is offered in evidence to prove the truth of the matter asserted.[339] Under this general rule, using a defendant's prearrest speech or silence[340] occurring before arrest is inadmissible when the state attempts to use this statement to support the facts contained in it. Prearrest silence in the face of police questioning, for example, could not be used by the prosecution as evidence of a denial of a fact, or as a tacit admission of a fact.

However, admissions by party opponents are not hearsay.[341] In addition, there are significant statutory and common law exceptions to the hearsay rule. The common feature of these exceptions is that such statements are "offered as evidence of a material fact" and have "circumstantial guarantees of trustworthiness."[342] Thus a police report written at or near the time of questioning, provided it was made "in the course of a regularly conducted business activity," may be admitted as trial evidence.[343] In addition, a defendant's statement or silence duly noted in the police report may be admissible as "hearsay included within hearsay"[344] as long as the statement is offered to show the defendant's "then existing state of mind, emotion . . . [s]uch as intent, plan, motive, design . . . ."[345] A defendant's prearrest statement "I refuse to talk to you guys" cleary meets the exception to the hearsay rule and would be admitted.

These exceptions to the hearsay rule demonstrate a consensus regarding the legitimacy of using out of court declarations as substantive evidence of guilt so long as there is a circumstantial guarantee of trustworthiness and the statement

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[339] FED. R. EVID. Rule 801(c).

[340] *See infra* text accompanying notes 221-22 for a review of the Supreme Court's treatment of silence as testimony.

[341] FED. R. EVID. Rule 801(c).

[342] FED. R. EVID. Rule 803(24).

[343] FED. R. EVID. Rule 803(6).

[344] FED. R. EVID. Rule 805.

[345] FED. R. EVID. Rule 803(3).

is offered as evidence of a material fact. Of course, a trial judge may ultimately deem the evidence of prearrest silence inadmissible on grounds of irrelevance or undue prejudice. But, as the *Jenkins* Court stated, the question of whether a given piece of evidence is relevant or unduly prejudicial "is a question of state [or federal] evidentiary law."[346] In the six circuit court cases surveyed in Part II, the trial courts obviously concluded that the respective defendants' prearrest silence was both relevant and probative.

A defendant's constitutional right to remain silent at trial is always burdened when inculpatory evidence is admitted against him. If prearrest silence does not arise out of contact with law enforcement and is therefore non-privileged, the prearrest silence would be evaluated like any other piece of evidence. In addition, using prearrest silence at trial is not facially prohibited under evidentiary law. Accordingly, trial use of non-privileged prearrest silence does not unconstitutionally burden the right to trial silence.

CONCLUSION

This Note has argued that the privilege against self-incrimination attaches to the prearrest setting whenever state action compels an individual to choose between incriminating himself by speaking or incriminating himself by silence. In such a prearrest setting, the individual faces a dilemma comparable to the historic cruel trilemma which the privilege was intended to prevent. The United States Supreme Court should address the circuit split on this issue and resolve the prearrest dilemma in the same way it has resolved the dilemma in courtroom and custodial settings: the speech may be constitutionally admitted into evidence while the silence should be constitutionally protected from comment in the prosecution's case-in-chief.

Michael R. Patrick

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[346] *Jenkins*, 447 U.S. at 239.