You [Might] Have the Right to Remain Silent: Examining the Miranda Problem (United States v. Wright, 777 F.3d 769 (5th Cir. 2015))

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I. INTRODUCTION

Every American with a television knows the phrase “you have the right to remain silent” and has had the opportunity to hear it on every televised crime drama imaginable. While this phrase is commonplace today, many Americans take their right to remain silent for granted. Furthermore, some do not consider the possibility that the circumstances surrounding police questioning may affect their right to remain silent. This ignorance of the law has led to serious consequences. To date, 1,772 people in the United States alone have been exonerated of a crime for which they were previously convicted. These statistics demonstrate that the American criminal justice system has an unfortunate history of convicting innocent people and that something is going wrong during criminal investigation.

Recently, several courts noted confusion regarding whether courts may punish post-arrest, pre-Miranda silence by presenting that silence as substantive evidence of guilt at trial. This confusion has resulted in a split between circuits. The Supreme Court has unexplainably denied certiorari on this issue several times, only muddling the matter even further. Courts have begun focusing on definitions and textual analyses to determine a citizen’s rights instead of framing the question within a constitutional analysis. In reality, the question is quite simple: When is a citizen required to speak to the police?

The split has resulted in inconsistent holdings in lower courts, causing unpredictable results and a pool of conflicting decisions. A majority of the state court cases have held that the prosecution may not use evidence of a defendant’s post-arrest, pre-Miranda warning silence as substantive evidence of guilt. In contrast, the circuits are evenly split on this issue.

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On September 10, 2014, the Supreme Court of Pennsylvania heard Commonwealth v. Molina, a decision concerning a citizen’s right against self-incrimination. In 2003, Michael Molina was suspected of the beating and subsequent murder of a female. The prosecution relied heavily on Mr. Molina’s refusal to accompany the police to the station for questioning as substantive evidence of his guilt at trial. The Pennsylvania Supreme Court granted certiorari in order to determine whether the prosecution may use a defendant’s pre-arrest silence as substantive evidence of guilt, but encountered difficulty because of the unclear jurisprudence within the state and federal court systems.

The Molina court found the federal jurisprudence unclear and confusing and elected to ignore it, instead looking to the legislative history behind Pennsylvania’s self-incrimination clause. It held that Pennsylvania citizens have the right against self-incrimination through the Pennsylvania Constitution, which contains a self-incrimination clause almost identical to that in the Fifth Amendment. This demonstrates that the federal jurisprudence on this issue is so inconclusive that state supreme courts are unable to find a persuasive line of cases in either direction. This lack of definition is caused by a series of mistakes, confusion, and complications in the analysis of an arrestee’s silence.

This Casenote analyzes the Fifth Circuit’s decision in United States v. Wright, a case that examines the post-arrest, pre-Miranda silence issue in depth. Part II then examines the Supreme Court jurisprudence on the issues surrounding the right against self-incrimination. Part III presents the relevant circuit court opinions on this issue and their conflicting holdings. Part IV presents Wright and its analysis of the issue. Part V considers the Fifth Circuit’s misapplication of the Fifth Amendment, Miranda, and the circuit court opinions. Part V also proposes two
solutions for how the Fifth Amendment, *Miranda*, and the circuit court opinions should be interpreted in the future in order to uphold the spirit of *Miranda*. Finally, Part VI will conclude that the Supreme Court should reinterpret *Miranda* within a modern context to respect the intent of the Fifth Amendment.

II. BACKGROUND

A. The Fifth Amendment

The Fifth Amendment was introduced in 1791 as one of the original Amendments in the Bill of Rights. It reads, in relevant part, "[no person] shall be compelled in any criminal case to be a witness against himself." The history of the Fifth Amendment is unclear, but can be traced back to an "oath ex officio," an oath requiring defendants to agree to truthfully answer any question asked of them. Basically, a defendant could be brought in front of a court for any reason and forced to take the oath. If a defendant refused to take the oath, he or she was subject to a fine, sometimes imprisonment. In response, some people started to quote "maxim nemo tenetur seipsum prodere" to protest taking the oath, which means, "no man is bound to [accuse] himself." This was likely the earliest example of people attempting to exercise the right against self-incrimination now codified within the Fifth Amendment.

B. When Can You Plead the Fifth?

In 1955, the Supreme Court addressed the scope of the Fifth Amendment in *Quinn v. U.S.*, a case where three men taken in for questioning declined to answer any questions. The Court began its analysis by explaining the history of the Fifth Amendment and

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13. U.S. CONST. amend. V. The entire Amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (emphasis added).
14. 1 CRIM. PROC. § 2.10(c) (4th ed. 2015).
15. Id.
16. Id.
17. Id.
examine the Founders' intent in introducing the Amendment.\textsuperscript{19} Importantly, the Court held "the Self-Incrimination Clause must be accorded liberal construction in favor of the right it was intended to secure." Additionally, \textit{Quinn} found that the Fifth Amendment does not need to be explicitly invoked.\textsuperscript{20} It stated that "the fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his intention."\textsuperscript{21} In other words, if the police officer conducting the interrogation should reasonably believe that an arrestee might be invoking his right against self-incrimination, the officer should stop the interrogation.

\textit{Quinn} effectively broadened a citizen's ability to invoke the Fifth Amendment. As a result, the majority of the circuits' opinions first ask whether a suspect's conduct was sufficient to invoke the protection of the Fifth Amendment and second, whether the circumstances warranted protection by the Fifth Amendment.\textsuperscript{22} This issue arises when courts consider at what point in time a suspect may properly invoke Fifth Amendment rights. Simplified, this is an issue focused on timing. When does the Fifth Amendment protect a suspect?

\textbf{C. You Have the Right to Remain Silent}

\textit{Miranda v. Arizona} was decided in 1966 amidst serious police misconduct and manipulation of arrestees.\textsuperscript{23} The Supreme Court granted certiorari in \textit{Miranda} because of the confusion surrounding the application of a citizen's right against self-incrimination. Several cases were pending in front of the Court with a similar fact pattern: the police had arrested someone, convinced that person that it was better to talk to the police openly than to stay silent or get an attorney, confused them, and then elicited an allegedly false confession. \textit{Miranda} held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."\textsuperscript{24} \textit{Miranda} placed upon police officers a duty to recite the \textit{Miranda} warnings to an arrestee as soon as she was within their custody. At the time \textit{Miranda} was decided, the Supreme Court thought the Fifth Amendment right against self-incrimination was so important that it required every police officer in the nation to warn an arrestee that "he

\begin{footnotesize}
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\item \textsuperscript{19} \textit{Id.} at 161.
\item \textsuperscript{20} \textit{Id.} at 162.
\item \textsuperscript{21} \textit{Id.} at 164.
\item \textsuperscript{22} \textit{See infra} Part IV.
\item \textsuperscript{23} 384 U.S. 436 (1966).
\item \textsuperscript{24} \textit{Id.} at 478.
\end{itemize}
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has the right to remain silent . . .

However, is this how the American judicial system still reads *Miranda* today?

**D. The Confusion Behind Custody**

The *Miranda* majority opinion states several times that an arrestee has the right to remain silent and that the arresting officer must read the arrestee her *Miranda* rights before engaging in "custodial" or "in-custody interrogation." Although the Court may not have intended to make this distinction, a gray space was created around the definition of "custodial." It also limited the Fifth Amendment by inadvertently implying that the right to remain silent only applies when an interrogatee is in the custody of the police. The main issues in this circuit split are the courts’ confusion about the application of the Fifth Amendment and, subsequently, their struggle to define "custodial" and "interrogation."

In 1995, the Supreme Court heard *Thompson v. Keohane* and established the two-part *Keohane* test to determine whether a person is within police custody. In 1986, Carl Thompson was asked to come to the police station for questioning regarding the murder of his wife. The police did not read him his *Miranda* warning before the interrogation. Though Mr. Thompson was told repeatedly that he was free to leave, the police continued to ask him "questions that invited confession." He confessed to the murder and was convicted. After his conviction, Mr. Thompson submitted a writ of habeas corpus because the police did not read him his *Miranda* rights before questioning. The main issue before the Court was whether Mr. Thompson was in custody when he was interrogated, because he was not owed a *Miranda* warning if he was not. The Court developed a two-part test for determining when someone is in police custody:

Two discrete inquiries are essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and

25. *Id.* at 479. The entire *Miranda* warning reads, "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?"

26. *Id.* at 439.


28. *Id.* at 103.

29. *Id.*

30. *Id.* at 106.
leave . . . [T]he court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.\(^{31}\)

Put plainly, courts should look at all of the circumstances surrounding the interrogation to determine whether or not a reasonable person in that situation would feel he or she was under the control of the police.

**E. What Constitutes Interrogation?**

In 1980, the Supreme Court attempted to clarify *Miranda's* definition of interrogation in *Rhode Island v. Innis*.\(^{32}\) When the police arrested Thomas Innis, he was immediately informed of his *Miranda* rights and placed in the police car, where he subsequently asked for an attorney.\(^{33}\) However, on the way to the police station, the officers openly discussed the consequences of children finding the missing weapon used during the murder and robberies they suspected Mr. Innis had committed. Mr. Innis responded by taking the police to the gun in order to protect the children.\(^{34}\) The question for the Court was whether these police comments amounted to interrogation. The *Innis* Court broadened the definition of “interrogation,” stating:

“Interrogation,” as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself . . . [This] definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police . . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation . . . . [T]he definition of interrogation can extend only to words or actions on the part of the police officers that they *should have known* were reasonably likely to elicit an incriminating response.\(^{35}\)

This view was very Fifth Amendment focused because it added more protection for the average American citizen. It “focus[e] primarily upon the perceptions of the suspect,” instead of the intent of the police,\(^{36}\) and placed the burden on the police officers to consider when an

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31. *Id.* at 111.
33. *Id.* at 294.
34. *Id.* at 295.
35. *Id.* at 301-02 (emphasis added).
36. *Id.*
interrogatee may feel the pressure to make an incriminating statement.

Although Innis clarified the definition of interrogation, the Supreme Court still has not clarified the meaning of the word “custodial,” which has created a significant amount of confusion. Half of the circuits have found that the test for custody has a low bar, holding that if a person feels he or she is subject to interrogation according to Innis, that person should be granted the right to remain silent regardless of whether he or she has been Mirandized.37 However, the other half of the circuits have held that custody means being completely under the control of the police.38 Therefore, Fifth Amendment-protected interrogation cannot occur until someone has been arrested. Under the latter view, Fifth Amendment protection does not apply until the moment that someone should be Mirandized.

F. Substantive Evidence v. Impeachment at Trial

The Supreme Court ruled in Doyle v. Ohio that a court may present evidence of an arrestee’s silence pre-Miranda for impeachment purposes.39 In the early 1970s, two defendants were caught selling marijuana to an informant in a police sting.40 The defendants claimed that the police informant set them up.41 At trial, the prosecution asked each defendant why he did not tell the police they were mistaken at the time of arrest, which the defense challenged as unconstitutional.42 The Court held that using a defendant’s post-Miranda silence against him at trial for any reason, including impeachment, would be a deprivation of the defendant’s due process rights.43 However, it avoided the pre-Miranda silence as substantive evidence of guilt examined in this Casenote, which created an assumption that pre-Miranda silence may be used as impeachment evidence against a defendant at trial.44

III. CIRCUIT OPINIONS

The U.S. Circuit Courts are split on the issue of what circumstances amount to custody. Half of the circuits have found that an arrestee is

37. See infra Part III.
38. See infra Part III.
40. Id. at 612.
41. Id. at 614.
42. Id. at 613.
43. Id. at 618.
44. Doyle, 426 U.S. at 618. The end of the Doyle opinion only addresses an interrogatee’s perception of her right to remain silent post-Miranda warning, not whether her pre-Miranda silence should be used as substantive evidence against her at trial.
within the custody of the police if that arrestee feels he or she is under control of the police, and that arrestee has the right to remain silent from that moment on. These circuits approach the analysis of the issue from the Fifth Amendment right against self-incrimination, before moving through to *Miranda*. Contrarily, the remaining circuits conduct a reverse analysis, beginning by examining the intent behind the language in the *Miranda* opinion and treating *Miranda* as having defined the limits of the Fifth Amendment right against self-incrimination. As a result, these circuits have held that the prosecution may introduce evidence of an arrestee’s silence as substantive evidence of guilt because the right to remain silent is explicit only in the *Miranda* warning.

A. Post-Arrest, Pre-Miranda Silence Is Not Substantive Evidence of Guilt

The circuit courts that do not allow pre-*Miranda* silence to be used as substantive evidence of guilt are the First, Sixth, Seventh, and Tenth Circuits. The First Circuit is representative of this category. The First Circuit held that introducing a defendant’s decision not to speak during pre-arrest interrogation violates an arrestee’s Fifth Amendment rights. In *Coppola v. Powell*, Vincent Coppola was suspected of rape. The police questioned Mr. Coppola and later returned to his home to ask for a confession, but he refused to confess and asked for attorney representation.

The *Coppola* court applied three Fifth Amendment principles in order to determine whether Mr. Coppola’s constitutional rights were violated. The first two principles were taken from *Quinn*: the court acknowledged that “the invocation of the right [against self-incrimination] must be given a liberal construction,” and “that invocation of the privilege ... does not turn on a person’s choice of

45. The First, Sixth, Seventh, and Tenth Circuits do not allow silence to be used as substantive evidence of guilt at trial.
46. The Fifth, Eighth, Ninth and Eleventh Circuits allow use of an arrestee’s silence as substantive evidence of guilt at trial.
47. *See also* Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) (holding that that if a person is placed in a situation in which his or her custody status is unclear, the court must first determine whether the suspect reasonably felt that he or she was in the custody of the police in order to determine whether silence may be used as substantive evidence of guilt); United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987) (holding that alluding to a defendant’s silence pre-*Miranda* was a constitutional violation that must be weighed in collateral review with the other evidence presented at trial); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991) (holding that a defendant has a right to silence during pre-custodial interrogation).
49. *Id.*
50. *Id.* at 1565.
words.” Additionally, Coppola included a third principle separate from Quinn, taken from the Seventh Circuit. It found that “application of the privilege is not limited to persons in custody or charged with a crime,” a very important distinction within the context of pre-Miranda silence.

B. Post-Arrest, Pre-Miranda Silence Can Be Substantive Evidence of Guilt

On the other hand, half of the circuits do not agree with Coppola. The Fifth, Eighth, Ninth, and Eleventh Circuits allow pre-Miranda silence to be introduced as substantive evidence of guilt. In 2006, the Ninth Circuit heard United States v. Lopez and determined that commenting on a defendant’s post-arrest silence at trial does not violate the Fifth Amendment right against self-incrimination if it only includes pre-Miranda silence. Jorge Lopez was caught trying to bring drugs into the United States. At trial, he tried to bring a duress claim to explain why he had the drugs in his possession. While Mr. Lopez was on the witness stand, the prosecution asked him why he had failed to tell anyone about the duress claim before trial. Mr. Lopez was found guilty and appealed on the basis that the prosecutor’s question was an impermissible comment on his post-arrest silence. The court held that the question was permissible because it primarily referenced pre-Miranda silence, and the Fifth Amendment does not protect pre-Miranda silence.

The Ninth Circuit exemplifies the analysis of the courts that allow pre-Miranda silence as substantive evidence of guilt. Instead of looking to the language in the Fifth Amendment, the courts focused on the phrase “custodial interrogation” and then found that it limits the breadth of the Fifth Amendment. This is reversed from the analysis of the courts that do not allow pre-Miranda silence as substantive evidence of guilt at.

51. Id.
52. United States ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).
53. Id. at 1565.
54. See also United States v. Osuna-Zepada, 416 F.3d 838, 840 (8th Cir. 2005) (holding that pre-Miranda, an arrestee does not have the right to silence because of the lack of police-created compulsion to speak); United States v. Suarez, 162 F. App’x 897, 898 (11th Cir. 2006) (holding that post-arrest, pre-Miranda silence may be used as substantive evidence of guilt because an interrogation may only commence after Miranda warnings are given by the police).
55. United States v. Lopez, 500 F.3d 840, 843 (9th Cir. 2007).
56. Id. at 843.
57. Id.
58. Id.
59. Id. at 844.
IV. United States v. Wright

In February 2015, the Fifth Circuit heard United States v. Wright and held that a person only has the right to remain silent under Miranda if he or she is actually physically under the control of an arresting agency. In 2011, police investigated Charles Wright under the suspicion that he shared child pornography on the internet. The investigating officer in Mr. Wright’s case obtained a search warrant on Mr. Wright’s home because child pornography was being shared from an IP address registered to him. All of the officers on the scene of the search were wearing “bulletproof vests and/or raid gear,” armed, and instructed not to let anyone leave the premises without permission. During the search, the police officers told Mr. Wright they needed to ask him some questions and he was “escorted to his bedroom so that he could change into more appropriate clothing.” Mr. Wright contended that the officers walked him to his room to change while holding his arm. The officers then removed him from his home and took him to their police car in order to interrogate him. The officers placed him in the front passenger seat of the vehicle and took the driver’s seat and the backseat for themselves.

During the interview, the police asked Mr. Wright several questions that made him uncomfortable and prompted him to ask for an attorney. Specifically, he stated, “we’re getting into [questions] . . . I should probably talk to that lawyer first.” The police did not call an attorney for Mr. Wright because he “never [explicitly] requested the presence of an attorney.” He then proceeded to give a significant amount of incriminating information to the police but refused to answer specific questions concerning the age of the women in the pornography he downloaded.

60. United States v. Wright, 777 F.3d 769, 777 (5th Cir. 2015).
61. Id. at 771.
62. Id.
63. Id.
64. Id.
65. Wright, 777 F.3d at 771.
66. Id.
67. Id.
68. Id. at 772.
69. Id.
70. Wright, 777 F.3d at 773.
71. Id. at 772.
porn habits and came close to asking about the ages of the girls several other times. At trial, the prosecution presented evidence of Mr. Wright’s refusal to answer several questions during the police car interview and argued that this was evidence of a guilty conscience. Mr. Wright argued that this was an improper comment on his silence because he had invoked his right to remain silent under *Miranda.*

The court first analyzed whether Mr. Wright had the right to an attorney while he was being interrogated in the police car. To determine this issue, it focused on whether the interrogation was custodial. Several factors were examined, including:

1. the length of the questioning;
2. the location of the questioning; (3) the accusatory, or non-accusatory, nature of the questioning, (4) the amount of restraint on the individual’s physical movement, and (5) statements made by officers regarding the individual’s freedom to move or leave.

The court found that the first and third factors leaned in favor of being custodial because the questioning was extensive and involved Mr. Wright’s criminal activities. However, the court felt that remaining factors seemed to suggest that he was not under the control of the police at the time of custody. The court focused on the facts that the police officers told Mr. Wright that he was free to leave with police permission, he was not placed into handcuffs, and he was cooperative throughout the interview to determine that Mr. Wright was not within the custody of the police at the time of his interrogation.

In the second part of the analysis, the court relied on *Doyle* to determine whether the trial court should have suppressed the prosecutor’s remarks on Mr. Wright’s silence during the interview. It focused heavily on the timing of the protections and the ambiguity of his statements pre-*Miranda* warning. According to the court, *Doyle* protections only apply once an arrestee has been read the *Miranda* warnings.

72. Id.
73. Id.
74. Id. at 773.
75. Specifically, the court used Edwards v. Ariz., 451 U.S. 477 (1981), to examine Mr. Wright’s case through the *Miranda-Edwards* guarantee. Through this guarantee, an arrestee is entitled to an attorney during custodial interrogation the moment he or she asks for one, and the police may not continue the interrogation until an attorney is present.
76. Wright, 777 F.3d at 775 (internal citations omitted).
77. Id. at 776.
78. Id. at 776-77.
79. Id.
80. Id. at 777.
warning.\textsuperscript{81} The court stated that "it is not the arrest and custody that trigger \textit{Doyle} protections, but rather the assurance of \textit{Miranda} warnings."\textsuperscript{82}

In short, the \textit{Wright} court imposed a burden on an arrestee to adamantly assert their innocence pre-\textit{Miranda} because an arrestee does not have the right to remain silent before that moment. An arrestee's options pre-\textit{Miranda} are to confess, lie to the police, or stay silent and have that silence used against them as substantive evidence of guilt.

\section*{V. Analysis}

This Part conducts a deep analysis of \textit{Miranda}, how the \textit{Wright} court applied \textit{Miranda}, and the effect \textit{Miranda} has had on the circuits within this circuit split. It specifically addresses the history of why the issue of presenting pre-\textit{Miranda} silence as substantive evidence at trial is constitutionally barred. It offers two solutions to the problem \textit{Miranda} creates: first, a test that clarifies the holding in \textit{Miranda}; and second, an option that moves beyond \textit{Miranda} into solving more modern issues.

\subsection*{A. Unintended Consequences}

\textit{Miranda} has unintentionally created a gray area between arrest and the \textit{Miranda} warning in which the police may infringe upon a citizen's right to remain silent. As long as the police claim that an interrogatee is free to leave, it is unlikely the courts will find that he or she is under the control of the police.\textsuperscript{83} This provides the police with a very broad net. The way the \textit{Miranda} warning is currently structured allows the police to argue that they were only speaking with an interrogatee or holding a conversation around them when the interrogatee decided to volunteer information about the crime. This also allows the police to argue that a truly innocent person would shout about his or her innocence until the police informed him or her that they would be engaging in interrogation. However, it no longer prevents the police from denying an arrestee's right to remain silent during custodial interrogation because that issue has almost been eradicated—there is almost nothing to prevent.\textsuperscript{84}

The problem \textit{Miranda} addresses no longer exists, but a new one has been created. The Supreme Court has dealt with cases that have created constitutional infringement before—for example, forced integration of

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  \item \textsuperscript{81} \textit{Wright}, 777 F.3d at 778.
  \item \textsuperscript{82} \textit{Id}.
  \item \textsuperscript{83} \textit{Id.} at 776. The Court stated that it was "crucial" to the analysis.
  \item \textsuperscript{84} \textit{See} \textit{Leo}, \textit{supra} note 1.
\end{itemize}
EXAMINING THE \textit{MIRANDA} PROBLEM

At the time \textit{Brown v. Board of Education} was decided, the United States was dealing with segregation of schools and the Jim Crow laws. \textit{Brown} declared that segregation was illegal, and was followed by \textit{Keyes v. School District}, which enacted forced desegregation laws. Although these laws adequately dealt with the segregation issue, schools eventually stopped trying to intentionally segregate themselves, and the problem was largely fixed. Thirty-four years after the desegregation laws were implemented, intentional segregation was almost nonexistent. The courts were simply applying racial classifications to schoolchildren and placing them in districts based on their race—a completely new problem. The Court addressed this new issue in \textit{Parents Involved in Community School v. Seattle School District No. 1} and determined that the issue addressed in \textit{Brown} was now remedied sufficiently to remove the desegregation laws in order to prevent infringing upon the constitutional rights of schoolchildren. This reasoning should be transferred to the \textit{Miranda} problem.

The difficulty with \textit{Miranda} in modern terms is that the Court did not consider the confusion its language would create. The \textit{Miranda} opinion should be treated as a trial run and adjusted accordingly. For example, Justice Warren used the phrase “once warnings have been given” to explain what a citizen’s rights are in relation to police conduct once a defendant is in custodial interrogation. The issue with this phrase is that courts have interpreted it as meaning that a citizen does not have those rights until he or she is in custodial interrogation, whereas Justice Warren likely meant it as a reminder to the police that they must issue the warning if they wish to speak to a suspect about his or her crime. The \textit{Miranda} Court was attempting to broaden the Fifth Amendment right against self-incrimination, not create an unclear timing issue about when it should be applicable. The \textit{Miranda} Court never meant to create this problem.

\textbf{B. Two Approaches}

Unclear language between the Fifth Amendment and \textit{Miranda} has

\begin{itemize}
  \item 85. See \textit{Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1}, 551 U.S. 701, 748 (2007) (holding that racial imbalances within schools are not themselves unconstitutional and should only be subject to desegregation laws if they are caused by intentional segregation).
  \item 88. See generally \textit{Parents Involved}, 551 U.S. 701.
  \item 89. \textit{Id. at} 713.
  \item 90. \textit{Id. at} 748.
  \item 92. See generally \textit{id.}
\end{itemize}
caused half of the circuits to allow the admission of evidence of an interrogatee’s pre-arrest silence as substantive evidence of guilt at trial.93 \textit{Miranda} established a warning that must be given to each suspect before the police can engage in custodial interrogation. Several experts in the Fifth Amendment right against self-incrimination field agree that the \textit{Miranda} warnings should be revamped in order to consider the questions posed in this article.94 One proposed revision to the warning states:

[T]he first two warnings, relating to the right to silence, should be buttressed by a new “right to silence” warning that would provide something to the effect of: “If you choose to remain silent, your silence will not be used against [you] as evidence to suggest that you committed a crime simply because you refused to speak.”95

This amendment would clarify not only the rights of the arrestee, but also the analysis of courts trying to interpret whether or not the arrestee had the right to remain silent.96 Adopting this version of the beginning of \textit{Miranda} warnings would be a temporary solution, and the first step in the right direction to clarifying the substantive evidence of guilt issue.

There are two separate approaches courts could adopt that would feasibly address the pre-\textit{Miranda} silence issue at trial. The first involves an approach that initially determines whether an arrestee was subject to custodial interrogation, and then examines whether he or she adequately invoked the Fifth Amendment. This approach preserves the language of \textit{Miranda} and may be easier to implement. The second, more effective, approach is for courts to ignore the issue of custody and, instead, focus on whether the arrestee is subject to interrogation according to \textit{Innis}.97 This second approach involves the Supreme Court granting certiorari on the issue and overruling the part of \textit{Miranda} that focuses on the custody of the interrogatee. Either way, the right against self-incrimination should be approached through the Fifth Amendment instead of \textit{Miranda} in order to avoid issuing a high court opinion that would promote giving interrogatees the choice of either lying to the police or incriminating themselves.

\begin{thebibliography}{99}

93. See supra note 46.
94. See Leo, supra note 1; Mark. A Godsey, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, 90 MINN. L. REV. 781 (2006).
95. Godsey, supra note 94, at 783.
96. Id. at 784.
\end{thebibliography}
1. Broadening "Custody"

The first proposed solution is a three-prong test that examines the amount of control exerted on an arrestee and the likelihood that an arrestee will make an incriminating statement. This solution incorporates tests from three of the Supreme Court cases pertinent to this issue—Keohane, Innis, and Quinn.98

First, courts should ask if the arrestee was in the custody of the police under the Keohane test.99 Second, if the arrestee was in the custody of the police, it should then ask if he or she was being interrogated according to the Innis test.100 If the answer to both of these questions is "yes," the arrestee was subject to custodial interrogation and was protected under both the Fifth Amendment and Miranda. This part of the test combines Keohane and Innis to show that the definition of custody, as treated by the Supreme Court, is broader than the definition applied by the lower courts. Finally, if custodial interrogation occurred, courts should then ask if the interrogatee sufficiently invoked his or her Fifth Amendment right against self-incrimination during interrogation in accordance with Quinn.101

a. Keohane

The first prong of the proposed test incorporates the Keohane test, which examines the circumstances surrounding the police interaction and whether a reasonable person would have felt he or she could leave the situation.

The first part of the Keohane test addresses the interrogatee’s circumstances. As applied to Wright, Mr. Wright was in his house in the middle of the night when a police raid team barged in. He was escorted throughout his home and, although he technically was not under arrest, he was never able to leave the company of a police officer. Additionally, he was only allowed to leave the premises after express permission from the police. He was taken out of his home and into a police vehicle, where he was placed in the front seat and subjected to several incriminating questions.102

This part of the Keohane test also examines physical control of the arrestee. The Wright court focused on Mr. Wright’s ability to leave the

99. See supra notes 27-31 and accompanying text.
100. See Innis, 446 U.S. at 301-02; see also supra notes 35-38 and accompanying text.
101. See Quinn, 349 U.S. at 163; see also supra notes 20-21.
102. See generally United States v. Wright, 777 F.3d 769 (5th Cir. 2015).
premises as indicia of the police’s lack of control over his person. Although Mr. Wright was theoretically allowed to leave, the reality of the situation is that police—who wanted to prosecute him for a serious crime—invaded his home. Part of the purpose of *Miranda* is to relieve pressure placed on an arrestee to speak to the police. Holding that Mr. Wright was not under the control of the police because he was free to leave ignores the policy behind *Miranda*. This is a step backwards towards gross misapplication of the Fifth Amendment.

The second part of the *Keohane* test examines whether or not a reasonable person should have felt that he or she could leave the situation. The *Wright* court erred in its analysis when it found that Mr. Wright should have felt that he could leave the interview conducted in the police car. Nothing about his situation should have indicated to Mr. Wright that the police were simply entertaining the idea that he was sharing child pornography. He probably felt the police believed he was guilty and likely was terrified; an entire team of police was tearing apart his home dressed in riot gear, and he was inside of a police car answering their questions. Mr. Wright likely felt that he was in the custody of the police because they were asking him about his porn habits, accusing him of looking at illegal child porn, and tearing apart his house in the process. The court should have found that Mr. Wright was in custody of the police according to *Keohane*.

b. Interrogation

The second prong of the proposed test incorporates *Innis*. In essence, the *Wright* court imposed its own objective test on the arrestee’s perception of the interrogation instead of the subjective test imposed by *Innis*. The *Innis* test asks whether the police conduct would foreseeably elicit an incriminating statement from an interrogatee. If it would, then it is sufficient interrogation under *Innis* to require a Miranda warning.

In this instance, the police removed Mr. Wright from his home and took him to their police car. This was not a neutral location—it was the only available location controlled by the police. During the time that Mr. Wright was in the car, the police asked him several questions about his porn habits, specifically whether or not he had ever looked for child porn. Although these questions were clearly intended to elicit a confession, the focus of the analysis was placed on the custody status of Mr. Wright, finding that he was not being interrogated because of a lack of compulsion to speak to the police. The court was mistaken in its analysis of Mr. Wright’s interrogation. To hold that this was anything other than interrogation would severely limit the holding in *Innis*, which the Fifth Circuit obviously does not have the power to do. The *Wright*
court was wrong not to look at the subjective view of Mr. Wright. His belief that the police were interrogating him was completely reasonable under the circumstances and should have been taken into account at trial.

c. Invocation of the Fifth Amendment

The analysis of whether an interrogatee has invoked their Fifth Amendment rights is much simpler than the previous two prongs. Quinn held that an arrestee’s invocation of their Fifth Amendment right against self-incrimination can be invoked when the police, in any way, could construe an invocation of the right. An arrestee does not need to explicitly ask for an attorney or express his desire to stay silent. However, in Wright, Mr. Wright explicitly asked for an attorney as soon as he felt uncomfortable. This act should have signaled to the police that he wished to remain silent and caused them to bring him to the police station, call an attorney, and wait to continue questioning him until after they had complied with his Miranda rights.

2. Interrogation and the Fifth Amendment

Although the issue involving silence as substantive evidence of guilt at trial may be solved by broadening the definition of “custody,” a clearer test would eliminate the custody issue altogether. If the police are speaking to someone they suspect may be involved in a crime and are engaging in behavior that amounts to interrogation under Innis, that suspect should be able to invoke their right against self-incrimination without the danger of the invocation being introduced as substantive evidence of her guilt at trial.

The main issue with this circuit split is the courts’ application of Miranda within the context of the Fifth Amendment. Courts holding that silence may not be used as substantive evidence of guilt look to the Fifth Amendment for guidance, while other courts have taken a textual approach to Miranda. Miranda caused so much confusion that a substantial jurisprudence on the meaning of the word “custodial” has developed. In fact, the majority opinion in Keohane focused mainly on how to determine when an arrestee is within the custody of the police. The idea of custody should not be the focus of the analysis of the courts—the nature of the interrogation should be.

A better approach to the right against self-incrimination is to remove Keohane from the earlier proposed test. The more important prong

examines whether or not the police were (a) soliciting an incriminating statement or (b) should have known that their words or actions were reasonably likely to elicit an incriminating response. Instead of asking whether or not an interrogatee was within the custody of the police, the courts should assess the type of questions the police were asking. This analysis involves first looking at the situation from a more objective standpoint to determine the intent behind the questioning. At the outset, courts should ask whether the interrogatee was a suspect or involved in the crime in some way.

In this approach, the right to silence need not apply if the police were simply speaking to a person without attempting to elicit incriminating information. Allowing everyone to stay silent when speaking to the police would seriously inhibit law enforcement’s ability to investigate crimes. The standard should be whether or not the police are speaking to the interrogatee as a suspect. For example, consider Mr. Wright’s situation in Wright. If there is agreement with the court’s opinion, the Fifth Amendment should not protect Mr. Wright because he was not within the custody of the police at the time of his interrogation. However, the Fifth Amendment was not written with the language “custodial interrogation” in mind—it was written because the Founders wanted to remove an interrogatee’s compulsion to make self-incriminating statements. Alternatively, Miranda was written with the language of the Fifth Amendment at the forefront of the opinion. When one considers that the Fifth Amendment is the controlling authority, the question is clearer: Why does it matter whether the interrogatee was in the custody of the police? It should not matter, because the Fifth Amendment grants citizens the right against self-incrimination without qualifying that statement with the word “custodial.”

The second proposed test mirrors the first proposed test in all respects except for the first prong. It dismisses the issue of custody and, instead, focuses on the nature of the interrogation to determine whether or not the interrogatee reasonably felt that he or she should invoke the right against self-incrimination. Once this is determined, the test applies Innis and Quinn.

While at first glance, the proposed test appears to overrule part of Miranda, this test instead upholds the Court’s general intent in the
Miranda opinion. This is evidenced by language within the opinion. First, Miranda imposes a duty upon the police to give a “warning” of the interrogatee’s already existing rights. The Court doesn’t create a right to remain silent—it seeks to educate interrogatees about their rights. At no point does the opinion attempt to create a right not already contained within the Constitution.

Second, the Miranda Court did not seek to limit the Fifth Amendment. To the contrary, it acknowledged the Fifth Amendment’s breadth. It expressly stated that the right against self-incrimination is “as broad as the mischief against which it seeks to guard.” This language also suggests that the Court was not creating a right or limiting the Fifth Amendment, but rather ensuring its application to interrogation. The issue was not that citizens did not have the right to remain silent, but that they were not aware exactly how far their right against self-incrimination reached.

Finally, Miranda focuses on awareness of the right, not the timing of its attachment. Again, the bulk of Miranda is based on discussing a right that existed prior to that holding. This suggests that a citizen always has the right to remain silent in the face of incrimination, but imposes a duty on the police to remind arrestees of their rights because of the stress inherent in a custodial interrogation. Unfortunately, the phrasing of Miranda had the unintended effect of limiting rights found in the Fifth Amendment.

If the Wright court had applied this test, the analysis would have been significantly more compliant with the right against self-incrimination. The court would have initially determined that Mr. Wright was a suspect based on the police raiding his home. It would have moved on to determine whether or not the police were asking questions that invite confession and determined that Mr. Wright was being interrogated according to the Innis test. At this point, the right to remain silent would have attached. To finish its analysis, the court would have determined that Mr. Wright invoked his right against self-incrimination by expressing his discomfort in answering questions without an attorney present. The issue would have been much simpler, and Mr. Wright’s constitutional right against self-incrimination would have been preserved.

107. See Miranda v. Ariz., 384 U.S. 436, 512 (1966). The Court set a standard that an interrogatee must be “distinctly aware” of his or her right not to speak.
108. Id.
109. Id. at 459-60.
Either of the proposed solutions would be better than the test applied by the Wright court. The first solution limits the change that would need to be effectuated by the court in clarifying the pre-Miranda silence issue. This would be an easy decision for the court—it needs only apply parts of Keohane, Innis, and Quinn to create a test. This test would make it easier for lower courts to interpret cases and produce uniform opinions. However, imposing this test could still create confusion between the lower courts.

The second proposed test would clarify the issues caused by Miranda. Courts allowing pre-Miranda silence as substantive evidence of guilt have relied too heavily on Miranda and have begun to forget the spirit behind the Fifth Amendment. A better method is to focus on the intent of the police when questioning the interrogatee to determine whether an interrogation actually occurred. It should not matter whether someone is within the control of the police as long as the police ask questions that invite confession or incrimination. The focus on custody has clouded the ultimate issue and likely contributed to the wrongful conviction of Americans.

Under either proposed solution, the Wright court would have held that the Fifth Amendment protected Mr. Wright during the police car interrogation. Mr. Wright was within the control of the police, so his circumstances were sufficient to satisfy the Keohane test. More importantly, the police asked Mr. Wright questions that would cause a reasonable person to feel that the police were looking for a confession. He adequately invoked his right against self-incrimination when he expressed his discomfort in answering the questions posed to him by the police.

In conclusion, Miranda has confused the courts for long enough. The Supreme Court should grant certiorari on this issue and view the cases through the lens of the Fifth Amendment. The right against self-incrimination was not included exclusively to protect citizens under arrest, but rather to ensure that no one was placed in that situation.