

**PRE-ARREST SILENCE AND SELF-
INCRIMINATION RIGHTS: WHY STATES
SHOULD ADOPT AN IMPLIED
INVOCATION STANDARD UNDER THEIR
STATE CONSTITUTIONS IN THE WAKE OF
*SALINAS V. TEXAS***

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INTRODUCTION

Imagine you are eighteen years old, sitting alone in a police station while two seasoned police officers question you about a homicide. You are scared, nervous, and unsure why they want to talk to you. The officers tell you that you are not under arrest and can leave the room at any time. They begin asking relatively easy questions. Suddenly, the officers change their tone and start asking if you murdered “that young kid.” Shocked and startled at their accusation, you say nothing in response. You know you did

not commit that crime, but you cannot seem to say the words. Then you remember those police shows you always watched with your mom. The officers in those shows always tell the suspect “he has the right to remain silent” and that police can use anything he says against him.¹ So, you decide you better not say anything. Surely they cannot use your silence against you.

At trial a year later, despite your attorney’s objections, the prosecutor draws out testimony regarding your pre-arrest silence in response to the officer’s question, “Did you murder that kid?” The prosecutor suggests a truly blameless person would not remain silent, but you did.² Therefore, you are guilty. You are faced with a dilemma. Do you get on the witness stand and try to explain why you remained silent? Your attorney has told you once you get on the stand the prosecutor will subject you to cross-examination, which can prove damaging. You do not want to testify, yet you do not want jurors to assume your silence equates to your guilt. If the prosecutor had not brought up your pre-arrest silence, you would not find yourself in such a precarious situation now.

The Supreme Court granted certiorari to hear the case of *Salinas v. Texas* to determine whether commenting on a defendant’s pre-arrest, pre-*Miranda* silence violated the Fifth Amendment’s Self-Incrimination Clause.³ Police were investigating Salinas in connection with a recent double homicide.⁴ Salinas voluntarily went to the police station and answered all but one of the officers’ questions.⁵ “[W]hen asked whether his shotgun ‘would match the shells recovered at the scene of the murder,’” Salinas sat there silently.⁶ During the prosecutor’s closing argument, he referenced Salinas’s silence in response to the question about the shotgun shells.⁷ The prosecutor argued a blameless person would proclaim his innocence, not sit

¹ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), for a description of what police officers must inform defendants under custodial interrogation.

² The prosecutor in *Salinas* made a very similar statement during Salinas’s jury trial. See *Salinas v. Texas*, 133 S. Ct. 2174, 2185 (2013) (Breyer, J., dissenting).

³ *Id.*

⁴ *Id.* at 2178 (plurality opinion).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2185 (Breyer, J., dissenting).

there silently.⁸ Salinas argued this comment infringed on his constitutional right against self-incrimination.⁹

The Court did not ultimately resolve whether commenting on a defendant's pre-arrest, pre-*Miranda* silence violated the Fifth Amendment's Self-Incrimination Clause.¹⁰ Instead, Justice Alito, writing for a plurality, stated Salinas's failure to "expressly invoke the privilege" meant he could not later rely on it.¹¹ Justice Thomas, in his concurrence, argued Salinas's claim failed regardless of whether he invoked the privilege.¹² Justice Breyer, in his dissent, contended that the prosecutor's use of Salinas's pre-arrest silence violated his privilege against self-incrimination.¹³ He argued Salinas invoked his right and that "[c]ircumstances, not a defendant's statement, tie the defendant's silence to the right."¹⁴

In the wake of this decision, this Comment advocates states adopt and follow Justice Breyer's dissent and offer greater protections to their citizens under their state constitutional analogues to the Self-Incrimination Clause. State courts should conduct an implied invocation analysis, using the "accusation test"

⁸ *Id.*

⁹ *Id.* at 2178 (plurality opinion).

¹⁰ *Id.* at 2179.

¹¹ *Id.* at 2178.

¹² *Id.* at 2184 (Thomas, J., concurring). He also advocated against expanding *Griffin v. California's* "no adverse inference rule" to cover pre-arrest situations. *Id.*; see *Griffin v. California*, 380 U.S. 609 (1965).

¹³ *Salinas*, 133 S. Ct. at 2185 (Breyer, J., dissenting). When prosecutors use a defendant's pre-arrest silence as substantive evidence of guilt and ask jurors to draw an adverse inference from the silence, prosecutors force defendants into a "cruel trilemma." *Id.* at 2186. Originally, the "cruel trilemma" stood for the proposition that a person had to choose between "self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Now the "cruel trilemma" stands for the proposition that a defendant is forced to

either answer the question or remain silent. If he answers the question, he may well reveal . . . prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt. And if the defendant then takes the witness stand . . . the prosecution may introduce . . . a prior conviction that the law would otherwise [bar].

Salinas, 133 S. Ct. at 2186 (Breyer, J., dissenting) (citations omitted).

¹⁴ *Salinas*, 133 S. Ct. at 2186, 2189 (Breyer, J., dissenting). Thus, the need for an express invocation requirement is not necessary in certain circumstances. *Id.* at 2189-90.

set forth in this Comment.¹⁵ This test will assist courts in determining whether the person's pre-arrest silence constituted an invocation of the state's analogue to the Self-Incrimination Clause.

If the court finds the defendant invoked the privilege, *Griffin's* no adverse inference bar¹⁶ should apply pre-arrest, pre-*Miranda* to prevent the "cruel trilemma"¹⁷ which occurs when a prosecutor comments on the pre-arrest silence. By utilizing this implied invocation analysis, state courts will better protect defendants whose silence represents an invocation from having an adverse inference drawn against them.

In Part I, this Comment will discuss the historical background of the Fifth Amendment's Self-Incrimination Clause and the major Supreme Court cases governing the issue. It will also discuss the federal circuit split and state court jurisprudence prior to and post *Salinas v. Texas*. Part II will advocate that state courts adopt Justice Breyer's dissenting view under their state constitutional analogues to the Self-Incrimination Clause. This Comment urges courts to conduct an implied invocation analysis using the "accusation test" to determine if the defendant impliedly invoked his right. If the defendant invoked, courts should prohibit prosecutors from commenting on the pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. This Comment will also briefly discuss demeanor versus testimonial evidence as it relates to the privilege against self-incrimination. Finally, in Part III, this Comment will apply and analyze how an implied invocation analysis will work in practice.

¹⁵ This "accusation test" draws from prior Supreme Court jurisprudence and provides state courts a new way to analyze pre-arrest silence cases. *See infra* notes 131-42 and accompanying text.

¹⁶ *See infra* notes 36-40 and accompanying text.

¹⁷ *See supra* note 13 for a description of the "cruel trilemma."

I. BACKGROUND

A. The Self-Incrimination Clause and Supreme Court Jurisprudence

1. Historical Beginnings

The Fifth Amendment's Self-Incrimination Clause began in response to various happenings in Europe.¹⁸ Pope Innocent III's religious council¹⁹ "forced [those brought before it] to choose between self-incrimination, perjury, or contempt."²⁰ In England, the ecclesiastical courts used the "*oath ex officio*" which required "a sworn statement by the defendant promising to give honest answers to all questions asked of him."²¹ When a "defendant refused to take the oath, the court had the power to coerce the accused into taking the oath by threatening contempt of court, conviction, or even torture."²² Out of these egregious actions by authorities came the "cruel trilemma" of "self-incrimination, perjury, or contempt."²³

The Star Chamber's use of the "*oath ex officio*" went on for many years until the seventeenth century when John Lilburne fought for men's right not to answer questions or incriminate oneself.²⁴ Possibly in response to the actions of the Star Chamber and religious councils in Europe, the colonists included the Fifth Amendment's Self-Incrimination Clause in the Constitution to help prevent citizens from being forced into the "cruel trilemma."²⁵

¹⁸ See Maria Noelle Berger, Note, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence Be Admissible as Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015, 1027-34 (further discussing the historical beginnings of the Fifth Amendment).

¹⁹ Andrew J. M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 909 (2012).

²⁰ *Id.* at 910.

²¹ Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 183 (1997) (citing LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 46-47 (1968)).

²² *Id.* at 184.

²³ Bentz, *supra* note 19, at 910.

²⁴ *Id.* at 911-12.

²⁵ *Id.* at 913, 916.

2. The Invocation Requirement

Even though the Self-Incrimination Clause²⁶ does not state that a person must invoke the privilege in order to benefit from its protections, the Supreme Court has required express invocation in certain situations.²⁷ The express invocation requirement seems to derive from the widely accepted belief “that governments have the right to everyone’s testimony.”²⁸ By requiring a defendant to expressly invoke the privilege, the Government guarantees that it receives warning of the defendant’s plan to use the privilege.²⁹

Interestingly, in certain circumstances, the Court has waived the usual express invocation requirement, especially in situations where a person is “den[ied] . . . a ‘free choice to admit, to deny, or to refuse to answer.’”³⁰ For example, in *Garrity v. New Jersey*, the Court focused on the voluntariness of the defendants’ choice to speak.³¹ The Court stated “[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the

²⁶ “No person shall . . . be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

²⁷ See, e.g., *Garner v. United States*, 424 U.S. 648, 665 (1976) (holding Garner needed to invoke the privilege prior to providing the incriminating information on his tax returns); *Roberts v. United States*, 445 U.S. 552, 559-61 (1980) (arguing Roberts needed to expressly invoke the privilege because the District Court had no way to know the reason why Roberts refused to cooperate or answer questions was because he was avoiding incriminating himself); *United States v. Sullivan*, 274 U.S. 259, 264 (1927) (stating “if the defendant desired to test [his Fifth Amendment claim] or any other point he should have tested it in the [tax] return so that it could be passed upon”).

²⁸ *Garner*, 424 U.S. at 655 (citing *Mason v. United States*, 244 U.S. 362, 364-65 (1917)).

²⁹ *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (plurality opinion). Once alerted, the government can take steps to address the defendant’s Fifth Amendment claim. For example, the Government “may either argue that the testimony sought could not be self-incriminating, or cure any potential self-incrimination through a grant of immunity.” *Id.* (citations omitted). Additionally, the express invocation requirement ensures that the Government and courts have an opportunity to determine whether the Fifth Amendment actually protects the information the person claims to be privileged. *Id.*

³⁰ *Garner*, 424 U.S. at 657 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

³¹ 385 U.S. 493, 496-98 (1967). The appellants argued the information they provided to police officers was coerced because they were told their options basically consisted of incriminating themselves or losing their jobs. *Id.* at 495.

antithesis of [a] free choice to speak out or . . . remain silent.”³² Therefore, no express invocation of the privilege was required.³³

The Court has also waived the express invocation requirement in situations “where governmental coercion makes . . . forfeiture of the privilege involuntary.”³⁴ Additionally, the Court has said silence invokes the right when “assertion of the privilege would itself tend to incriminate.”³⁵ Therefore, if a person’s situation falls into one of the above-enumerated categories, it appears that the Court will excuse the need for an express invocation of the right.

3. Adverse Inference and *Griffin v. California*

In a 1965 opinion authored by Justice Douglas, the Court held that the Fifth Amendment’s Self-Incrimination Clause barred comment on a defendant’s choice not to take the stand in his own defense at trial.³⁶ The majority strongly believed allowing prosecutorial comment on a defendant’s choice not to testify “[was] a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws.”³⁷ Therefore, preventing comment on a defendant’s choice not to take the stand was imperative to retaining the “spirit of the Self-Incrimination Clause.”³⁸

The Court reasoned that commenting on a person’s choice not to testify “[was] a penalty imposed by courts for exercising a

³² *Id.* at 497.

³³ *Salinas*, 133 S. Ct. at 2180. The Court deemed the statements coerced and involuntary and prevented the Government from using the statements against them. *Garrity*, 385 U.S. at 497-500.

³⁴ *Salinas*, 133 S. Ct. at 2180. When a defendant is placed under “custodial interrogation” but does not receive *Miranda* warnings, he is not required to expressly invoke the right. *Id.*

³⁵ *Id.*

³⁶ *Griffin v. California*, 380 U.S. 609, 615 (1965). The prosecutor commented on the defendant’s choice not to take the stand during the guilt phase of his trial. *Id.* at 610-11. While the judge’s instruction informed jurors that a defendant does not have to take the witness stand, the instruction also told jurors they could draw an unfavorable inference regarding any facts the defendant knew but chose not to speak about. *Id.* at 610. The instruction also “stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.” *Id.*

³⁷ *Id.* at 614 (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

³⁸ *Id.* at 613-14.

constitutional privilege. It cuts down on the privilege by making its assertion costly.³⁹ So, to prevent jurors from penalizing a defendant and drawing any adverse inferences against him, the Court prohibited comment on the defendant's choice not to take the stand.⁴⁰

4. Testimonial vs. Demeanor Evidence

In *Schmerber v. California*, the Supreme Court addressed how the Fifth Amendment's privilege against self-incrimination applied to testimonial versus non-testimonial evidence.⁴¹ After Schmerber was injured in an accident, while allegedly driving under the influence, police officers arrested him at the hospital.⁴² One of the officers requested that the doctor take a sample of the defendant's blood.⁴³ At trial, prosecutors presented evidence of the defendant's blood test results over his objections.⁴⁴

The Court determined the admission of his blood test evidence did not violate the defendant's Fifth Amendment privilege because "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."⁴⁵ Evidence is deemed testimonial when it "relate[s to] a factual assertion or disclose[s] information. Only then is a person compelled to be a 'witness' against himself."⁴⁶

³⁹ *Id.* at 614.

⁴⁰ *Id.* at 614-15. The Court reasoned jurors may deduce whatever they want from a defendant's choice not to take the stand, but the court should not set forth its own ideas and suggestions about what that choice means. *Id.*

⁴¹ 384 U.S. 757, 760-65 (1966). The question the Court sought to answer was whether the use of the defendant's blood test results "compelled [him] 'to be a witness against himself.'" *Id.* at 761.

⁴² *Id.* at 758.

⁴³ *Id.* Schmerber's blood test results revealed he was intoxicated. *Id.* at 759.

⁴⁴ *Id.* at 759. Schmerber made a variety of objections to the presentation of the blood test evidence, but this Comment will focus only on his Fifth Amendment argument. *Id.*

⁴⁵ *Id.* at 761. The Court determined "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765.

⁴⁶ *Doe v. United States*, 487 U.S. 201, 210 (1988) (footnote omitted). "The expression of the contents of an individual's mind' is testimonial communication for purposes of the Fifth Amendment." *Id.* at 210 n.9.

Therefore, the right against self-incrimination only shields testimonial or communicative evidence from use by the prosecution.⁴⁷ It does not protect a person's "demeanor" or physiological responses to questions.⁴⁸

B. *The Circuit Split Prior to Salinas v. Texas*

Prior to *Salinas*, the federal circuit courts sharply split on the issue of whether a prosecutor could comment on a defendant's pre-arrest, pre-*Miranda* silence during its case in chief. The First, Sixth, Seventh, and Tenth Circuits held that a prosecutor's use of a defendant's pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violated the Fifth Amendment's right against self-incrimination. Conversely, the Fourth, Fifth, Ninth, and Eleventh Circuits held a prosecutor could comment on the silence without violating the Self-Incrimination Clause. The remaining circuits did not address whether a prosecutor could comment on pre-arrest, pre-*Miranda* silence.

1. Circuits Not Allowing Prosecutors to Comment on Pre-Arrest, Pre-*Miranda* Silence: The First, Sixth, Seventh, and Tenth Circuits

Some circuits that prohibited prosecutorial comment on a defendant's pre-arrest silence focused their analysis on the fact that the right against self-incrimination applied to individuals' pre-arrest, pre-*Miranda*. Other circuits seemed to focus their analysis more on *Griffin* and held that *Griffin's*⁴⁹ no adverse inference rule applied in pre-arrest situations as well.

⁴⁷ *Schmerber*, 384 U.S. at 763-64. For further discussions on testimonial versus demeanor evidence, see, e.g., Emily Rebekkah Hanks, Note, *Body Language: Should Physical Responses to Interrogation Be Admissible Under Miranda?*, 11 VA. J. SOC. POL'Y & L. 89 (2003); Vanessa Willis, Comment, *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, 749-758 (2008).

⁴⁸ *United States v. Velarde-Gomez*, 269 F.3d 1023, 1030 (9th Cir. 2001) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 592 (1990)). "[C]ompulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege]." *Schmerber*, 384 U.S. at 764.

⁴⁹ See *supra* Part I.A.3 for a discussion of *Griffin v. California*. Even though some courts focused their analysis on *Griffin* and not on whether the right existed pre-arrest, one can argue implicit in that fact is that in order for *Griffin* to apply, the right against self-incrimination must actually exist pre-arrest.

The Sixth Circuit, in *Combs v. Coyle*, held that because the right against self-incrimination was available to Ronald Dean Combs pre-arrest, the prosecutor infringed on Combs's right by remarking, during his case in chief, on that silence as substantive evidence of guilt.⁵⁰ In *Coppola v. Powell*, the prosecutor elicited testimony from a police officer regarding a statement the defendant made during pre-arrest, pre-*Miranda* questioning.⁵¹ The First Circuit held Vincent Coppola's statement to police constituted an invocation of the privilege.⁵² Therefore, the prosecutor infringed on Coppola's right when he elicited testimony about that pre-arrest statement.⁵³

The Seventh Circuit, in *United States ex rel. Savory v. Lane*, stated both the Fifth Amendment's privilege against self-incrimination and *Griffin's* no adverse inference rule applied to individuals pre-arrest.⁵⁴ The Tenth Circuit, in *United States v. Burson*, relied on *Griffin* and held testimony about the defendant's pre-arrest silence inadmissible.⁵⁵

⁵⁰ 205 F.3d 269, 285-86 (6th Cir. 2000). In this case, the pre-arrest silence at issue was Combs's statement at the scene that he wanted to speak to his attorney. *Id.* at 279. The Sixth Circuit determined his statement was sufficient to invoke the privilege. *Id.* at 286. The court reasoned, "Combs's statement is best understood as communicating a desire to remain silent outside the presence of an attorney." *Id.* at 279.

⁵¹ 878 F.2d 1562, 1563-64 (1st Cir. 1989). Coppola responded to the police officer's question regarding a recent burglary and sexual assault by stating, "I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." *Id.* He also told police that unless his lawyer was present, he would not speak to them. *Id.*

⁵² *Id.* at 1567.

⁵³ *Id.* at 1568.

⁵⁴ 832 F.2d 1011, 1017 (7th Cir. 1987). The silence at issue in this case was Savory's response to officers' pre-arrest questions about a double murder. *Id.* at 1015. He told officers that he did not wish to speak to them. *Id.* The court did not specifically address whether this statement constituted an invocation of the privilege. The Seventh Circuit reasoned that "the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, [but] they are not a necessary condition to such a prohibition." *Id.* at 1018.

⁵⁵ 952 F.2d 1196, 1201 (10th Cir. 1991). Burson refrained from answering agents' questions regarding either his or another person's taxes. *Id.* at 1200. "The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised." *Id.* at 1201 (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)).

2. Circuits Allowing Prosecutors to Comment on Pre-Arrest, Pre-*Miranda* Silence: The Fourth, Fifth, Ninth, and Eleventh Circuits

Circuits that allowed a prosecutor to comment on a defendant's pre-arrest, pre-*Miranda* silence during the prosecution's case in chief seemed to believe a voluntary pre-arrest interview presented no issue with regard to compulsion. Thus, the Self-Incrimination Clause was not implicated.

The Ninth Circuit refused to extend the Fifth Amendment's Self-Incrimination Clause to protect a defendant's pre-arrest, pre-*Miranda* silence.⁵⁶ The court held since no compulsion was present, "the constitutional privilege . . . simply did not come into play."⁵⁷ Similarly, the Fifth Circuit held the Self-Incrimination Clause applied only to compelled communications.⁵⁸ The Fourth Circuit, in *United States v. Quinn*, held because Clifford Quinn was not in custody and had never received *Miranda* warnings, *Doyle v. Ohio*'s⁵⁹ holding did not govern the case.⁶⁰ Therefore, the prosecutor could elicit testimony about Quinn's pre-arrest

⁵⁶ *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998). The defendant's silence was in response to questions by a private individual, not a government actor. *Id.* at 1064.

⁵⁷ *Id.* at 1067.

⁵⁸ *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996). The pre-arrest silence referred to was the defendant's choice not to mention outstanding circumstances that he said impacted his actions. *Id.* The defendant asserted duress as a defense to the crime charged. *Id.* at 592. The Fifth Circuit did not specifically address whether "Zanabria's pre-arrest silence [fell] within the reach of 'testimonial communications' protected by the [F]ifth [A]mendment." *Id.* at 593. The court stated that because a government actor did not provoke Zanabria's silence, no compulsion was present. *Id.*

⁵⁹ 426 U.S. 610, 618-19 (1976). *Doyle*'s holding relies on the premise that *Miranda* warnings contain an implied guarantee that the person's silence will not later be used against him. *Id.* The *Doyle* Court held the prosecutor could not use the defendant's post-arrest, post-*Miranda* silence as impeachment evidence. *Id.* at 619.

⁶⁰ *United States v. Quinn*, 359 F.3d 666, 678 (4th Cir. 2004). Quinn argued the government should have been prohibited from drawing out testimony regarding his failure to answer some of the questions put to him while he was being investigated by the Treasury Department. *Id.* at 677.

silence.⁶¹ The Eleventh Circuit has also allowed prosecutorial comment on pre-arrest, pre-*Miranda* silence.⁶²

C. Salinas v. Texas

An investigation into a recent double homicide brought police officers to Genovevo Salinas's doorstep.⁶³ Suspecting his involvement in the crime, officers asked Salinas to provide them with his shotgun for testing and to come to the police station to answer questions.⁶⁴ Salinas agreed and went to the station.⁶⁵ Salinas responded to the majority of the officer's questions during the voluntary, noncustodial interview.⁶⁶ When asked if "his shotgun 'would match the shells recovered at the scene of the murder,'" Salinas sat silently.⁶⁷ Salinas resumed answering questions after a brief pause.⁶⁸

During Salinas's trial the prosecutor commented on the fact that Salinas was only silent when officers inquired about the gun.⁶⁹ The prosecutor suggested Salinas's silence was not representative of an innocent person's reaction.⁷⁰ The jury convicted Salinas of the murders.⁷¹

The Court of Appeals of Texas dismissed Salinas's argument that the prosecutor's comment about his pre-arrest silence violated his right against self-incrimination.⁷² The Supreme Court, in granting certiorari, recognized the split in the lower

⁶¹ *Id.* at 678.

⁶² *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). "The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings." *Id.*

⁶³ *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (plurality opinion).

⁶⁴ *Id.*

⁶⁵ *Id.* Officers never provided Salinas with *Miranda* warnings because he was not in custody at the time of the interview. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 2185 (Breyer, J., dissenting). Salinas chose not to take the stand in his defense. *Id.* at 2178 (plurality opinion).

⁷⁰ *Id.* at 2185 (Breyer, J., dissenting) (citing *Salinas v. State*, 368 S.W.3d 550, 556 (Tex. Ct. App. 2011)). The prosecutor said an innocent person would have protested and claimed his innocence, but instead Salinas did nothing. *Id.*

⁷¹ *Id.* at 2178 (plurality opinion).

⁷² *Id.* The Texas Court of Criminal Appeals then heard the case and affirmed Salinas's conviction. *Id.* at 2179; see *Salinas v. State*, 369 S.W.3d 176, 177 (Tex. Crim. App. 2012).

courts “over whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.”⁷³

1. The Plurality’s Express Invocation Requirement

Justice Alito authored the plurality opinion joined by Chief Justice Roberts and Justice Kennedy.⁷⁴ The plurality held Salinas’s failure to expressly invoke the right meant that he could not benefit from its protections.⁷⁵ They reasoned because Salinas willingly went to the police station, responded to the officer’s questions, and could have left at any point, no governmental compulsion stopped him from invoking his rights.⁷⁶

Justice Alito cited the Court’s previous holdings, which required the individual to take some affirmative action in order to invoke the privilege.⁷⁷ The plurality conceded that some of its previous holdings carved out exceptions to the express invocation requirement but stated those situations did not apply to Salinas.⁷⁸ Therefore, he had to invoke in order to rely on the privilege.⁷⁹

The plurality also dismissed Salinas’s argument that many suspects remain unaware that silence alone does not invoke the privilege.⁸⁰ The plurality concluded that, contrary to the dissent’s concerns, the express invocation requirement would not create future difficulties for law enforcement or lower courts.⁸¹

⁷³ *Salinas*, 133 S. Ct. at 2179.

⁷⁴ *Id.* at 2177.

⁷⁵ *Id.* at 2179.

⁷⁶ *Id.* at 2180.

⁷⁷ *Id.* at 2181-82. “Our cases establish that a defendant normally does not invoke the privilege by remaining silent.” *Id.* at 2181; *see, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 381-86 (2010) (holding post-*Miranda* silence for 2 hours and 45 minutes did not invoke the privilege). *See supra* Part I.A.2 for a discussion of the reasons behind requiring an express invocation.

⁷⁸ *Salinas*, 133 S. Ct. at 2179.

⁷⁹ *Id.* at 2180.

⁸⁰ *Id.* at 2182. The plurality reasoned, “[F]orfeiture of the privilege against self-incrimination need not be knowing.” *Id.* at 2183 (citing *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984)).

⁸¹ *Id.* at 2183. Justice Alito countered by arguing that the dissent’s approach would actually create more confusion as courts attempt to determine “[a]t precisely what point . . . reactions transform ‘silence’ into expressive conduct.” *Id.*

2. The Concurrence's Rejection of *Griffin's* Adverse Inference Bar

Justices Thomas and Scalia concurred in the judgment only.⁸² They stated that regardless of whether Salinas expressly invoked the right, “because the prosecutor’s comments . . . did not compel him to give self-incriminating testimony” the privilege was not implicated.⁸³ Justice Thomas refused to expand *Griffin's* no adverse inference rule pre-arrest, pre-*Miranda*.⁸⁴ He reiterated his disagreement with *Griffin's* holding because of its failure to comport with the “text of the Fifth Amendment.”⁸⁵

3. The Dissent's Implied Invocation Analysis

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, argued an individual does not always need to expressly invoke the privilege.⁸⁶ Instead, he advocated using a circumstantial invocation analysis to determine whether the person’s silence equated to an invocation of the Self-Incrimination Clause.⁸⁷ He argued that by analyzing the circumstances surrounding Salinas’s silence, one could conclude his silence illustrated a reliance on the right.⁸⁸ Therefore, the government

⁸² *Id.* at 2184 (Thomas, J., concurring).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2189 (Breyer, J., dissenting). He emphasized that express invocation of the privilege was only required in cases

where (1) the circumstances surrounding the silence . . . did not give rise to an inference that the defendant intended, by his silence, to exercise his Fifth Amendment rights; *and* (2) the questioner greeted by the silence . . . had a special need to know whether the defendant sought to rely on the protections of the Fifth Amendment.

Id. at 2186-87.

⁸⁷ *Id.* at 2189.

⁸⁸ *Id.* For example, Salinas spoke to police officers at the precinct as part of their investigation into a double homicide. *Id.* Salinas knew the officers believed he was involved in the murders. *Id.* Salinas did not have an attorney at the time of the interview. *Id.* Furthermore, “[t]he relevant question—about whether the shotgun from Salinas’ home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder.” *Id.*

would have been aware of Salinas's intent to depend on the privilege.⁸⁹

Justice Breyer asserted that where one can reasonably conclude the person's silence constitutes an invocation or reliance on the Fifth Amendment, prosecutors should not comment on that silence.⁹⁰ He stated allowing mention of a defendant's pre-arrest, pre-*Miranda* silence "would put that defendant in an impossible predicament."⁹¹ He also argued against the plurality's express invocation requirement saying many defendants do not know what words are necessary to invoke the Fifth Amendment's Self-Incrimination Clause.⁹² He reasoned the plurality's express invocation requirement would prove hard for courts to manage in the future.⁹³

D. Federalism and State Court Jurisprudence

1. Federalism Allows States to Offer Citizens More Protections Under Their State Constitutional Analogues

Federalism allows state courts to provide citizens greater protections than those required by the federal government.⁹⁴ As Justice Brennan once eloquently explained,

State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the

⁸⁹ *Id.* at 2190.

⁹⁰ *Id.* at 2191. Justice Breyer relied on the Court's earlier holding in *Griffin v. California* for the basis of barring prosecutorial comment on pre-arrest silence. *Id.* at 2190.

⁹¹ *Id.* at 2186. If the defendant chooses to stay silent, that silence can later be used against him to infer his guilt. *Id.* If the defendant speaks, he potentially gives law enforcement incriminating information they can later use against him. *Id.* If the defendant testifies at trial to clarify the reasons for his silence, he opens himself up to potentially damaging cross-examination. *Id.*

⁹² *Id.* at 2190-91.

⁹³ *Id.* at 2190. Without a definition of what constitutes an express invocation, courts will likely struggle to try and define it in the future.

⁹⁴ The protections given by the federal government create the floor by which state governments cannot go below. Mary A. Crossley, Note, *Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693, 1699 (1986) (citing Larry M. Ellison & Dennis NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177, 191 (1984)). States may, if they interpret their own constitutions as allowing it, provide more protections to their citizens. *Id.* at 1699, 1701.

Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁹⁵

Additionally, since most criminal cases will be resolved in state, not federal court,⁹⁶ states have a very important role in protecting their citizens' constitutional rights. This ability to provide greater protections to their citizens under their own constitutional analogues to the Fifth Amendment's Self-Incrimination Clause cannot be understated.⁹⁷

2. State Court Jurisprudence Prior to *Salinas v. Texas*

Prior to the decision in *Salinas v. Texas*, state courts had little guidance on whether a prosecutor's comment on a

⁹⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

⁹⁶ See COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 8 (2014), available at http://www.courtstatistics.org/~media/Microsites/Files/CSP/NCSC_EWSC_WEB_NOV_25_14.ashx, for an estimate of the number of criminal cases handled in state trial courts in 2012. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2012, at 64-66 (2012), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/D00CMar12.pdf>, for the number of criminal cases handled in the United States District Courts from April 1, 2011, to March 31, 2012.

⁹⁷ Some states already interpret their own constitutional analogues to the Self-Incrimination Clause as providing their citizens greater protections than those provided by the federal government. See, e.g., *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011); *Tortolito v. State*, 901 P.2d 387, 389-90 (Wyo. 1995) (citing *Clenin v. State*, 573 P.2d 844, 846 (Wyo. 1978)); *State v. Hill*, 781 A.2d 979, 987 (N.H. 2001) (citing *State v. Ball*, 471 A.2d 347, 350 (N.H. 1983), for the proposition that the courts of New Hampshire could view the state constitution as providing greater protections to individuals). Other states interpret their state constitutional analogues as parallel to their federal counterpart and thus provide no increased protections. See, e.g., *State v. Terry*, 328 P.3d 932, 937 (Wash. Ct. App. 2014) ("The Washington Constitution includes its own provision against self-incrimination but it provides no greater protection . . ."); *Commonwealth v. Molina*, 33 A.3d 51, 57 (Pa. Super. Ct. 2011); *State v. Sorenson*, 421 N.W.2d 77, 90 (Wis. 1988); *State v. Lovejoy*, 89 A.3d 1066, 1072 (Me. 2014) ("We interpret the Maine Constitution to be coextensive with the United States Constitution in this context."). But see *State v. Millay*, 787 A.2d 129, 133-34 (Me. 2001) (stating that the Maine Constitution only provides greater protection than the United States Constitution when the individual is compelled to provide testimonial evidence).

defendant's pre-arrest, pre-*Miranda* silence violated the right against self-incrimination. As a result, they divided on the issue.

Some state courts prohibited the use of a person's pre-arrest, pre-*Miranda* silence when the court found that person invoked the right.⁹⁸ Other state courts, citing a variety of reasons, have held that the use of pre-arrest, pre-*Miranda* silence violates the Fifth Amendment.⁹⁹ Still other states have prohibited the admission of pre-arrest silence on an evidentiary basis, with some conducting a Rule 403 probative-versus-prejudicial balancing test.¹⁰⁰ Conversely, some state courts allowed comments or testimony about a defendant's pre-arrest, pre-*Miranda* silence because they believed a compulsion to speak did not exist in pre-custodial situations.¹⁰¹

⁹⁸ See *State v. Remick*, 829 A.2d 1079, 1082 (N.H. 2003) ("Assuming [his silence in response to the officer's request to describe his version of events] was sufficient to invoke his Fifth Amendment privilege, we conclude that admission of this testimony was unconstitutional."); *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004) ("Allowing the use of pre-arrest silence, evidenced here by the *pre-arrest invocation of the right* to counsel, as substantive evidence of guilt in the state's case-in-chief undermines the very protections the Fifth Amendment was designed to provide.") (emphasis added).

⁹⁹ See *Molina*, 33 A.3d at 62 (holding "the Commonwealth cannot use a non-testifying defendant's pre-arrest silence to support its contention that the defendant is guilty of the crime charged as such use infringes on a defendant's right to be free from self-incrimination"). However, the Pennsylvania Superior Court has recently held that under the "fair-response doctrine" a prosecutor may comment on a defendant's pre-arrest silence if defense counsel first "open[s] the door" and a court finds the evidence more probative than prejudicial. *Commonwealth v. Fischere*, 70 A.3d 1270, 1279-80 (Pa. Super. Ct. 2013); see also *State v. Moore*, 965 P.2d 174, 180-81 (Idaho 1998) (stating that the right against self-incrimination applies pre-arrest and pre-*Miranda* but cautioning that the right "applies only when the silence is used solely for the purpose of implying guilt"); *State v. Easter*, 922 P.2d 1285, 1293 (Wash. 1996) ("The Fifth Amendment right to silence extends to situations prior to the arrest of the accused."); *Spinner v. State*, 75 P.3d 1016, 1024 (Wyo. 2003); *State v. Fencl*, 325 N.W.2d 703, 710 (Wis. 1982); *State v. Palmer*, 860 P.2d 339, 350 (Utah Ct. App. 1993).

¹⁰⁰ See *Adams v. State*, 261 P.3d 758, 767 (Alaska 2011); *Weitzel v. State*, 863 A.2d 999, 1004-05 (Md. 2004) (preventing comment on defendant's pre-arrest silence on state evidentiary grounds).

¹⁰¹ *State v. Edmonds*, 188 S.W.3d 119, 124 (Mo. Ct. App. 2006) ("[W]e note that in Missouri evidence of a defendant's silence or refusal to answer questions is only disallowed if the defendant was in custody."); *People v. Richardson*, 58 P.3d 1039, 1046 (Colo. App. 2002).

3. Federal and State Court Jurisprudence Post *Salinas v. Texas*

Since *Salinas*, both the federal circuits and state courts have addressed the issue of pre-arrest silence. Two federal circuits seemed to address, at least implicitly, what acts were sufficient to invoke the privilege. The Second Circuit held a defendant's pre-arrest statement to a border patrol agent that he wanted a lawyer signified an invocation of the privilege against self-incrimination.¹⁰² Relying on *Griffin*, the Second Circuit held when a person invokes the privilege, the prosecutor must not comment on that silence or any silence derived therefrom as proof of the defendant's guilt during its case in chief.¹⁰³ The Sixth Circuit, in *Abby v. Howe*,¹⁰⁴ implied that it would follow *Salinas* and allow prosecutorial comment on pre-arrest silence when an individual fails to "expressly invoke" the privilege.¹⁰⁵

Of the state courts that have addressed the issue of pre-arrest silence since *Salinas*, a few courts have seemed to uphold *Salinas's* express invocation requirement.¹⁰⁶ Two other state courts allowed prosecutorial comment on the pre-arrest silence, stating because the silence occurred prior to the time when officers placed the defendant in custody, the Fifth Amendment did

¹⁰² *United States v. Okatan*, 728 F.3d 111, 118-19 (2d Cir. 2013). It is important to note that the Second Circuit distinguished the factual situation in *Okatan* from that in *Salinas*. *Id.* at 119. The court stated that Okatan expressly invoked the privilege when he asked for his lawyer. *Id.*

¹⁰³ *Id.* at 119-20. "Use of a defendant's invocation of the privilege imposes the same cost no matter the context in which that invocation is made." *Id.* at 119. Therefore, when the court finds the person invoked the privilege, it appears that the Second Circuit will prevent prosecutorial comment on the silence.

¹⁰⁴ 742 F.3d 221 (6th Cir. 2014). One issue on appeal was whether the defendant's attorney provided ineffective assistance of counsel because he did not object to the prosecutor's statements regarding Abby's pre-arrest silence. *Id.* at 227.

¹⁰⁵ *Id.* at 228. The silence at issue in the case was the defendant's decision not to talk to the police and instead remain hidden in his paramour's house while they questioned her there. *Id.* at 224.

¹⁰⁶ See *State v. Gunn*, No. 1CA-CR12-0276, 2013 WL 3828328, at *1, 2 (Ariz. Ct. App. July 18, 2013) (the court found the defendant's silence in response to the police officer's question "[W]hy [did you] not just turn around and come back after [you] missed [your] turn?" insufficient to claim the privilege); *Mira v. State*, 3 N.E.3d 985, 989 n.1 (Ind. Ct. App. 2013) (not returning a police detective's phone call was insufficient to invoke the privilege); *Commonwealth v. Fischere*, 70 A.3d 1270, 1277 n.4 (Pa. Super. Ct. 2013) (appearing to find an invocation based on the fact the defendant "affirmatively informed Detective Gordon that he did not wish to answer any further questions without first speaking to an attorney").

not shield it from use.¹⁰⁷ A few other state courts have held when a defendant invoked the right, the prosecutor could not comment on the pre-arrest silence as substantive evidence of guilt.¹⁰⁸

II. ARGUMENT

A. *The Fifth Amendment's Self-Incrimination Clause Applies Pre-Arrest, Pre-Miranda*

1. Importance of the Right

By adding the Self-Incrimination Clause to the Constitution, the Framers attempted to protect future generations from the horrors of the “cruel trilemma.”¹⁰⁹ Even though the modern criminal justice system has progressed considerably since its inception and people are no longer forced to incriminate themselves to avoid torture, the need for the right is still just as important.¹¹⁰ The right must extend not only to individuals in

¹⁰⁷ Heitz v. State, No. E2012-01171-CCA-R3-PC, 2013 WL 4779760, at *6, 7 (Tenn. Crim. App. Sept. 5, 2013) (the silence the prosecutor referenced was the defendant's pre-arrest choice to flee); People v. Thomas, No. 11CA1071, 2014 WL 2144721, at *3 (Colo. App. May 22, 2014).

¹⁰⁸ State v. Trusty, Nos. C-120378, C-120386, 2013 WL 4400547, at *3, 4 (Ohio Ct. App. Aug. 16, 2013) (holding defendant's pre-arrest invocation of the privilege through his lawyer meant the prosecution could not comment on the pre-arrest silence); State v. Lovejoy, 89 A.3d 1066, 1074-75 (Me. 2014) (“We do . . . require that the record demonstrate the defendant's intention to exercise the constitutional right against compelled self-incrimination.”). In *Lovejoy*, the court found an invocation based on the fact that the defendant “terminated a telephone conversation with the investigating detective upon stating that he wanted to speak with a lawyer and . . . did not return the detective's subsequent telephone calls.” *Id.* at 1075 (footnote omitted). The court distinguished the facts in *Lovejoy* from those in *Salinas*. *Id.* at 1074.

¹⁰⁹ Bentz, *supra* note 19, at 899-900; *see also* *Miranda v. Arizona*, 384 U.S. 436, 442-43 (1966) (quoting *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)).

¹¹⁰ Most notably for the prevention against the “cruel trilemma,” when a prosecutor uses a defendant's pre-arrest silence as substantive evidence of guilt:

When a defendant's silence is used to imply his guilt, a ‘new trilemma’ results: (1) the defendant may make a self-accusation by affirmative statement; (2) he may make a self-accusation by silence; or (3) he may perjure himself. Therefore, if the accused is not allowed to remain silent without worrying that his silence will be used against him, he has an extremely unattractive choice—he may either incriminate himself or perjure himself.

Pettit, *supra* note 21, at 218-19 (citing Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 211 (1984)).

trial, or in custodial interrogations, but also to individuals, like Genovevo Salinas, in pre-arrest, pre-*Miranda* situations.

2. Liberal Interpretation of When the Right Attaches

The Fifth Amendment's Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure."¹¹¹ In support of this view, many federal circuit and state courts already hold that the right against self-incrimination applies pre-arrest and pre-*Miranda*.¹¹² The Supreme Court itself has even said "[the Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."¹¹³

Even the plurality in *Salinas* seemed to believe Salinas could have invoked the privilege. The plurality held his claim failed not because the right was not available to him, but because he did not "expressly invoke" it.¹¹⁴ Based on the doctrine of stare decisis and for public policy reasons, state courts should adopt a liberal view of when the right against self-incrimination attaches and extend it pre-arrest, pre-*Miranda*.

B. State Courts Should Employ an Implied Invocation Analysis

This Comment argues that because the Self-Incrimination Clause does not require an express invocation, and states can provide their citizens greater protections under their state constitutional analogues, state courts should utilize the implied

¹¹¹ *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920)); see also *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989) (discussing the various principles governing the Fifth Amendment's Self-Incrimination Clause).

¹¹² See, e.g., *Coppola*, 878 F.2d at 1565; *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011); *State v. Moore*, 965 P.2d 174, 180 (Idaho 1998). Although, the court in *Moore* limited the right in some ways by stating, "The constitutional right against self-incrimination is not absolute . . . and applies only when the silence is used solely for the purpose of implying guilt." *Moore*, 965 P.2d at 181. See *supra* notes 98, 99, 102-105 and 108 for additional federal circuit and state cases holding that the Self-Incrimination Clause applies pre-arrest.

¹¹³ *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

¹¹⁴ *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (plurality opinion).

invocation analysis set forth in this Comment.¹¹⁵ Courts would use the implied invocation analysis in situations where a reasonable person could conclude that the person's silence amounts to an invocation of the right against self-incrimination.¹¹⁶

Once a court determines an implied invocation took place, courts must prevent prosecutors from commenting¹¹⁷ on the defendant's pre-arrest silence as substantive evidence of guilt.¹¹⁸ Utilizing an implied invocation analysis better encapsulates the protections that both the federal and state Self-Incrimination Clauses espouse and provides individuals, who would otherwise be barred, greater protections under their state constitutions.

1. Requirements for an Invocation

The Supreme Court in *Quinn v. United States* held "no ritualistic formula is necessary in order to invoke the privilege."¹¹⁹ Furthermore, "invocation of the privilege against self-incrimination does not turn on a person's choice of words."¹²⁰ Some state courts even hold that the right "is a self executing right."¹²¹

¹¹⁵ This Comment drew heavily from Justice Breyer's dissenting opinion in *Salinas* in creating the implied invocation analysis and "accusation test."

¹¹⁶ *Salinas*, 133 S. Ct. at 2189 (Breyer, J., dissenting).

¹¹⁷ "A comment upon an accused's silence occurs when used to the state's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Tortolito v. State*, 901 P.2d 387, 391 (Wyo. 1995) (citing *Parkhurst v. State*, 628 P.2d 1369, 1382 (Wyo. 1981)).

¹¹⁸ See *supra* note 90 and accompanying text.

¹¹⁹ 349 U.S. 155, 164 (1955). When a congressional committee asked Quinn about his potential membership in the Communist party, Quinn chose not to answer. *Id.* at 157-58.

¹²⁰ *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989).

¹²¹ *Spinner v. State*, 75 P.3d 1016, 1024 (Wyo. 2003); *Tortolito*, 901 P.2d at 390; see also *State v. Easter*, 922 P.2d 1285, 1291 (Wash. 1996). For example, one state court has explained that when a police officer questions a suspect during a criminal investigation and that suspect remains silent, the assumption is that the person is relying on the right. *Spinner*, 75 P.3d at 1024; *Tortolito*, 901 P.2d at 390.

2. An Implied Invocation¹²²

An implied invocation analysis¹²³ is not a new concept. In *Hoffman v. United States*, the Court appeared to conduct an implied invocation analysis.¹²⁴ The Court stated “[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”¹²⁵ In *Salinas*, Justice Breyer suggested courts ask whether “one [can] fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment’s privilege.”¹²⁶ Therefore, before one can affirmatively conclude silence constitutes an invocation, certain factors must exist that would lead a reasonable person “to connect [the] silence to the Fifth Amendment.”¹²⁷

The logic behind utilizing an implied invocation analysis in pre-arrest silence cases is bolstered by the prosecutor’s very use of a defendant’s silence. The prosecutor would not comment on a defendant’s silence unless he thought the silence representative of the defendant’s guilt.¹²⁸ For the silence to represent guilt, the defendant would have had to remain silent in response to some

¹²² This implied invocation inquiry will most often come into play either during a pre-trial suppression motion, at trial after a prosecutor comments or elicits testimony about the pre-arrest silence, or during an appellate court’s review of the lower court’s decision.

¹²³ An implied invocation analysis looks at the circumstances that caused the defendant’s silence and asks courts to determine whether an invocation of the state’s constitutional analogue to the Self-Incrimination Clause took place. *See, e.g.*, *State v. Lovejoy*, 89 A.3d 1066, 1074-75 (Me. 2014) (“To determine whether a defendant did express the intention to exercise this Fifth Amendment right, a court must consider the specific circumstances in which a defendant was questioned and the defendant’s response to that questioning.”).

¹²⁴ 341 U.S. 479, 480-88 (1951). Hoffman received a subpoena requiring his testimony in front of a grand jury. *Id.* at 481. Hoffman chose not to answer the questions in an attempt to avoid giving testimony that could potentially incriminate him. *Id.* at 482.

¹²⁵ *Id.* at 486-87. The Court found that the lower court erred in holding Hoffman’s refusal to answer questions insufficient to invoke the privilege. *Id.* at 489.

¹²⁶ *Salinas v. Texas*, 133 S. Ct. 2174, 2191 (Breyer, J., dissenting).

¹²⁷ *Id.* at 2188.

¹²⁸ *See, e.g.*, *Tortolito v. State*, 901 P.2d 387, 391 (Wyo. 1995) (“The prosecutor elicited this ‘silence’ testimony as proof of guilt and . . . characterized it as an admission of guilt.”).

type of accusatory questions, conduct, or statements by police.¹²⁹ Only then does the inference that silence equals guilt have any probative value.¹³⁰ Therefore, the very fact that prosecutors bring up the defendant's silence and ask jurors to draw an adverse inference means the defendant's silence was in response to accusatory questions, conduct, or statements by officers and ought to pass the "accusation test" set forth below in this Comment.

3. Test for an Implied Invocation

Every situation where a person remains silent in the face of police officers' questioning does not automatically lead to the conclusion that the person invoked his right. Thus, courts need a test to determine when a suspect's pre-arrest silence in response to accusatory questions or conduct amounts to an implied invocation of the state constitutional analogue to the Self-Incrimination Clause. This Comment, drawing on Justice Breyer's dissent, advocates adoption of an "accusation test" under the totality of the circumstances.¹³¹

The "accusation test" requires courts to determine whether the questions or conduct by the police officers that elicited the silence were the functional equivalent of an express or implied accusation.¹³² Courts should ask whether the officers' accusatory questions, statements, or conduct would lead a reasonable suspect

¹²⁹ See Berger, *supra* note 18, at 1044. For example, say officers meet with a defendant for a pre-arrest interview. During the interview an officer throws a bloody t-shirt on the table in front of the defendant and asks if his blood is on that shirt. The defendant does not answer. The officer's actions are arguably accusatory in nature. The only reason a prosecutor would comment on that silence would be because he believes the person remained silent because he knew he was guilty. As the prosecutor mentioned in *Salinas*, the inference a jury is supposed to draw is that an innocent person would have responded to the accusation. *Salinas*, 133 S. Ct. at 2185.

¹³⁰ Berger, *supra* note 18, at 1044.

¹³¹ See *Ashcraft v. Tennessee*, 322 U.S. 143, 148-54 (1944) (utilizing a totality of the circumstances test to determine whether an interrogation is coercive); see also *Spinner v. State*, 75 P.3d 1016, 1024 (Wyo. 2003) ("In analyzing right-to-silence cases, we consider 'the entire context in which the statements were made' and we will 'not take sentences and phrases out of context.'" (quoting *Robinson v. State*, 11 P.3d 361, 373 (Wyo. 2000))).

¹³² For example, in *Tortolito*, the defendant remained completely silent in response to officers' accusations that he took the money during the robbery. 901 P.2d at 391.

to believe that if he responded, he would incriminate himself.¹³³ If the court answers that question in the affirmative, then a reasonable inference would be that the suspect's silence constitutes an invocation of his right against self-incrimination. Once a court establishes an implied invocation took place, the prosecutor should not comment on the defendant's pre-arrest silence in its case in chief as substantive evidence of guilt.¹³⁴

In order to assist state courts in utilizing the "accusation test," this Comment has compiled a list of factors for courts to consider. While not an exhaustive list, the most relevant factors to analyze consist of (1) the location of the questioning, (2) the person's status as a 'suspect' during questioning, and (3) the type of question asked or accusatory conduct by the police which prompted the person's silence.

The first factor asks courts to identify the location where police officers questioned the individual. For example, did the officer question the defendant at the scene of the crime, his house, or the police station?¹³⁵ At its heart, this question tries to determine whether the defendant "was 'engaged by the police in a plainly confrontational setting.'"¹³⁶

An interview at a police station generally creates a far more accusatory and confrontational atmosphere than the same questioning at the suspect's house. Even when a defendant voluntarily accompanies an officer to the police station, he may not believe he can freely leave or end questioning. In comparison, a person questioned in his home may find comfort in his domain and find it easier to end the interview or rely on his rights. Therefore, if an individual remains silent in response to a police officer's accusatory questions, conduct, or statements while at the police station, a likely inference is that the suspect's silence represents an implied invocation of the right against self-incrimination.

¹³³ This is similar to the test the Court espoused in *Hoffman*. See *supra* note 125 and accompanying text.

¹³⁴ See *supra* note 90 and accompanying text.

¹³⁵ In Justice Breyer's analysis of the *Salinas* facts, he pointed out that the police questioned Salinas at the police station. Therefore, Justice Breyer must have felt that fact important to his analysis. *Salinas*, 133 S. Ct. at 2189.

¹³⁶ *Adams v. State*, 261 P.3d 758, 770 (Alaska 2011) (quoting *Silvernail v. State*, 777 P.2d 1169, 1178 (Alaska Ct. App. 1989)).

The second factor asks courts to determine the person's status in the investigation at the time of questioning.¹³⁷ For example, has the officer explicitly told the individual they consider him a suspect in the crime?¹³⁸ If not, do their actions indicate that they believe he committed the crime?¹³⁹ Therefore, when police either explicitly tell a suspect or imply through their actions that they believe he committed a crime, the situation becomes accusatory.

If that person later remains silent in response to accusatory questioning, conduct, or statements by officers, a reasonable person can conclude the individual's silence amounts to an invocation of his right against self-incrimination.¹⁴⁰ In situations where an invocation is not reasonably implied, an individual may

¹³⁷ For example, in *Commonwealth v. Molina*,

[t]he Commonwealth suggests that because the police did not know whether a crime had been committed at the time Molina was questioned, the import of his silence did not have constitutional implications. We disagree.

As Molina states, an investigation by a police officer was being conducted. During the investigation, the police developed information that Molina may have been involved in Snodgrass's disappearance.

33 A.3d 51, 66 (Pa. Super. Ct. 2011). Therefore, additional sub-points for courts to consider are whether police have commenced an investigation at the time the officers questioned the individual and whether the person knew that a criminal investigation was underway. Another possible sub-point for courts to consider is whether "the defendant's arrest was imminent" at the time of the silence. *State v. Kulzer*, 979 A.2d 1031, 1035 (Vt. 2009) (finding relevance in the fact that the suspect believed his arrest was impending).

¹³⁸ In *Salinas*, the defendant knew police suspected he committed the crime because they explicitly told him so. *Salinas*, 133 S. Ct. at 2189.

¹³⁹ When officers initiate the questioning of an individual on numerous occasions, their conduct seems to imply they consider the person a suspect in the crime. In *United States v. Okatan*, the border patrol agent twice asked the defendant why he made a U-turn at the border. 728 F.3d 111, 114 (2d Cir. 2013). The Second Circuit reasoned that because the border patrol agent asked a question twice it "explicitly suggest[ed] that Okatan's first answer to that question . . . constituted a crime." *Id.* at 118.

¹⁴⁰ When a person knows police officers consider him a suspect in the crime, he arguably has "reasonable cause to apprehend danger" if he answers. *Id.* (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). Therefore, he may remain silent to avoid incriminating himself. One can argue the question officers asked Salinas about the shotgun shells called for an incriminating response, lending credence to the argument that his silence constituted reliance on the privilege. *Salinas*, 133 S. Ct. at 2189.

need to expressly invoke to put the officers and government on notice of his intent to rely on the privilege.¹⁴¹

Finally, courts should consider the questions, conduct, and statements made by police officers prior to the defendant's silence. The appropriate question for a court to ask is whether the questions, conduct, or statements by an officer "would appear to a reasonable person in the suspect's position to call for a[n] [incriminating] response."¹⁴² If yes, and the suspect subsequently remains silent, courts can reasonably conclude that the silence amounts to an implied invocation of the right against self-incrimination. Since most individuals know an officer can use their words against them in a court of law,¹⁴³ an individual's silence in response to accusatory questioning, statements, or conduct by the police very likely represents an attempt to avoid self-incrimination.

Since federalism allows state courts to provide their citizens greater protections under their state constitutional analogues, *Salinas's* express invocation requirement does not bind them.¹⁴⁴ When a reasonable person would believe the person's silence in response to an express or implied accusation by police constitutes an invocation of the right against self-incrimination, this Comment argues state courts should recognize the implied invocation.

4. Policy Reasons for Allowing an Implied Invocation

Even though the policy reasons behind requiring an express invocation remain an important consideration, they should not

¹⁴¹ See *Abby v. Howe*, 742 F.3d 221, 224, 228 (6th Cir. 2014) (The defendant's decision to remain concealed and silent while officers questioned his fiancé did not invoke the privilege.). In a situation such as the one in *Abby*, there would have been no way for officers to conclude the defendant was relying on the privilege. Therefore, an express invocation was required.

¹⁴² *Rhode Island v. Innis*, 446 U.S. 291, 311 (1980) (Stevens, J., dissenting); see also *Okatan*, 728 F.3d at 118 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (quoting *Hoffman*, 341 U.S. at 486-87)).

¹⁴³ See *Pettit*, *supra* note 21, at 219-20; *Weitzel v. State*, 863 A.2d 999, 1005 (Md. 2004).

¹⁴⁴ See *Crossley*, *supra* note 94, at 1698.

take precedence over a person's constitutional rights. The implied invocation test set forth in this Comment should not impede law enforcement from carrying out its job of protecting citizens or prevent them from obtaining the information they are entitled to. It should only prevent the adverse inference that results when prosecutors use a defendant's pre-arrest silence as substantive evidence of guilt.

The plurality in *Salinas* stressed the need for the express invocation requirement to place the Government "on notice" of the person's "inten[t] to rely on the privilege."¹⁴⁵ Because this test does not require an officer to cease all questioning when he believes the suspect invokes the right,¹⁴⁶ it will not prevent them from gathering information for later use. To clear up any confusion, the officer can ask clarifying questions to obtain an express answer from the defendant about whether he is relying on his right.¹⁴⁷

Furthermore, when courts use an implied invocation analysis to determine if a defendant invoked his right, it may encourage police officers to provide a defendant with *Miranda* warnings earlier.¹⁴⁸ Without this incentive

[l]aw enforcement personnel can time the . . . arrest to occur after the citizen stands mute in the face of the accusation. This practice . . . encourages manipulative timing of arrests, [and] does not serve the constitutional provision's purpose of protecting the right to silence during pre-arrest, accusatory interrogation by the state's agents.¹⁴⁹

¹⁴⁵ *Salinas*, 133 S. Ct. at 2179 (plurality opinion). In situations where a court will likely determine an implied invocation took place, the circumstances were probably already such that the officer could reasonably have concluded the person meant to rely on his right. Therefore, the officers would have had notice of the defendant's desire to use the privilege.

¹⁴⁶ Distinguished from *Miranda*, where, when a suspect invokes his right, all questioning must cease. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). Although, pre-arrest, *Miranda* does not apply.

¹⁴⁷ *Berghuis v. Thompkins*, 560 U.S. 370, 410 (2010) (Sotomayor, J., dissenting).

¹⁴⁸ *See, e.g.*, *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004); *Spinner v. State*, 75 P.3d 1016, 1024 (Wyo. 2003).

¹⁴⁹ *Spinner*, 75 P.3d at 1024 (quoting *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995)); *see also State v. Palmer*, 860 P.2d 339, 349 (Utah Ct. App. 1993) ("Such a rule would also encourage the authorities to refrain from issuing *Miranda* warnings as long

Additionally, by barring comment on pre-arrest silence the burden to prove a defendant's guilt is placed back on the prosecution, where it should remain.¹⁵⁰

Salinas's express invocation requirement may also prevent deserving defendants from benefitting from the protections of their state's constitutional analogue to the Self-Incrimination Clause. As Justice Breyer suggested in *Salinas*, forcing an individual to expressly invoke the right presupposes the individual not only knows what to say, but that he also knows his silence alone does not invoke it.¹⁵¹ This requirement contradicts earlier holdings by the Court that state no magic formula is required for a person to invoke his constitutional right.¹⁵² To now require individuals to expressly invoke the privilege will create a serious injustice for many defendants who remain unaware they must speak to invoke.

Moreover, some individuals use silence as a way to avoid incriminating themselves.¹⁵³ If a defendant chooses to speak, a prosecutor may later use his words against him at trial.¹⁵⁴ If he chooses to remain silent, under *Salinas*, the prosecutor can comment on that as well. The person thus falls into the "cruel trilemma."¹⁵⁵ The use of this implied invocation analysis may help to prevent that "cruel trilemma."

as possible in an attempt to generate either inferential evidence of guilt from silence or an admission prior to custodial interrogation.").

¹⁵⁰ Pettit, *supra* note 21, at 217. "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth," or in this case, his silence. *Miranda*, 384 U.S. at 460.

¹⁵¹ *Salinas v. Texas*, 133 S. Ct. 2174, 2189-90 (2013) (Breyer, J., dissenting); *see also Berghuis*, 560 U.S. at 410 (Sotomayor, J., dissenting) (stating "suspects often use equivocal or colloquial language in attempting to invoke their right to silence"); Benjamin Berkley, Comment, *Demeanor Evidence Does Not Demean Anything: How Exposure to Mass Media Provides a Solution to the Question of Whether Demeanor Evidence Should Be Admissible as Substantive Evidence of Guilt Post-Arrest and Pre-Miranda*, 42 SW. L. REV. 481, 494-95 (2013) (stating that because of the popularity of crime drama television shows, many individuals assume they have an inherent "right to remain silent").

¹⁵² *Quinn v. United States*, 349 U.S. 155, 164 (1955); *Salinas*, 133 S. Ct. at 2191.

¹⁵³ Pettit, *supra* note 21, at 220.

¹⁵⁴ *Salinas*, 133 S. Ct. at 2186.

¹⁵⁵ Pettit, *supra* note 21, at 218.

C. State Courts Should Not Allow Prosecutors to Comment on a Person's Pre-Arrest, Pre-Miranda Silence

So far, this Comment has explored the requirements necessary for an invocation of the Self-Incrimination Clause, and has advocated that state courts adopt an implied invocation analysis for pre-arrest silence cases. Determining whether an invocation occurred is the first step in deciding whether a prosecutor can comment on a defendant's pre-arrest silence.¹⁵⁶ A court cannot effectively prohibit a prosecutor from commenting on an individual's pre-arrest, pre-*Miranda* silence unless it first determines the individual actually invoked the privilege.¹⁵⁷ Once a court establishes that a defendant either explicitly or impliedly invoked his right, this Comment argues a court must then apply *Griffin's* no adverse inference bar to cover pre-arrest silence.¹⁵⁸

1. *Griffin's* Adverse Inference Bar Should Apply Pre-Arrest, Pre-*Miranda*

States should extend *Griffin v. California's* "no adverse inference rule" to cover pre-arrest, pre-*Miranda* silence under their state constitutional analogues to the Self-Incrimination Clause.¹⁵⁹ Some federal courts already do apply *Griffin* pre-arrest. For example, the Seventh Circuit has held that since a person can exercise his right against self-incrimination before arrest, *Griffin's* principles apply equally as well pre-arrest.¹⁶⁰ The Tenth Circuit, in accord, has held "[t]he general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which

¹⁵⁶ See *United States v. Okatan*, 728 F.3d 111, 118 (2d Cir. 2013) (stating that the two-step analysis begins by deciding whether the silence invoked the privilege and then deciding if a prosecutor can comment on that silence).

¹⁵⁷ *Id.* Courts can determine this by utilizing the "accusation test" set forth in this Comment.

¹⁵⁸ See *supra* note 90 and accompanying text.

¹⁵⁹ See *Pettit*, *supra* note 21, at 214-15 (for a discussion on why *Griffin* should apply to pre-arrest situations). See *supra* Part I.A.3 for a detailed discussion on *Griffin* and the "no adverse inference rule."

¹⁶⁰ *Unites States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Okatan*, 728 F.3d at 118-20 (The Second Circuit has held *Griffin* applies pre-arrest, provided the defendant invokes his right.).

[the] defendant exercise[s].”¹⁶¹ Many state courts already prohibit a prosecutor from commenting on a person’s pre-arrest, pre-*Miranda* silence when the person invokes.¹⁶²

2. Commenting on Silence Can Compel Testimony and Create an Adverse Inference

The dissenting justices in *Griffin* and the concurring justices in *Salinas* focused their analysis on whether the defendant felt compelled to testify against himself.¹⁶³ Justice Stewart, in his *Griffin* dissent, argued commenting on a defendant’s failure to take the witness stand does not compel testimony, as historically viewed.¹⁶⁴ Similarly, Justice Thomas, concurring in *Salinas*, stated “[a] defendant is not ‘compelled . . . to be a witness against himself’ simply because a jury has been told that it may draw an adverse inference from his silence.”¹⁶⁵

Contrary to those views, compulsion does exist pre-arrest, pre-*Miranda*. At its heart, the “cruel trilemma” created when a prosecutor comments on a defendant’s pre-arrest silence is still the same “trilemma” the drafters of the Constitution worried about. As one court has said, “[a]ny time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person’s pre-arrest speech and silence may be used against [him] . . . that person has no choice that will prevent self-incrimination.”¹⁶⁶

The adverse inference resulting from a prosecutor’s comment also creates a penalty as understood by the Court in *Griffin*. A “comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege

¹⁶¹ *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)).

¹⁶² *See supra* notes 98, 108 and accompanying text.

¹⁶³ *Griffin*, 380 U.S. at 618-23 (Stewart, J., dissenting); *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring).

¹⁶⁴ *Griffin*, 380 U.S. at 620.

¹⁶⁵ *Salinas*, 133 S. Ct. at 2184.

¹⁶⁶ *State v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982).

by making its assertion costly.”¹⁶⁷ Therefore, commenting on pre-arrest silence can compel testimony by creating an adverse inference.

3. Commenting on Silence Is Highly Prejudicial with Low Probative Value

Courts should prohibit prosecutorial comment on a defendant’s pre-arrest silence because of the highly prejudicial nature of this information compared to its relatively low probative value. “[T]here are many reasons why a defendant may remain silent before arrest, such as a knowledge of his *Miranda* rights or a fear that his story may not be believed.”¹⁶⁸ Additionally, because of the many ambiguities surrounding a person’s silence in the face of accusatory questioning, silence has minimal probative value.¹⁶⁹

By commenting on a person’s pre-arrest, pre-*Miranda* silence a prosecutor essentially asks jurors to infer the defendant’s guilt based on his silence,¹⁷⁰ which prejudices the defendant in the eyes of the jurors. While jurors will certainly notice if a defendant does not testify and draw their own conclusions based on that fact,¹⁷¹ unless a prosecutor comments on the defendant’s pre-arrest silence, jurors would never know about it.¹⁷² Armed with this knowledge, juries may place too much emphasis on the defendant’s pre-arrest silence.¹⁷³ They may allow their assumptions as to how innocent or guilty people “should” react to cloud their judgment. Therefore, the probative value of allowing prosecutorial comment on pre-arrest silence is nominal compared to the very great risk of unfair prejudice against the defendant.¹⁷⁴

¹⁶⁷ *Griffin*, 380 U.S. at 614 (majority opinion) (footnote omitted) (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

¹⁶⁸ *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

¹⁶⁹ *Adams v. State*, 261 P.3d 758, 766 (Alaska 2011); *Weitzel v. State*, 863 A.2d 999, 1002 (Md. 2004); *State v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (dealing specifically with post-arrest silence).

¹⁷⁰ See Adam M. Stewart, Note, *The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda*, 37 SUFFOLK U. L. REV. 189, 199 (2004).

¹⁷¹ *Pettit*, *supra* note 21, at 215.

¹⁷² *Id.*

¹⁷³ *Weitzel*, 863 A.2d at 1004 (quoting *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989)).

¹⁷⁴ *Adams*, 261 P.3d at 766.

D. Prosecutors Can Comment on Demeanor and Non-Testimonial Evidence

Rather than commenting on a defendant's pre-arrest silence, a prosecutor can comment on any non-testimonial evidence or the defendant's demeanor¹⁷⁵ during the pre-arrest interview.¹⁷⁶ The Fifth Amendment's privilege against self-incrimination only protects an individual's "testimonial" or "communicative" evidence from use.¹⁷⁷ Evidence is testimonial only if "[it] explicitly or implicitly, relate[s] a factual assertion or disclose[s] information."¹⁷⁸ Therefore, the Fifth Amendment would not protect evidence of a person's demeanor or non-expressive conduct.¹⁷⁹

In *Salinas*, instead of commenting on his pre-arrest silence, the prosecutor could have commented on Salinas's demeanor and physical actions during the non-custodial interview. For example, Salinas "[l]ooked down at the floor . . . bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."¹⁸⁰

¹⁷⁵ See *supra* Part I.A.4 for a discussion on testimonial versus demeanor evidence.

¹⁷⁶ See *State v. Easter*, 922 P.2d 1285, 1292 n.10 (Wash. 1996). This Comment concedes, as suggested by the plurality in *Salinas*, that courts may experience an increase in litigation over what constitutes demeanor versus testimonial evidence. *Salinas v. Texas*, 133 S. Ct. 2174, 2183 (2013) (plurality opinion) ("At precisely what point such reactions transform 'silence' into expressive conduct would be a difficult and recurring question that our decision allows us to avoid."). This Comment also recognizes that prosecutors may find it difficult to introduce demeanor evidence without also bringing up the fact the defendant remained silent. See, e.g., Hanks, *supra* note 47, at 110 ("The Ninth Circuit recognized in *Velarde-Gomez* that to say 'he just sat there' or was 'unsurprised' is equivalent to saying he expressed nothing.") (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001)).

¹⁷⁷ *Schmerber v. California*, 384 U.S. 757, 763-64 (1966). "[T]he protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications . . ." *Id.* The Ninth Circuit held "testimony that Velarde shook his head to signify 'no' [as an answer to a question] would have been inadmissible." *Velarde-Gomez*, 269 F.3d at 1031.

¹⁷⁸ *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

¹⁷⁹ *Velarde-Gomez*, 269 F.3d at 1032; see also *Muniz*, 496 U.S. at 592 (A defendant's slurred speech was not testimonial, and therefore not protected by the Fifth Amendment.); *People v. Rogers*, 68 P.3d 486, 492 (Colo. App. 2002) (holding a prosecutor could comment on defendant's pre-arrest conduct and demeanor); *Easter*, 922 P.2d at 1292 n.10 (holding prosecutors could comment on any non-testimonial evidence from the defendant's pre-arrest interview).

¹⁸⁰ *Salinas*, 133 S. Ct. at 2178.

Under *Holt v. United States*,¹⁸¹ *Muniz*, and *Schmerber*, a court would likely consider these actions non-testimonial demeanor evidence because the actions do not assert a fact and are reflexive, non-expressive conduct.¹⁸² Therefore, the Self-Incrimination Clause does not protect them from use.

III. APPLICATION

Given the complexities of determining whether an implied invocation took place and the “insolubly ambiguous”¹⁸³ nature of silence, an examination and analysis of a couple hypothetical cases will help illustrate how courts would conduct an implied invocation analysis in practice. Applying this Comment’s “accusation test,” once a court determines an implied invocation took place, the court should ban prosecutors from eliciting testimony or commenting on a defendant’s pre-arrest silence as substantive evidence of guilt.¹⁸⁴

Imagine a situation where a local deputy goes to a man’s house to question him regarding accusations a relative made.¹⁸⁵ The deputy had not placed the defendant in custody at the time of questioning. The defendant answered almost all of the questions asked by the deputy. When asked if he committed the crime, he sat there silently. After a short time, the deputy resumed questioning. The defendant again answered most of his questions. At the defendant’s trial, the prosecutor referenced the defendant’s pre-arrest silence in response to the deputy’s question about

¹⁸¹ 218 U.S. 245, 252-53 (1910).

¹⁸² See *supra* notes 41-48, 175-79 and accompanying text. This Comment acknowledges that allowing comment on a person’s demeanor during pre-arrest questioning may invite police subjectivity in determining what a defendant’s action means.

¹⁸³ *Doyle v. Ohio*, 426 U.S. 610, 617 (1976).

¹⁸⁴ See *supra* note 90 and accompanying text.

¹⁸⁵ This hypothetical is based on *State v. Edmonds*, 188 S.W.3d 119, 123-25 (Mo. Ct. App. 2006). For purposes of this hypothetical, a few facts have been changed to illustrate how courts would conduct an implied invocation analysis. See *id.* In the actual case, the court allowed the prosecutor to comment on the pre-arrest silence holding since the defendant was not in custody at the time of the police interview, the Fifth Amendment did not apply. *Id.* at 124-25. In further support of allowing prosecutorial comment, the court referenced the fact that “[a]ppellant voluntarily talked with [the] Deputy about anything but that one question.” *Id.* at 125.

whether he committed the crime. The jury has convicted the defendant, and the case is now on appeal.

A court must determine whether the prosecutor violated the state's analogue to the Self-Incrimination Clause by commenting on the defendant's pre-arrest silence. The court must first determine whether the defendant's silence constituted an invocation of the right.¹⁸⁶ In order to do so, this Comment proposes courts utilize an "accusation test" looking at the totality of the circumstances.

Using the factors discussed previously,¹⁸⁷ the court would begin by looking at the location the police questioned the individual. In this situation, officers questioned him in his home, arguably a less accusatory atmosphere than a police station. The defendant may feel slightly more in control of the situation or in a better position to assert his rights. The fact that the defendant was questioned at his home instead of the police station would not, by itself, lead a court to definitively conclude that his silence equaled an invocation of the Self-Incrimination Clause.

The second important factor for a court to consider is the defendant's status at the time of the questioning.¹⁸⁸ In this hypothetical, even though not explicitly stated, both the defendant and deputy seem to be operating under the belief that the police considered him a suspect. The police officer initiated the questioning of the suspect and likely went to the suspect's home with the express purpose of obtaining a confession.

Additionally, the deputy told the defendant he wanted to speak with him regarding accusations his relative made about him. This would lead a reasonable individual to believe the officer considered him a suspect in the crime and that a criminal investigation had begun. In this situation, where both parties consider the person a suspect and a criminal investigation has begun, if the person remains silent in response to an accusatory question, statement, or conduct by the police officer, a reasonable inference is that the person invoked the right against self-incrimination.

¹⁸⁶ See *supra* notes 156-57.

¹⁸⁷ See *supra* Part II.B.3 for a discussion of the "accusation test" and its constituent components.

¹⁸⁸ See *supra* note 137 and accompanying text.

Next, the court would look at what type of questions, conduct, or statements by the officer prompted the defendant's silence. In this hypothetical, the deputy asked the individual if he committed the crime, at which point the defendant remained silent. Undoubtedly, that question constituted an accusation and called for an incriminating response.¹⁸⁹ A court can reasonably infer that the defendant's silence in response to that question represents an invocation of the right. When a person's constitutional rights are implicated, courts should err on the side of caution and conclude the defendant invoked or is relying on his right.

After completing the implied invocation analysis,¹⁹⁰ a court would probably state, based on the totality of the circumstances, that the defendant's silence amounted to an implied invocation of that state's constitutional analogue to the Self-Incrimination Clause. Therefore, because the defendant invoked his right, the prosecutor erred when he referenced the defendant's pre-arrest silence.

For the second hypothetical, police officers receive a call to come to the scene of a serious assault. When they arrive, they see a young man lying unconscious on the ground. The victim, unable to speak because of the brutal beating, cannot inform officers what happened to him. The officers call for an ambulance and decide to canvass the crowd to determine whom, if anyone, knows what happened to this young man. Most in the crowd respond that they did not see anything or that they do not know what happened. One man does not respond to their questions at all. He just silently stares back at them.

Over the next week officers continue to investigate the assault on the young man. Evidence begins to emerge that the man at the scene who remained silent in response to their questions, "Were you here when the assault occurred?" and "Did you see anything?," actually committed the vicious assault. The officers and prosecutor now want to introduce evidence of the man's silence at the crime scene. The case is now in front of a judge on a motion in limine. How should the court rule?

¹⁸⁹ See *supra* notes 125, 133, 142 and accompanying text.

¹⁹⁰ This Comment recognizes the very fact specific nature of this implied invocation analysis and that it may create potential problems for courts, but argues that protecting a person's constitutional right should take precedence over the possibility of more litigation.

Utilizing the “accusation test,” a court would look to see where the officers questioned the individual. In this hypothetical, the officers questioned the individual at the scene of the crime. At the time the officers questioned him, he is one of many individuals in the crowd. They only ask him two general questions before moving on to the next person.

Next, a court would look to see if an investigation had commenced at the time of the questioning and the person’s status, if any, at the time of the investigation.¹⁹¹ At the time of the individual’s silence, an investigation had commenced, albeit at its very early stages. When the officers questioned the man, he was nothing more than a witness in their eyes. Since the officers asked every person in the crowd the same questions, an objectively reasonable person would not think officers considered him a suspect. He was just one among many in a crowd. Had he been the only person at the scene, maybe a reasonable person could assume the police considered him a suspect. The officers in this hypothetical have not implied through their actions or explicitly told the individual they believe he committed the crime.¹⁹²

Finally, a court must determine whether the officers’ questions, conduct, or statements called for an incriminating response from the individual.¹⁹³ In this situation the only questions the police officers asked the individual were “Were you here?” and “Did you see what happened?” A reasonable person would not believe those questions necessarily called for an incriminating response.

Under a totality of the circumstances approach, a court would probably not conclude that an implied invocation took place. While the police officers questioned the individual at the scene of the crime, they only considered him a witness at the time. Their questions were designed to gather information about what just occurred, not to elicit an incriminating response. Therefore, an individual in a situation like the one just described would need to expressly invoke the right in order to benefit from its privileges. A reasonable conclusion would not be that the individual’s silence in

¹⁹¹ See *supra* note 137 and accompanying text.

¹⁹² See *supra* notes 138-39 and accompanying text.

¹⁹³ See *supra* note 142 and accompanying text.

response to the two questions asked by the officers constituted an invocation of his self-incrimination rights.

CONCLUSION

A bedrock principle of the American criminal justice system is the right against self-incrimination. The Fifth Amendment's Self-Incrimination Clause guarantees "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."¹⁹⁴ When prosecutors comment on a defendant's pre-arrest silence and ask jurors to draw an adverse inference, they effectively place the defendant in a "cruel trilemma." This practice violates the protections people should enjoy under the federal Self-Incrimination Clause. *Salinas* notwithstanding, all state courts should also so hold under their state court analogues.¹⁹⁵

If the defendant does not refute the adverse inference created by the comment, jurors will likely assume that the pre-arrest silence equals the defendant's guilt, even though individuals remain silent for a variety of reasons. Remember the eighteen-year-old defendant from the hypothetical in the introduction—his silence did not represent his guilt, only shock and nervousness. Yet under the holding of *Salinas*, because the eighteen-year-old boy did not know he needed to expressly invoke his right against self-incrimination, prosecutors can now use his silence against him at trial.

This Comment argues the better solution is for state courts to conduct an implied invocation analysis using an "accusation test" to determine if the defendant's pre-arrest silence was an invocation of the privilege. If courts find the silence was an invocation, it will prevent prosecutors from commenting on that pre-arrest silence. This analysis provides defendants greater protections under their state constitutional analogues to the Self-Incrimination Clause, especially in situations where the defendant's guilt is not overwhelming and the comment by the

¹⁹⁴ U.S. CONST. amend. V.

¹⁹⁵ One state superior court eloquently summed up the reason for its prohibition against the use of a defendant's pre-arrest silence as substantive evidence of guilt by stating, "[O]ur decision . . . enforces one of the underlying policies of the Fifth Amendment, which is to avoid having a jury assume that a defendant's silence is equated with guilt." *Commonwealth v. Molina*, 33 A.3d 51, 65 (Pa. Super. Ct. 2011).

prosecutor becomes the tipping point for the jury in finding the defendant guilty. Allowing an implied invocation better adheres to the protections of the right against self-incrimination.

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* J.D. Candidate 2015 at the University of Mississippi School of Law. The author would like to thank Professor Jack Wade Nowlin for his help, insights, and encouragement throughout the writing and editing process. I would also like to thank Professors Ronald Rychlak, Hans Sinha, Phillip Broadhead, Thomas K. Clancy and Dean Matthew Hall for their help in preparing this paper for publication. A special thank you to Jeffrey Dimmig for his help in the early stages of this Comment and Heather Gallagher for providing a topic to write on. An additional thanks to my classmates from my Academic Legal Writing Class and my family and friends for all their support.

