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THE SOUND OF SILENCE: EVIDENTIARY ANALYSES OF PRECUSTODIAL SILENCE IN LIGHT OF *SALINAS V. TEXAS*

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In the recent Supreme Court case Salinas v. Texas*, the Court declined to answer whether precustodial silence should be admissible as evidence of a defendant's guilt. This Comment uses the case as an example from which it argues that courts should take a different approach to precustodial silence. Rather than examining a defendant's precustodial silence from a constitutional perspective, as many courts, including the Supreme Court, have done, this Comment argues that courts would be better served examining this type of silence from an evidentiary perspective instead.*

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INTRODUCTION

Imagine the following scenario: you are a young immigrant who recently came to the United States.[1] You have moved into a poor, crime-ridden neighborhood in New York City. You intend to stay, at least temporarily, because the cost of rent is low and other immigrants of your ethnicity live in the area. One Friday night, you are invited to an acquaintance's home to celebrate his twenty-fifth birthday. The party spirals out of control, and amidst the commotion, gunshots ring out in the house. You and the other guests quickly leave the premises.

The next morning, police officers knock on your door. They tell you someone at the party last night was murdered and want to question you about the incident as a "person of interest." They ask you to come to the police station for brief questioning. You oblige. You answer their questions until they ask you whether you saw anyone suspicious at the party. You

[1] This scenario is loosely based on the facts in *Salinas v. Texas*, the case that is the subject of this Comment.

think you saw someone you know carrying a gun, but you are unsure and you do not want to falsely implicate him. Furthermore, if word were to get out in the neighborhood that you are a snitch, it could cut you off from the only friends and network you have in this country. In response to this question, "you shuffle[] [your] feet, [bite your] bottom lip, [clench your] hands in [your] lap, and [begin] to tighten up."[2] The police questioning becomes increasingly persistent, and sweat breaks out on your forehead. You refuse to answer the question, and decide to leave the police station. Soon after, the police arrest you for the murder.

Can a prosecutor use your silence against you in the subsequent trial for murder? In *Salinas v. Texas*, the Court presumably sought to resolve this question when it certified the question presented as "whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant's precustodial[3] silence as evidence of his guilt."[4] In the plurality opinion written by Justice Alito, the Court declined to answer this question, instead rejecting Salinas's Fifth Amendment claim because he did not expressly invoke his Fifth Amendment right to remain silent.[5] The plurality held that Salinas was "required to assert the privilege in order to benefit from it."[6] Thus, because Salinas never said, "I have the right to remain silent," "I plead the Fifth," or some other combination of

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[2] Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (illustrating how Salinas dealt with police questioning).

[3] What constitutes a "custodial" interview is up for debate. *See* Oregon v. Elstad, 470 U.S. 298, 315 (1985) (citing potential confusion over whether police questioning in the living room of a suspect who has not been told he is under arrest amounts to a custodial interrogation). However, note that the Supreme Court has held that the right to remain silent from *Miranda* is not triggered by a custodial interrogation: it is triggered by suspect's receipt of the required warnings. Fletcher v. Weir, 455 U.S. 603, 606–07 (1982). See *infra* Part II(a) for more on what constitutes custody for these purposes.

[4] *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).

[5] *Id.* at 2180. Many courts, including the Supreme Court, inquire whether the defendant "reasonably invoked" his right to remain silent. For example, in *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st. Cir. 1989), the First Circuit held that a prosecutor's use of a defendant's precustodial silence as substantive evidence of their guilt violates their Fifth Amendment right. The court stressed that Fifth Amendment privileges must be claimed in some form and further reasoned, "in determining whether the privilege has been invoked, the 'entire context in which the claimant spoke must be considered.'" *Id.* at 1565 (quoting United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972)). The Supreme Court strengthened this invocation requirement in the post-arrest context in 2010 in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). Additionally, in *Quinn v. United States*, 349 U.S. 155, 162–63 (1955), the Supreme Court noted that "[i]f an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a court in a prosecution . . . ."

[6] *Salinas*, 133 S. Ct. at 2178.

similar language during questioning and prior to being in police custody, he could not claim Fifth Amendment protections.[7]

The Fifth Amendment states that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Supreme Court has held that this provision prohibits the prosecution from using a defendant's decision not to testify at trial as evidence of his guilt.[8] The Court has also held that the same provision applies to a defendant's choice to remain silent during a custodial interrogation.[9] But the Supreme Court has yet to provide guidance regarding the admissibility of precustodial silence, resulting in "a large gray area in the law."[10]

Justice Thomas's concurrence in *Salinas* criticized the plurality for failing to hold that precustodial silence is admissible for substantive use, meaning as evidence of a defendant's guilt.[11] Relying heavily on Fifth Amendment language and jurisprudence, Justice Thomas argued that Salinas's claim should fail "even if he had invoked the privilege" because the prosecutor's comments regarding Salinas's silence to the jury did not compel Salinas to give incriminating testimony.[12] Justice Thomas concluded Salinas did not have the constitutional right to not have his precustodial silence used against him at trial.[13] Lower courts often rely on approaches similar to Justice Thomas's constitutional reading when

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[7] In *Salinas*, the Court said there is "no ritualistic formula" necessary to claim the privilege but simply "remaining silent" is not enough in most instances. *Id.* at 2181, 2186. The plurality in *Salinas* held that subject to a few narrow exceptions, one must expressly invoke their Fifth Amendment right to remain silent in precustodial circumstances. The Court invoked *Minnesota v. Murphy*, 465 U.S. 420, 425, 427 (1984), where it had previously ruled that a "witness who desires its protection 'must claim it.'" *Id*. at 2178 (citing *Murphy*, 465 U.S. at 427). When one fails to invoke the privilege, the silence or answers are properly admitted into the trial. Most importantly, the Court states "a defendant normally does not invoke the privilege by remaining silent," relying on its decision in *Roberts v. United States*, 445 U.S. 552, 560 (1980). *Id.* at 2181. According to the *Salinas* plurality, only two exceptions exist to the general rule that one must invoke their right to remain silent in a precustodial context. *Id.* at 2179. First, the defendant need not take the stand and assert the privilege at his own trial. Griffin v. California, 380 U.S. 609, 613–15 (1965). Second, government coercion sometimes makes the privilege attach automatically. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467−68 & n.37 (1966).

[8] *Griffin*, 380 U.S. at 615.

[9] Berkemer v. McCarty, 468 U.S. 420, 434 (1984).

[10] Justin I. Hale, Weitzel v. State of Maryland: *Turning Gray Into Black and White—The Evidentiary Analysis Approach to Pre-arrest Silence*, 29 AM. J. TRIAL ADVOC. 429, 435 (2005).

[11] *Salinas*, 133 S. Ct. at 2184. (Thomas, J., concurring).

[12] *Id.*

[13] *Id.*

permitting a prosecutor to use a defendant's silence as substantive evidence of guilt at trial.[14]

Justice Breyer's *Salinas* dissent similarly relied on Fifth Amendment language and jurisprudence to reach a contrary conclusion.[15] Breyer argued that allowing a prosecutor to comment on a suspect's silence "would undermine the basic protection that the Fifth Amendment provides," and concluded that those in precustodial circumstances should not have to expressly invoke their Fifth Amendment rights.[16]

While the entire *Salinas* Court assessed the admissibility of precustodial silence from a constitutional standpoint,[17] this Comment instead examines the arguments from an evidentiary perspective. It explains the relevance of precustodial silence and its potential to have an unfairly prejudicial impact according to the Federal Rules of Evidence. Traditionally, courts have only alluded to this type of analysis.[18] Courts may use this evidentiary analysis to answer whether precustodial silence should be used as substantive evidence[19] of a person's guilt.

This Comment argues that courts should use an evidentiary analysis rather than a constitutional analysis and determine issues of precustodial silence admissibility on a case-by-case basis. When faced with a suspect's precustodial silence, courts should adhere to standard evidentiary law in determining whether a suspect's silence in a particular case is probative of guilt,[20] and if it is, weigh its probative value against the potential for unfair prejudice.[21] This Comment also provides support for the proposition that

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[14] *See, e.g.*, United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991); United States v. Butler, 924 F.2d 1124, 1129–30 (D.C. Cir. 1991). These cases all hold that the Fifth Amendment allows prosecutors to use prearrest, pre-*Miranda* silence as evidence of the suspect's guilt.

[15] *Salinas*, 133 S. Ct. at 2185. (Breyer, J., dissenting).

[16] *Id*.

[17] Fifth Amendment language and jurisprudence is often referred to as the "constitutional approach" or "constitutional analysis" in this Comment.

[18] *See, e.g.*, People v. Rogers, 68 P.3d 486, 492 (Colo. App. 2002); State v. Moore, 965 P.2d 174, 179 (Idaho 1998). These cases primarily utilize constitutional analyses but allude to evidentiary analyses of precustodial silence as well.

[19] "Substantive use" of evidence refers to evidence offered to prove actual facts in question, rather than to attack a witness or party's credibility (impeachment evidence). See FED. R. EVID. 607 for an example of when evidence is used for impeachment purposes; see also subparts I(A(2)(i–ii)) for a more in depth analysis of substantive and impeachment use of evidence. As used in this Comment, "substantive use" means "as evidence of guilt." Jane Elinor Notz, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009, 1009 (1997).

[20] FED. R. EVID. 401.

[21] FED. R. EVID. 403.

precustodial silence is rarely probative of guilt, and thus this Comment argues that a court's application of the aforementioned balancing test should usually result in the exclusion of such evidence.

Part I of this Comment provides background on the Fifth Amendment, including its application to precustodial and custodial settings. Additionally, Part I contains a brief description of what courts have termed a "custodial" setting, in which defendants have a Fifth Amendment right to not have their silence used against them, as established in *Miranda*.[22] Part I also examines the use of silence for both impeachment and substantive purposes, and considers how *Salinas* fits into this broader discussion. Finally, Part I describes the current method most courts use to determine the admissibility of precustodial silence: the constitutional approach.

Part II of this Comment discusses the evidentiary approach to admissibility of precustodial silence. It argues that while more research is needed, existing research indicates that silence should usually not be admitted as evidence because it is rarely relevant (i.e., not probative of guilt). Furthermore, even in rare instances where it is relevant, it is unfairly prejudicial. Thus, silence should rarely be admissible as substantive evidence of a suspect's guilt in a criminal trial.

I. BACKGROUND

A. HISTORY AND PURPOSE OF THE FIFTH AMENDMENT

The Fifth Amendment protects against abuses of governmental authority.[23] Courts have applied Fifth Amendment protections in many situations where individuals may incriminate themselves. Aside from finding that the Amendment protects one's right to not take the stand at one's own trial, courts have also extended this privilege against compelled self-incrimination to coercive situations (like custodial interrogations).[24]

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

[23] *Amendment V*, THE CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, *archived at* http://perma.cc/4EFS-TBJG (explaining that the States expressed a desire to create an amendment that would prevent an abuse of their powers).

[24] *See supra* text accompanying note 9. The privilege applies whether the witness is in a federal court or, under the incorporation doctrine of the Fourteenth Amendment, in a state court. Malloy v. Hogan, 378 U.S. 1, 3 (1964). It also applies regardless of whether the proceeding is civil or criminal in nature. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); *Miranda*, 384 U.S. 436, 444 (1966) (stating that custodial interrogation is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of movement before being questioned as to the specifics of the crime). There are several examples of the Supreme Court invalidating the use of evidence when it was obtained under

Examining the Framers' purpose when they drafted the Amendment is one way to better understand the privilege today. At least one scholar concludes that the "drafters of the Fifth Amendment never envisioned such a broad interpretation of the [Amendment's] language," especially in out-of-court terms.[25] The Framers certainly did not develop the Fifth Amendment for guilty people to mislead the justice system.[26] But to what extent is the Fifth Amendment intended to protect the innocent? One popular theory asserts that the Fifth Amendment is intended to uphold the values of the adversary system.[27] According to this line of reasoning, the prosecution should be forced to prove its case without any help from the defendant.[28]

1. Miranda v. Arizona

Other experts argue the Fifth Amendment is designed to deter police misconduct, like delaying formal arrest or the delivery of *Miranda* warnings.[29] A variety of similar actions may ensure that a defendant's silence is admissible. For example, since the early twentieth century, the Supreme Court has held inadmissible confessions obtained through torture or coercion.[30] Another primary theory is that the Fifth Amendment is meant to prevent individuals from facing the "'cruel trilemma' of incriminating himself, perjuring himself under oath, or being held in contempt of court by refusing to answer in an interrogation."[31]

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coercive circumstances. For example, in *Chambers v. Florida*, 309 U.S. 227, 239–42 (1940), the Court held a confession obtained after five days of prolonged questioning, during which time the defendant was held without being allowed to speak to others, to be coerced. In *Ashcraft v. Tennessee*, 322 U.S. 143, 150 (1944), the suspect had been interrogated continuously for thirty-six hours under electric lights. In *Haynes v. Washington*, 373 U.S. 503, 514 (1963) the Court held that an "unfair and inherently coercive context" including a prolonged interrogation rendered a confession inadmissible.

[25] *See* Adam M. Stewart, *The Silent Domino: Allowing Pre-arrest Silence As Evidence of Guilt and the Possible Effect on* Miranda, 37 SUFFOLK U. L. REV. 189, 207 (2004). Historically, the protection against compelled self-incrimination was directly related to the ability to challenge official government ideology relating to political and religious freedom. AKHIL REED AMAR, THE BILL OF RIGHTS 82–83 (1998).

[26] Stewart, *supra* note 25, at 205.

[27] *See* Notz, *supra* note 19, at 1019.

[28] *Id.* at 1020.

[29] *See* Sara Ciarelli, Comment, *Pre-arrest Silence: Minding That Gap Between Fourth Amendment Stops and Fifth Amendment Custody*, 93 J. CRIM. L. & CRIMINOLOGY 651, 654–55 (2003) ("[S]ome scholars have viewed [the Fifth Amendment] as a relic from 17th century efforts to abolish the coercive questioning practices of Ecclesiastical courts.").

[30] *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936).

[31] Ciarelli, *supra* note 29, at 655 (citing Albert W. Alschuler, *A Peculiar Privilege in*

Frequent disputes over the Fifth Amendment's purpose and evolving case law have formed the "right to remain silent" as we know it today.[32] In the early twentieth century, the Supreme Court broadened the application of the Fifth Amendment,[33] paving the way for the landmark case *Miranda v. Arizona*.[34] In *Miranda*, the Court extended the Fifth Amendment privilege to custodial settings due to their coercive nature.[35] The Court stated that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[36] The Court further stated that these "procedural safeguards" include informing individuals of their rights to (1) remain silent, (2) consult with an attorney and have an attorney present during questioning, and (3) have an attorney appointed if they cannot afford one.[37] Such safeguards are commonly known as "*Miranda* rights."

The opinion did not provide definitive guidance regarding precustodial situations.[38] Therefore, *Miranda* created a significant distinction between an individual's Fifth Amendment rights in precustodial and custodial contexts.

Historical Perspective, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 181, 185–90 (R.H. Helmholz, et al. eds., 1997)).

[32] *Id. See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). In *Murphy*, the Court stated that the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations . . . . 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 . . . .'" *Id.* (citation omitted).

[33] Ciarelli, *supra* note 29, at 655–56.

[34] *Id.* at 656. Though the Court in *Miranda v. Arizona* did not discuss the particular guarantees of the Fifth Amendment, it is *Miranda v. Arizona* that gave us our present-day "*Miranda* right(s)" to remain silent. Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of* Miranda *and Why It Remains Vital Today*, 40 VAL. U. L. REV., 685, 693–94 (2006).

[35] *See* Miranda v. Arizona, 384 U.S. 436, 456–58 (1966) (reasoning custodial interrogations are inherently coercive and require Fifth Amendment protection).

[36] *Id.* at 444.

[37] *Id.* at 473. However, this was a limited extension, as the Court explicitly stated that its decision did not affect "on-the-scene questioning" and other preliminary inquiries intended to initiate police investigations. *Id*. at 477–78 (differentiating between preliminary questioning and custodial investigations that occur post-arrest). Additionally, a subsequent Supreme Court case also stood for the proposition that a person in custody is entitled to all the procedural safeguards enunciated in *Miranda*. Berkemer v. McCarty, 468 U.S. 420, 434 (1984).

[38] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Lisa Savadjian, Student Scholarship, *Silence Should Not Speak Louder Than Words: The Use of Pre-arrest, Pre-*Miranda *Silence as Substantive Evidence of Guilt* 26 (Seton Hall Law, Working Paper No. 299, 2013), *available at* http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1299&context=student_scholarship, *archived at* http://perma.cc/3M4S-BX8X.

While *Miranda* has been sharply criticized in subsequent decisions,[39] the Supreme Court has consistently held that if the defendant explicitly invoked his right to remain silent while in custody,[40] the prosecution may not use that silence as evidence of guilt.[41]

Subsequent court decisions have further clarified what constitutes a "custodial interrogation." Generally, a person detained in jail or under arrest is deemed to be in custody.[42] In less obvious scenarios, it may be more difficult to ascertain whether a person is "in custody." To determine whether a person is in custody one must ascertain, given all of the "circumstances surrounding the interrogation," how the person would have gauged his freedom of movement.[43]

Perhaps unsurprisingly, a circuit split has developed over whether a prosecutor can make use of a defendant's precustodial silence in its case-in-chief.[44] The *Salinas* plurality declined to answer this question, leaving the circuit courts divided for the foreseeable future.

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[39] Stewart, *supra* note 25, at 195–96 (listing increasing number of exceptions to *Miranda*). The primary exception to the *Miranda* holding is the exception for admitting statements for impeachment purposes, even if the statement was in violation of *Miranda*. *Id.* at 195.

[40] One must explicitly invoke their right to remain silent in custodial situations. See *supra* note 5 for discussion of *Berghuis v. Thompkins*.

[41] *See*, *e.g.*, Doyle v. Ohio, 426 U.S. 610 (1976) (upholding *Miranda v. Arizona*). *But see* Stewart, *supra* note 25, at 196–97 (arguing that *Dickerson v. United States*, 530 U.S. 428 (2000), "feebly" upheld *Miranda* and asserted that the rights under that case were constitutional in nature).

[42] *See* California v. Beheler, 463 U.S. 1121, 1123 (1983) for more information on what constitutes a "custodial" interrogation.

[43] Howes v. Fields, 132 S. Ct. 1181, 1189 (2012) (citing Stansbury v. California, 511 U.S. 318, 322–23, 325 (1994)).

[44] The First, Sixth, Seventh, and Tenth Circuits have held that admission of such evidence violates the Fifth Amendment privilege against self-incrimination. *See* Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989) (holding petitioner's statement was a clear invocation of his Fifth Amendment right to silence and therefore the admission violated his right against self-incrimination); U.S. *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987) (holding the Fifth Amendment right applied equally to defendant's silence before trial and arrest); Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) (holding that the use of defendant's prearrest silence as substantive evidence of guilt violates Fifth Amendment privilege against self-incrimination), *cert. denied*, 531 U.S. 1035 (2000); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991) (relying on *Griffin* to hold that any comment on silence during trial is inappropriate, even though the exact language of *Griffin* was limited to prohibiting commentary on a defendant's failure to take the stand and testify). Conversely, the Fourth, Fifth, and Eleventh Circuits have held admission of silence as substantive evidence of guilt does not violate the Fifth Amendment privilege. *See* United States v. Quinn, 359 F.3d 666, 678 (4th Cir. 2004); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991).

2. Use of Silence as Evidence: Impeachment and Substantive Use

Regardless of whether an individual's silence occurs pre- or post-custody, there is a significant difference between using silence for impeachment and substantive purposes. If a witness testifies at trial, he or she may be impeached by an attorney on either side of the case. Evidence proffered to impeach a witness is intended to undermine the credibility of his or her testimony. Meanwhile, evidence used "substantively" helps a factfinder determine whether a suspect is guilty or innocent.[45] Two seminal Supreme Court cases, *Jenkins v. Anderson*[46] and *Griffin v. California,*[47] illustrate how the rules for proffering evidence of one's silence apply in each of these circumstances.

i. Impeachment Use of Precustodial Silence: *Jenkins v. Anderson*

In the impeachment context, when a defendant testifies at trial, the prosecutor may attempt to undermine the defendant's credibility by introducing his previous silence, if doing so would challenge the defendant's statements on direct examination. For example, imagine that the police, prior to trial, asked a burglary suspect whether he had seen anyone enter his neighbor's home, and the suspect remained silent in response to the question. Subsequently, the suspect testified at trial that he saw someone enter the home on the night in question. As this testimony would be inconsistent with the suspect's previous silence, the prosecutor could introduce evidence of that earlier silence. In doing so, the prosecutor would impeach the defendant by questioning the defendant's credibility. Juries are prohibited from drawing inferences of guilt from evidence used for impeachment purposes.[48]

In *Jenkins*,[49] the Supreme Court held that the use of precustodial silence for impeachment purposes does not violate the Fifth Amendment.[50]

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[45] *See supra* note 19 for further information on impeachment and substantive use of evidence.

[46] 447 U.S. 231 (1980) (holding that precustodial silence may be used for impeachment purposes).

[47] 380 U.S. 609 (1965) (holding that it is a violation of a defendant's Fifth Amendment rights for the prosecutor to comment to the jury on the defendant's declining to testify, or for the judge to instruct the jury that such silence is substantive evidence of guilt).

[48] *See supra* note 19.

[49] In *Jenkins*, the defendant stabbed a man to death and fled the scene, but was apprehended by police two weeks later. At trial, the defendant claimed self-defense. The prosecutor questioned the defendant as to why he did not explain to the arresting officer that he acted in self-defense. The defendant appealed his conviction, arguing the prosecution's comment on his silence violated his Fifth Amendment right. *See Jenkins*, 447 U.S. at 234.

The Court applied an impermissible burden test[51] to determine whether society's interest in preserving the truth-seeking function of trials outweighs an individual's Fifth Amendment rights.[52] Under this test, the Court weighed the legitimacy of law enforcement practices—ascertaining truth in trials—against the extent to which that practice impairs the policies behind the Fifth Amendment.[53] In holding that the prosecutor's use of Jenkins's silence to impeach Jenkins's credibility during trial did not violate the Fifth Amendment, the Court reasoned that some burden on Fifth Amendment privilege is allowable.[54] The Court stated that the defendant's precustodial silence could be used against him for impeachment purposes because no governmental action compelled an individual to remain silent while he was not in custody.[55]

Justice Stevens, in his concurring opinion,[56] rejected Jenkins's Fifth Amendment claim "because the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."[57] Stevens further reasoned that because the precustodial context involves "no official compulsion whatever," there is no reason why a "voluntary decision to do one or the other should raise any issue under the Fifth Amendment."[58]

ii. Substantive Use of Precustodial Silence: *Griffin v. California*

While the *Jenkins* holding affirmed the use of a defendant's precustodial silence in the impeachment context only, the decision supplied strong constitutional arguments for prohibiting the substantive use of such evidence. When a defendant's silence is introduced as substantive evidence, the defendant usually has exercised his right not to testify at trial.[59] The

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[50] *See id*. at 240. For example, a court can allow impeachment use of prior silence if they determine that it is inconsistent with his present statements, and thus probative of the defendant's credibility on a certain issue. *Id.* at 239.

[51] *See id.* at 250. This test was first alluded to by the Court in *Raffel v. United States*, 271 U.S. 494 (1926).

[52] *Jenkins*, 447 U.S. at 236–37; *see also* Notz, *supra* note 19, at 1018.

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

[54] *Id.* at 240–41. *Jenkins* has been reaffirmed and extended in *Fletcher v. Weir*, 455 U.S. 603, 606 (1982).

[55] *Jenkins*, 447 U.S. at 240.

[56] It is notable that the Texas Court of Criminal Appeals later relied on Justice Stevens's *Jenkins* concurrence when deciding *Salinas*. Salinas v. State, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012).

[57] *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring).

[58] *Id.* at 243–44.

[59] Meaghan Elizabeth Ryan, Note, *Do You Have the Right to Remain Silent?: The*

prosecutor may introduce evidence of the defendant's silence to suggest knowledge of guilt or prove some other element of the crime.[60] Prosecutors and juries may fallaciously assume that innocent suspects will profess their innocence in the precustodial questioning context.[61]

The critical difference between impeachment and substantive uses of evidence lies in the decision by the suspect-turned-defendant not to take the stand at trial.[62] If the defendant does not take the stand, the prosecutor will have no opportunity to impeach the defendant, and must proffer such evidence in its case-in-chief instead.[63]

The Court prohibited the substantive use of a suspect's silence in the trial context in *Griffin v. California*. While *Griffin* involved a defendant who elected not to take the stand at his trial, there is a strong argument that the Court may extend the *Griffin* holding to precustodial contexts in the future

In *Griffin*, the Court held that the Fifth Amendment prohibits a prosecutor from commenting on a defendant's decision not to testify at trial.[64] The prosecutor in *Griffin* expressly suggested that the jury draw a negative inference from the defendant's choice not to take the stand.[65] The Court reasoned that commenting on the refusal to testify harkens back to the "inquisitorial system of criminal justice" that the Fifth Amendment outlawed.[66] The Court relied on the "penalty doctrine"[67] in holding that comment by a prosecutor on a defendant's silence violates the Fifth Amendment; permitting such comment is akin to a court-imposed "penalty" following a defendant's exercise of a constitutional privilege.[68]

Substantive Use of Pre-Miranda *Silence*, 58 ALA. L. REV. 903, 905 (2007).

[60] *Id.* (citing United States v. Frazier, 394 F.3d 612, 618–20 (8th Cir. 2005)).

[61] *Id.*

[62] *See* United States v. Moore, 104 F.3d 377, 388 (D.C. Cir. 1997).

[63] There is also the chance that the defendant testifies to his own silence, in which case the prosecutor cannot impeach either. However, this situation is outside the scope, as this Comment focuses on the factual circumstances in which a defendant does not want his silence to be admissible.

[64] Griffin v. California, 380 U.S. 609, 613 (1965).

[65] *Id.* at 610.

[66] *Id.* at 614 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

[67] This term is used by some legal scholars to describe the Court's holding that the Fifth Amendment guarantees not just freedom from traditionally prohibited forms of compulsion (e.g., torture), but "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will" and the right "to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964). *See, e.g.,* Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 245 (2010).

[68] *Griffin*, 380 U.S. at 614 ("[W]hat the jury may infer, given no help from court, is one

The First, Sixth, Seventh, and Tenth Circuits have extended the Court's reasoning in *Griffin* to bar the substantive use of precustodial silence.[69] As previously noted, *Miranda* extended the Fifth Amendment privilege beyond the trial context[70] to the custodial context.[71] In broadly applying the penalty doctrine, these courts further reasoned that an individual's precustodial silence also cannot be used to penalize a suspect-turned-defendant.

These circuit courts often relied on constitutional arguments. For example, in *Coppola v. Powell*, the First Circuit reasoned that "the protection of the fifth amendment is not limited to those in custody or charged with a crime."[72] The court further noted that "[t]he privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application."[73] The court also attempted to examine the Framers' intention behind the Fifth Amendment.[74] In sum, at least four circuit courts hold that a prosecutor may not proffer evidence of a defendant's precustodial silence to infer guilt at trial.[75]

When making constitutional arguments regarding the admissibility of precustodial silence, courts often analyze the amount of compulsion on a defendant to determine if his Fifth Amendment rights have been violated. This is because the Amendment's plain language protects a criminal defendant from being compelled to testify against himself. Notably, some

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thing. What it may infer when court solemnizes the silence of the accused into evidence against him is quite another.").

[69] *See supra* note 44.

[70] Notz, *supra* note 19, at 1016 (explaining the privilege may be asserted in any situation where the defendant may make self-incriminating statements that could be used against him in a criminal proceeding).

[71] *See supra* text accompanying notes 35–37.

[72] 878 F.2d 1562, 1566 (1st Cir. 1989).

[73] *Id.* (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)) (citation omitted).

[74] *Id.* (citation omitted).

[75] Like federal circuit courts, state courts have not reached consistent results on the substantive use of precustodial silence. State courts usually discuss the implications of precustodial silence under their own state constitutions and rules of evidence. For example, Alaska's state constitution bars the use of pre-*Miranda* silence. *See* Nelson v. State, 691 P.2d 1056, 1059 (Alaska Ct. App. 1984). Further discussion of the state court split is outside the scope of this Comment.

Supreme Court justices have since criticized the *Griffin* decision[76] on grounds that no government compulsion existed for Griffin to testify.[77]

3. Examining the Constitutional Approach to Precustodial Silence Further: Baxter v. Palmigiano

Another prominent Fifth Amendment case focused on compulsion when a defendant remained silent in a custodial setting. In *Baxter v. Palmigiano*, the Supreme Court noted that "[t]he compulsion upon [the jailed defendant/petitioner] is . . . obvious . . . . [The defendant] was told that criminal charges might be brought against him. [The defendant] was also told that anything he said in the disciplinary hearing could be used against him in a criminal proceeding."[78] The Court stated that "the possibility of self-incrimination was just as real and the threat of a penalty just as coercive."[79] Thus, the Court invoked *Griffin*'s holding that it was "constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his [or her] case."[80] Compulsion is referenced directly in Fifth Amendment language and thus courts that reference compulsion make a constitutional argument regarding the admissibility of silence.

The holdings in *Jenkins*, *Griffin*, and *Baxter* use the language of compulsion to reach their holdings on the admissibility of silence as substantive and impeachment evidence.[81] Whether circumstances "compel" a suspect to invoke his Fifth Amendment privilege is the main dispute between the parties in these cases. Courts have used this factor to determine whether precustodial silence may be used substantively at trial.[82]

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[76] *See*, *e.g.*, Mitchell v. United States, 526 U.S. 314, 331–41 (1999) (Scalia, J., dissenting).

[77] Ciarelli, *supra* note 29, at 661–62 (explaining that some Supreme Court justices oppose the extension of *Griffin*).

[78] Baxter v. Palmigiano, 425 U.S. 308, 333 (1976).

[79] *Id.*

[80] Griffin v. California, 380 U.S. 609, 613 (1965).

[81] *See* Jenkins v. Anderson, 447 U.S. 231, 240 (1980); *Griffin*, 380 U.S. at 614; *Baxter*, 425 U.S. at 333. *Jenkins* held that the Fifth Amendment is not violated by the use of precustodial silence to impeach a criminal defendant's credibility. 447 U.S. at 231. *Griffin* held that the Fifth Amendment is violated when a prosecutor comments on a suspect's failure to testify as substantive evidence of his guilt. 380 U.S. at 609.

[82] *See supra* note 44.

B. *SALINAS V. TEXAS*

The *Jenkins* and *Griffin* holdings leave open the question of whether substantive use of precustodial silence violates the Fifth Amendment.[83] This was the issue before the Supreme Court in *Salinas v. Texas*.[84] Police questioned defendant, Genovevo Salinas, about the 1992 murders of two brothers, whose house he visited the night before their murders.[85] Salinas voluntarily accompanied police to the station for nearly an hour of precustodial questioning.[86] But when police asked Salinas whether the shell casings at the scene would match his shotgun, Salinas fell silent.[87] According to the police officer questioning him, Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[88] After a few moments of silence, the officer moved to another line of questions, which Salinas answered.[89] Days after his interview, police gathered sufficient evidence to charge him with murder when they obtained a statement from a man who claimed he heard Salinas confess to the killings.[90] However, by this point Salinas had disappeared.[91] After evading capture for fifteen years, Salinas was found living in the Houston area under an assumed name.[92] He was eventually charged and tried for the brothers' murders in 2007.[93] Salinas did not testify at trial, and thus there was no opportunity to use evidence of his prior silence to impeach him. However, during their closing argument, and over the defense's objection, prosecutors suggested Salinas's precustodial silence was substantive evidence of his guilt.[94]

The jury convicted Salinas, and he appealed to the Texas Court of Criminal Appeals on the ground that use of his silence in a precustodial

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[83] *Griffin*, 380 U.S. 609 (1965); Ryan, *supra* note 59, at 907.

[84] *See supra* text accompanying note 4.

[85] Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).

[86] *Id.* at 2178; Aurora Maoz, Note, *Empty Promises:* Miranda *Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1316 (2012) (discussing that Miranda rights only apply when the subject is in custody and subject to interrogation). For more information on whether an interview is considered custodial or noncustodial, see United States v. Cavazos, No. 12-4701, slip op. (4th Cir. June 21, 2013) (illustrating that officers often read suspects their rights in noncustodial investigations as well).

[87] *Salinas*, 133 S. Ct. at 2178.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

interview violated his Fifth Amendment right against self-incrimination.[95] While acknowledging that the United States Supreme Court had not decided the issue,[96] the Texas Court of Criminal Appeals nonetheless relied on Justice Stevens's *Jenkins* concurrence in holding there was no violation of Salinas's Fifth Amendment privilege.[97] The Court reasoned that the Fifth Amendment did not protect precustodial silence because the interaction with police was not "compelled" within its meaning.[98] Salinas again appealed, and the Supreme Court granted certiorari.[99]

The Supreme Court did not address the question the lower courts wrestled with: whether substantive use of a suspect's precustodial silence violates the Fifth Amendment.[100] Instead, the Court rejected Salinas's Fifth Amendment claim "because [Salinas] did not invoke the privilege during his [precustodial] interview."[101]

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[95] *Id.*

[96] Salinas v. State, 369 S.W.3d 176, 178 (Tex. Crim. App. 2012).

[97] *Id.* at 179.

[98] *Id.*

[99] *See Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).

[100] *Id.* at 2179 (plurality opinion).

[101] *Id.* at 2179. Justice Alito noted that Salinas could not benefit from either of the two previously recognized exceptions to the invocation requirement. His silence occurred in a precustodial context, not at trial, where the first exception applies. *Id.* at 2179. Second, Justice Alito concluded that a witness "need not expressly invoke the privilege where some form of official compulsion denies him a 'free choice to admit, deny or refuse to answer.'" *Id.* (quoting Garner v. United States, 424 U.S. 648, 656–57 (1976)). According to Justice Alito, Salinas's interview with the police was voluntary and thus not coercive: he agreed to accompany police officers to the station and he was free to leave at any time during the interview. *Id.* at 2180. Thus, such official compulsion was not found in *Salinas v. Texas*. Therefore, the *Salinas* Court held that unless one explicitly invokes the right to remain silent before an arrest, prosecutors can use that silence as evidence of guilt at trial. *Id.* at 2183–84. Furthermore, the Court noted that there is "no ritualistic formula" necessary to claim the privilege, but simply remaining silent is not enough. *Id.* at 2186 (citing Quinn v. United States, 349 U.S. 155, 164 (1955)).

Conversely, Justice Breyer's dissent criticized Alito's invocation argument in three different ways. First, it attacked Justice Alito's argument that precustodial circumstances are not inherently coercive. *Id.* at 2185–86 (Breyer, J., dissenting). Justice Breyer stated that the precustodial setting is often coercive. Many people are nervous or distrustful of police, and the unfamiliar circumstances surrounding a police headquarters or police questioning may prove unnerving. *Id.* Breyer argued that the standard should be whether one can "fairly infer from an individual's silence" that he is asserting a constitutional right. *Id.* at 2191. Circumstances, not express invocation, trigger the Fifth Amendment. *Id.* at 2189. Second, Justice Breyer asserted that there was no special reason the police had to know whether Salinas was relying on the Fifth Amendment. *Id.* at 2190. Breyer noted the irony of not allowing one to assert their right to remain silent by actually being silent. Salinas's silence was "sufficient to put the [government] on notice of the apparent claim of the privilege." *Id.* at 2190 (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)). Third, Breyer asserted

C. *SALINAS*: THOMAS'S CONCURRENCE, BREYER'S DISSENT, AND THE USE OF CONSTITUTIONAL ARGUMENTS

The standard constitutional approach to the admissibility of a defendant's silence requires a court to make two key inquiries.[102] First, to assess the extent of compulsion, a court determines whether the suspect was questioned in a coercive atmosphere that may have resulted in compelled testimony.[103] Second, if a court finds compulsion, it then examines whether the Fifth Amendment privilege against self-incrimination was invoked as a "reasonable response" to this coercive atmosphere.[104]

This two-pronged approach may be applied either broadly or narrowly with respect to the Fifth Amendment. The primary difference between the broad and narrow views turns on whether one believes precustodial encounters with law enforcement to be coercive and police-dominated.

1. The Narrow Constitutional Approach

While the plurality opinion in *Salinas* did not rule on the issue presented, Justice Thomas's concurrence, in which Justice Scalia also joined, argued that the Court should have applied a narrow constitutional approach to reach its holding that evidence of Salinas's silence was admissible. Both Justices approved of the prosecution's substantive use of Salinas's precustodial, pre-*Miranda* silence,[105] and they argued for this view on constitutional grounds. Justice Thomas advocated overruling *Griffin*, which held that the prosecution cannot use a defendant's failure to testify at trial as evidence of guilt.[106] Thomas reasoned that, based on the plain language of the Fifth Amendment, a defendant is not compelled to testify against himself "simply because a jury has been told that it may draw an

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there are two circumstances when a Court should insist a defendant expressly invoke the Fifth Amendment: first, when circumstances surrounding the silence do not give rise to an inference that the defendant intended to assert his Fifth Amendment privilege, and second, when the questioner had a special need to know whether the defendant sought to rely on the Fifth Amendment. *Id.* at 2186–87. According to Justice Breyer, neither was the case with Salinas, whose silence should have been sufficient to invoke his right to remain silent.

[102] Ciarelli, *supra* note 29, at 666.

[103] *Id.*

[104] *Id.* A brief discussion of the invocation requirement may be found in the Introduction. Any discussion of the Court's invocation requirement holding is beyond this Comment's scope.

[105] *See Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).

[106] *Id.* ("[*Griffin*] 'lacks foundation in the Constitution's text, history, or logic' and should not be extended." (citing Mitchell v. United States, 526 U.S. 314, 341 (1999) (Thomas, J., dissenting))).

adverse inference from his silence."[107] Therefore, Thomas's concurrence heavily relied on a narrow view of the Fifth Amendment[108] in concluding there is no compulsion inherent in the precustodial context which triggers Fifth Amendment protections.

Those who narrowly construe the Fifth Amendment argue that precustodial interrogation is not coercive, and that the Fifth Amendment only protects against government acts which compel an individual to incriminate himself.[109] Adherents of the narrow view argue the prosecution should have the right to use evidence of precustodial silence because government agents do not typically compel suspects to remain silent in such circumstances.[110] Furthermore, they argue that the precustodial context is not compulsive because the suspect is "free to leave at any time."[111] In sum, they argue that the government presenting evidence of precustodial silence as evidence of guilt "does not rise to the level of compulsion proscribed by the Fifth Amendment."[112] Preliminary investigations are a crucial part of law enforcement, and therefore, the Fifth Amendment should not strip the police or other law enforcement of this power. The narrow perspective argues that "an individual's decision to remain silent is both voluntary and within his exercise of free will."[113]

2. The Broad Constitutional Approach

Conversely, those who broadly construe the Fifth Amendment, such as Justice Breyer in his *Salinas* dissent, assert that the precustodial context is inherently coercive.[114] This assertion acknowledges that the threat of future prosecutorial comments concerning a suspect-turned-defendant's silence sometimes compels an individual to speak, and possibly to incriminate himself.[115] If silence is admissible as a means of proving guilt, for example, then a defendant may feel the only way to correct the misconception that his silence evidences his guilt would be to take the stand.[116]

Furthermore, adherents to the broad Fifth Amendment view assert there is an impermissible "penalty imposed" on an individual's Fifth

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[107] *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).
[108] *See supra* note 11–14 and accompanying text.
[109] *See Salinas*, 133 S. Ct. at 2180 (plurality opinion).
[110] *See Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring); Hale, *supra* note 10, at 435.
[111] *Salinas*, 133 S. Ct. at 2180.
[112] Stewart, *supra* note 25, at 204.
[113] *Id.* at 205.
[114] *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting).
[115] Stewart, *supra* note 25, at 199.
[116] *Id.*

Amendment rights when this silence is admitted at trial.[117] For example, this view would argue Salinas was penalized for exercising his right to remain silent in the face of police questioning, because this silence was later used against him to infer guilt.[118] Thus, they interpret the Fifth Amendment to prevent a suspect's silence from being used against him in court.[119]

Additionally, the Ninth Circuit (which takes a broad view) held in *United States v. Whitehead* that "the right to remain silent is derived from the Constitution and not from the *Miranda* warnings, and since the Constitution applies in all situations, including precustodial ones, a prosecutor's comment on a defendant's precustodial silence violates the Fifth Amendment of the Constitution.[120] In short, the privilege against self-incrimination would be rendered ineffective if the prosecution could use an accused's silence against him.[121]

One suggestion is that the Supreme Court should formally adopt a compulsion test similar to the first prong of the aforementioned approach, which would permit a jury to draw "rational inferences" from silence that is not in response to pressure from law enforcement.[122] Another proposal suggests courts examine the scope of detention, the length of detention, the defendant's state of mind, and how a reasonable person would view the circumstances at the time.[123] However, such approaches are needlessly complex compared to the evidentiary analysis this Comment prescribes.

II. ANALYSIS: COURTS SHOULD USE EVIDENTIARY ANALYSIS TO DETERMINE ADMISSIBILITY OF PRECUSTODIAL SILENCE ON A CASE-BY-CASE BASIS

Thirty-three years after deciding *Jenkins*, the Supreme Court granted certiorari in *Salinas*. It appeared the Court would finally address whether substantive use of a suspect's precustodial silence violates the Fifth

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[117] *See supra* note 67.

[118] *See Salinas*, 133 S. Ct. at 2178 (plurality opinion).

[119] *See infra* Part II(a).

[120] United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000).

[121] The Idaho appellate court case, State v. Kerchusky, 67 P.3d 1283 (Idaho Ct. App. 2003), is instructive here. The prosecution argued that the defendant's precustodial silence should be admissible because it was being offered to show that he was not surprised at the reference to the bank robbery, and he therefore must have had prior knowledge of the robbery. *Id.* at 1289. However, the court rejected this argument, saying the only reason for the prosecution to show the defendant had prior knowledge would be to thereby imply he must have been the robber. *Id.*

[122] Ciarelli, *supra* note 29, at 672.

[123] *Id.* at 679–80.

Amendment.[124] However, the Court did not rule on the issue, instead resolving *Salinas* on other grounds.[125] The Supreme Court should have held in *Salinas* that courts should use an evidentiary analysis to determine whether precustodial silence should be used in a prosecutor's case-in-chief.

The *Salinas* Court should have held that evidentiary analysis on a case-by-case basis is the best approach to determine the admissibility of precustodial silence for several reasons.

First, the Federal Rules of Evidence are a widely respected and utilized body of rules that are concise and easily applicable to numerous evidentiary situations. Under Rule 401, evidence is admissible only if it is relevant.[126] Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[127] Evidence is measured in terms of its "probative value": that is, how supportive it is of the fact sought to be proved.[128] Even if evidence (in this case, precustodial silence) is relevant, the evidence may still be excluded under Rule 403 if it is unfairly prejudicial.[129] The Advisory Committee Notes to the Federal Rules of Evidence explain that "'[u]nfair prejudice' within [the context of Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[130]

Second, courts have already shown some willingness to use evidentiary analysis. As early as 1957, the Supreme Court recognized that the evidentiary issue with precustodial silence had "grave constitutional overtones."[131] Since then, the Supreme Court, some circuit courts, and several state courts have shown at least some willingness to use evidentiary analysis to resolve questions regarding the admissibility of precustodial silence in lieu of the constitutional approach favored by the *Salinas*

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[124] *See* Salinas v. Texas, 133 S. Ct. 2174 (2013). For example, in 2000, the Court denied certiorari on *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), in which the Sixth Circuit had held that "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination."

[125] *See supra* note 5 and accompanying text.

[126] FED. R. EVID. 401.

[127] *Id.*

[128] Advisory Committee's Note to FED. R. EVID. 401.

[129] FED. R. EVID. 403 (stating "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence").

[130] Advisory Committee's Note to FED. R. EVID. 403.

[131] Grunewald v. United States, 353 U.S. 391, 423 (1957).

Court.[132] Furthermore, many courts applying evidentiary analysis have held that precustodial silence is not probative of guilt.[133]

In *Weitzel v. State*, for example, the Maryland Court of Appeals utilized evidentiary analysis to conclude that "pre[custodial] silence in police presence is inadmissible under Maryland evidence law as direct evidence of guilt."[134] Defendant Weitzel remained silent as he heard his friend tell a police officer that Weitzel had thrown the victim down the stairs.[135] Prosecutors attempted to use this evidence to illustrate Weitzel's guilt.[136] The court reasoned that precustodial silence in the presence of an officer was "too ambiguous to be probative."[137] The court noted that "silence is the natural reaction of many people in the presence of law enforcement," and hence "[w]hile silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best."[138] Other courts have reached similar conclusions using at least partially evidentiary grounds.[139] The *Weitzel* court stated in sum that precustodial silence is not a "tacit admission" and should not be treated as such.[140]

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[132] *See* Combs v. Coyle, 205 F.3d 269, 286 (6th Cir. 2000) ("Even if Combs's counsel failed to realize that use of the 'talk to my lawyer' statement as substantive evidence of guilt might be unconstitutional, counsel still should have objected to the statement on evidentiary grounds."); State v. Moore, 965 P.2d 174, 181 (Idaho 1998) ("The constitutional right against self-incrimination is not absolute, however, and applies only when the silence is used solely for the purpose of implying guilt."); State v. Leach, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, at ¶ 34 (Ohio 2004) ("A defendant's pre[custodial] silence is inherently ambiguous and, therefore, not probative of guilt."); Hartigan v. Commonwealth, 522 S.E.2d 406, 408–10 (Va. Ct. App. 1999); Spinner v. State, 75 P.3d 1016, 1025 (Wyo. 2003) ("[I]ndeed, the ***substantive*** use of 'silence' is generally of minimal probative value.").

[133] *See* Weitzel v. State, 863 A.2d 999, 999–1000 (Md. 2004); Hartigan v. Commonwealth, 522 S.E.2d 406, 410 (Va. Ct. App. 1999); Spinner v. State, 75 P.3d 1016, 1025 (Wyo. 2003).

[134] Weitzel v. State, 863 A.2d 999, 999–1000 (Md. 2004).

[135] *Id.* at 1000.

[136] *Id.*

[137] This holding overruled the court's previous decision in *Key-El v. State*, 709 A.2d 1305 (Md. 1998). In that case, the Maryland Court of Appeals ruled based on the tacit admission rule, which is premised on the assumption that an individual will not remain silent in the face of an accusation if he believes himself to be innocent. *Weitzel*, 863 A.2d at 1002.

[138] *Weitzel*, 863 A.2d at 1004–05.

[139] *See* State v. Moore, 965 P.2d 174, 181 (Idaho 1998); Hartigan v. Commonwealth, 522 S.E.2d 406, 409 (Va. Ct. App. 1999); Spinner v. State, 75 P.3d 1016, 1025 (Wyo. 2003).

[140] *Weitzel*, 863 A.2d at 1002 (rejecting the tacit admission rule and noting that "[w]e think the better view is that the evidence is too ambiguous to be probative when the 'pre-[custodial] silence' is in the presence of a police officer, and join the increasing number of

In *United States v. Hale*,[141] the Supreme Court also rejected the tacit admission rule, which assumes that an innocent man would deny a serious charge, and therefore, that a suspect silent in the face of an accusation has tacitly admitted the crime. The *Hale* Court noted the tacit admission rule did not withstand scrutiny because "["[i]n most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others."[142] The Court further reasoned it is illogical to infer guilt from silence.[143] The Court stated that normally,

> [s]ilence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.[144]

Third, a case-by-case analysis is the best approach to resolve the precustodial silence question of admissibility because there may be strong arguments for admitting or banning such evidence depending on the factual circumstances of a given case.

For example, proponents of precustodial silence admissibility as substantive evidence of guilt argue the defendant's choice to remain silent is relevant and not prejudicial.[145] First, they argue that a prosecutor's comment on a defendant's precustodial silence is only one piece of evidence the factfinder assesses before reaching a final conclusion.[146] Indeed, while there could be many reasons for one's silence, Justice Marshall noted in *Jenkins* that favorable inferences could be drawn from precustodial silence.[147] Proponents of admissibility also point to Rule 403's demanding standard: only evidence which rises to the level of being unfairly prejudicial will be excluded.[148] Thus, one could imagine factual circumstances where precustodial silence would be relevant to the case-in-chief and not prejudicial to the suspect-turned-defendant.

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jurisdictions that have so held.").

[141] 422 U.S. 171 (1975).

[142] *Id.* at 176.

[143] *Id.*

[144] *Id.*

[145] Stewart, *supra* note 25, at 202.

[146] *Id.* at 207.

[147] Jenkins v. Anderson, 447 U.S. 231, 248–49 (1980) (Marshall, J., dissenting); *see also* Stewart, *supra* note 25, at 203.

[148] Advisory Committee's Note to FED. R. EVID. 403.

Conversely, advocates of banning the substantive use of precustodial silence on evidentiary grounds are more persuasive. Evidence of precustodial silence is too ambiguous to be probative of guilt.[149] Justice Marshall commented that fear of false accusations and general nervousness are conceivable reasons for a suspect's silence in the precustodial context.[150] Silence is not "demonstrative of a particular thought or belief," and therefore it is quite unreliable when compared to other forms of evidence.[151] Silence is only "circumstantial" evidence, and "*argumentum ex silentio*," the idea that you can make an argument through silence, is a logical fallacy.[152] Other social science research suggests that non-verbal clues such as silence are not probative of guilt or truthfulness.[153]

Furthermore, "a defendant likely believes that he has the right to remain silent before he is informed of his right and undoubtedly believes that his silence cannot be used against him even if he is not read his rights."[154] As the *Key-El* Court noted, the underlying assumption that an innocent person always objects when confronted with a baseless accusation is "inappropriately simple."[155] Moreover, the argument that silence suggests guilt rests on the false assumption that an innocent suspect will never remain silent. Such an assumption is greatly undercut by the myriad explanations for one's silence, especially in the precustodial context.

Even if silence is probative in a given situation, and therefore satisfies Rule 401, some courts argue it should nonetheless be inadmissible under Rule 403 due to its potential to create unfair prejudice.[156] The Supreme Court has cautioned that a jury is likely to attach more weight to one's

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[149] Hale, *supra* note 10, at 430.

[150] Stewart, *supra* note 25, at 204.

[151] *Id.* at 197 (noting Justice Marshall's dissent in *Jenkins v. Anderson*, which stated that many non-adverse reasons may exist for an individual's precustodial silence).

[152] Jonathan Turley, *The Price of Silence: Supreme Court Rules That Pre*-Miranda *Silence Can Be Used Against Defendant to Prove Guilt*, JONATHAN TURLEY (June 17, 2013), http://jonathanturley.org/2013/06/17/the-price-of-silence-supreme-court-rules-that-pre-Miranda-silence-can-be-used-against-defendant-to-prove-guilt/, *archived at* http://perma.cc/4UPR-HZQ5.

[153] ALDERT VRIJ, DETECTING LIES AND DECEIT 142–51 (2008).

[154] Ryan, *supra* note 59, at 916.

[155] Key-El v. State, 709 A.2d 1305, 1314 (Md. 1998) (citing *Ex Parte* Marek, 556 So.2d 375, 381 (Ala. 1989)).

[156] Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (arguing silence creates an inference of guilt); Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-arrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 219–20 (1997) (arguing prearrest silence is highly prejudicial).

silence than is warranted.[157] In *People v. DeGeorge*, the New York Court of Appeals stated that jurors "may not be sensitive to the wide variety of alternative explanations for a defendant's pretrial silence," and may give the evidence "much more weight . . . than is warranted," creating a substantial risk of prejudice.[158] For example, a New York City jury would likely be unfairly prejudiced towards a defendant suspected of terrorism if it knew about the defendant's refusal to answer authorities' questions at an airport. Under these circumstances, evidence of the defendant's silence may be unfairly prejudicial such that the jury may give the evidence more probative value than it deserves. If a suspected terrorist remains silent while authorities questioned him at an airport, a jury could be unfairly prejudiced against him and could think that his silence in that situation is evidence of guilt.[159] Jurors often assign great weight to silence; in some cases, "even a defendant's explanation for his silence would be insufficient to overcome [a jury's] prejudice."[160]

CONCLUSION

If the Supreme Court were to adopt an evidentiary approach to precustodial silence, proponents of both the broad and narrow constitutional approaches would likely criticize that decision. Some may argue that in avoiding the question of whether a prosecutor can use a suspect's precustodial silence to infer guilt, the Court is condoning this prosecutorial tactic. Thus, proponents of the broad constitutional approach to precustodial silence might contend that the *Salinas* Court's refusal to rule that precustodial silence is always inadmissible erodes citizens' Fifth Amendment rights anyway.

Conversely, many who agree with the *Salinas* plurality claim the Fifth Amendment was never meant to apply in precustodial situations. They argue that the *Salinas* dissenters advocated for an overly-expansive right that heavily burdens law enforcement. Thus, the evidentiary solution will likely satisfy few commentators.

Additionally, an evidentiary approach might dissatisfy the general public. If a prosecutor were to introduce evidence that the suspect, prior to being in custody, remained silent in response to numerous allegations and questions, it is likely such silence would be found irrelevant under Rule 401, and even if the silence is deemed relevant, a court may very well find

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[157] *See* United States v. Hale, 422 U.S. 171, 180 (1975).

[158] People v. DeGeorge, 541 N.E.2d 11, 13 (N.Y. 1989).

[159] *See* Ciarelli, *supra* note 29, at 652.

[160] Ryan, *supra* note 59, at 918.

the silence unfairly prejudicial under Rule 403. It is easy to see how this might draw public ire in a highly publicized trial.

Indeed, Salinas himself managed to evade arrest for over fifteen years. This is a piece of evidence a jury may find quite repellent. But evidence of evading arrest will be subject to the Federal Rules of Evidence before it is admitted in court. Courts should similarly apply standard evidentiary analysis to evidence of precustodial silence to determine if it will aid the jury in determining innocence or guilt. When one puts aside the constitutional rhetoric, it is clear that the evidentiary approach is the most viable way of resolving this question.

While the Supreme Court has thus far resisted such an approach in favor of a constitutional analysis, state courts that have taken an evidentiary approach to determine the admissibility of silence often hold it inadmissible on these grounds. A constitutional analysis is a poor roadmap for analyzing whether precustodial silence is admissible. When silence is examined for admissibility, an evidentiary analysis provides a simple and standard approach that can be replicated and applied to any set of facts to determine whether precustodial silence is admissible in a given case. The evidentiary approach is also flexible enough to account for the limited situations where precustodial silence is probative and not highly prejudicial, and should thus be admitted.

However, under the evidentiary approach, most evidence of precustodial silence will likely be excluded from the prosecutor's case-in-chief. The support for this conclusion is two-fold: first, silence is rarely probative because there are a variety of reasons for one's silence, and second, even if the silence is deemed relevant under Rule 401, the Supreme Court has indicated that such silence is often "highly prejudicial" from a jury's standpoint. In closing, evidentiary analysis of precustodial silence provides courts with an easily repeatable, fact-specific test to analyze this question. While some courts already use evidentiary analysis when dealing with questions of precustodial silence admissibility, such analysis should be ubiquitous within the court system. The way for this ubiquity to take hold is obvious: the next time the Supreme Court is presented with the question of whether a defendant's precustodial silence may be used as substantive evidence of his guilt, the Court must not fail to act like it did in *Salinas*. The Court should use an evidentiary analysis to determine admissibility.