NOTE

THE ORIGINAL PUBLIC MEANING OF THE FIFTH AMENDMENT AND PRE-*MIRANDA* SILENCE

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INTRODUCTION

THE Fifth Amendment's assurance that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"[1] is "one of the great landmarks in man's struggle to be free of tyranny, to be decent and civilized."[2] But one question that the Supreme Court has yet to address regarding the Fifth Amendment is whether a prosecutor can use pre-*Miranda* warning silence in the government's case-in-chief. This question divides federal courts of appeals and state courts.[3] For example, if a defendant finds herself

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

[2] William O. Douglas, An Almanac of Liberty 238 (1954).

[3] Several circuits have said that pre-*Miranda* silence cannot be used. See United States v. Velarde Gomez, 269 F.3d 1023, 1036–37 (9th Cir. 2001); Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000); United States v. Moore, 104 F.3d 377, 389 (D.C. Cir. 1997); United States v. Burson, 952 F.2d 1196, 1200–01 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987). Other circuits disagree. See, e.g., United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).

The U.S. Court of Appeals for the Second Circuit has indicated that pre-*Miranda* silence is likely not admissible. See United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (stating that it was "not confident that [*Jenkins v. Anderson*, 447 U.S. 231 (1980),] permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief"). The Fifth Circuit has avoided the question on several occasions. In *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996), the court assumed without deciding that a defendant's pre-arrest, pre-*Miranda* silence fell within the scope of the Fifth Amendment's protection. But in post-*Zanabria* cases the Court has held that "a prosecutor's reference to a non-testifying defendant's pre-arrest silence does not violate the privilege against self-incrimination if the defendant's silence is not induced by, or a response to, the actions of a government agent." United States v. Elashyi, 554 F.3d 480, 506 (5th Cir. 2008). While the Third Circuit has not addressed the issue, one district court in the

in federal court in Nebraska, the prosecutor can use any silence the defendant maintained up until she received her *Miranda* warnings to convict her.[4] If she is tried in the District of Columbia, the prosecutor can refer to her refusal to speak, but only with regard to the time before she was taken into police custody.[5] If the defendant is in New Hampshire, however, the prosecutor cannot refer to any of the defendant's silence.[6]

Third Circuit has suggested that pre-*Miranda* silence may be admissible. See Whitney v. Horn, No. 99-1993, 2008 U.S. Dist. LEXIS 87910, at *38 (E.D. Pa. Oct. 30, 2008) (saying there is no protection for "a defendant from references to his pre-*Miranda* silence immediately following his arrest").

A majority of states that allow the admission of pre-*Miranda* silence as evidence of guilt do so as an extension of *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that post-arrest, pre-*Miranda* silence can be used to impeach a testifying defendant). See, e.g., State v. Brown, 517 A.2d 831, 835–36 (N.H. 1986). Most states that exclude pre-*Miranda* silence do so because their state constitutions require it. See, e.g., Nelson v. State, 691 P.2d 1056, 1059 (Alaska Ct. App. 1984) ("We, therefore, conclude that under Article 1, § 9 of the Alaska Constitution, a person who is under arrest for a crime cannot normally be impeached by the fact that he was silent following his arrest."); People v. Jacobs, 204 Cal. Rptr. 849 (Cal. Ct. App. 1984) ("We hold that under the circumstances of this case questioning appellant on cross-examination about his silence occurring both during and following his arrest violated appellant's privilege against self-incrimination under California Constitution, article I, section 15."); Lee v. State, 422 So. 2d 928, 930 (Fla. Ct. App. 1982) ("[T]he right to remain silent is entitled to greater protection in our state than that required by the United States Supreme Court."); State v. Davis, 686 P.2d 1143, 1146 (Wash. Ct. App. 1984) ("There is no logic in protecting a defendant advised of his rights and not an unadvised defendant. Both defendants are exercising the same constitutional right."). Other state courts have excluded silence evidence under the Fifth Amendment. See, e.g., Commonwealth v. Turner, 454 A.2d 537, 539 (Pa. 1982) ("[W]e do not think it sufficiently probative of an inconsistency with [a defendant's] in-court testimony to warrant allowance of any reference at trial to the silence.").

[4] *Frazier*, 408 F.3d at 1111.

[5] *Moore*, 104 F.3d at 389. Nonetheless, the court did say that there "may be another exception to the bar against the use of silence where the silence occurred before the defendant's arrest." Id. But as far as the Fifth Amendment is concerned, it is not triggered until custody. Id.

[6] *Coppola*, 878 F.2d at 1568.

The Supreme Court incorporated the right[7] to remain silent against the states precisely because the Court deemed it "incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court."[8] Yet by allowing the division of authority over the admissibility of pre-*Miranda* silence "to fester for so long,"[9] the Supreme Court has allowed such incongruity to persist. Many judges[10] and academics[11] have attempted to construct rules for the admissibility or inadmissibility of pre-*Miranda* silence, but none has looked to the original meaning of the right against self-incrimination.[12] This Note fills that void.

The right against self-incrimination originated in the maxim *nemo tenetur seipsum prodere* ("no man shall be compelled to

[7] While the Court speaks of the "privilege against self-incrimination," see, e.g., Ullman v. United States, 350 U.S. 422, 426 (1956), that wording appears to conflict with both the Constitution and history. See U.S. Const. amend. V (listing among the protected rights the right against self-incrimination). A privilege is in some sense less than a right because it is granted to someone by another entity. But if the right to remain silent is a privilege, then so too is the right to an attorney during trial and the right to free speech. Moreover, the Court does on occasion discuss the "right to remain silent," see Miranda v. Arizona, 384 U.S. 436, 460 (1966). Thus, this Note will refer to the concept as the "right against self-incrimination," rather than the privilege.

[8] Malloy v. Hogan, 378 U.S. 1, 11 (1964).

[9] Marc Scott Hennes, Note, Manipulating *Miranda*: *United States v. Frazier* and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda* Silence, 92 Cornell L. Rev. 1013, 1037 (2007).

[10] See, e.g., United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding that the prosecutor can introduce pre-*Miranda* silence in his case-in-chief); *Moore*, 104 F.3d at 389 (disagreeing).

[11] See, e.g., Jan Martin Rybnicek, Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-*Miranda* Silence, 19 Geo. Mason U. C.R. L.J. 405 (2009); Mikah K. Story Thompson, Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence, 47 U. Louisville L. Rev. 21, 50–53 (2008); Hennes, supra note 9; Marty Skrapka, Note, Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-*Miranda* Silence as Evidence of Guilt, 59 Okla. L. Rev. 357, 360 (2006); Vanessa Willis, Note, The Government's Use of Pre-*Miranda* Silence in its Case-in-Chief: An Alternative Approach under *Schmerber v. California*, 77 U. Cin. L. Rev. 741, 753 (2008).

[12] But see Frank R. Herrmann & Brownlow M. Speer, Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack, 35 Am. J. Crim. L. 1, 3–11 (2007) (using the historical understanding of the right to refute the adoptive admissions rule adopted by some courts).

criminate himself").[13] The history and constitutionalization of that maxim illuminate several findings relevant to the right's applicability in pre-*Miranda* situations. One of the main motivations in securing the right to silence was to avoid the "cruel trilemma,"[14] thereby preserving individual autonomy.[15] The cruel trilemma is the decision a defendant would face if forced to choose between maintaining her silence and being held in contempt of court, or speaking and thereby either perjuring or incriminating herself.[16] The Fifth Amendment provides individuals a way out of this cruel choice—remain silent without fear of contempt.

Absent real protection of the right to remain silent in pre-*Miranda* situations, the Fifth Amendment ceases to be a barrier to cruel trilemmas. First, when police approach someone, that indi-

[13] See John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71, 71 (1891).

[14] See, e.g., Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 694–95 (1968) (outlining the cruel trilemma); see also Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (saying that the Court is unwilling "to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt").

[15] This justification is best illustrated by John Lilburne's famous cry that "no mans [sic] conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." John Lilburne, The Just Defence of John Lilburne, *reprinted in* The Leveller Tracts, 1647–1653, at 450, 454 (William Haller & Godfrey Davies eds., Columbia Univ. Press 1944) (1653).

[16] See Friendly, supra note 14. While the traditional formulation of the cruel trilemma assumes that the defendant is guilty, this could be modified to show that an innocent person also faces a dilemma: the innocent defendant must choose between contempt or testifying and giving the prosecutor potentially damaging information. As the Court said many years ago,

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.

Wilson v. United States, 149 U.S. 60, 66 (1893). Indeed, the Court has on more than one occasion said that "one of the Fifth Amendment's 'basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances.'" Ohio v. Reiner, 532 U.S. 17, 20 (2001) (quoting Grunewald v. United States, 353 U.S. 391, 421 (1957)); see also Ullman v. United States, 350 U.S. 422, 426 (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.").

vidual must choose among three unappealing choices—incriminating herself; lying to the police, which may be a crime itself;[17] or remaining silent in the face of accusations, providing evidence for the prosecution.[18] A second trilemma occurs at trial, when the individual must choose between taking the stand and incriminating herself, taking the stand and perjuring herself, or remaining silent as the prosecutor argues that her pre-*Miranda* silence is evidence of guilt.[19]

A second historical finding relevant to pre-*Miranda* situations is that as originally understood the right to remain silent first attached, not upon the reading of a *Miranda*-like incantation, but when the defendant reasonably believed that her statement might be used against her at a criminal trial or lead the investigator to inculpatory evidence.[20] In other words, this right was available outside of the courthouse. The Constitution itself reflects this understanding. While the Sixth Amendment uses the word "accused" in protecting certain trial rights,[21] the Fifth Amendment uses the word "person."[22] This deliberate contrast shows that the Fifth Amendment was meant to attach before someone became an "accused."[23] Moreover, since a criminal defendant had no right to testify on her

[17] For the federal law, see 18 U.S.C. § 1001 (2006) (making it illegal to give false statements to federal investigators even when not under oath).

[18] This is the case in the Eighth Circuit. See United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (permitting the use of silence evidence).

[19] This trilemma is different from the original one encountered by the Founders, but it implicates the same value, namely individual autonomy. See *Miranda*, 384 U.S. at 460 ("All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

[20] This further implies that a prosecutor could not use the silence as evidence. Cf. Griffin v. California, 380 U.S. 609, 611 n.3, 613–14 (1965) (arguing that failure to protect a constitutional right in one context may prejudice the exercise of the same right in another context).

[21] U.S. Const. amend. VI; see also United States v. Gouveia, 467 U.S. 180, 188 (1984) (finding that the word "accused" limits when Sixth Amendment rights are available).

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

[23] See United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) ("The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.").

own behalf when the Fifth Amendment was ratified,[24] unless the right was available before a trial started, the right was meaningless.

Two further factors support precluding prosecutorial use of pre-*Miranda* silence. First, history shows that the right was developed in the face of executive-like bodies exercising the prerogative power of the Crown.[25] In America, the right soon grew to protect people from having to give incriminating information to clerical bodies,[26] tax collectors,[27] and even the Supreme Court's interrogatories.[28] Second, the right precluded judges and juries from making inferences from a person's silence in the face of accusations.[29] That preclusion is based not only on the fact that it is necessary in order for the right to be real protection,[30] but also on the understanding that not all innocent people vocally object to false accusations.[31] Taken together, these four factors show that the original understanding of the Fifth Amendment supports excluding pre-*Miranda* silence when an individual has reason to fear that she may be the subject of a criminal prosecution.

This Note proceeds in three Parts. Part I serves two purposes. First, it advances several arguments as to why the original public meaning of the Fifth Amendment's proscription of self-incrimination should be used to analyze pre-*Miranda* silence. It then analyzes primary-source documents to discern the original public meaning of the Fifth Amendment. Perhaps surprisingly, the original meaning was highly protective of potential criminal defen-

[24] See McGautha v. California, 402 U.S. 183, 214 (1971) (noting that there was no right to testify for many years after the framing of the Fifth Amendment).

[25] Edward Coke, The Fourth Part of the Institutes of the Laws of England 60–65 (London, E. & R. Brooke 1797).

[26] Benjamin Franklin, Some Observations on the Proceedings Against the Rev. Mr. Hemphill, With a Vindication of his Sermons (1735), *reprinted in* 2 The Papers of Benjamin Franklin 37–50 (Leonard E. Labaree et al. eds., 1960) [hereinafter Franklin Papers] (describing how a church body used silence against an accused clergyman).

[27] Paul S. Boyer, Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754, 21 Wm. & Mary Q. 328, 328–51 (1964) (discussing the Massachusetts Excise Controversy during which individuals were required to swear under oath before tax collectors).

[28] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 139 (1803).

[29] 4 Cobbett's Complete Collection of State Trials 1341 (London, R. Bagshaw 1809).

[30] Cf. Griffin v. California, 380 U.S. 609, 614–15 (1965) (arguing that failure to protect a constitutional right in one context may prejudice the exercise of the same right in another context).

[31] See Ex parte Marek, 556 So. 2d 375, 381 (Ala. 1989).

dants. An individual had the right to remain silent in the face of executive investigators when she reasonably believed her statements could incriminate herself. Part II demonstrates that the original understanding fits comfortably within current Supreme Court doctrine. Finally, Part III addresses potential challenges to the original meaning, including that compulsion should be required, that silence is not testimonial, and that the rule will impede police and prosecutors.

I. THE ORIGINAL PUBLIC MEANING OF THE SELF-INCRIMINATION CLAUSE

When the framers constitutionalized the right against self-incrimination, they "had in mind a lot of history which has been largely forgotten today."[32] This Part seeks to rediscover that history and to apply it to the question of pre-*Miranda* silence.

A. Why Originalism?

The original public meaning of the Fifth Amendment is what the public who voted on the Amendment understood it to mean.[33] Before determining what those who ratified the Amendment understood, however, it is necessary to justify why the original meaning matters. There are two related challenges to pursuing the original meaning. First, applying the original meaning of the Fifth Amendment to a problem that was seemingly created out of a unoriginalist ruling (that is, *Miranda*[34]) requires particular justification.[35] Second, assuming the original meaning of the Fifth Amendment *can* be applied does not necessarily mean it *should*.

[32] Ullmann v. United States, 350 U.S. 422, 427 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) (opinion of Magruder, C.J.)).

[33] See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990) ("The search is not for a subjective intention . . . . [W]hat counts is what the public understood."); see also Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37–48 (1997) (arguing that originalism is the best method of constitutional interpretation).

[34] See Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates, 28 Ariz. St. L.J. 17, 97 (1996) [hereinafter Panel] (distinguishing *Miranda* as not driven by originalist conceptions).

[35] For a concise defense of originalism applied to new challenges, see Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856–65 (1989).

As to the first challenge, this Note argues for a proscription against the use of specifically "pre-*Miranda*" silence only because the Court's jurisprudence has limited the inquiry.[36] In other words, the Court has already decided that post-*Miranda* warning silence cannot be used to convict someone,[37] but it has not addressed the use of pre-*Miranda* silence. Moreover, the issue of whether a prosecutor can convict someone with that person's silence exists independent of *Miranda* warnings. *Miranda* highlighted the problem; it did not create it. In 1791, people were questioned outside the context of a criminal trial.[38] While arrestees were not read *Miranda* warnings before 1966, they nonetheless had to make the same decision as someone questioned by the police today: speak or stay silent. Thus, the original understanding is not being applied to a solely modern problem. Instead, the original understanding is being applied to a problem that has existed since the Fifth Amendment was ratified: whether a defendant's silence in response to inquiring government officials can be used by a prosecutor to convict her. As will be shown, under the original understanding of the Fifth Amendment, the answer is "no."

The second challenge of applying an original understanding is to show that the original meaning should be applied. While there are many general justifications for originalism,[39] three are particularly powerful in this context. The first argument is perhaps the strongest argument for originalism in general. The public understanding

[36] As Part II shows, the Court has decided that post-*Miranda* silence cannot be used to convict the defendant, *Miranda*, 384 U.S. at 468 n.37, nor can post-*Miranda* silence be introduced to impeach a testifying defendant, Doyle v. Ohio, 426 U.S. 610, 619 (1976). However, pre-*Miranda* silence can be introduced to impeach a testifying defendant. Fletcher v. Weir, 455 U.S. 603, 607 (1982) (holding that post-arrest, pre-*Miranda* silence can be used to impeach a testifying defendant); Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (holding that pre-arrest silence can be introduced to impeach a defendant).

[37] *Miranda*, 384 U.S. at 468 n.37 (1966).

[38] One famous example of this phenomenon occurred in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143–44 (1803) (asking for responses from Levi Lincoln, President Jefferson's Attorney General, as to what happened to the commissions); see also John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1059–61 (1994) (noting a 1555 English statute required justices of the peace to question an accused after apprehension but before trial and transmit any material testimony to the trial court).

[39] See Scalia, supra note 33, at 37–48, 129–50 (giving several arguments as to why originalism is the best method of constitutional interpretation).

of the Fifth Amendment at the time of its ratification represents a rule approved by a supermajority, which neither judges nor a simple majority can override.[40] The Fifth Amendment was adopted through a cumbersome process that represented the affirmation of a supermajority of Americans at the time.[41] Two-thirds of each house of Congress passed the Amendment and ten of fourteen states ratified it.[42] This strength in numbers permits confidence in the desirability of the original understanding of the Amendment as a rule for our society.[43]

As many scholars have pointed out, the supermajority rule produces positive, entrenched norms for society.[44] These entrenched norms set "ground rules that protect against predictable dangers of ordinary democratic governance."[45] In addition to setting ground rules, these entrenchments "establish a structure of government that preserves democratic decision making, individual rights, and other beneficial goals."[46] Respecting entrenched norms is especially important with regard to criminal procedure.[47] Moreover, in the case of the Fifth Amendment, the right "serves as a protection to the innocent as well as to the guilty."[48] When the government is try-

[40] See John O. McGinnis & Michael B. Rappaport, A Pragmatic Defense of Originalism, 31 Harv. J.L. & Pub. Pol'y 917, 918–20 (2008) (arguing that constitutional provisions should be interpreted according to the original meaning because they have been approved by a supermajority); cf. Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 Yale L.J. 1665, 1670–73, 1701–02 (2002) (arguing for both courts and legislatures to use entrenchment, thereby making decisions and legislation binding on future bodies to promote stability).

[41] See McGinnis & Rappaport, supra note 40, at 924 (describing the amendment process).

[42] See Bernard Schwartz, The Great Rights of Mankind: A History of the American Bill of Rights 186–91 (1977).

[43] McGinnis & Rappaport, supra note 40, at 924–25.

[44] See id. at 919; Posner & Vermeule, supra note 40, at 1670–73; Brent Wible, Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations, 13 Wm. & Mary Bill Rts. J. 923, 963 (2005).

[45] McGinnis & Rappaport, supra note 40, at 921.

[46] Id.; see also Wible, supra note 44, at 958 ("Although historical evidence presents no express rationale for the supermajority provisions included in the Constitution, a more apt, albeit general, characterization is that they were intended to promote good decision making in instances where majority rule would have proved problematic in some respect.").

[47] See, e.g., Ullman v. United States, 350 U.S. 422, 427–28 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) (opinion of Magruder, C.J.)).

[48] Id.

ing to take away someone's liberty, the rules should be set forth in advance. Otherwise, individual rights, like the right to remain silent, can be compromised.

While rules, like the Fifth Amendment, "are bound to impose costs because they are always over- or under-inclusive,"[49] they are clear and easy to administer. Moreover, rules "promote predictability and equal treatment, reduce judicial arbitrariness, and foster judicial courage to make unpopular decisions."[50] In short, originalism, particularly in interpreting the Constitution's provisions regarding criminal procedure, is necessary to preserve the supermajoritarian benefits that the ratification process affords.[51]

The second reason to use the original public meaning flows from the entrenched-rule argument. Without adhering to the original meaning, the Fifth Amendment becomes, as Thomas Jefferson said, "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."[52] Just as an entrenched rule helps to prevent the tyranny of the majority (the people), it also helps to prevent the tyranny of the minority (the judge).[53] If a simple majority cannot excise portions of the Constitution,[54] a judge should not be able to reject the entrenched rule.[55] Judges' power to take away someone's liberty must be checked.[56] The Fifth Amendment provides a check on that power, and judges

[49] Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183, 187 (2005).

[50] Id.; see also Posner & Vermeule, supra note 40, at 1670–73.

[51] See McGinnis & Rappaport, supra note 40, at 918–21.

[52] Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 12 The Works of Thomas Jefferson 135, 137 (Paul Leicester Ford ed., 1905); see also Antonin Scalia, Speech at the Woodrow Wilson International Center (Mar. 14, 2005), available at http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm.

[53] McGinnis & Rappaport, supra note 40, at 920; see also Posner & Vermeule, supra note 40, at 1670–73.

[54] U.S. Const. art. V (delineating the process by which the Constitution can be amended).

[55] Cf. Atkins v. Virginia, 536 U.S. 304, 341–48 (2002) (Scalia, J., dissenting) (arguing that a "national consensus" is not enough to overturn the original understanding that the proscription of cruel and unusual punishment did not include the execution of the mentally challenged).

[56] See INS v. Chadha, 462 U.S 919, 961 (1983) (Powell, J., concurring in the judgment) ("The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'").

must uphold it. Because a judge often has the power to say which rights an individual has, that power has to be constrained. Absolute power over the criminal process, which results when the judge can "twist and shape" the Constitution, is an affront to the fundamental idea of our criminal justice system that the government should be of laws, not men.[57]

It may be that silence at the time of questioning or investigation is probative of guilt.[58] Moreover, a judge may be correct in believing that justice is served by allowing a prosecutor to argue that innocent people do not stand silent in the face of accusations.[59] But a supermajority adopted the Fifth Amendment as a check against that belief. And "[i]f it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."[60]

Finally, an originalist approach to interpreting the Fifth Amendment provides predictability, which is particularly important in the context of criminal procedure.[61] While predictability in the law is a value in and of itself, it also serves other values. Foremost, predictability leads to fairness and equal treatment.[62] If judges adhere to the original understanding of the Fifth Amendment, then those who are questioned will know that they can re-

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[57] See Scalia, supra note 52.

[58] The Eight Circuit believes that it is, at least sometimes, on particular facts. United States v. Frazier, 408 F.3d 1102, 1110–11 (8th Cir. 2005) (saying that pre-*Miranda* silence is admissible as evidence of guilt). But see Ex parte Marek, 556 So. 2d 375, 381 (Ala. 1989).

[59] See *Frazier*, 408 F.3d at 1110 (making such an argument).

The British Parliament seems to agree that innocent people do not remain silent in the face of false accusations. While an accused has the right to remain silent, Criminal Justice and Public Order Act, 1994, c. 33, § 36 (Eng.), adverse inferences may be drawn from his or her silence if he or she fails to answer any questions at trial, id. § 35(2) ("[I]t will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question."). Moreover, the "caution" read to arrestees says, "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence." Code C, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, § 10.5 (Eng.).

[60] Ullman v. United States, 350 U.S. 422, 427–28 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) (opinion of Magruder, C.J.)).

[61] See Bibas, supra note 49; Posner & Vermeule, supra note 40, at 1672–73.

[62] Posner & Vermeule, supra note 40, at 1672–73.

main silent.[63] In addition, similarly situated individuals will be treated similarly. As Justice Scalia has said, "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law."[64] Thus, with the exponential growth of laws over the centuries, it is ever more important to have laws that are understandable and understood.[65] Professor Karl Llewellyn called this attribute of a law "reckonability."[66] To say a law has "reckonability" means the law is one which people can understand and use to reasonably predict the outcome of a legal case.[67] As it is today, the Fifth Amendment no longer has this attribute. An arrestee would first have to determine the jurisdiction of her future trial. Then she would have to determine the circuit's rule on the issue. Such a complicated process renders the Fifth Amendment ambiguous to the average person, rather than a clear statement of a fundamental right. Thus, the Court needs to reaffirm that which our Founders have already said, "No person shall . . . be compelled in any criminal case to be a witness against himself."[68]

B. The Original Meaning of "No Person Shall . . . be Compelled in any Criminal Case to be a Witness Against Himself"

The phrase "[n]o person shall . . . be compelled in any criminal case to be a witness against himself"[69] codified a centuries-old rule that a person did not have to answer an inquiring government offi-

[63] With *Miranda*'s ubiquity, "[i]t is unlikely that suspects today hear the *Miranda* rights for the first time" from an arresting officer. Richard A. Leo, Criminal Law: The Impact of *Miranda* Revisited, 86 J. Crim. L. & Criminology 621, 651 (1996). One study conducted in the mid-1990s found that 80% of Americans knew they had a right to remain silent before they were given *Miranda* warnings. Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950–1990, at 51 (1993). Thus, many defendants may rely on *Miranda*'s guarantee before an officer recites the warning. As the First Circuit noted, when a defendant "relie[s] on the protection guaranteed by the fifth amendment from the first police interrogation through trial . . . [his] constitutional rights [are] violated by the use of his statement in the prosecutor's case in chief." Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989).

[64] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989).

[65] Id.

[66] Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 17 (1960).

[67] Id.

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

[69] Id.

cial about criminal matters in which the person may have been involved.[70] The original understanding of the right drew on this history in four particular respects. First, the right derived from centuries of experience with the cruel trilemma. Second, the right extended beyond the courthouse door. Third, the right was available in the face of executives investigating crimes. Finally, the right precluded the judge or jury from inferring admissions of guilt from silence. Each of these aspects of the right supports finding not only that an individual has the right to remain silent in the face of investigators, but also that the prosecutor cannot use that silence to convict the person once it is clear that she is the target of a criminal probe.

1. Religious Origins and the Cruel Trilemma

The religious origins of the right against self-incrimination show that the right was not originally about testimony at trial. In fact, it was adopted as a defense to the cruel trilemma induced by investigative bodies. In 1213, Pope Innocent III issued a papal bull creating the Fourth Lateran Council.[71] One of the "most odious features" of that Council was the oath *de veritate dicenda*, or the oath to answer truthfully all questions.[72] While an oath to tell the truth may seem benign, in time it became *tortura spiritualis* and was used to force self-incrimination.[73] Upon being brought before the Council, the person was required to swear the oath.[74] If he did not, he was found guilty. If he did answer and denied the charges, he would be convicted of perjury.[75] There was also a spiritual element to the oath, namely it threatened the faithful with damnation if

[70] The struggle for the right is comprehensively documented in Leonard W. Levy, Origins of the Fifth Amendment (1968). Thus, for a more complete account of any events or periods discussed in this section, one should turn to Levy's study.

[71] A. Esmein, A History of Continental Criminal Procedure, with Special Reference to France 79–84 (John Simpson trans., 1914); Henri Leclerq, Fourth Lateran Council (1215), in 9 The Catholic Encyclopedia (1910), available at http://www.newadvent.org/cathen/09018a.htm; Levy, supra note 70, at 14.

[72] Esmein, supra note 71, at 82; see also Helen Silving, The Oath: I, 68 Yale L.J. 1329, 1342 (1959).

[73] See Silving, supra note 72.

[74] Id.

[75] Id.

they did not confess, but also threatened damnation if they confessed to something untrue (thereby lying).[76]

The oath thus forced the suspect into what many commentators have called the cruel trilemma.[77] That is, a person brought before the Council was forced to choose between self-incrimination, perjury, or contempt. This ancient history was not lost on the Founders. As Senator William Maclay of Pennsylvania said during the ratification process for the Fifth Amendment, "[E]xtorting evidence from any person [is] a species of torture . . . . [H]ere [is] an attempt to exercise a tyranny of the same kind over the mind. The conscience was to be put on the rack . . . ."[78]

Just as the *de veritate dicenda* oath placed individuals at the crossroads of three unappealing choices, so too does the admissibility of pre-*Miranda* silence. In fact, the person approached by a police officer not only faces three unfair options at the time of investigation, she also faces a similar range of options at a resulting trial.[79] These types of choices are the very evil that proved so useful to the Council. And for the Fifth Amendment to continue to fully protect citizens from these cruel choices, it must be available prior to *Miranda* warnings.

2. The British Development of the Right

The British development of the right shows that the right both extended beyond the courthouse and precluded judges and juries from drawing inferences of guilt. The *de veritate dicenda* oath eventually became known as the oath ex officio because the oath was associated with trials where the judge was the indictor, interrogator, and jury. In the centuries that followed the Fourth Lateran Council, the High Commission and the Star Chamber in England adopted the oath ex officio.[80] The High Commission and Star Chamber were both exercises of the King's prerogative power and

[76] Esmein, supra note 71, at 79–82.

[77] See, e.g., Friendly, supra note 14.

[78] William Maclay, The Journal of William Maclay, United States Senator from Pennsylvania 90 (Edgar S. Maclay ed., 1927).

[79] See supra text accompanying notes 17–19.

[80] Mary H. Maguire, Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England, *in* Essays in History and Political Theory in Honor of Charles Howard McIlwain 199, 199–202 (1936).

investigatory authority.[81] Thus, the right against self-incrimination has its origins not in the courtroom per se, but in the face of executive interrogation. When the Constitution was adopted, no prerogative power was listed; however, it is clear that the investigatory aspect of the royal prerogative was translated to the executive branch.[82] Thus, when the Founders eventually constitutionalized the right against self-incrimination, they necessarily constitutionalized it against the executive's investigatory function.

In England, many legal thinkers and defendants battled against the oath ex officio. The death of the oath ex officio, however, was not until John Lilburne's celebrated trial in the mid-seventeenth century.[83] Lilburne first appeared before the Star Chamber in 1637.[84] As was tradition, the judge asked him how he pleaded, but Lilburne refused to answer.[85] For his refusal, the judge punished Lilburne with a fine, whipping, and pillorying.[86] While on the Westminster pillory, Lilburne cried out, "[N]o mans [sic] conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so."[87]

While the oath ex officio remained a tool of the Star Chamber after Lilburne's plea, his case precipitated the oath's decline. And in 1649, the oath came to a spectacular end. In that year, Oliver

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[81] Coke, supra note 25.

[82] The debate dates to the founding. Compare Alexander Hamilton, Pacificus No. 1, (June 29, 1793), *reprinted in* 15 The Papers of Alexander Hamilton 33, 33–40 (Harold Syrett ed., 1961) (finding that other foreign relations aspects of the prerogative power are vested in the president), with James Madison, Letters of Helvidius, No. 1, (Aug.–Sept. 1793), *reprinted in* 6 The Writings of James Madison 138, 142–45 (Gaillard Hunt ed., 1900) (finding that the prerogative was eviscerated by the idea that the people were sovereign).

[83] See Levy, supra note 70, at 301–10.

[84] Lilburne was a member of the Levellers, a political party born from the English Civil War. They advocated broad civil rights, including popular sovereignty, extended suffrage, equality before the law, and religious tolerance. See An Agreement of the People for a Firm and Present Peace upon Grounds of Common Right (Oct. 1647), *reprinted in* The English Levellers, Cambridge Texts in the History of Political Thought 92, 92–95 (Andrew Sharp ed., 1998).

[85] 3 Cobbett's Complete Collection of State Trials, supra note 29, at 1332.

[86] Levy, supra note 70, at 276.

[87] Lilburne, supra note 15.

Cromwell brought charges against Lilburne for high treason.[88] At the trial, Judge Prideaux inquired if Lilburne had written a certain treasonous pamphlet. When Lilburne demurred, Prideaux told the jury, "[Y]ou may see the valiantness of this champion for the people's liberties, that will not own his own hand; although I must desire you, gentlemen of the jury, to observe that Mr. Lilburne implicitly confesseth it."[89] Lilburne retorted that he had no duty to answer questions "against or concerning" himself.[90] When the jury delivered a not guilty verdict, the assembled crowd "gave such a loud and unanimous shout, as is believed was never heard in Guildhall . . . ."[91]

After Lilburne's trial, acceptance of the right grew quickly. In 1656, the book *Examen Legum Angliae: Or the Laws of England* noted that the oath ex officio violated "the Law of Nature."[92] Moreover, it recognized that the maxim *nemo tenetur* was "agreed [upon] by all men."[93] Thus, Lilburne's impassioned plea won Englishmen their right to remain silent once and for all.[94]

As the records show, Lilburne's fight was not only for the right to remain silent at trial, but also an argument against Judge Prideaux's insinuations. Prideaux argued to the jury that Lilburne's silence was an implicit confession. But just as Lilburne argued in the seventeenth century, we still must reject the tacit admission rule.[95] More recently, the underlying logic of a rejection of the tacit admission rule was clearly explained by the Alabama Supreme Court.[96] When abolishing the tacit admission rule, that court noted,

[88] See Levy, supra note 70, at 300; Harold W. Wolfram, John Lilburne: Democracy's Pillar of Fire, 3 Syracuse L. Rev. 213, 233 (1952).

[89] Cobbett's Complete Collection of State Trials, supra note 29.

[90] Id.

[91] Id. at 1405.

[92] Examen Legum Angliae: Or the Laws of England Examined by Scripture, Antiquity, and Reason (1656), *reprinted in* Readings in American Legal History 86, 91 (Mark Howe ed., 1949).

[93] Id.

[94] Britain has moved away from its original understanding of the right against having to offer evidence against oneself. While the accused has the right to remain silent, adverse inferences may be drawn from silence if the accused fails to answer any questions at trial. Criminal Justice and Public Order Act, 1994, c. 33, § 35(2) (Eng.).

[95] See, e.g., United States v. Osuna-Zepeda, 416 F.3d 838, 846 (8th Cir. 2005) (Lay, J., concurring) (arguing that a tacit admission rule, adopted by the Eighth Circuit, makes no sense).

[96] Ex parte Marek, 556 So. 2d 375, 381 (Ala. 1989).

"[The] underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent."[97] Once that premise is abandoned, the evidence of silence simply describes two concurrent events—accusation and silence. Thus, substantive use of pre-*Miranda* silence should be proscribed because a tacit admission rule does not hold up.

The germination of the right to silence can be attributed to many factors. The right originated in the Church's inquisitions and matured in the Crown's trials. It began as a shield against unfair options and morphed into a protection for all. Most importantly though, "It became merely one of the ways of fairly determining guilt or innocence, like trial by jury itself; it became part of the due process of the law, a fundamental principle of the accusatorial system."[98] All of these considerations and history soon led American states to adopt the right against self-incrimination.

3. The Right in Colonial America

The right in colonial America shows that the right was available outside the courtroom, protected more than just testimony, and was not limited to criminal trials. Perhaps no event in early America displays the right and its meaning better than Samuel Hemphill's trial in 1735.[99] Hemphill, a Presbyterian minister who preached deistic sermons, became the subject of an ecclesiastical inquiry by the Presbyterian synod in Pennsylvania.[100] Despite Hemphill's refusal to give copies of his sermons over to the specially formed commission, the commission found Hemphill's sermons "Unsound and Dangerous."[101] Benjamin Franklin heard of the trial and came to Hemphill's defense. Franklin composed a pamphlet charging that "[i]t was contrary to the common Rights of Mankind, no Man being obliged to furnish Matter of Accusation

[97] Id.
[98] Levy, supra note 70, at 332.
[99] For a detailed account of Samuel Hemphill's trial, see Franklin Papers, supra note 26, at 44–48.
[100] See Levy, supra note 70, at 382–83.
[101] Id.

against himself."[102] After Franklin's rebuke, the commission recognized Hemphill's right to not "furnish Matter of Accusation against himself"; nonetheless, the commission took Hemphill's refusal as "but a tacit Acknowledgement of his Guilt."[103] Franklin was again incensed and wrote that Hemphill rightly claimed his right because the "Commission was determin'd to find Heresy enough in [his sermons], to condemn him . . . ."[104]

This early event in America's history shows that when the right migrated from England, the understanding remained the same. The right not to implicate oneself extended beyond the courtroom, as Franklin's invocation to an ecclesiastical inquiry suggests, and disallowed the inference of admission. Moreover, Franklin's argument echoed Lilburne: the judge and jury are not allowed to infer admission from the accused's silence. Lilburne's fight had clearly made an impact.

Another early invocation of the right occurred in Massachusetts. In 1754, the Massachusetts legislature passed an excise tax on all liquor sales that required buyers to declare their purchases, under oath, to local tax collectors.[105] When this bill was passed, pamphleteers raged against it, calling it "the most pernicious Attack upon English Liberty that ever was attempted . . . ."[106] Samuel Cooper, a minister, said that if the state were allowed to extort this type of information from people, "every other Part may with equal Reason be required, and a Political Inquisition severe as that in Catholick Countries may inspect and controul every Step of his private Conduct."[107] Cooper's argument shows a similar understanding to that of Franklin. The right extended beyond the courtroom and included any communication of criminality or immorality.

Cooper's argument went further. He said, "If the argument for purging by Oath in one Case, is founded upon the Advantage the Publick will receive by knowing the Truth, the very same Argument will hold stronger in Criminal Cases . . . ."[108] Cooper's argu-

[102] Id.
[103] Franklin Papers, supra note 26, at 90–100.
[104] Id. at 99.
[105] Boyer, supra note 27, at 328; see also Levy, supra note 70, at 385–86.
[106] John Lovell, Freedom, the First of Blessings 1 (Boston, Heart & Crown 1754) (emphasis omitted).
[107] Samuel Cooper, The Crisis 5 (Boston 1754) (emphasis omitted).
[108] Id. at 6 (emphasis omitted).

ment forcefully shows that if a person is required to furnish evidence against herself in a non-criminal matter, it makes even more sense to require her to do so in the criminal setting. In the same way, if a person is required to furnish evidence before being formally arrested, it makes even more sense to require her to furnish evidence once she is arrested. In the pre-arrest stage, there is no requirement of probable cause. An arrest, however, shows that there is probable cause to believe the person has committed a crime. Thus, if someone is not allowed to remain silent when the police do not have probable cause then, a fortiori, she should not be allowed to remain silent after being arrested. But clearly an arrestee has the right to remain silent.

When the colonies began their fight for independence in 1776, there was a flurry of constitutional activity.[109] Virginia, under the guidance of George Mason, enacted an influential and foundational preface to its constitution called the Declaration of Rights.[110] The Declaration "was the first thing of the kind upon the continent" and became the model for other states.[111] Section 8 of the Declaration of Rights guaranteed that no person could "be compelled to give evidence against himself . . . ."[112] Mason's formulation of the right against self-incrimination introduced ambiguity by limiting the right to criminal defendants. The *nemo tenetur* maxim was included in the list of trial rights; thus, according to the language of Section 8, only the criminal on trial could invoke the right.[113]

Mason, however, almost certainly did not mean what he wrote.[114] First, if the right truly only extended to the criminal on trial, such a

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[109] In fact, eight states wrote constitutions in that year: Connecticut, Delaware, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia. See 1 Frederic Jesup Stimson, The Law of the Federal and State Constitutions of the United States 68 (1908); see also Levy, supra note 70, at 405–10.

[110] See Robert A. Rutland, The Birth of the Bill of Rights, 1776–1791, at 30–44 (1955).

[111] Letter from George Mason to George Mercer (Oct. 2, 1778), *in* 1 Kate Mason Rowland, The Life of George Mason, 1725–1792, at 237 (New York, G. P. Putnam's Sons 1892).

[112] Virginia Declaration of Rights § 8 (June 12, 1776) [hereinafter Virginia Declaration of Rights], *reprinted in* 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3812, 3813 (Francis N. Thorpe ed., 1909) [hereinafter Federal and State Constitutions].

[113] See Levy, supra note 70, at 405–07.

[114] See id. at 407.

guarantee was meaningless because the defendant was not allowed to testify at trial in Virginia.[115] Second, the history of the right in Virginia belies the limitation. The law in Virginia, at least since 1677, was that "noe law can compell a man to sweare against himself in any matter wherein he is lyable to corporal punishment."[116] More importantly, though, the evidence shows that authorities in Virginia continued to respect the right against self-incrimination in the same way they had before Virginia's Declaration of Rights.[117] Thus, Virginia paid no heed to Mason's inadvertent limitation. This constitutionalization of the right was not meant to change the substance of it, but to affirm the common law right.

Following Virginia's lead, eight other states adopted a declaration of rights. Each had some form of the right against self-incrimination and almost all had the same language of Virginia's declaration that no one can be "compelled to give evidence against himself."[118] For example, Massachusetts, North Carolina, and Pennsylvania used the same language.[119] Delaware, however, took the opportunity to give self-incrimination its own section, making clear that the right extended beyond the criminal defendant.[120] These states' efforts show that the right retained the meaning it had in Britain and the colonies.

4. The Federal Constitutionalization of the Right

The federal constitutionalization of the right against self-incrimination shows that the Framers were concerned about the cruel trilemma but also understood the right to be available outside the courtroom in the face of inquiring executives. In 1789, when

[115] Id. The fact that defendants were not allowed to testify also shows that the right must have been available outside of the courtroom; otherwise, when would the right have applied?

[116] Id. at 406.

[117] Id. at 409.

[118] Id.

[119] Mass. Const. art. XII, *reprinted in* 3 Federal and State Constitutions, supra note 112, at 1891; N.C. Const. of 1776, art. VII, *reprinted in* 5 id. at 2787; Pa. Const. of 1776, art. IX, *reprinted in* id. at 3083; see also N.H. Const. of 1784, art. XV, *reprinted in* 4 id. at 2455; Vt. Const. of 1777, art. X, *reprinted in* 6 id. at 3741.

[120] Delaware Declaration of Rights of 1776, art. 15, *reprinted in* Proceedings of the Convention of the Delaware State Held at New-Castle on Tuesday the Twenty-Seventh of August, 1776, at 19 (Star Publ'g Co. 1927) ("THAT no Man in the Courts of common Law ought to be compelled to give Evidence against himself.").

the First Congress gathered, James Madison began pushing for a bill of rights.[121] Madison's formulation of *nemo tenetur* was in the proposed amendment that said,

> No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.[122]

Madison's right was unoriginal in many ways. First, it was unoriginal in its placement within the Constitution. Like the Delaware Constitution during the Revolution,[123] Madison's Bill of Rights did not list this right with those rights afforded only to criminal defendants. Instead, this general right could be invoked by anyone at any time.[124]

Also unoriginal was the use of the word "person."[125] Nonetheless, the word "person" must have been a deliberate choice because the Sixth Amendment uses the word "accused" in its guarantee that "[i]n all criminal prosecutions, the *accused* shall . . . have the Assistance of Counsel for his defence."[126] The modern Supreme Court has used the word "accused" to limit the attachment of the Sixth Amendment.[127] The word "accused," according to the Court, means a person against whom adversarial proceedings have been initiated.[128] The Fifth Amendment, however, cannot be so defined because it provides that "no *person* shall . . . ."[129] As the U.S. Court

[121] See Levy, supra note 70, at 421–22.
[122] James Madison, Presentment of Articles (June 8, 1789), *in* 1 Annals of Cong. 451–52 (1789) (Joseph Gales ed., 1834) (emphasis added).
[123] Delaware Declaration of Rights of 1776, supra note 120.
[124] See Levy, supra note 70, at 422–23.
[125] Cf. Delaware Declaration of Rights of 1776, supra note 120 ("THAT no Man in the Courts of common Law ought to be compelled to give Evidence against himself.").
[126] U.S. Const. amend. VI (emphasis added). Madison's original formulation of this amendment used the word "accused" as well. Madison, supra note 122, at 452 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").
[127] See United States v. Gouveia, 467 U.S. 180, 188 (1984).
[128] Id.
[129] U.S. Const. amend. V (emphasis added).

of Appeals for the Seventh Circuit has pointed out, the words "person" and "accused" purposely contrast.[130] Thus, the right against self-incrimination must inure any time the person's statement could be used against her.

If Madison's right was unoriginal in location, it was new in formulation. Nowhere in history had *nemo tenetur* been phrased as "no person . . . shall be compelled to be a witness against himself."[131] Unfortunately, there is no evidence of Madison's motivations for changing the typical phrasing of the right.[132] He said nothing during his presentment of the amendments about the right against self-incrimination.[133] During congressional debate, however, the one person to speak on the right, John Laurence, called it the proposal that "a person shall not be compelled to give evidence against himself."[134] In other words, he framed the right in the same terms that *nemo tenetur* had been phrased for centuries and clearly understood Madison's language to be invoking that history.[135]

In his comment, Laurence argued that the right should "be confined to criminal cases" because the right was "a general declaration in some degree contrary to laws passed."[136] The assembly then adopted the modification without debate.[137] As Charles Warren has pointed out, the law to which Laurence was referring was probably Section 15 of the Judiciary Act of 1789.[138] In the Senate's initial draft of that Act, federal courts could compel parties in civil matters to produce books and papers that contained evidence relevant to the matter.[139] The provision was meant to eliminate the need to initiate an equity suit to obtain evidence in civil cases.[140] Despite Laurence's concerns, the provision did not, in fact, contradict the

[130] See United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) ("The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.").
[131] Levy, supra note 70, at 423.
[132] See id.
[133] See Madison, supra note 122, at 448–54.
[134] 1 Annals of Cong. 753 (1789) (Joseph Gales ed., 1834).
[135] Levy, supra note 70, at 424.
[136] Id.
[137] Id. at 424–25.
[138] See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 111 (1923).
[139] Id. at 95.
[140] See id. at 95 n.102.

right against self-incrimination because the provision used the word "against." Evidence can be against a party without being criminally inculpatory. Thus, the introduction of the restriction to criminal cases was likely a response to a misunderstanding.

But as most originalists recognize, the motivations of the lawgivers are irrelevant.[141] Thus, the text must trump this evidence. The right, after it was adopted, was to be confined to criminal cases, or at least potential criminal cases. But the broader point still stands. The right was understood by the Framers as an expansive right. During the debates on whether to ratify the Bill of Rights, Senator William Maclay of Pennsylvania spoke on the proposed Fifth Amendment: "[E]xtorting evidence from any person [is] a species of torture . . . . [H]ere [is] an attempt to exercise a tyranny of the same kind over the mind. The conscience was to be put on the rack . . . ."[142] Thus, the Fifth Amendment was "a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach . . . ."[143]

Another historical fact that supports the right's availability before a criminal trial begins is the fact that there was no right for criminal defendants to testify until the mid-nineteenth century.[144] Wigmore described the similar rule in civil cases as: "Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely . . . ."[145] He said that civil litigants were "persons having a pecuniary interest in the event of the cause" and were therefore "specially likely to speak falsely."[146] This was the same rule for criminal defendants: because they could not be trusted to testify truthfully, they should not be allowed to testify.[147] Such a rule was

[141] See Bork, supra note 33.
[142] Maclay, supra note 78.
[143] Levy, supra note 70, at 427.
[144] See Ferguson v. Georgia, 365 U.S. 570, 577 (1961).
[145] 2 John H. Wigmore, Evidence in Trials at Common Law § 576, at 810 (Chadbourn rev. 1979).
[146] Id.
[147] See Robert Popper, History and Development of the Accused's Right to Testify, 1962 Wash. U. L.Q. 454, 458–59. As Sir James Stephen said, "[T]he prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner . . . ." James Stephen, A General View of the Criminal Law of England 201–02 (1863), *quoted in* Popper, supra.

in place until after Jeremy Bentham published his *Rationale of Judicial Evidence*,[148] which argued that witnesses' biases should go to the weight of their credibility, not to the admissibility of their testimony.[149] Thus, in order for the Fifth Amendment to have meant anything at the time of its ratification, it must have meant that one had the right to remain silent outside the courtroom. Since defendants were required to remain silent in the courtroom, limiting *nemo tenetur* to sworn testimony in a criminal trial would have rendered it a redundancy.

Practice after the constitutionalization of the right confirms that the right did not become mere superfluity. Shortly after the ratification, the highest profile case involving the invocation of the right to remain silent was *Marbury v. Madison*.[150] Levi Lincoln argued the case on behalf of the government as the Attorney General.[151] At the beginning of President Jefferson's administration, though, he was the acting Secretary of State.[152] Thus, Lincoln was the one who failed to deliver Marbury's commission.[153] When Chief Justice Marshall sent inquiries to Lincoln regarding what happened to Marbury's commission, Lincoln said that he had a right not to be "compelled to answer any thing which might tend to criminate himself."[154] Even though Lincoln eventually did answer some questions, everyone involved recognized that Lincoln "was not bound to disclose any thing which might tend to criminate himself."[155] This event shows that the early Court recognized that the right was

[148] 1 Jeremy Bentham, Rationale of Judicial Evidence (Fred B. Rothman & Co. 1995) (1827).

[149] See Wigmore, supra note 145, § 576, at 811 (discussing Bentham's argument). The states began abolishing the ban on criminal defendant testimony in 1864. See, e.g., 1864 Me. Laws 214. But not all states were quick to adopt the new rule. In fact, Georgia barred criminal defendants from testifying until 1960. Ferguson v. Georgia, 365 U.S. 570, 577–96 (1961). The federal right to testify came along in 1878, when Congress passed a statute declaring criminal defendants competent to testify in their own defense. See Craig M. Bradley, *Havens*, *Jenkins* and *Salvucci* and the Defendant's "Right" to Testify, 18 Am. Crim. L. Rev. 419, 420 n.17 (1981).

[150] 5 U.S. (1 Cranch) 137, 137 (1803).

[151] Id. at 143.

[152] Robert J. Reinstein & Mark C. Rahdert, Reconstructing *Marbury*, 57 Ark. L. Rev. 729, 742 (2005).

[153] Id.

[154] *Marbury*, 5 U.S. (1 Cranch) at 144.

[155] Id.

available outside the courtroom, and more importantly that the right remained the same despite Madison's reformulation.

5. Conclusion

The history of the Fifth Amendment and its underlying justification support proscribing prosecutors from using silence maintained in the face of police officers as substantive evidence of guilt. The right, born of executive investigations, was meant to guard against cruel trilemmas, one of the evils that admission of pre-*Miranda* silence creates. The right was available in the face of tax collectors, religious bodies, and even the Supreme Court. Moreover, the right did more than just allow someone to remain silent. After Lilburne's trial, the right precluded the judge or jury from inferring admissions of guilt from silence. The Founding generation understood all of these factors when they constitutionalized the right against self-incrimination. Thus, the original understanding of the right would proscribe substantive, prosecutorial use of pre-*Miranda* silence because it is silence maintained in the face of investigating executives.

II. THE ORIGINAL MEANING AND SUPREME COURT PRECEDENT

One perennial challenge to originalism is that it sometimes calls for throwing out well-settled precedent.[156] At the same time, however, even ardent originalists usually subscribe to some form of stare decisis.[157] While the precise role that stare decisis plays in originalist theories varies, some non-originalists use the fact that originalism's outcomes sometimes clash with precedent to throw the approach out completely. Whatever the merits and demerits of that critique, in the case of pre-*Miranda* silence, the rule that originalism favors—not permitting its use—comports with the Supreme Court's decisions regarding Fifth Amendment silence.

In order to understand how the rule fits within the decisions, one must divide the Supreme Court's decisions into two doctrinal categories: those that address the substantive use of silence and those

[156] Thomas W. Merrill, Originalism, Stare Decisis, and the Promotion of Judicial Restraint, 22 Const. Comment. 271, 271 (2005).

[157] Scalia, supra note 35, at 861.

that address the use of silence for impeachment purposes.[158] This bifurcated approach illustrates the Court's attempt to fashion a general rule—silence cannot be used against a defendant;[159] an exception to that general rule—silence can be used to impeach a testifying defendant;[160] and an exception to that exception—post-*Miranda* silence cannot be used to impeach a defendant.[161] This understanding allows the proposed pre-*Miranda* rule to fit comfortably within the general rule.

A. The General Rule and Its Exception

Since *Raffel v. United States*,[162] the Supreme Court has acknowledged the difference between the use of a defendant's silence for impeachment purposes and the use of a defendant's silence to imply her guilt.[163] In *Raffel*, the Court held that the prosecutor's use of Raffel's pre-trial silence to impeach him was permissible because "[t]he 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."[164] That decision implied that a defendant who does not take the stand can retain her "cloak of immunity."[165]

In *Griffin v. California*,[166] the Court spelled out one of *Raffel*'s implications by holding 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."[167] *Griffin*'s language was broad enough to support an argument that the prosecutor cannot comment on the defendant's silence, whether the silence was maintained at trial or before trial. *Raffel*, however, explicitly allowed prosecutorial use of silence evidence for impeachment. Therefore, *Griffin* cannot extend to impeach-

[158] This is the method suggested by the D.C. Circuit as well. See United States v. Moore, 104 F.3d 377, 385–86 (D.C. Cir. 1997).
[159] Griffin v. California, 380 U.S. 609, 615 (1965) (Harlan, J., concurring).
[160] Raffel v. United States, 271 U.S. 494, 499 (1926).
[161] Doyle v. Ohio, 426 U.S. 610, 619 (1976).
[162] 271 U.S. 494.
[163] *Doyle*, 426 U.S. at 628 (Stevens, J., dissenting).
[164] *Raffel*, 271 U.S. at 499.
[165] Id. at 497.
[166] 380 U.S. 609 (1965).
[167] Id. at 615 (Harlan, J., concurring).

ment cases. Just how far *Griffin* extends, though, remains an open question.

A year after *Griffin*, the Supreme Court handed down *Miranda v. Arizona*.[168] The Court in *Miranda* held that it was the government's burden to prove that a defendant had waived her Fifth Amendment rights and agreed to custodial interrogation.[169] When *Griffin* was decided, there was a colorable argument that its holding was confined to comments about a defendant's failure to testify at trial. After *Miranda*, however, it was clear that a defendant's silence after *Miranda* warnings had been issued could not be used as substantive evidence of guilt.[170] *Miranda* did not address the use of silence for impeachment purposes. Thus, there was tension between *Raffel*'s apparent authorization of this practice and *Miranda*'s sweeping language. Where did the *Raffel* exception—that a testifying defendant can be impeached with silence evidence—end? That tension remained for nearly a decade until the 1976 case *Doyle v. Ohio*.[171]

B. The Exception to the Exception

Doyle involved the use of post-*Miranda* warning silence to impeach a testifying defendant.[172] The Court said, "[T]he use *for impeachment purposes* of petitioners' silence" violated the Fourteenth Amendment.[173] The Court relied on an estoppel theory as the primary rationale for this holding, explaining that *Miranda* warnings contain an implicit promise that the government will not use silence against the defendant.[174] *Doyle* declared that it was fundamentally unfair to let the government impeach the defendant with her post-*Miranda* warning silence.[175] The holding thus delineated a clear exception to any use that *Raffel* may have permitted.

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[168] 384 U.S. 436.

[169] Id. at 468.

[170] Id. at 468 n.37 ("The prosecution may not use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.").

[171] 426 U.S. 610 (1976).

[172] Id. at 619–20.

[173] Id. at 619 (emphasis added).

[174] Id.

[175] Id. at 618; see also United States v. Hale, 422 U.S. 171, 182–83 (1975) (White, J., concurring) ("[W]hen a person under arrest is informed [of his *Miranda* rights] it seems to me that it does not comport with due process to permit the prosecution dur-

As the D.C. Circuit has recognized, *Doyle* is an exception to *Raffel* because its holding was clearly limited to impeachment.[176] First, *Doyle*'s facts involved the impeachment of a testifying defendant. Second, the holding centered on an estoppel theory, which implied that the government might be authorized to use the silence for impeachment absent the estoppel theory.[177] The Court meant *Doyle* as a post-*Miranda* warning exception to the impeachment exception to the general rule—that the prosecutor cannot use the defendant's silence.[178] In other words, a prosecutor cannot use post-*Miranda* silence to impeach a testifying defendant because it is fundamentally unfair to break the implicit promise that silence will not be used against the person.[179] Thus, *Doyle*'s holding is limited to impeachment contexts and has no relevance to substantive use of silence.[180]

*C. Impeachment with Pre-*Miranda *Silence*

Three questions were left open after *Doyle*: (1) whether a prosecutor could impeach a defendant with pre-custody silence; (2) whether a prosecutor could impeach a defendant with post-custody, pre-*Miranda* silence; and (3) whether a prosecutor could use pre-*Miranda* silence as substantive evidence.[181]

The Court addressed the first question in *Jenkins v. Anderson*.[182] In *Jenkins*, the prosecutor used the defendant's pre-custody silence to impeach his claim of self-defense.[183] The Court found that the Fifth Amendment did not protect the defendant in that case be-

ing the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.").

[176] United States v. Moore, 104 F.3d 377, 385–86 (D.C. Cir. 1997). But see United States v. Frazier, 408 F.3d 1102, 1110 (8th Cir. 2005).

[177] *Doyle*, 426 U.S. at 617–19.

[178] *Moore*, 104 F.3d at 386.

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

[180] *Moore*, 104 F.3d at 386.

[181] If one divides pre-*Miranda* silence into the pre-custody stage and post-custody stage, two questions could arise regarding the substantive use of pre-*Miranda* silence. Nonetheless, the Court has held that custody is not determinative of the right to remain silent. See Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam).

[182] 447 U.S. 231 (1980).

[183] Id. at 232–34.

cause impeachment with pre-custody silence "follow[ed] the defendant's own decision to cast aside his cloak of silence and advance[d] the truth-finding function of the criminal trial."[184] Moreover, the Court said that because the police had not read the defendant his *Miranda* rights *Doyle*'s estoppel theory did not apply.[185]

Two years later, the Court faced the question of whether the Fifth Amendment precluded the use of post-arrest, pre-*Miranda* silence for impeachment purposes in *Fletcher v. Weir*.[186] The only significant difference between the defendants in *Jenkins* and *Fletcher* was that the defendant's silence in *Fletcher* was maintained post-arrest.[187] The Court rejected the assertion that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent."[188] In a conclusory manner, the Court said that *Miranda* warnings must be given for *Doyle*'s estoppel theory to apply.[189] After *Jenkins* and *Fletcher*, the one remaining question is whether pre-*Miranda* silence can be used substantively.

D. The Original Meaning and Supreme Court Doctrine

The original understanding then fits under the general rule that silence cannot be used to convict someone. Neither the exception—silence can be used for impeachment—nor the exception to that exception—no impeachment with post-*Miranda* silence—is relevant to the inquiry.

The only potential problem with the original understanding under current Supreme Court decisions is a different interpretation of *Doyle*. Some courts have read *Doyle* to mean that unless a person has been read the *Miranda* warnings, the right to remain silent is unavailable.[190] The Eighth Circuit sees the general rule as silence *can* be used against a defendant.[191] Under this interpretation, *Griffin* bars prosecutorial use of the defendant's failure to testify at

[184] Id. at 238.
[185] Id. at 239–40.
[186] 455 U.S. 603 (1982).
[187] Compare *Jenkins*, 447 U.S. at 233, with *Fletcher*, 455 U.S. at 603–04.
[188] *Fletcher*, 455 U.S. at 606 (internal citation omitted).
[189] Id. at 605–07.
[190] United States v. Frazier, 408 F.3d 1102, 1110 (8th Cir. 2005).
[191] Id.

trial and *Doyle* bars the use of post-*Miranda* warning silence.[192] Otherwise, silence can be freely admitted. The result of this way of thinking is that the Fifth Amendment is effectively limited to a defendant's failure to testify at trial.[193] It takes *Doyle* out of context and "turns a whole realm of constitutional protection on its head."[194] *Doyle*'s holding in whole was: "We hold that the use *for impeachment purposes* of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."[195] The negative inference drawn by the Eighth Circuit from *Doyl*e's mention of *Miranda* warnings is that silence before *Miranda* could be used substantively. Yet, the *Doyle* Court specifically stated, "[T]he State does not suggest petitioners' silence could be used as evidence of guilt, [but] contends that the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue."[196]

Doyle simply does not advance the proposition that the government can use pre-*Miranda* silence as evidence of guilt.[197] *Doyle* was meant as an exception to the exception to the general rule. *Griffin* stands as the general rule: that the prosecutor cannot use the defendant's silence against her.[198] By testifying, however, the defendant triggers the exception to the general rule, meaning the prosecutor can use a defendant's silence to impeach her.[199] *Doyle* serves as an exception to that exception. A prosecutor cannot use post-*Miranda* silence to impeach the defendant because of the implicit promise in *Miranda* warnings that silence will not be used against

[192] See id. at 1109–10.

[193] United States v. Moore, 104 F.3d 377, 386.

[194] Id.

[195] *Doyle*, 426 U.S.at 619.

[196] Id. at 617.

[197] *Moore*, 104 F.3d at 386 ("Neither *Doyle* nor any other case stands for the proposition advanced by the prosecution that the defendant's silence can be used against him so long as he has not received his *Miranda* warnings. Logically, none could.").

[198] *Griffin*, 380 U.S. at 615 ("We hold 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.").

[199] See *Jenkins*, 447 U.S. at 238 ("[I]mpeachment 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 [sic] silence to impeach a criminal defendant's credibility.").

the defendant.[200] Thus, the general rule—that silence is inadmissible as substantive evidence—applies to pre-*Miranda* silence. This doctrinal understanding means that the original meaning of the Self-Incrimination Clause does not conflict with any Supreme Court cases. In fact, it accords with the general proscription against the use of silence in *Miranda*[201] and *Griffin*.[202]

III. COUNTERARGUMENTS

This Part addresses three arguments against using the original meaning of the Self-Incrimination Clause. First, one could argue that in a pre-*Miranda* situation a person is not under any compulsion to speak. Second, one could argue that "silence evidence" has no communicative aspects and therefore does not fall within "testimony." Finally, one could argue that not allowing evidence of silence will hamstring police officers and prosecutors in their pursuit of justice.

A. Compulsion

Justice Stevens, in his concurrence in *Jenkins v. Anderson*, suggested that the key to analyzing the right against self-incrimination is whether the person was under an official compulsion to speak.[203] After all, the Fifth Amendment does say, "No person . . . shall be *compelled* in any criminal case to be a witness against himself . . . ."[204] Stevens wrote that the right "is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak" because the purpose of the right "is to protect the defendant from being compelled to testify against himself at his own trial."[205] Specifically, Stevens said that the Fifth Amendment has no applicability to a situation before the police interview the

[200] *Doyle*, 426 U.S. at 617 ("Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights.").

[201] See *Miranda*, 384 U.S. at 460 ("All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

[202] See *Griffin*, 380 U.S. at 615.

[203] *Jenkins*, 447 U.S. at 241–42 (Stevens, J., concurring in the judgment).

[204] U.S. Const. amend. V (emphasis added).

[205] *Jenkins*, 447 U.S. at 241–42 (Stevens, J., concurring in the judgment).

person.[206] Nonetheless, even if Stevens had explicitly stated that there must be official compulsion for the right to protect against self-incrimination, there is official compulsion when police question someone.

As a preliminary matter, Stevens is correct that compulsion has become an important part of Fifth Amendment analysis.[207] Though Stevens implies that there is not compulsion in a pre-*Miranda* setting, the majority in *Jenkins* recognized that as an open question.[208] Rather than reaching the compulsion question, the majority rested its holding on the fact that the government was impeaching the defendant with his pre-*Miranda* silence, the exception to the general rule that has been recognized since at least *Raffel*.[209]

In adopting Stevens's view that compulsion is the keystone of the Self-Incrimination Clause, the Eighth Circuit looked to the Supreme Court's per curiam opinion in *Fletcher v. Weir*, which said that an arrest was not "governmental action which implicitly induces a defendant to remain silent."[210] But the Eighth Circuit read *Fletcher* out of context. *Fletcher* was addressing *Doyle*'s estoppel theory when it said that an arrest did not induce a defendant to remain silent.[211] The Court in *Fletcher* said that an arrest is not the equivalent of the *Miranda* warning because an arrest does not imply that the government will not use the defendant's silence at trial.[212] Thus, arrest alone does not induce a person to remain silent.

[206] Id. at 241–43; see also Doyle v. Ohio, 426 U.S. 610, 628 (1976) (Stevens, J., dissenting) ("But as long ago as *Raffel v. United States*, 271 U.S. 494, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes.").

[207] See, e.g., Perlman v. United States, 247 U.S. 7, 13 (1918) (discussing the types of seizures that qualify under the Fifth Amendment's compulsion component); Johnson v. United States, 228 U.S. 457, 458 (1913) ("A party is privileged from producing the evidence but not from its production.").

[208] *Jenkins*, 447 U.S. at 236 n.2 (majority opinion) ("Our decision today does not consider whether or under what circumstances prearrest [sic] silence may be protected by the Fifth Amendment.").

[209] Id. at 235 (citing Raffel v. United States, 271 U.S. 494, 496–97 (1926)).

[210] United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (discussing *Fletcher v. Weir*, 455 U.S. 603, 607 (1982)).

[211] *Fletcher*, 455 U.S. at 606–07.

[212] Id. at 607 ("In the absence of the sort of affirmative assurance embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest [sic] silence when a defendant chooses to take the stand.").

That is different than saying an arrest or police questioning is not compulsion. In short, *Fletcher* said that for the estoppel theory of *Doyle* to apply, the police must have given the defendant the implied promise contained in *Miranda* warnings.[213] Thus, the Court has never suggested that there cannot be compulsion before *Miranda* warnings have been issued.[214]

In fact, there is compulsion when a person stands mute in the face of police questioning. When someone is questioned by the police, she is compelled by the police to do one of three things. She can remain silent, admit her guilt, or lie. One may argue that the right against self-incrimination was born from torture, and therefore, unless the government is applying physical or extreme mental coercion, there is no applicability of the right.[215] But that argument reflects only one aspect of the historical development of the right. The right against self-incrimination developed as a response to the cruelties of the trilemma that the oath ex officio created. While there was a threat of physical torture involved, the true aim of the right was to prohibit the government from requiring the defendant to provide evidence of her own guilt. As the history of the right against self-incrimination shows, physical compulsion was not the only compulsion with which the Founders were concerned.[216]

At least one Eighth Circuit judge has questioned the wisdom of saying there is no compulsion inherent in police questioning.[217] Judge Lay pointed out that denying the defendant the right to remain silent is at odds with the logic of the argument that the silence

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[213] Id. at 606 ("In *Jenkins*, as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him.").

[214] Frank R. Herrmann & Brownlow M. Speer, Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack, 35 Am. J. Crim. L. 1, 19–20 (2007) ("[T]here is no rule of law that postpones the protection of an arrested defendant's privilege against self-incrimination until he is under 'official compulsion to speak,' i.e., subjected to custodial interrogation by law enforcement authorities.").

[215] This is essentially what the Eighth Circuit has held. *Frazier*, 408 F.3d at 1111.

[216] During the ratification process of the Fifth Amendment, Senator William Maclay of Pennsylvania said, "[E]xtorting evidence from any person [is] a species of torture . . . . [H]ere [is] an attempt to exercise a tyranny of the same kind over the mind. The conscience was to be put on the rack . . . ." Maclay, supra note 78.

[217] United States v. Osuna-Zepeda, 416 F.3d 838, 846 (8th Cir. 2005) (Lay, J., concurring).

is probative of guilt.[218] Judge Lay said, "[I]f an arrested person would feel an instinctive urge to protest his innocence, he has experienced an official compulsion to speak sufficient to trigger the right to remain silent."[219] In other words, the government cannot argue both that the person's silence is relevant and therefore admissible because a normal person would feel compelled to speak, but also argue that the Fifth Amendment does not apply because the person is not compelled. Such an argument is specious. A person questioned by the police is compelled to speak because of the cruel choices she faces: incriminate herself, lie, or stay silent and give the prosecutor evidence of her guilt.[220]

B. Testimony

Although one may argue that silence does not satisfy the testimonial requirement under *Schmerber v. California*,[221] silence is testimonial when it is introduced for the purpose of imputing an admission of guilt. In *Schmerber*, police officers drew blood from a drunk driving suspect over the suspect's objections to such a procedure.[222] The 5-4 Court held that the right against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial or communicative nature*."[223] Blood, the majority found, was not communicative or testimonial in nature. The

[218] Id.

[219] Id. at 847.

[220] This formulation assumes that the person is guilty. But the Fifth Amendment "serves as a protection to the innocent as well as to the guilty." Ullman v. United States, 350 U.S. 422, 427 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) (opinion of Magruder, C.J.)).

[221] 384 U.S. 757, 761 (1966) (noting that the privilege protects one from "provid[ing] the State with evidence of a testimonial or communicative nature").

[222] Id. at 765. The Court was presented the same question in *Breithaupt v. Abram*, 352 U.S. 432, 432–33 (1957), but there the Court did not have to decide the Fifth Amendment issue because the Self-Incrimination Clause had not been incorporated against the states. See Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Self-Incrimination Clause against the states).

[223] *Schmerber*, 384 U.S. at 761 (emphasis added). This reading of the Self-Incrimination Clause highlights the problem with Madison's novel formulation. Instead of keeping the right phrased the way it had been for years, Madison struck out on his own with a new phrase that would eventually inject a new requirement into the old maxim.

Court in *Schmerber* relied on Wigmore's view that "the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence."[224]

While one may conceive of blood as non-communicative in the sense that it is just physical evidence, silence is most certainly communicative. As the Ninth Circuit pointed out in rejecting the argument that silence is demeanor evidence, "The non-reaction the government seeks to introduce as 'demeanor' evidence is not an action or a physical response, but a failure to speak."[225] If the defendant's silence did not communicate anything, it would not be relevant to the defendant's guilt. Wigmore believed that the right should only protect words "from the person's own lips."[226] With pre-*Miranda* silence, however, it is the police and prosecutor who are putting the words onto the person's lips. By accusing the person and then introducing her silence in the face of that accusation, the prosecutor is putting the admission upon the defendant's lips and compelling her to communicate her guilt. Thus, pre-*Miranda* silence satisfies the communicative requirement of *Schmerber*.[227]

C. Impediments

Finally, there is the potential criticism that if people can assert their Fifth Amendment right in the face of police officers, police will no longer be able to conduct effective investigations and prosecutors will lose valuable evidence. This argument is a variant of the arguments leveled by *Miranda*'s detractors. When the Court handed down *Miranda*, many politicians, police officers, and academics assailed the decision as deleterious to police investiga-

[224] Wigmore, supra note 145, § 2263, at 378–79. *Schmerber*'s majority also drew on Justice Holmes's reading of the Fifth Amendment right as a "prohibition of the use of physical or moral compulsion to extort communications from [the accused], not an exclusion of his body as evidence when it may be material." 384 U.S. at 763.

[225] United States v. Velarde-Gomez, 269 F.3d 1023, 1031 (9th Cir. 2001).

[226] Wigmore, supra note 145, § 2263, at 378–79.

[227] For more explanation on this, see Willis, supra note 11 ("Under this framework, evidence that is considered testimonial will be subject to exclusion when it is not preceded by *Miranda* warnings. Consequently, evidentiary use of a non-testifying defendant's post arrest [sic], pre-*Miranda* silence should be barred under the Fifth Amendment as testimonial evidence.").

tions.[228] Most scholars, studying *Miranda*'s effect, have found that *Miranda* only had a negligible effect on the number of confessions that police garnered.[229] Thus, there is little reason to expect that the application of the right to pre-*Miranda* situations would have a significant impact on confessions and prosecutions.[230]

There are more reasons to reject this counterargument. First, there is no requirement that a person be told she has the right to refuse questioning. The Court has already rejected a similar requirement that police inform people that they have the right to refuse consent for search.[231] Thus, the argument that the rule will decrease confessions only makes sense if people learn of the rule independent of the police and remember their right when confronted. In any event, the majority of people already believe they have the right to remain silent. One study conducted in the mid-1990s found that 80% of Americans believed they had a right to remain silent before they were read *Miranda* warnings.[232] Thus, in the vast majority of cases, a defendant believes she has the right to remain silent whether or not she receives a verbal *Miranda* warning. The proposed rule merely reflects this reality, rather than altering the status quo.

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[228] See, e.g., Liva Baker, *Miranda*: Crime, Law and Politics 176–77 (1983) (arguing that *Miranda* warnings can impede investigations); Fred P. Graham, The Self-Inflicted Wound 276–304 (1970) (noting and contesting some scholars' assertions that *Miranda* reduces confession rates); Fred E. Inbau & James P. Manak, *Miranda v. Arizona*—Is it Worth the Cost?, 24 Cal. W. L. Rev. 185, 199 (1988) (arguing *Miranda* warnings unnecessarily burden police, prosecutors, and courts).

[229] See, e.g., Irene M. Rosenberg & Yale L. Rosenberg, A Modest Proposal for the Abolition of Custodial Confessions, 68 N.C. L. Rev. 69, 114 n.259 (1989) (quoting Welsh White, Defending *Miranda*: A Reply to Professor Caplan, 39 Vand. L. Rev. 1, 19 n.99 (1986)) ("[I]t seems reasonably clear that '[t]he great weight of empirical evidence supports that conclusion that *Miranda*'s impact on the police's ability to obtain confessions has not been significant.'" (second alteration in original)).

[230] In addition, a rule permitting pre-*Miranda* silence offers perverse incentives to police officers. Hennes, supra note 9, at 1036–37 ("Under the current system, an enterprising arresting officer may expand the time window during which silence is admissible by delaying custodial interrogation and thus delaying the need to administer *Miranda* warnings.").

[231] Drayton v. United States, 536 U.S. 194, 206–07 (2002) (rejecting the requirement that police warn a person he has the right to refuse consent).

[232] Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950–1990, at 51 (1993).

Second, silence evidence is "insolubly ambiguous."[233] After all, once one abandons the premise that all innocent people speak when false accusations are leveled, there is no substance left to silence. Finally, even if the original understanding has a negative effect on confession rates, that is the price society must pay to respect individual rights. While society must punish criminals, it must sometimes subjugate that necessity to individuals' autonomy.

CONCLUSION

Our forefathers understood the long history of *nemo tenetur*. They recognized that the right was forged in centuries where the cruel trilemma reigned. They knew the maxim was a simplification of Lilburne's plea that "no mans [sic] conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so."[234] The Founders also understood that the right extended beyond the courthouse doors. It was available in the face of inquiring tax collectors and curious Supreme Court Justices. Throughout its history, the right precluded the judge or jury from inferring admissions of guilt from silence. As Lilburne fought against the insinuations of Judge Prideaux, so Benjamin Franklin railed against the assumptions of the Presbyterian Synod.

When Madison introduced what was to become the Fifth Amendment, he introduced it in the shadow of this history. And when understood as it was originally read, the Fifth Amendment prohibits the substantive use of pre-*Miranda* silence. It protects the right to remain silent outside of the courthouse in the face of executive officials, something that was protected throughout the history of *nemo tenetur*. But introducing silence evidence would invite the jury to infer guilt from silence, one of the chief abuses the Amendment was meant to cure. Finally, admitting pre-*Miranda* silence would create the very evil out of which the right was born: cruel choices. From these considerations, it is clear that the Founders meant to preclude admission of pre-*Miranda* silence because

[233] *Doyle*, 426 U.S. at 617; see also United States v. Hale, 422 U.S. 171, 180 (1975) ("In most circumstances silence is so ambiguous that it is of little probative force.").

[234] Lilburne, supra note 15.

of the right's historical genesis and because the right was "as broad as the mischief against which it seeks to guard."[235]

[235] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).