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David Rossman

Boston University School of Law

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RESURRECTING *MIRANDA*'S RIGHT TO COUNSEL

DAVID ROSSMAN*

INTRODUCTION

The pedantic policeman's *Miranda* warning:

OK. Listen up. I am going to read you your rights. You have the right to remain silent.¹ Anything you say can be used against you.² You have the right to an attorney.³ If you can't afford one, an attorney will be appointed for you.⁴

Now that I've told you what the Supreme Court says I have to say, let me tell you what it really means.

That right to silence I told you about, it's not exactly what it seems. It's true that I can't force you to talk. And it's certainly true that anything you say can be used against you. But not much else about it is really what it seems.

For starters, I can keep asking you questions until you do make a statement.⁵ Unless you make it absolutely clear that you want to remain silent, by words and not by actions, nothing prevents me from keeping it up and getting you to say something that we can use in court.⁶ And you know what, even if you're absolutely clear about wanting to assert this so-called right to silence, I don't have to listen to you.⁷ I can keep on trying to get you to make a damaging statement, and according to the Supreme Court, I will have done nothing wrong.⁸ So long as the prosecutor doesn't use the statement itself, I will still be on the right side of the Constitution. Why would I do that? Because, even though you tried to assert your "right to silence," if I ignore you and get you to tell me something that provides a lead to evidence I can use against you or the name of a person who can

* Professor of Law and Director, Criminal Law Clinical Programs, Boston University School of Law.

¹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

² *Id.*

³ *Id.*

⁴ *Id.* at 473.

⁵ *Berghuis v. Thompson*, 560 U.S. 370, 381-82 (2010).

⁶ *Id.* at 382.

⁷ *Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003).

⁸ *Id.*

testify against you, I can build up my case and use what I found in court.⁹ Plus—and this is the icing on the cake—even if I ignore your clear and unequivocal statement that you want to remain silent and keep asking questions that finally gets you to say something useful to me, the jury will learn about your statement if you take the stand and testify in your own defense.¹⁰

And if you feel a little let down because the right to silence isn't quite what it seems, boy, wait until I spell out what the right to an attorney means. The first thing I want you to know is that, just like with the right to silence, this so-called right to an attorney won't even come into play unless you are unequivocally clear about what you want.¹¹ And even if you have the presence of mind to come out with that kind of clear statement, I can ignore what you say, just like with the right to silence.¹² Yeah, if I do ignore you and keep on questioning you, we can use whatever you say if you take the stand later,¹³ and we can use any leads you give us to find other evidence that can be introduced at trial.¹⁴

But that's not the best part about this so-called right to an attorney. Even if you make one of those clear requests for a lawyer that most suspects find so hard to make, you will never, ever get an attorney to talk to you as part of a police interrogation. The best that will happen is that we'll stop questioning you, at least until you bring up the topic of our interrogation again, at which point we can recommence questioning.¹⁵ But you won't get a lawyer then either. There's no way any police officer will allow a lawyer in the interrogation room. Buddy, you are on your own.

Everything in this pedantic policeman's *Miranda* warning is an accurate statement of the law. The *Miranda* doctrine was the product of the Warren Court's lofty and, in hindsight, wildly naïve view that its four-part warning would make the interrogation process more fair. Since then, *Miranda* has been largely gutted at the hands of Justices who did not share their predecessors' vision of the correct balance between suspects' rights and police interrogation.

Miranda represented the high-water mark of the criminal procedure revolution of the 1960s.¹⁶ The audacity of its solution to the problem of coerced police confessions embroiled the Supreme Court in controversy that extended

⁹ *United States v. Patane*, 542 U.S. 630, 641-43 (2004).

¹⁰ *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

¹¹ *Davis v. United States*, 512 U.S. 452, 459 (1994).

¹² *Chavez*, 538 U.S. at 767.

¹³ *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

¹⁴ *Patane*, 542 U.S. at 639-41.

¹⁵ *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983).

¹⁶ See Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1627 (2006) (referring to the Warren Court's criminal procedure decisions as a "revolution in constitutional criminal procedure").

for decades. At this point in its history, however, *Miranda* is bankrupt both intellectually and in terms of practical effect.

Miranda, by way of what I am sure is unnecessary background, was the Court's major effort to establish a proper balance between the need of the police in obtaining information from a suspect and respect for the suspect's individual autonomy in deciding whether to cooperate. Relying on the privilege against self-incrimination and the controversial assumption that the environment inherent in police interrogation is so psychologically coercive that a universal antidote is needed, *Miranda* announced its controversial prophylactic rule.¹⁷ Thus, *Miranda* requires the police to tell a suspect who is in custody four things prior to any interrogation: (1) you have a right to remain silent; (2) anything you say can be used against you; (3) you have the right to the presence of an attorney; and (4) if you cannot afford an attorney, one will be appointed for you prior to any questioning.¹⁸

The presence of a defense attorney played a key role in the *Miranda* Court's vision of the interrogation process. "[T]he right to have counsel present at the interrogation is *indispensable* to the protection of the Fifth Amendment privilege under the system we delineate today."¹⁹ The Court's reasoning in *Miranda* depends on the assumption that a lawyer would actually be present to ensure that the suspect is protected from making a coerced confession. The Court believed a lawyer's presence during interrogation was necessary to give the suspect any sort of meaningful opportunity to exercise the right to remain silent.²⁰ Without a lawyer present, the *Miranda* Court was skeptical of the efficacy of the police telling suspects that they did not have to answer their questions.²¹

Having a lawyer present, Chief Justice Warren reasoned, would also serve other important ends. Just having a lawyer in the room would deter the police from engaging in questionable tactics that may coerce a suspect into giving an untrustworthy statement.²² And, if the police did use an improper tactic, it would much more likely be exposed in court with a lawyer's testimony than that of a suspect.²³ If a guilty suspect decided to talk, the lawyer could ensure that the

¹⁷ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (concluding that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist," and that "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights").

¹⁸ *Id.* at 444.

¹⁹ *Id.* at 469 (emphasis added).

²⁰ See *id.* at 470.

²¹ See *id.* at 469 ("Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.").

²² *Id.* at 470.

²³ See *id.*

statement was fully accurate.²⁴ Finally, an innocent suspect would be in a better position to show that the police had picked the wrong target if he or she were assisted by counsel.²⁵

To ensure that lawyers were able to play the role the Court envisioned for them, the *Miranda* opinion gave clear directions about what the police had to do if the suspect asked for a lawyer. The interrogation could go no further until an attorney was by the suspect's side.²⁶ The Court did recognize that the police would not have to have lawyers on call at every police station for the purpose of advising suspects during interrogation.²⁷ The *Miranda* Court itself recognized that, even if a suspect asked for a lawyer, the police could always just terminate the interrogation.²⁸ But, unless the police were to abandon interrogation as an investigative technique, the Court left them with the choice of either doing it with an attorney present or meeting the heavy burden of showing that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."²⁹ The state could not meet the burden of showing a waiver simply from the fact that the police eventually obtained a confession.³⁰

Could the Justices have realistically thought that defense attorneys would become a routine part of the interrogation process? Certainly, their view of a defense attorney's salutary role in the process would have inclined them to think so:

An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.³¹

In terms of bringing about a fundamental change in the way that police conduct interrogations, however, *Miranda* was almost a dead letter on arrival. From its inception, no lawyers were ever actually made available to suspects

²⁴ *Id.*

²⁵ *Id.* at 482.

²⁶ *Id.* at 474.

²⁷ *Id.*

²⁸ *See id.* (noting that police may refrain from providing counsel "without violating the person's Fifth Amendment privilege so long as they do not question him during that time").

²⁹ *Id.* at 475 (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1964)).

³⁰ *Id.*

³¹ *Id.* at 480-81.

subject to police questioning.³² The police, not surprisingly, did not share the *Miranda* Court's opinion of the legitimacy of a lawyer's role in the interrogation room.³³ The traditional law enforcement view of defense attorneys' role in the interrogation process is redolent with salt allusions. "[A]ny lawyer worth his salt," Justice Jackson famously said in one such reference, "will tell the suspect in no uncertain terms to make no statement to police under any circumstances."³⁴

Viewing defense attorneys as their mortal enemy, the police went about implementing *Miranda* by doing everything in their power to use the one way out that would still allow interrogation without the presence of counsel. The warnings had to be given in a way that minimized the chance that the suspect would actually choose to exercise the right to silence or ask for the help of a lawyer. Modern studies on *Miranda* show that about eighty percent of all suspects agree to talk without a lawyer.³⁵ In my forty-five years as a criminal trial attorney, the ones who do not are overwhelming either professional criminals or educated people with money. Neither group is likely to be as intimidated by the police as those who make up the rest. The poor. The undereducated. The young. The members of racial and ethnic minority groups who fear the way the police interact with their community.

Skilled police interrogators do not view the *Miranda* warnings as much of an impediment. The typical interrogation takes places in an environment where the police have total control. Everything that happens is designed to minimize the importance of the rights contained in the *Miranda* warnings and the possibility that the suspect will say something that will cut off the flow of questions. Before the interrogator gets around to asking about the crime, the conversation often stays on mundane topics designed to establish rapport and gain trust.³⁶ The idea

³² See Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 797 (2006) (noting that in the vast majority of cases where a suspect asks for an attorney, no attorney is provided because the police simply cease the interrogations).

³³ See *id.* at 797-98 (arguing that rather than waste the time securing an attorney for the suspect, the police will simply cease interrogations because they know that the attorney will just tell their client to remain silent anyways).

³⁴ *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). The value of salt also seems to play a role in how prosecutors describe their role in keeping lawyers consulting with suspects. In *Malinski v. New York*, 324 U.S. 401 (1945), the prosecutor in a murder case explained to the jury why the defendant's confession, given in response to questioning by an Assistant District Attorney, was voluntary despite the police refusing to allow the defendant to see the lawyer that he requested: "You want a District Attorney in this county that is worth his salt, not a powder-puff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, 'Do you want anything? Do you want to have your lawyer or your wife or somebody else?'" *Id.* at 405 n.3.

³⁵ See Godsey, *supra* note 32, at 792.

³⁶ See Saul M. Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 389 (2007).

is to “establish a norm of friendly reciprocation.”³⁷ The warnings themselves are packaged much like the adverse health effects in a pharmaceutical advertisement, delivered as quickly as possible in a perfunctory way.³⁸ Moving from the warnings without giving the suspect any time to reflect reinforces an atmosphere that the suspect has no choice in the matter.³⁹

Miranda does nothing to curtail the sort of police interrogation tactics that are likely to produce false confessions. It does not prevent the police from pretending to have independent evidence of the suspect’s guilt, a prevalent ploy.⁴⁰ It also does not prevent the police from making suspects believe that they will face harsher consequences if they do not confess, a tactic that some officers still admit to using occasionally.⁴¹ Where the police do obtain a confession, it is potent evidence that almost always leads to a conviction. That goes for false confessions as well.⁴² As of 2009, of 252 people who have been exonerated by DNA evidence, 42 had given false confessions.⁴³ All were given *Miranda* warnings.⁴⁴

Miranda has become a safe harbor for the interrogation process that has displaced any other means of evaluating whether a confession should be admitted into evidence. In theory, the Due Process Clause still requires confessions to be voluntary, a doctrine that has traditionally considered whether the suspect was exercising free will in making the decision to talk to the police.⁴⁵ But, if the police have given an adequate *Miranda* warning and have obtained a

³⁷ George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME & JUST. 203, 251 (2002).

³⁸ See *id.* at 250 (“One strategy is to suggest that the warnings are a mere formality to dispense with prior to questioning, a simple matter of routine, by delivering the warnings quickly in a perfunctory tone of voice or in a bureaucratic manner.”).

³⁹ See *id.* at 250-51 (listing strategies used by police interrogators designed “to trivialize the legal significance of *Miranda*, create the appearance of a nonadversarial relationship between the interrogators and the suspect, and communicate that the interrogator expects the suspect to passively execute the waiver and respond to subsequent questioning”); Kassin et al., *supra* note 36, at 383 (“[T]hey may read the rights but then proceed to question suspects as though they had no choice in the matter, eliciting what some courts have called an ‘implicit waiver.’” (citation omitted)).

⁴⁰ See Kassin et al., *supra* note 36, at 389.

⁴¹ See *id.*

⁴² See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 24 (2009) (stating that in cases where confessions were proven false, conviction rates ranged from seventy-three to eighty-one percent).

⁴³ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2010).

⁴⁴ *Id.* at 1092.

⁴⁵ See *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (stating that the Court has an independent obligation to determine whether the confession was “the product of a free and rational will” and thus “comports with due process”).

statement that will pass muster under the law that has developed since *Miranda*, the confession is almost certainly going to be found to have been voluntary.⁴⁶

In the years since the *Miranda* decision, the Court has made it increasingly easy for police to get a confession that will pass muster. In order to demonstrate that the suspect understood his rights and declined to exercise them, all the police must do is show that the suspect understood the language used to deliver the warnings and afterwards answered questions.⁴⁷ In order to cut off questioning by invoking the right to silence or an attorney, the suspect has to make the kind of clear and unequivocal statement that powerless people in intimidating circumstances find practically impossible.⁴⁸ And, if a suspect does indicate that he or she wants an attorney, subsequently making the most obscure comment on the topic of the investigation will open the door to the police trying again to get a statement.⁴⁹

What is more, in the years since *Miranda*, subsequent Courts have given the police a great deal of incentive not even to follow the decision's relatively tepid mandate. The Court has held that statements obtained in violation of *Miranda* can still be used to impeach a defendant who takes the stand⁵⁰ or as a lead to further evidence that will be admissible despite its tainted origin.⁵¹ And, in the final insult to the vitality of *Miranda*, the Court has held that the police are generically incapable of violating the privilege against self-incrimination, the basis for the *Miranda* warnings in the first place, because the privilege only prevents the use of a compelled statement as evidence in a criminal trial, not the act of obtaining the statement.⁵²

The *Miranda* decision's vision of the need for defense counsel to make the interrogation process was not misguided. Leaving the police to deliver the message that a suspect has rights in the interrogation process simply does not work. But the *Miranda* Court was naïve. Given what we know about the way that defense attorneys conceptualize their role, the police will not allow the attorneys into the interrogation room. Where that leaves us today is with *Miranda* as a fig leaf—it provides cover for those who would avert their eyes

⁴⁶ See, e.g., *Degraffenreid v. McKellar*, No. 88-6590, 1989 WL 90569, *2-4 (4th Cir. Aug. 9, 1989) (reasoning that adequate *Miranda* warnings were sufficient to make the confession admissible despite the suspect being held incommunicado for five days in solitary confinement and taken from his cold cell only for questioning).

⁴⁷ See *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2011).

⁴⁸ See *Davis v. United States*, 512 U.S. 452, 460-62 (1994) (holding that a suspect's statement "Maybe I should talk to a lawyer" was not an unambiguous request for counsel).

⁴⁹ See *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (stating that a suspect's statement "Well, what is going to happen to me now?" was sufficient to allow the police to reinitiate interrogation of the suspect who had previously asked for an attorney).

⁵⁰ *Harris v. New York*, 401 U.S. 222, 226 (1971).

⁵¹ See *United States v. Patane*, 542 U.S. 630, 641-43 (2004).

⁵² See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

from the naked truth. But anyone with an imagination knows what is really going on behind closed doors.

What I propose is a modest change in the doctrinal landscape that might reinvigorate *Miranda* and produce a fairer balance between police interrogation and suspects' rights. It is the sort of proposal that could be adopted by a state supreme court or legislature. It would entail the following:

1. Police would give the same *Miranda* warnings that they have always provided.
2. The police would still operate under the same rules governing the legitimacy of a suspect's decision to talk in the absence of an attorney. In other words, the waiver rules for *Miranda* rights would not change.
3. If the police obtain a statement from a suspect without the presence of an attorney, then the jury would be instructed that there is a policy in the jurisdiction that the police should not interrogate suspects in the absence of a defense attorney, even with a valid waiver, and that the jury may take into account in evaluating the credibility of the statement the fact that the police did not follow this policy.⁵³
4. If the police do provide an attorney for the suspect during interrogation, then the suspect would be permitted to consult with the attorney, and the attorney would be given a reasonable opportunity to advise the suspect during the interrogation.
5. If the suspect does not answer questions that are reasonable for someone in the suspect's position at the time to respond to, then that information would be admissible as substantive evidence of the suspect's guilt, subject to a ruling on the probative value of the suspect's silence at the time of trial.
6. If the suspect at trial maintains that his or her silence during the interrogation was based on the advice of the attorney, then that claim shall constitute a waiver of the attorney-client privilege insofar as it would otherwise protect the contents of the conversation between the suspect and the attorney.⁵⁴

⁵³ Some jurisdictions have mandated jury instructions in other contexts when police interrogation does not meet a recommended standard. Massachusetts is one such jurisdiction. See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004) (“[W]hen the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.”).

⁵⁴ This proposal is very similar to the English practice which provides solicitors for

The main rationale behind the proposal is pragmatism. It is not politically feasible to expect any jurisdiction to mandate the introduction of defense attorneys into the interrogation process without changing the incentives for attorneys to advise their clients to say absolutely nothing to the police. Nor is it feasible to expect any change in the current regime that allows police to operate under the Supreme Court's current waiver standards. But, giving each side something that they do not currently get under existing interrogation doctrine may make this modest change possible. Under this proposal, law enforcement gets the ability to tell juries in some cases that a suspect refused to answer police questions, and defense counsel gains the ability to tell juries that the police failed to follow the jurisdiction's policy preference for giving suspects a lawyer prior to interrogation. Defendants, meanwhile, get an actual chance of having a lawyer present to provide advice during the interrogation process, but only at the cost of the jury potentially learning of their refusal to cooperate if that is what they choose.

None of the steps this proposal calls for would require jettisoning any existing Supreme Court precedent. But one step, offering the possibility of using a suspect's refusal to answer as part of the prosecution's case in chief, is at least contestable. The Supreme Court has refused on a number of occasions to provide a direct answer to the closely related question of whether a suspect's refusal to answer an incriminating question in an uncounseled, noncustodial interrogation may be used as substantive evidence.⁵⁵ In its most recent encounter with this issue in *Salinas v. Texas*, the Court found it unnecessary to confront this question because the suspect had not explicitly asserted a Fifth Amendment privilege, but simply remained silent.⁵⁶ One can make, however, a good case that no matter how the Court answers the question of the use of an uncounseled suspect's assertion of the privilege in a noncustodial interrogation, where counsel is present, the privilege does not stand in the way of the State using the suspect's responses whatever they may be.

DOES THE CONSTITUTION PERMIT THE USE OF A COUNSELED SUSPECT'S SILENCE AS EVIDENCE OF GUILT?

The *Miranda* decision itself seems to foreclose any proposal to allow the prosecution to use a suspect's silence during police interrogation as evidence of guilt. Chief Justice Warren girded the *Miranda* warnings with self-incrimination

suspects interrogated by the police and allows the prosecutor to comment on a suspect's refusal to answer questions. *See* Criminal Justice and Public Order Act of 1994, c. 33, §§ 34-35 (Eng.) (permitting inferences to be made regarding a suspect's guilt based on the suspect's silence).

⁵⁵ *See* *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (addressing only the issue of whether the express invocation requirement applies to noncustodial police interviews); *Jenkins v. Anderson*, 447 U.S. 231, 232 (1980) (addressing only the issue of whether prearrest silence can be used to impeach a criminal defendant who chooses to testify).

⁵⁶ *Salinas*, 133 S. Ct. at 2184.

armor designed to protect those who relied on them from any taint in the jury's eyes: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."⁵⁷ Ten years later in *Doyle v. Ohio*,⁵⁸ the Court reinforced this protection by finding a due process violation in impeaching a defendant's trial testimony by evidence that the defendant remained silent after receiving a *Miranda* warning.⁵⁹

Yet, a closer examination of these two barriers reveals that neither is insurmountable. They each rest on basic premises that would make questionable their application to the situation of a suspect who remained silent during a custodial police interrogation where a lawyer was actually present.

The *Doyle* hurdle is easier to clear, and we will look at it first. The defendants in *Doyle* were arrested after selling ten pounds of marijuana to a police informant.⁶⁰ They both testified at trial that an aborted transaction took place, but that they were purchasers not vendors.⁶¹ They claimed that the informant had framed them.⁶² To impeach this testimony, the prosecutor on cross-examination brought out the fact that after they had been arrested and had received *Miranda* warnings, neither defendant had told this story to the police.⁶³

The Court's decision in *Doyle* rested on an estoppel theory and how the government's action affected the relevance of the defendant's silence.⁶⁴ By not coming forward with their story, the defendants had done exactly what the police invited them to do when the police told the defendants they had a right to remain silent. Because the police's action in giving the *Miranda* warning may well have prompted the defendants to keep their story to themselves, it would be fundamentally unfair to allow the government to use the defendants' reliance on what they were told as evidence of their guilt.⁶⁵ Moreover, the Court reasoned, it would be reasonable for anyone hearing the part of the *Miranda* warning about the right to remain silent to think that if one took the police up on their word it would come without any penalty, including the use of silence as impeachment.⁶⁶ Not only did the Government invite the defendants to keep their story from the police, but by doing so the Government also robbed the defendants' silence of a

⁵⁷ *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) (citations omitted).

⁵⁸ 426 U.S. 610 (1976).

⁵⁹ *Id.* at 618.

⁶⁰ *Id.* at 611.

⁶¹ *Id.* at 612-13.

⁶² *Id.* at 613.

⁶³ *Id.* at 613-14. The case also had as one of its more unlikely elements the contention that the informant mysteriously threw \$1320 in cash into the defendants' car. *Id.*

⁶⁴ *See id.* at 620 (Stevens, J., dissenting) (noting that "[t]he Court's due process rationale has some of the characteristics of an estoppel theory").

⁶⁵ *See id.* at 618.

⁶⁶ *See id.*

substantial proportion of the value it would have in contradicting their trial testimony. Because the police themselves prompted the defendants to fail to tell them their fantastic story, their silence after being told that they need not say anything was too ambiguous to support the prosecutor's attempt to use it as impeachment material.⁶⁷

Because the lynchpin of the *Doyle* doctrine is the police announcement of a right to remain silent, all one needs to do to avoid its consequence is to have the police be silent on the topic of silence. Voilà, problem solved. In a world where *Miranda* still requires police to give warnings to suspects prior to custodial interrogation, this insight gives prosecutors a way to impeach defendants with evidence of their silence only in situations where the defendants were not entitled to *Miranda* warnings. One example would be prior to a suspect's initial contact with the police, where there simply is no occasion to provide a warning about the right to silence. This is precisely the context in which the *Doyle* problem came to the Court in *Jenkins v. Anderson*.⁶⁸

Dennis Jenkins testified in his murder trial that he stabbed the victim in self-defense.⁶⁹ He turned himself in to the police two weeks later.⁷⁰ On cross-examination, the prosecutor brought out the fact that in the interim between the stabbing and his arrest, the defendant never told the police his exculpatory version of the events.⁷¹ The Court not only found that Jenkins's two weeks of silence was probative,⁷² but that there was nothing unfair about the State's use of it to impeach his trial testimony. Because no government action induced Jenkins to remain silent, the Court held that "the fundamental unfairness present in *Doyle* is not present in this case."⁷³

Jenkins, remember, involved silence prior to a suspect's contact with the police. There is another time frame where the police similarly do not have to give a *Miranda* warning: after arrest but before any interrogation. The Court extended *Jenkins* to just this context in *Fletcher v. Weir*.⁷⁴ Eric Weir seemed to follow the script written by Jenkins. He also got into a knife fight and killed his adversary.⁷⁵ He also testified at trial that he acted in self-defense.⁷⁶ And, he also

⁶⁷ See *id.* at 617 ("[E]very post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.").

⁶⁸ 447 U.S. 231 (1980).

⁶⁹ *Id.* at 232-33.

⁷⁰ *Id.*

⁷¹ *Id.* at 233-34.

⁷² See *id.* at 239 ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." (citing 3 JOHN HENRY WIGMORE, EVIDENCE § 1042, at 1056 (Chadbourn rev. 1970))).

⁷³ *Id.* at 240.

⁷⁴ 455 U.S. 603 (1982).

⁷⁵ *Id.* at 603-04.

⁷⁶ *Id.* at 603.

never told the police his version of the events.⁷⁷ But, unlike Jenkins, Weir was not only asked on cross-examination why he did not go to the police and report the killing, but also why he never told the police after he was arrested that he acted in self-defense.⁷⁸ Critical to the Court's resolution of the issue was the fact that Weir never "received any *Miranda* warnings during the period in which he remained silent immediately after his arrest."⁷⁹ Absent an affirmative assurance from the government that Weir could remain silent without any penalty, the Court saw nothing unfair about using Weir's postarrest silence to impeach him.⁸⁰ And, because Weir was not relying on an express invitation to keep his story to himself, the use of the inconsistency between his silence and his trial testimony was more reasonable.⁸¹

Given the extent to which *Miranda* warnings have pervaded the national consciousness through myriad television cop shows and movies, one might question the soundness of a distinction based on the police telling a suspect something that probably every American over the age of ten knows by heart.⁸² Indeed, it is fairly common for defendants to tell their lawyers about their outrage at the fact that they were not "given their rights." Now, there is nothing wrong with police withholding a *Miranda* warning when they have made an arrest. *Miranda* only requires the warning as a predicate to interrogation, and if the police do not ask questions about the crime, then they do not have to recite the *Miranda* rights. But, if one wanted to ensure that even those who did not receive a *Miranda* warning were not misled about the consequences of remaining silent, there is a simple fix to this problem as well. Someone could simply inform the suspect of the pros and cons of not answering police questions. And who better to do that than defense counsel?

If a defendant were given access to a lawyer during police questioning in a regime where one's silence might be admissible at trial, one of the things the

⁷⁷ *Id.* at 603-04.

⁷⁸ Compare *Jenkins*, 447 U.S. at 233 (reciting the cross-examination of the defendant, which focused on why the defendant had not gone to the police with his version of the events sooner), with *Weir*, 455 U.S. at 603 (noting that the in-court statement regarding self-defense "was the first occasion on which respondent offered an exculpatory version of the stabbing" and the prosecution cross-examined him as to why he had not advanced his self-defense claim sooner).

⁷⁹ *Weir*, 455 U.S. at 605.

⁸⁰ *Id.* at 607 ("In the absence of the sort of affirmative assurances 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 silence when a defendant chooses to take the stand.").

⁸¹ See *id.* ("A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.").

⁸² See *State v. Leach*, 102 Ohio St. 3d 135, 2004-Ohio-2147, 807 N.E.2d 335, at ¶ 34 ("With the proliferation of movies and television shows portraying the criminal justice system, it would be difficult to find a person living in America who has not heard of *Miranda* warnings.").

lawyer would do would be to advise the client on precisely this issue. The lawyer would point out the advantages and disadvantages of cooperating with the police. And one of the advantages would be avoiding the possibility that the jury would learn of the client's refusal to answer questions.

So long as a suspect has not been left with the misconception that remaining silent carries no penalty, the due process problem that *Doyle* presents is not relevant. And a major benefit that lawyers provide for clients is to disabuse them of misconceptions about the criminal justice system.

However, the barrier to the proposal allowing a suspect's counseled silence to be used as evidence based on the privilege is more daunting. The rationale for the Court's conclusion, that using a suspect's silence is an impermissible penalty on the exercise of the privilege against self-incrimination, does not have any traction when an attorney is sitting next to a suspect in an interrogation. In order to see why, let us first examine the rationale for Chief Justice Warren's statement in *Miranda*.

The idea that the State may not penalize people who exercise the privilege by referring to their silence at trial comes from *Griffin v. California*,⁸³ the case on which *Miranda* relied for this proposition.⁸⁴ *Griffin* involved a murder trial where the defendant did not take the stand.⁸⁵ Both the prosecutor and the judge, following a provision in the California Constitution that made it fair game for both to comment on the failure of the defendant to explain or deny the evidence against him,⁸⁶ pointed out that the only surviving witness to the events surrounding the victim's death was the defendant who chose not to tell the jury what had happened.⁸⁷ The prosecutor and judge's solemnizing the significance of the defendant's failure to take the stand, *Griffin* held, was "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."⁸⁸

⁸³ 380 U.S. 609, 615 (1965).

⁸⁴ *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

⁸⁵ *Griffin*, 380 U.S. at 609.

⁸⁶ *See id.* at 610 n.2 ("Article I, § 13, of the California Constitution provides in part: ' . . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.'").

⁸⁷ *See id.* at 610-11. The trial judge's instructions to the jury included the following:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Id. at 610.

⁸⁸ *Id.* at 614. The opinion went on to explain: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Id.*

The defendants in *Griffin* and *Miranda* were both exercising the privilege against self-incrimination when they remained silent in their respective contexts. The defendant in *Griffin* was taking advantage of the special rule concerning the privilege that applies to a defendant in his or her own criminal trial. A prosecutor (or a co-defendant if the case is tried jointly) cannot even call the defendant to the stand.⁸⁹ The basis for this exception is the negative inference most jurors would likely draw from the fact that the defendant explicitly refused to answer the prosecutor's pointed questions.⁹⁰ Staying off the stand was precisely what the privilege allowed Eddie Griffin to do. So asking the jury to draw a negative inference from that behavior imposed a cost on the exercise of a constitutionally protected right.

The people who were the objects of the Court's solicitude in *Miranda*—suspects in police custody who are subject to interrogation—are also exercising a constitutionally protected right. That is because of the Court's assumption about the effect of the police-dominated environment in which they find themselves. “Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings,” Chief Justice Warren famously proclaimed, “no statement obtained from the defendant can truly be the product of his free choice.”⁹¹ The highly suspect empirical assertion implicit in this statement and the resulting prophylactic nature of the remedy the Court prescribed have led to much controversy. But taken on its face, the assumption about the inherently coercive nature of custodial interrogation means that suspects in custody do not have to affirmatively assert the privilege to gain its benefit. If a suspect in police custody makes an incriminating statement in response to a question, the statement will be excluded at trial on the grounds of the privilege without a judge looking to see what actually motivated the answer. By virtue of the *Miranda* Court's amateur psychology, compulsion must be presumed in custodial interrogations.

It should be clear by now why it was natural for the *Miranda* Court to use the *Griffin* principle, which condemned imposing costs on the exercise of the privilege, as the reason why a prosecutor could not use at trial the fact that a suspect remained silent in the face of an accusation. Remaining silent during custodial interrogation is what the privilege allows one to do. If asking the jury to draw a negative inference from the exercise of the privilege in the context of refusing to take the stand is prohibited, as in *Griffin*, then the same negative inference regarding the exercise of the privilege in the context of police interrogation should also be prohibited.

⁸⁹ *Minnesota v. Murphy*, 465 U.S. 420, 426 (1983) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

⁹⁰ *Cf. Namet v. United States*, 373 U.S. 179, 185-88 (1963) (discussing the probability that jurors would draw a negative inference from the fact that prosecution witnesses claimed the privilege on cross-examination to questions about their participation in criminal conduct together with the defendant).

⁹¹ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

This equation changes, however, when the interrogation takes place in the presence of an attorney. The *Miranda* Court's underlying psychological assumption about the pressure a suspect faces in a police-dominated environment no longer fits. It would be disingenuous to conclude that the presence of the very antidote to police pressure, a defense attorney, did not remove the coercion that custodial police interrogation would otherwise entail. In short, when a suspect with a lawyer present remains silent at a custodial interrogation, one cannot conclude by virtue of *Miranda*'s logic that the silence represents an exercise of the privilege against self-incrimination. It is a different kind of silence. Which leads us to the next question we must confront: Does every act of silence in the face of police questioning entail an exercise of the privilege against self-incrimination?

Not every person who remains silent is doing something the Constitution protects. Silence is a funny sort of right. Of course, we all have the power within us to remain silent whenever we want. So to say we have a right to silence clearly cannot mean that the Constitution guarantees us the ability to do something we otherwise could not do, like vote. We cannot vote without some affirmative act on the part of the government allowing us to engage in the act of voting. We do not need the government to do anything like that to allow us to remain silent. So clearly, what a right to silence must mean is that if we remain silent under some, or all, circumstances, we not only have the power to do so but also have a normative claim that it is proper to do so. And, having a normative claim against the State to exercise a right means that the State is under a corresponding duty not simply to allow us to exercise that right, but to avoid interfering with us when we do.⁹²

That is where the concept of compulsion comes into play. What the privilege gives us is not a generalized right granted to us by the State to remain silent, but a right to have the State not use compulsion to get us to give up our power to exercise silence. If you think you have a generalized right to remain silent that governs all of your interactions with government officials, try it out. When you are appointed to the federal bench and a future colleague administers the oath asking you to swear to uphold the Constitution, remain silent and see what happens. Even if your silence was based on a fear that anything you said in response to the oath would require you to admit your commitment to the violent overthrow of the government (which we can assume under some circumstances would be an incriminating statement), I would not count on your chances of convincing anyone you were entitled to the job because of the privilege against self-incrimination.

The language of the privilege rings the bell of compulsion, not silence. It guarantees only that no person "shall be *compelled* in any criminal case to be a

⁹² See Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812, 817-18 (1957) (discussing how the word "rights" is a conclusory term for expressing the normative judgment that a particular person in a particular setting is entitled to do or receive a particular thing).

witness against himself.”⁹³ The Court has consistently adhered to, and sometimes quoted, the view of Leonard Levy about this aspect of the privilege: “The element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories.”⁹⁴ *Miranda* did not require police to tell a suspect that you have “the right to remain silent”⁹⁵ because that is an accurate general description of what the privilege provides. It required police to give suspects this information because the suspects were going to be questioned in an environment where the Court concluded compulsion was an inherent part of the environment. That is why the Chief Justice does not warn the incoming President of a right to silence before administering the oath of office. Nor does a police officer have to give you a *Miranda* warning unless you are in custody, because it is only when suspects are in a custodial environment that the Court is willing to presume that suspects cannot resist police compulsion to answer questions.⁹⁶

Justice Stevens was the foremost proponent of this view of the privilege. He explained his position in *Jenkins*, in which he concluded “the privilege against compulsory self-incrimination is simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.”⁹⁷ Where a defendant remained silent at his trial, Justice Stevens understood that an exercise of the privilege was involved.⁹⁸ But in the prearrest context where the suspect is under no official compulsion to speak or remain silent, a voluntary decision to do one or the other does not raise any issue under the privilege.⁹⁹ That being the

⁹³ U.S. CONST. amend. V (emphasis added).

⁹⁴ *South Dakota v. Neville*, 459 U.S. 553, 562 (1983) (quoting LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 328 (1968)); see also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 57 n.6 (1964) (“The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use *compulsion* to elicit self-incriminating statements; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by *compulsion*.” (emphasis added) (citations omitted)).

⁹⁵ *Miranda*, 384 U.S. at 468.

⁹⁶ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 437-42 (1984) (framing the issue of custody in the case as “whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights” and concluding that a traffic stop did not constitute custody under this formulation).

⁹⁷ *Jenkins v. Anderson*, 447 U.S. 231, 232-33 (1980) (Stevens, J., concurring) (footnote omitted).

⁹⁸ *Id.* at 242.

⁹⁹ *Id.* at 243-44. Justice Stevens’s concurrence did contain language that some have maintained strip it of any support for its application to the situation where the suspect is represented by counsel during police interrogation. See *State v. Borg*, 806 N.W.2d 535, 554-55 (Minn. 2011) (Meyer, J., dissenting) (“Justice Stevens’ opinion is clearly tied to the facts of that case, in which the defendant’s silence came before any contact with the police.”). Distinguishing the prearrest context presented by the facts in *Jenkins* from a trial where a

case, if a defendant's silence was otherwise probative, a prosecutor could introduce it at trial either for impeachment or as substantive evidence of guilt.¹⁰⁰

There is, however, one small problem with Justice Stevens's explanation. He essentially hid the rabbit he pulled out of the hat by assuming that there is no official compulsion to speak if remaining silent means that the prosecutor can use your silence to impeach you should you be charged with a crime and take the stand in your own defense. He never addressed the question of whether the threat of using one's silence is, itself, prohibited under the privilege. There are consequences that the State may not attach to a person's decision not to reveal potentially incriminating information. The paradigmatic historical example is putting someone behind bars for contempt.¹⁰¹ If the state put someone in the

defendant remains silent, Justice Stevens stated: "The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police." *Jenkins*, 447 U.S. at 243 (Stevens, J., concurring). The reference to a right to remain silent when questioned has to be understood in the context of the discussion which preceded it, and that discussion concerned the application of the privilege at trial and not a general right to silence whenever faced with a question. *See id.* at 242. Indeed, Justice Stevens went on to say: "[I]n determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment." *Id.* at 244. The logic of Justice Stevens's position applies whether someone has been arrested or not. Because *Jenkins* only presented the Court with the problem of how to apply the privilege to someone who had not yet been arrested, there was no reason for Justice Stevens to opine about how the issue should be resolved in other contexts. Thus, it is a very shaky leap from his reference to the significance of silence before contact with the police to the conclusion that the analysis would be different afterwards.

¹⁰⁰ *Jenkins*, 447 U.S. at 244 n.7 (Stevens, J., concurring) ("Under my approach, assuming relevance, the evidence could have been used not only for impeachment but also in rebuttal even had petitioner not taken the stand.").

¹⁰¹ *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1983) ("[A] District Court cannot compel Conboy to answer deposition questions over a valid assertion of his Fifth Amendment right, absent a duly authorized assurance of immunity at the time."). The list of other government sanctions that may not be attached to an individual's silence contains:

- The imposition of the loss of a government benefit, such as a job or a license to engage in a profession. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (addressing loss of position as a political party official); *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (addressing loss of eligibility as a public contractor); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (addressing loss of employment as a police officer).
- The revocation of probation. *See Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) (stating in dicta that "if the State . . . asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution").
- A criminal sanction for failing to provide information outside of trial context where the information provides definitive evidence of guilt. *See Marchetti v. United States*, 390 U.S. 39, 61 (1968) (holding that the privilege protects a taxpayer who refuses to file a gambling tax return or register as a gambler, because the information in those

position of either making a potentially incriminating statement or going to jail, the privilege would not be “simply irrelevant” because there would be compulsion involved. Justice Stevens never explained why the same cannot be said when the State places people in the position of either making a potentially incriminating statement or having their silence used to impeach them.

It turns out that the majority in *Jenkins* did address this problem, although not in an altogether straightforward way. In fact, the majority expressly noted it was not deciding the application of the privilege to prearrest silence.¹⁰² But it did provide some support for the proposition that silence where one is not under any other type of compulsion to answer is fair game for the prosecutor at trial.¹⁰³ The majority in *Jenkins* instead disposed of the privilege question on waiver grounds. The Court reasoned that even if the defendant’s prearrest silence were an invocation of the privilege, by taking the stand and testifying the defendant waived his right to keep that fact from the jury.¹⁰⁴ In reaching this result, the majority applied a waiver rule announced in the 1926 case of *Raffel v. United States*.¹⁰⁵ An examination of *Raffel* suggests a way of viewing waiver that would allow the prosecution to use a counselled defendant’s silence during interrogation as substantive evidence at trial.

Raffel involved a defendant whose first trial ended with a hung jury.¹⁰⁶ He was retried and convicted. At both trials, a prohibition agent testified that the defendant admitted to owning the speakeasy where the liquor was found.¹⁰⁷ Before the first jury, the defendant did not take the stand.¹⁰⁸ At the second trial, the defendant did testify and denied making the admission to the prohibition

forms would incriminate him).

- The use of an exercise of the privilege at trial as substantive evidence. *See Griffin v. California*, 380 U.S. 609, 615 (1965) (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”).
- The automatic imposition of a quasicriminal sanction. *See Boyd v. United States*, 116 U.S. 616, 634, 637-38 (1886) (addressing forfeiture of goods).

¹⁰² *See Jenkins*, 447 U.S. at 236 n.2 (“Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment.”).

¹⁰³ *See id.* at 240 (“In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. . . . We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.”).

¹⁰⁴ *See id.* at 235 (“[T]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined” (quoting *Raffel v. United States*, 271 U.S. 494, 496-97 (1926))).

¹⁰⁵ *Id.*

¹⁰⁶ *Raffel*, 271 U.S. at 495.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

agent.¹⁰⁹ On cross-examination, the prosecutor brought out the fact that at the previous trial the defendant chose not to testify.¹¹⁰ The *Raffel* Court viewed the problem through the lens of the general rule that when a defendant takes the stand he or she must answer all the prosecutor's relevant questions.¹¹¹ The defendant, in other words, cannot claim the privilege on cross-examination.¹¹² But the Court was not completely blind to the tension between the general rule and the special case where the relevant question concerns a prior invocation of the privilege.¹¹³

In a brief discussion that in some ways foreshadowed the *Griffin* concept of a cost on the exercise of the privilege against self-incrimination, *Raffel* considered whether the prosecutor's comment in the second trial could have impermissibly burdened the defendant's choice to remain silent at the first.¹¹⁴ The explanation the Court gave tells us why use of a prior invocation of the privilege for impeachment may not be the type of compulsion the privilege prohibits.

The *Raffel* Court recognized that a defendant's decision to exercise the privilege and stay off the stand is made more difficult if he or she must factor in the possibility of some future prosecutor using that fact on cross-examination.¹¹⁵ But the Court found no significant difference between this amount of pressure and the inevitable cost of remaining silent inherent in any trial. If a defendant chooses not to testify, there is always the possibility that the jury, despite an instruction to the contrary, will draw a negative inference from the defendant's choice.¹¹⁶ Even if the privilege prevented cross-examination on a prior invocation, there would still be pressure on a defendant to testify arising from the defendant's calculation of how the jury would react if there were a second trial.¹¹⁷ In essence, the *Raffel* Court determined that allowing the prosecutor to use a prior invocation imposed only an insignificant cost on the exercise of the

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The cross-examination also gave the defendant an opportunity to explain why he chose not to testify, which the defendant did, saying that he did not see a reason to testify before because he thought the evidence against him was not strong enough to convict. *Id.*

¹¹¹ *See id.* at 497.

¹¹² *See* *Brown v. United States*, 356 U.S. 148, 154-55 (1958) (discussing how the decision to testify constitutes a waiver of the privilege with respect to the subject matter of the testimony and the scope of the "waiver is determined by the scope of relevant cross-examination").

¹¹³ *See Raffel*, 271 U.S. at 497. The Court conceded, without deciding, that if the defendant had not taken the stand, his prior invocation of the privilege would not have been admissible. *Id.* But, it explained this result on the ground that this type of evidence would lack any probative value, not on the basis of any policy behind the privilege. *Id.*

¹¹⁴ *See id.* at 498-99.

¹¹⁵ *See id.* What a defendant must take into account is the convergence of three future events: (1) the current proceeding ending in a mistrial, (2) the case being retried, and (3) the defendant making the decision to testify in the second trial.

¹¹⁶ *See id.* at 499.

¹¹⁷ *See id.*

privilege. “We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.”¹¹⁸ What we learn from *Raffel*, therefore, is that not every detriment associated with remaining silent is forbidden. Silence has its own inherent costs and only if the State substantially adds to that baseline does the privilege stand in the way.

The *Jenkins* majority could have just cited *Raffel* and stopped there to support its conclusion that the defendant’s decision to take the stand waived any privilege against self-incrimination. But it didn’t. The opinion went on to use the *Raffel* analysis and compare other situations to the type of pressure that the use of silence for impeachment imposes.¹¹⁹

In the years after *Raffel*, the Court considered a number of additional contexts where the defendant’s choice to remain silent comes at a price. The *Jenkins* majority relied on two particular contexts. One had to do with capital murder cases featured in the Court’s joint decision in *McGautha v. California*.¹²⁰ In some jurisdictions, defendants charged with capital murder have the same jury decide both the question of guilt and the question of whether to impose the death penalty in a unitary trial. Defendants in this situation are faced with a similar choice to the defendant in *Jenkins*. Defendants in a *Jenkins* context must weigh remaining silent against the prospect of being impeached if they testify. Defendants in a *McGautha* context must weigh remaining silent on the question of guilt against the lost opportunity to present through their own testimony mitigating information on the issue of sentencing.

In *McGautha*, the Court held that “the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.”¹²¹ Even considering “the peculiar poignancy of the position of a man whose life is at stake,”¹²² the Court held that the state may make the price of silence the loss of an opportunity personally to plead one’s case on the issue of punishment. That establishes another benchmark against which to measure the effect of using otherwise noncompelled silence as substantive evidence of guilt.

Jenkins also held out another example of a permissible type of pressure a state may bring to bear on someone who refuses to make an incriminating statement: plea-bargaining. As authority for the proposition that not every type of pressure to abandon a constitutional right is invalid, *Jenkins* cited *Corbitt v. New*

¹¹⁸ *Id.*

¹¹⁹ *Jenkins v. Anderson*, 447 U.S. 231, 236-38 (1980).

¹²⁰ *See id.* at 236 n.3 (discussing *McGautha v. California*, 402 U.S. 183 (1971)).

¹²¹ *McGautha*, 402 U.S. at 217.

¹²² *Id.* at 216.

Jersey,¹²³ which upheld a statute that rewarded defendants who pled guilty with immunity from the maximum sentence for the crime of murder.¹²⁴

Think about what is involved in a guilty plea. It is the paramount exercise of self-incrimination. By contrast, the entry of a plea of not guilty is a constitutive act of invoking the privilege. And so, at bottom, plea bargaining is all about the use of state power to get the defendant to abandon the privilege and incriminate himself. *Corbitt*, and the earlier guilty plea cases on which it relied,¹²⁵ made it legitimate for the state to make a defendant bear the risk of receiving a harsher sentence if the defendant refused an offer to plead guilty.¹²⁶ *Corbitt* noted that the Court had retreated from the high water mark of the *Griffin* principle prohibiting a cost on the exercise of the privilege. “[N]ot every burden on the exercise of a constitutional right,” the Court noted, “and not every pressure or encouragement to waive such a right, is invalid.”¹²⁷

The plea-bargaining cases set another benchmark. If the State may force a defendant who exercises the privilege to bear the risk that the defendant may receive a sentence drastically more severe, does it exceed “in any substantial manner,” to use the test from *Raffel*, the burden of having one’s counseled silence used as substantive evidence?¹²⁸

There are other contexts in which the Court has been called upon to establish the permissible limits on how the state may react to someone’s silence. Let us take a look at them and see how they compare to the proposal at hand.

The Court has addressed the evidentiary use of silence, aside from the impeachment context that *Jenkins* considered. In *Baxter v. Palmigiano*¹²⁹ the Court dealt with whether a prison disciplinary hearing could draw an adverse inference from a prisoner remaining silent during the process.¹³⁰ The Court held that nothing in the Constitution prevented the state’s use of someone’s silence as evidence in a non-criminal case.¹³¹ Several aspects of the prison disciplinary

¹²³ *Jenkins*, 447 U.S. at 236 (citing *Corbitt v. New Jersey*, 439 U.S. 212, 220 (1978)).

¹²⁴ *Corbitt*, 439 U.S. at 220.

¹²⁵ *See id.* (discussing *Brady v. United States*, 397 U.S. 742 (1970), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)).

¹²⁶ In *Brady*, the Court upheld a guilty plea that the defendant entered that ensured a lengthy prison sentence rather than the defendant going to trial and facing the prospect of the death penalty. *Brady*, 397 U.S. at 744-45. In *Bordenkircher*, the Court upheld a life sentence after the defendant was convicted following his refusal of a plea offer that would have entailed only five years in prison. *Bordenkircher*, 434 U.S. at 366. And in *Corbitt*, the defendant went to trial and received a mandatory life sentence rather than enter a guilty plea which would have made him eligible for a term of not more than thirty years. *Corbitt*, 439 U.S. at 212, 216.

¹²⁷ *Corbitt*, 439 U.S. at 218.

¹²⁸ *Raffel v. United States*, 271 U.S. 494, 499 (1926).

¹²⁹ 425 U.S. 308, 310 (1976).

¹³⁰ *Id.*

¹³¹ *Id.* at 320. The stakes at issue in *Baxter* involved a term of thirty days in “punitive segregation” and a downgrade in his classification status. *See id.* at 312-13.

proceedings it considered led the Court to conclude that drawing an adverse inference did not contravene the privilege.¹³² First, and the most crucial, was that the hearing in which the inference played a role was not a criminal case.¹³³ The long-standing rule applying the privilege in civil cases is that a party may claim the privilege but may not escape an adverse inference from refusing to answer a question.¹³⁴ In civil cases, where the stakes are not as high and where the condemnation that accompanies conviction of a crime is not at issue, a *Griffin* rule is unnecessary.¹³⁵ Second, the Court in *Baxter* relied on the fact that the inmate's silence did not automatically result in the imposition of the disciplinary sanction.¹³⁶ It would just form part of the entire record and be given whatever weight its probative value commanded.¹³⁷ This second factor distinguished *Baxter* from a line of cases dealing with situations in which individuals who refused to answer potentially incriminating questions outside the context of a criminal trial were *automatically* subject to the loss of some government benefit.

In the first of the automatic penalty cases, *Garrity v. New Jersey*,¹³⁸ police officers suspected of criminal activity by their superiors were questioned by the Attorney General's Office.¹³⁹ The interrogation proceeded under the terms of a statute that provided that any public employee who refused to answer questions based on the privilege "upon matters relating to the . . . employment . . . shall thereby forfeit his . . . employment."¹⁴⁰ The Court held that the threat of being fired constituted "a form of compulsion," and thus the privilege prevented the use of the statements the officers made at their subsequent criminal trial.¹⁴¹ In explaining its result, the Court compared what happens when a state puts public employees to the choice between self-incrimination or loss of their livelihood to the plight facing suspects undergoing police custodial interrogation.¹⁴² In both situations, the Court reasoned, the context in which the state has placed the person it wants to question "is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"¹⁴³ This sweeping generalization may be questionable psychology, in the *Miranda* context as well as in *Garrity*. But, it does give us a way to identify what Fifth Amendment

¹³² *Id.* at 317.

¹³³ *Id.* at 316.

¹³⁴ *Id.* at 318 (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2272, at 439 (McNaughton rev. 1961)).

¹³⁵ *Id.* at 319.

¹³⁶ *Id.* at 331.

¹³⁷ *Id.* at 317-18.

¹³⁸ 385 U.S. 493 (1967).

¹³⁹ *Id.* at 494.

¹⁴⁰ *Id.* at 494-95 n.1 (quoting N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965)).

¹⁴¹ *Id.* at 497.

¹⁴² *Id.* ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.")

¹⁴³ *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 464-465 (1966)).

compulsion means. The state may not force someone to choose between self-incrimination and the automatic loss of something as important to them as their job. The immediacy and magnitude of the consequence are necessary ingredients.

The other automatic penalty cases the Court noted in *Baxter* all followed this pattern.¹⁴⁴ For example, in *Lefkowitz v. Turley*,¹⁴⁵ architects who claimed the privilege before a grand jury were automatically disqualified from government contracts.¹⁴⁶ The Court held that the New York statute that imposed this consequence violated the privilege, because the “threat of substantial economic sanction” constituted compulsion just as would the threat of imprisonment for contempt.¹⁴⁷

The state’s use of a person’s silence in the face of a government accusation also played a role in *Brogan v. United States*.¹⁴⁸ *Brogan* addressed the validity of the “exculpatory no” defense to a charge of making false statements.¹⁴⁹ An “exculpatory no” means that if someone makes a simple denial of an accusation of wrongdoing to a federal agent, it is not a violation of the statute that makes it a crime to make a materially false representation to a federal agency on a matter within their jurisdiction.¹⁵⁰ One of the arguments in support of the “exculpatory no” defense was based on a common metaphor found in the jurisprudence of the privilege: the “cruel trilemma.”¹⁵¹

The trilemma is essentially a three sided catch-22.¹⁵² The phrase, as applied to the privilege, originated in Justice Goldberg’s opinion in *Murphy v.*

¹⁴⁴ *Baxter* also relied on the companion cases of *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Assn. v. Comm’r of Sanitation*, 392 U.S. 280 (1968). *Baxter*, 425 U.S. at 329-30. In *Gardner*, the Court held that New York City could not fire a police officer solely because he asserted the privilege and refused to answer questions before a grand jury. *Gardner*, 392 U.S. at 278-79. The Court held that the “penalty of the loss of employment” constituted coercion. *Id.* at 279. In *Sanitation Men*, which also involved city employees who refused to testify before a grand jury and were fired solely for that reason, the result was the same. *Sanitation Men*, 392 U.S. at 284 (applying *Gardner*).

¹⁴⁵ 414 U.S. 70 (1973).

¹⁴⁶ *Id.* at 71-73.

¹⁴⁷ *Id.* at 82; *see also* *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) (finding it would violate the privilege for a state automatically to revoke probation of a probationer who refused to answer incriminating questions put to him by a probation officer in a noncustodial setting); *Boyd v. United States*, 116 U.S. 616, 638 (1886) (finding a Fifth Amendment violation where the court in a quasi-criminal forfeiture action treated an invocation of the privilege in response to a document request as a concession of liability).

¹⁴⁸ 522 U.S. 398, 399 (1998).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 401; *see also* 18 U.S.C. § 1001 (2012) (outlining the crime of false representation to a federal agency).

¹⁵¹ *Id.* at 404.

¹⁵² *See generally* JOSEPH HELLER, *CATCH-22* (1961) (illustrating a set of paradoxical requirements whereby airmen mentally unfit to fly did not have to do so, but could not actually

Waterfront Commission of New York Harbor,¹⁵³ where he used it to explain the plight of a witness testifying in front of a tribunal with contempt power.¹⁵⁴ The “cruel trilemma” that required the protection of the privilege consisted of three unpalatable options: “self-accusation, perjury or contempt.”¹⁵⁵

It is easy to see how the trilemma applies to the paradigmatic example of the privilege: the situation of a grand jury witness asked an incriminating question. If the witness answered truthfully, then she has provided inculpatory testimonial evidence to the prosecutor, which is precisely the type of result the privilege is designed to prevent. If the witness lies, then she exposes herself to prosecution for perjury. And if the witness remains silent, she will be jailed for contempt. The solution to the trilemma is to give its victim the right to remain silent without the possibility of going to jail for contempt, thus avoiding each of its perils.

In *Brogan*, the petitioner, a union official, met with agents from the IRS and the Department of Labor and falsely said “no” to a question about whether he had received any money from an employer for whom his union members worked.¹⁵⁶ The conundrum that the union official said he faced when he contemplated his answer was the equivalent of the trilemma.¹⁵⁷ If he answered the question truthfully, he would incriminate himself. If he lied, he would be subjecting himself to jail for committing perjury. And silence, he contended, was not a viable choice because anyone in his situation would fear that the act of remaining silent would be used against him in the future.¹⁵⁸ The only solution that would allow him to avoid the perils of the trilemma, he maintained, was to give him the option of an “exculpatory no.” Justice Scalia’s response was telling. “It is well established that *the fact that a person’s silence can be used against him*—either *as substantive evidence of guilt* or to impeach him if he takes the stand—does not exert a form of pressure that exonerates an otherwise unlawful lie.”¹⁵⁹

Now, we can circle back to the proposal that would allow a prosecutor the right to use as evidence a defendant’s assertion of the privilege at an interrogation where counsel was present. Is the threat of the use of a suspect’s silence the type of pressure that meets the definition of compulsion that the privilege prohibits? The concept of a baseline is helpful in unpacking this question.

be excused).

¹⁵³ 378 U.S. 52 (1964).

¹⁵⁴ *Id.* at 54 (“[A]bsent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction.”).

¹⁵⁵ *Id.* at 55.

¹⁵⁶ *Brogan*, 522 U.S. at 399.

¹⁵⁷ *Id.* at 404.

¹⁵⁸ *Id.* at 405.

¹⁵⁹ *Id.* (emphasis added).

The ordinary course of everyday life sometimes presents people with an awkward choice of either admitting something embarrassing or remaining silent. This dilemma may even be freighted with an accusation of criminality. Consider a conversation between a man and a woman after a night of drinking that culminated in a sexual encounter. Let's call them Alice and Ted. Alice calls Ted the next morning and says: "Oh Ted. How could you? You knew I had too much to drink last night. You knew I couldn't give any type of real consent. What you did was rape, wasn't it?" Ted is in the position of facing an accusation of a serious crime. Let's say he remains silent; hangs up the phone, in fact. Would there be anything in this encounter that would conceivably give Ted the right to prevent on the grounds of the privilege some future prosecutor from introducing this exchange into evidence as proof of Ted's guilty knowledge? Ted may say that he was exercising his generalized right to silence by his response to Alice's accusation. But it hardly seems likely that the Fifth Amendment privilege was adopted in order to overturn the established common law rule that silence in the face of an accusation is probative evidence.¹⁶⁰ The Constitution was not adopted to regulate the ordinary rules of conversation between ordinary citizens, even when it contains grave accusations. It may be that the rules of evidence would not allow the use of Ted's silence in this situation, but the privilege against self-incrimination would not play a role in the analysis.

Now, one might say that because Ted did not explicitly assert the privilege on hearing Alice's accusation, there's an independent reason why it would not play a role in any future criminal trial. The Supreme Court's recent decision in *Salinas* stands for just this proposition.¹⁶¹ But a simple change in the scenario would allow Ted to avoid being caught on the horns of *Salinas*. Instead of remaining silent when Alice finished her accusation, he simply could have said "Well, Alice, I'll take the Fifth on that one." That simple, though inelegant, statement would be enough to invoke the protection of the privilege if it otherwise applied.¹⁶² But it would not make Ted's claim any more grounded in the Constitution. You cannot cloak yourself in the mantle of the privilege just because you would like its protection. You cannot prevent your employer from firing you, for example, if you refuse to answer a question about why your expense account lists \$25,000 worth of charges for an escort service. In order to prevent yourself from suffering an adverse consequence because you have refused to answer a potentially incriminating question, you have to find yourself in a situation to which the privilege is directed. Interactions between private employers and their employees do not count and neither do conversations between ordinary people. These interactions do not present the sort of danger

¹⁶⁰ For the history of the evidentiary doctrine that a tacit admission is admissible as evidence of guilt, see generally 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 (2007).

¹⁶¹ See *Salinas v. Texas*, 133 S. Ct. 2174, 2180-83 (2013).

¹⁶² See *Anderson v. Terhune*, 516 F.3d 781, 783 (9th Cir. 2008) (recognizing that "I'll take the Fifth" is synonymous with asserting the privilege against self-incrimination).

that led to the adoption of the privilege. The state is not using its monopoly on the use of coercive instruments of power to force individuals to reveal incriminating information.

If the interaction between Alice and Ted does, as I contend, establish a base line from which the state may avoid any barrier to the use of Ted's purported shield of the privilege, consider how, if at all, the situation would change if Alice first went to the police. It would be a relatively conventional investigative technique in that situation for the police to ask Alice to call Ted on the telephone and try to get an admission from him that he had sex with her when she was too intoxicated to consent. The conversation might, in fact, proceed exactly as before, with Ted responding that he wants to "take the Fifth." Two things are clear from this new scenario. One is that now Alice is no longer just acting as an ordinary citizen. She is, effectively, an agent of the State. And the other is that from Ted's point of view, nothing has changed. If he was in a situation before that did not present him with the sort of compulsion that the privilege is designed to prevent the state from using to obtain an incriminating statement, he must be just as unencumbered in the second scenario.

Would the privilege prevent the state from using Ted's comment if Alice were working as a police agent? Would the pressure on Ted to respond, rise to the level of coercion under the privilege? Comparing it to the baseline context where Alice is just an ordinary citizen, the answer is no. The situations are essentially the same. Ted feels no more pressure to talk than is inevitable as an ordinary consequence of social life.

There is another aspect of Ted's situation that also points in the direction of the conclusion that he does not fall within the ambit of the privilege. The prospect that the potential cost he faces—the substantive use of his response at a future criminal trial—is by no means automatic. It depends on a number of contingencies: whether he is charged with a crime and whether a judge would allow the prosecutor to introduce Ted's response into evidence in the face of a challenge based on the rules of evidence.¹⁶³ We have seen that the immediacy of the penalty plays a key role in the analysis of whether it constitutes the sort of compulsions that the privilege prohibits. It is not part of the picture for Ted.

Would the future use of a suspect's silence be sufficiently coercive to rise to the level of compulsion that the privilege prevents if the suspect made his or her choice in a police interrogation where counsel was present? Let us look at the features of the environment where this question would arise. First of all, we have seen that no one can insulate himself or herself from the pressure of having to face the possibility of seeing a refusal to respond to an accusation of wrongdoing be used in some future criminal trial. It is a fact of social life that the privilege does not alter. Whether you are talking to your employer or someone who thinks he or she is a victim of a crime you committed, you cannot escape the possibility

¹⁶³ See generally Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21 (2008) (detailing the various ways that silence is used as evidence).

that your refusal to respond to an accusation will find itself as part of some prosecutor's case in chief. Some pressure to respond is part of everyone's baseline.

Second, it would no longer be appropriate to apply the *Miranda* presumption that the suspect was in an inherently coercive environment. The very presence of counsel would dispel the pressure that the police would otherwise bring to bear. The Court's conclusion that compulsion was inherent in custodial interrogation specifically relies on the absence of counsel as a necessary ingredient. "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."¹⁶⁴

Third, the pressure facing the suspect to make a statement, which comes from the potential future evidentiary use of a refusal to answer, is by no means automatic. It may or may not come to pass.

And, fourth, as in the plea-bargaining context, the suspect is not left to his or her own devices in making the decision about how to weigh the choice to speak or remain silent. With the assistance of counsel, while the decision may not be an easy one, it is likely to be a thoughtful, considered choice.

These four features of an interrogation where the suspect was actually given the assistance of counsel make it difficult to conclude that the type of compulsion that the privilege was designed to prevent is actually present. A prosecutor's use of the suspect's silence as part of the government's case in chief would not be imposing a cost of the exercise of the privilege because the act of silence would not have taken place in an environment where government compulsion was part of the picture.

CONCLUSION

When it comes to the question of the proper role for counsel in the police interrogation environment, we are not writing on a clean slate. *Miranda* created a chimera that serves neither the vast majority of suspects who are interrogated nor the integrity of the criminal justice system in holding out a false promise. Any proposal that actually provides attorneys for the approximately eighty percent of suspects who choose to talk with the police without invoking the magical words that will cut off questioning can only be an advantage to those who believe, as did the original *Miranda* Court, that attorneys do make the process fairer. *Miranda* recognized that its solution to the problem of the inherent pressure of the police-dominated interrogation process was not the only possibility and left it open for the states to experiment.¹⁶⁵ The proposal outlined

¹⁶⁴ *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).

¹⁶⁵ *Id.* at 490 (finding that both "Congress and the states are free to develop their own safeguards for the privilege").

here is a way to move the interrogation regime toward a role for defense counsel that comes closer to that envisioned by the majority in *Miranda*.