
Murder by Miranda

Russell L. Christopher^{†*} and Clint A. Summers^{**}

Which prevails when substantive criminal law obligates us to speak and the Constitution affords us the right to remain silent? Though not widely known, the U.S. Supreme Court has firmly established the unconstitutionality of omission liability that criminalizes silence protected by the Fifth Amendment privilege against compelled self-incrimination. But this issue has arisen only for minor crimes — failing to report or register. Courts and commentators have overlooked that this conflict between a criminal law duty to speak and the constitutional right to remain silent protected by the Fifth Amendment (as well as Miranda and the First Amendment) also arises for serious criminal offenses including murder. It occurs anytime someone has a duty to save imperiled life but is in custody (after having been Mirandized) and intentionally fails to disclose the peril because it would be self-incriminating. Should the constitutional rights to remain silent still prevail even when murder could be prevented and innocent life saved by prioritizing a criminal law duty to speak? Perhaps public policy demands the creation of an exception to the constitutional rights to remain silent when innocent life is at stake. By recognizing such an exception, however, the Miranda instruction itself — “You have the right to remain silent” — would constitute entrapment by the police and equally supply a defense. Precluding an entrapment defense requires revising Miranda. But then what becomes of Miranda’s venerable and celebrated instruction — perhaps the best-known language of the Supreme Court throughout the world: You have the right to remain silent, maybe? The

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^{*} Professor of Law, The University of Tulsa College of Law.

^{**} Law Clerk to the Honorable Jacques L. Wiener (U.S.C.A. 5th Cir. 2020–21). The authors thank Teri Baxter, Chad Flanders, Stephen Galoob, Lea Johnson, Dallas Jones, Jami King, Guha Krishnamurthi, Colleen McCarty, Robert McLendon, Eang Ngov, William Pizzi, Maneka Sinha, Bob Spoo, Eugene Volokh and participants at the ABA-AALS, Criminal Justice section, Academic Roundtable and the Loyola University Chicago Constitutional Law Colloquium where a previous version of this Article was presented. Thanks also to The University of Tulsa College of Law for a generous research grant.

Article concludes that there is no entirely satisfactory way to resolve the conflict. Do the rights trump lives, or do lives trump the rights?

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INTRODUCTION

Unaware that your infant rests atop a bag of drug-cartel money in a dangerously hot, locked car, the police arrest and Mirandize you. Your child, who you have a legal duty to protect, will die from heat stroke unless you disclose the infant's location to the police thereby self-incriminating as to the illegal money, exposing your entire family to deadly cartel reprisals, and foregoing your constitutional right to remain silent. May you remain silent or must you self-incriminate? Do the Fifth Amendment's Self-Incrimination Clause,¹ *Miranda v. Arizona*'s "right to remain silent,"² and the First Amendment Free Speech Clause's³ "right to refrain from speaking at all"⁴ each supply complete defenses⁵ to any criminal omission liability for murder, making it unconstitutional as applied,⁶ if you are prosecuted for allowing your infant to die?

Building upon this example, consider the following. A couple drive downtown to run errands with their infant (and the drug cartel's money). Dropping the mother off at the post office, the father drives to a nearby supermarket where all three will later reunite. Negligently forgetting about the infant, the father goes into the supermarket alone. Suddenly remembering the infant, the father hurriedly exits the supermarket and collides with the mother. They are spotted by the

¹ U.S. CONST. amend. V ("No person . . . shall be compelled in any Criminal Case to be a witness against himself.").

² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person [in custody] must be warned that he has a right to remain silent."); *accord Maryland v. Shatzer*, 559 U.S. 98, 103-04 (2010) ("[P]olice officers must warn a suspect prior to questioning that he has a right to remain silent." (citing *Miranda*, 384 U.S. at 444)).

³ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

⁴ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that in addition to a positive right of free speech, the First Amendment contains a negative right not to speak).

⁵ For the use of the term "complete" or "full" defense when the Fifth Amendment privilege does not merely prevent the admissibility of evidence, but prevents a conviction because the statute with which defendant is charged conflicts with the privilege and is thereby unconstitutional as applied, see, for example, *Leary v. United States*, 395 U.S. 6, 27 (1969) ("complete defense"); *id.* at 29 ("full defense"); *Haynes v. United States*, 390 U.S. 85, 100 (1968) ("full defense").

⁶ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (holding some parts of a statute facially unconstitutional and other parts unconstitutional as applied); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457-58 (2008) (explaining the difference between a facial challenge, where no "constitutional applications exist," and an as-applied challenge, where "at least some" constitutional applications exist).

police, arrested for drug dealing, and Mirandized (thereby informed of their right to remain silent). As they are led away in handcuffs, they (but not the police) see their car parked in the hot summer sun with their infant inside and the windows rolled up.⁷ Because they cannot directly aid their imperiled infant while in police custody, the only way they can fulfill their parental duty to prevent harm to their infant⁸ is to inform the police or someone else who could rescue the helpless infant. But because of the cartel's money in their car and they understand that the police may monitor their telephone calls while in custody,⁹ they reasonably fear that informing the police or anyone else would be self-incriminating.¹⁰ Fearing self-incrimination, worrying the cartel will execute the rest of their family should the police discover the money, and relying on their constitutional rights to remain silent, they intentionally fail to inform anyone as to the vulnerable infant. While the police interrogate the couple, the infant dies from heat stroke. Subsequently learning of the infant's death, the police charge¹¹ each

⁷ On average, three dozen children die annually in America from heatstroke from being left in a hot car with the windows rolled up. Sharon Otterman, *He Left His Twins in a Hot Car and They Died. Accident or Crime?*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/nyregion/children-left-to-die-in-hot-cars-accident-or-murder.html> [<https://perma.cc/Q6WR-GXYJ>]. In 2018, fifty-three children died in that way. Ellen Bryon & Ben Foldy, *Amid Rising Hot-Car Deaths, Auto Makers Agree to Back-Seat Alerts*, WALL ST. J. (Sept. 4, 2019, 6:15 PM ET), <https://www.wsj.com/articles/amid-rising-hot-car-deaths-auto-makers-agree-to-back-seat-alerts-11567612801> [<https://perma.cc/8AM3-QPM5>].

⁸ See, e.g., *State v. Williquette*, 385 N.W.2d 145, 147 (Wis. 1986) (holding that a mother had an affirmative duty to prevent her child from being abused due to her parent-child relationship); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.07(A)(2)(a), at 103 (Carolina Acad. Press ed., 8th ed. 2018) [hereinafter DRESSLER, CRIMINAL LAW] (specifying “parents to their minor children” as among the status relationships creating a duty to prevent harm).

⁹ See, e.g., *United States v. Alcorta*, 853 F.3d 1123, 1137 (10th Cir. 2017) (noting that police may permissibly record and monitor suspects in custody when they telephone a friend or relative).

¹⁰ Even though the statement as to the location of the infant is not self-incriminating on its face, the statement would provide a link to incriminating evidence — the contraband located inside the car. Innocuous statements that nonetheless provide a link to incriminating evidence are self-incriminating and enjoy protection under the Fifth Amendment privilege. See, e.g., *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that the Fifth Amendment privilege extends to protect against answering questions that might “furnish a link” to incriminatory evidence).

¹¹ Both the mother and father can be the legal cause of their infant's death. See, e.g., DRESSLER, CRIMINAL LAW, *supra* note 8, § 14.03(A), at 179 n.38 (stating that it is “possible for two negligent wrongdoers, each acting independently, to be the proximate cause of resulting harm”); PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 3.2,

parent with murder by omission for intentionally failing to fulfill their parental duty to prevent harm to their infant.¹² But their criminal law duty to prevent harm to their infant — in this case imposing a duty to speak — conflicts with their constitutional rights to remain silent. By criminalizing the exercise of their constitutionally protected rights to remain silent, is omission liability for murder unconstitutional as applied? Or does protecting innocent human life trump the constitutional rights?

The mother and father are under a duty to speak — to inform someone about the vulnerable infant — because, once in police custody, that is the only way to save the infant. Rather than requiring the commission of affirmative acts, like speaking, more typically the criminal law prohibits the commission of affirmative acts.¹³ But the law also criminalizes the failure to take actions — termed omission liability.¹⁴ While the criminal law’s prohibition of affirmative conduct generally applies to all, its prohibition of failures to act applies only to some — those under a duty to act.¹⁵ There are several bases under which criminal law imposes a duty to act to prevent harm.¹⁶ For example, the

at 132 (2d ed. 2012) (explaining that two defendants can be held liable as to the cause of death of a single victim).

¹² See, e.g., *Eaglen v. State*, 231 N.E.2d 147, 150 (Ind. 1967) (holding a parent liable for failing to provide care for their child); DRESSLER, *CRIMINAL LAW*, *supra* note 8, § 9.07(A)(2)(a), at 104 (explaining that “a parent’s failure to seek medical attention for her seriously sick child, which omission results in the child’s death, will support a conviction for criminal homicide”).

¹³ E.g., WAYNE R. LAFAVE, *CRIMINAL LAW* § 6.2, at 408 (West Acad. ed., 6th ed. 2017) [hereinafter LAFAVE, *CRIMINAL LAW*] (“Most crimes are committed by affirmative action rather than by non-action.”); ROBINSON & CAHILL, *supra* note 11, § 3.04, at 142 (“[O]mission liability is traditionally limited. Legal duties to act generally are few in number and narrow in scope.”).

¹⁴ E.g., *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (“The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with [murder].”); Arthur Levens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 548 (1988) (observing that “the law has always imposed criminal liability not only for acts that cause harm but also for failures to prevent harm”).

¹⁵ See, e.g., *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (noting the “general principle . . . that omissions may serve as the basis of criminal liability only if there is an affirmative duty to act”); LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a), at 409 (“For criminal liability to be based upon a failure to act it must first be found that there is a duty to act.”).

¹⁶ E.g., *State ex rel. Kuntz v. Mont. Thirteenth Jud. Dist. Court*, 995 P.2d 951, 955 (Mont. 2000) (noting that duties to act include the following: “(1) duty based on relationship; (2) duty based on statute; (3) duty arising from contract; (4) duty arising

mother and father's duty stems from their parent-child relationship.¹⁷ The failure to take affirmative steps to prevent harm to the infant fails to fulfill that duty and renders each subject to omission liability for the harm caused. Because they intentionally failed to prevent harm to the infant, they face liability for murder by omission.¹⁸

In conflict with their criminal law duty to speak, the parents enjoy three different constitutional rights to remain silent. First, and most obviously, a recipient of a *Miranda* warning has the "right to remain silent."¹⁹ Though originally merely a prophylactic rule supporting the Fifth Amendment privilege against compelled self-incrimination,²⁰ the *Miranda* right is itself now of constitutional magnitude.²¹ Because they were properly Mirandized and subjected to a custodial interrogation by the police, they have the constitutional right to remain silent.²² Second, the Fifth Amendment privilege also provides a right to be silent.²³ Having a reasonable fear of self-incrimination as well as satisfying other requirements,²⁴ the mother and father enjoy the Fifth Amendment right. Third, a less well-known basis for the right to remain silent is the First Amendment.²⁵ While the positive right of free speech is familiar,

from a voluntary assumption of care; (5) duty to control other; (6) duty arising from creation of peril"); *State v. Sherman*, 266 S.W.3d 395, 404-05 (Tenn. 2008) (same).

¹⁷ See, e.g., *Palmer v. State*, 164 A.2d 467, 468, 473 (Md. 1960) (holding that a mother had a duty to protect their child from an abusive partner based on a parent-child status relationship); *State v. Hocter*, 262 P.3d 1089, 1095 (Mont. 2011) (recognizing that "[a] parent's criminal liability based upon a failure to act in accordance with common law affirmative duties to protect their child is recognized in numerous jurisdictions, including this one").

¹⁸ See, e.g., *United States v. Baez-Martinez*, 258 F. Supp. 3d 228, 239-40 (D.P.R. 2017) ("[A]ttempted murder occurs when a person 'commits acts or . . . omissions unequivocally directed to' cause the death of a human being with malice aforethought." (citation omitted)).

¹⁹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person [in custody] must be warned that he has a right to remain silent . . .").

²⁰ *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (noting that *Miranda* is a prophylactic rule).

²¹ *Dickerson v. United States*, 530 U.S. 428, 428-30 (2000) (holding that the *Miranda* right is constitutionally based and thus cannot be overruled by Congress).

²² See *Miranda*, 384 U.S. at 444 (holding that a person in custody being interrogated has a constitutional right to remain silent).

²³ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding that the privilege provides "the right of a person to remain silent").

²⁴ See *infra* Part I.B (discussing the Fifth Amendment's privilege against self-incrimination).

²⁵ See *infra* Part I.C (on the First Amendment right not to speak).

the negative component of that right includes the right not to speak.²⁶ And this conflict could easily arise. It arises anytime someone has a duty to save imperiled life but is in custody (after having been Mirandized) and intentionally fails to fulfill their duty because disclosing the peril would self-incriminate.

When the criminal law duty to speak and a constitutional right to remain silent conflict,²⁷ which prevails? The Supreme Court has repeatedly held that criminal statutes imposing omission liability that require self-incrimination violate the Fifth Amendment²⁸ and are unconstitutional as applied.²⁹ But these cases involved comparatively minor crimes — reporting and registration offenses.³⁰ The Fifth Amendment privilege has never invalidated as unconstitutional a serious offense like murder. No court has ever faced nor has any commentator ever raised the issue.³¹

Perhaps prosecutors have prevented the issue from reaching courts by careful charging decisions. In some instances, prosecutors may circumvent the conflict by not prosecuting on the basis of omission

²⁶ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (declaring that the First Amendment provides “the right to refrain from speaking at all”).

²⁷ *See California v. Byers*, 402 U.S. 424, 427 (1971) (characterizing the situation when compliance with a statute creates a substantial risk of self-incrimination as a “conflict between the statute and the [Fifth Amendment] privilege”).

²⁸ *See, e.g., Leary v. United States*, 395 U.S. 6, 18 (1969) (holding a federal statute requiring registration as a transferee of marijuana and penalizing unregistered possessors unconstitutional when it induces self-incrimination); *Marchetti v. United States*, 390 U.S. 39, 60-61 (1968) (holding that a criminal conviction for the intentional failure to file a tax return is unconstitutional when the tax return is self-incriminating); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77-79 (1965) (setting aside a required registration form that would have revealed membership in the Communist Party).

²⁹ *See, e.g., Marchetti*, 390 U.S. at 60-61 (holding a federal statute requiring the reporting of wagering tax to be unconstitutional as applied when the defendant had a reasonable fear of self-incrimination).

³⁰ *See id.* (involving a federal tax reporting statute); *Haynes v. United States*, 390 U.S. 85, 87 (1968) (analyzing a federal firearm reporting statute); *Grosso v. United States*, 390 U.S. 62, 63 (1968) (examining a federal excise tax statute).

³¹ Only one scholar has argued that criminal omission liability outside of reporting and registration statutes can violate the Fifth Amendment’s Self-Incrimination Clause. *See* Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 410-15 (1998) (discussing Fifth Amendment self-incrimination issues of criminal omission liability). But she neither addressed how it could be a violation of particularly serious offenses nor considered the implications of *Miranda* and the First Amendment.

liability.³² It is the criminalization of the omission — failing to fulfill the duty to prevent harm by failing to speak to the police — that violates the constitutional rights to remain silent. For example, as to the infant who dies in the hot car, the father (unlike the mother who commits no culpable affirmative acts) could be prosecuted instead for the father's negligent affirmative act of leaving the infant alone. By prosecuting based on the father's affirmative act — not the father's failure to speak — the father's silence is not being criminalized, the rights to remain silent are not being violated, and thus a complete defense based on the rights is foreclosed. But were a prosecution on the basis of omission liability to occur (the only way to prosecute the mother³³), defense attorneys need to be aware that the constitutional rights to remain silent are a complete defense, not just for minor reporting or registration offenses, but also for serious omission offenses, including murder.

To resolve the conflict between criminal law omission liability imposing a duty to speak and the constitutional rights to remain silent, should the gravity of the crime matter? Perhaps in principle, it should not. If comparatively minor reporting or registration offenses can be unconstitutional for violating the Fifth Amendment privilege, then serious offenses, including murder, that violate the privilege are no less unconstitutional. But the Court has distinguished between serious public dangers and minor harms as to some aspects of the *Miranda* protections.³⁴ Under *Miranda*, suspects' answers to police questions while in custody are generally inadmissible at trial unless the suspects have first received the *Miranda* warning.³⁵ But the Court created an exception in *New York v. Quarles*: suspects' pre-Mirandized statements are admissible when there is a public danger that could be averted by obtaining information from the suspects.³⁶ *Quarles's* public safety exception to *Miranda* suggests that the constitutional rights to remain silent should yield to the greater value of saving innocent lives.

³² For discussion of defendants' conduct including both affirmative acts and failures to act when under a duty to act and thus prosecutors may choose which to prosecute, see *infra* note 190 and accompanying text.

³³ Unlike the father, the mother committed no culpable affirmative act. As a result, the mother's only basis for liability is the failure to act — the failure to speak to the police as to their imperiled infant.

³⁴ See *infra* Part I.A (discussing the constitutional right to remain silent under *Miranda*).

³⁵ *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) ("Without these warnings the statements were inadmissible.").

³⁶ *New York v. Quarles*, 467 U.S. 649, 649-50 (1984) (holding that an officer who has a reasonable belief that the safety of the public is at risk need not Mirandize a suspect and any statements by the suspect may be admissible at trial).

However, the *Quarles* exception (which is not an exception to the right to remain silent) fails to resolve the above example of the mother who remains silent. Because there are no statements by the mother to be made admissible under *Quarles*, it is inapplicable to suspects remaining silent. It fails to resolve the conflict that arises when the criminal law imposes a duty to speak on persons exercising their constitutional rights to remain silent.

One might argue that if not the letter then surely the spirit of the *Quarles* exception suggests that the constitutional rights to remain silent should bow to criminal omission liability when innocent life is at stake. Maybe so. But there are two obstacles. First, no court has ever found constitutional the criminalization of *Miranda*-protected silence. Second, implementing a public safety exception to the *Miranda*-protected right to remain silent itself (not merely an exception as to admissibility of suspects' statements) will create practical difficulties. Under the proposed resolution, a Mirandized suspect would no longer have a right to remain silent when speaking was required to avert public danger or save lives. But such a solution that eliminates a right to remain silent in a public danger context while retaining the *Miranda* warning simply creates a new defense for the suspects — entrapment. The State could hardly both encourage suspects' silence by informing them through the *Miranda* warning that they have a right to remain silent and then subsequently prosecute them for that very silence. To foreclose an entrapment defense (for eligible defendants who lack a predisposition to commit the omission offense³⁷), the *Miranda* warning itself would have to be changed. But then what would become of the venerable and iconic *Miranda* warning — possibly the Supreme Court's most famous language the world over?³⁸ “You have the right to remain silent, *maybe*.” Or, “You have the right to remain silent, *unless . . .*” The Court has stressed the importance of the language of the *Miranda* warning remaining simple and unchanged.³⁹ Would its virtues be lost if

³⁷ For predisposition to commit a criminal offense barring an entrapment defense, see *Jacobson v. United States*, 503 U.S. 540, 549-50 (1992). For further explanation of the elements of the entrapment defense, see *infra* Part III.B.1.D and accompanying text. As to murder of the infant by omission, the mother had no predisposition to commit the offense. Lacking the predisposition, the mother would be eligible to obtain the entrapment defense.

³⁸ Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in *TORTURE: A COLLECTION* 105, 114 (Sanford Levinson, ed., 2006) (“[*Miranda*] is the case most widely discussed among legal scholars, and surely the best known among television and movie viewers around the world for the famous warning known as ‘Miranda rights.’”).

³⁹ See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 391-92 (2010) (Sotomayor, J., dissenting) (stressing the importance of leaving the *Miranda* language unchanged);

ambiguity clouded its clarity and simplicity by numerous conditions and caveats appended to its celebrated language?

The Article proceeds as follows. Part I presents and explicates the three constitutional rights to remain silent. It demonstrates how each right conflicts with criminal omission liability for failing to speak. First, as to the *Miranda* right, Part I explains how the *Quarles* public safety exception to *Miranda* fails to preclude the conflict. Second, after analyzing the elements of a Fifth Amendment privilege claim, Part I demonstrates how the Supreme Court's quartet of cases finding the privilege to be a complete defense to minor criminal omission liability equally applies to serious omission offenses, including murder. Third, after explaining the First Amendment's negative right to refrain from speaking and presenting cases establishing compelled speech to be unconstitutional as applied, Part I demonstrates how this First Amendment right applies to the conflict. It also distinguishes the conflict from the clear and present danger exception. Each of these three constitutional rights to remain silent renders criminal omission liability that creates a duty to speak unconstitutional as applied. Each is a complete defense to serious omission offenses allowing the suspect to literally get away with murder.

Part II ties this "right to remain silent" law together with the law of criminal omission liability. It first provides a brief overview of criminal omission liability and demonstrates circumstances under which it conflicts with constitutional rights to remain silent. After explaining the difference between criminal liability resting on committing and failing to commit affirmative acts, it presents the six different bases for a criminal law duty to act. Each basis for a duty to act is illustrated by an example featuring a conflict between liability for murder by omission (imposing a duty to speak) and constitutional rights to remain silent. The dilemma of whether rights to remain silent trump saving lives or lives trump the rights arises for each of the six bases for omission liability.

Part III proposes and assesses possible resolutions of the conflict. If saving lives should trump rights to remain silent, there are five possible resolutions. First, extend the *Quarles* public safety exception so that it applies even if police are unaware of a public danger. But that applies neither to suspects who remain silent — like the mother in the example above — nor to the First and Fifth Amendment rights. Second, implement use restrictions on or use immunity for statements

Quarles, 467 U.S. at 658 (acknowledging *Miranda*'s "desirable clarity" and referencing attempts to "preserve its clarity").

disclosing public perils. By such restrictions or immunity eliminating the capacity of the disclosures to be self-incriminating, the Fifth Amendment privilege is inapplicable. But that fails as a resolution because it does not affect the *Miranda* and First Amendment rights to remain silent, neither of which is triggered by the prospect of self-incrimination. Third, extend the clear and present danger exception to the First Amendment so that it applies to the negative right to refrain from speaking. But this too fails because it fails to eliminate the *Miranda* and Fifth Amendment rights. As seen in the failures of the first three proposed resolutions, any successful resolution valuing lives over the rights must eliminate all three rights. So, fourth, eliminate all three rights to remain silent in public danger situations. But that only forecloses one defense while triggering another — entrapment. So, fifth, both eliminate the rights and alter the *Miranda* warning to preclude an entrapment defense. In addition to the costs incurred by amending *Miranda*'s iconic language, the resolution requires making as many as five separate changes to five separate and entrenched areas of constitutional law. Such substantial change is a tall order. If such practical difficulties are too great, or we simply value the rights over innocent lives, then the last possible resolution is simply to do nothing — the rights to remain silent and *Miranda* warning language remain. The rights serve as complete defenses to omission liability, not only for minor offenses, but also for serious offenses including murder. The rights render criminal law omission liability that triggers a duty to speak unconstitutional as applied. But, of course, the problem with this resolution is that it sacrifices innocent human life: it allows arrestees to use the rights to remain silent to get away with murder — to commit murder by *Miranda* and by other rights to remain silent. No resolution to the conflict between criminal omission liability for serious offenses, including murder, that entail a duty to speak and the constitutional rights to remain silent is entirely satisfactory.

I. THE CONSTITUTIONAL RIGHTS TO REMAIN SILENT

This Part presents the three constitutional rights to remain silent: the *Miranda* right, the Fifth Amendment privilege against compelled self-incrimination, and the First Amendment right to refrain from speaking (the right against compelled speech). It argues that each provides, under some circumstances, a complete defense to omission liability for serious offenses such as murder. Each renders omission liability that imposes a duty to speak unconstitutional as applied.

A. *Miranda Right*

The Supreme Court's language in *Miranda v. Arizona* is perhaps the most familiar in its history: "Prior to questioning, [persons in custody must be warned that they] ha[ve] a right to remain silent, that any statement [they] do[] make may be used as evidence against [them], and that [they have] a right to the presence of an attorney, either retained or appointed."⁴⁰ Not only does the defendant have the right to remain silent, but also the prosecution may not "use at trial the fact that [the defendant] stood mute or claimed [their] privilege in the face of accusation."⁴¹ This *Miranda* right applies to any crime the person may have committed, not just the crime for which they are detained.⁴²

⁴⁰ *Miranda*, 384 U.S. at 444; accord *Maryland v. Shatzer*, 559 U.S. 98, 103-04 (2010) ("[P]olice officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney." (citing *Miranda*, 384 U.S. at 444, 473-74)).

⁴¹ *Miranda*, 384 U.S. at 468 n.37; accord *Pennsylvania v. Muniz*, 496 U.S. 582, 616 n.4 (1990) (Marshall, J., concurring in part and dissenting in part) ("Of course, a person's refusal to incriminate himself also cannot be used against him." (emphasis added)); see, e.g., *Fowle v. United States*, 410 F.2d 48, 51-56 (9th Cir. 1969) (barring use of defendant's silence to prove defendant's guilt at trial); *United States ex rel. Parker v. McMann*, 308 F. Supp. 477, 483 (S.D.N.Y. 1969) (same); *Harris v. State*, 611 So.2d 1159, 1160-61 (Ala. Crim. App. 1992) (same); *People v. Wright*, 511 P.2d 460, 462 (Colo. 1973) (en banc) (same); *State v. Stuart*, 456 S.W.2d 19, 22 (Mo. 1970) (same); *State v. Castor*, 204 S.E.2d 848, 851-53 (N.C. 1974) (same); *Braden v. State*, 534 S.W.2d 657, 658-61 (Tenn. 1976) (same); *Hawk v. State*, 482 S.W.2d 183, 184 (Tex. Crim. App. 1972) (same); *State v. Easter*, 922 P.2d 1285, 1289 (Wash. 1996) (en banc) (same). In fact, even prior to the *Miranda* decision, this was the Court's rule with respect to the Fifth Amendment privilege against self-incrimination. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (declaring "the right of a person to remain silent . . . and to suffer no penalty . . . for such silence"). Some lower courts announced this rule prior to both *Miranda* and *Malloy*. See *Helton v. United States*, 221 F.2d 338, 341 (5th Cir. 1955) ("[W]e hold that this testimony constituted an attempt on the part of the Government to convict the appellant by his silence, by having the jury draw an inference of guilt from his refusal to explain, in violation of the spirit, if not the letter, of the Fifth Amendment."); *Yep v. United States*, 83 F.2d 41, 43 (10th Cir. 1936) ("When one is under arrest or in custody, charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and [such statements or silence] . . . are not admissible against him."). WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 6.5(b)(10), at 438 (6th ed. 2017) [hereinafter LAFAVE ET AL., CRIMINAL PROCEDURE] (noting that *Miranda's* holding contained a set of rules including that "exercise of the privilege [to remain silent] may not be penalized"); *id.* § 6.8(d), at 392 (referring to an "important part of the *Miranda* holding — that the prosecution 'may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation'" (quoting *Miranda*, 384 U.S. at 468 n.37)). Lower courts have followed and applied the rule.

⁴² See *Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement may be used as evidence against him." (emphasis added)); see also *infra* note 54.

Although once considered merely a “prophylactic” rule⁴³ protecting, among other rights,⁴⁴ a detained person’s Fifth Amendment right against self-incrimination,⁴⁵ the Court has now enshrined *Miranda* as “a constitutional decision.”⁴⁶ While overlapping with the Fifth Amendment privilege, the *Miranda* right “may be triggered even in the absence of a Fifth Amendment violation.”⁴⁷

For *Miranda* to apply, a person must be in police custody while being interrogated.⁴⁸ Persons are “in custody” when formally arrested.⁴⁹ Persons are interrogated when the police question them or when the police speak or act in a way that is likely to elicit an incriminating response.⁵⁰ If the *Miranda* warning is not given, then any evidence obtained as a result of the police interrogation is inadmissible against the defendant.⁵¹ As will be discussed further below, the only exception to this rule is if the police reasonably fear for the public’s safety.⁵²

Miranda furnishes a defense for the mother in the imperiled infant example. The mother was Mirandized, subjected to a custodial interrogation, and exercised the right to remain silent. The silence

⁴³ *Michigan v. Tucker*, 417 U.S. 433, 446 (1974).

⁴⁴ See *Miranda*, 384 U.S. at 473 (“In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.”).

⁴⁵ See *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“The *Miranda* exclusionary rule . . . serves the Fifth Amendment.”).

⁴⁶ *Dickerson v. United States*, 530 U.S. 428, 431 (2000). As a result of it being a constitutional decision, *Miranda* cannot be overruled by an Act of Congress. *Id.*

⁴⁷ *Elstad*, 470 U.S. at 306 (“The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself.”).

⁴⁸ *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980) (holding that *Miranda* warnings must be given when a person is in custody being interrogated).

⁴⁹ See *Stansbury v. California*, 511 U.S. 318, 322 (1994) (holding that “the ultimate inquiry is simply whether there was a formal arrest” (quotation marks omitted)).

⁵⁰ *Innis*, 446 U.S. at 301 (“[T]he term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.”).

⁵¹ *Stansbury*, 511 U.S. at 322 (holding that statements obtained while a person is in custody subject to interrogation are inadmissible without prior *Miranda* warnings).

⁵² See *New York v. Quarles*, 467 U.S. 649, 649-50 (1984) (holding that *Miranda* warnings need not be given to make a statement admissible when the arresting officer has a reasonable fear for public safety). For examples of lower courts applying the *Quarles* exception, see *United States v. Hodge*, 714 F.3d 380, 385 (3d Cir. 2013) (ruling that defendant’s statements to police about the location of a pipe bomb were admissible within the *Quarles* exception to *Miranda*); *United States v. Ferguson*, 702 F.3d 89, 96 (2d Cir. 2012) (holding that an officer’s objectively reasonable belief that the suspect had left a gun in a public place supported the *Quarles* exception).

cannot be used against the mother at trial to prove guilt.⁵³ Without using the silence, the prosecution cannot prove that the mother failed to speak. Without proving a failure to speak (when speaking about the infant's peril was the only way to fulfill the duty to prevent harm), the prosecution cannot prove that the mother was able to fulfill the duty but intentionally failed to do so. Without being able to prove that, the prosecution cannot prove the mother's omission liability for homicide. Further, that the mother was arrested for crimes different from the omission is irrelevant because the *Miranda* right applies to all crimes, not just the crime for which a suspect is arrested.⁵⁴

One might object that *Miranda* is inapplicable here because of the public safety exception. The imperiled infant constitutes a public safety risk. In *New York v. Quarles*, the Court held that when police officers reasonably believe public safety is at risk, they need not issue a *Miranda* warning in order for self-incriminating statements to be used at trial against defendants.⁵⁵ The Court's rationale was that it did not want officers to have to choose between obtaining incriminating statements

⁵³ See *supra* note 41 and accompanying text.

⁵⁴ See *Pennsylvania v. Muniz*, 496 U.S. 582, 598-99, 599 n.13 (1990) (rejecting the State's claim that a suspect's answer to a question unrelated to the crime charged was not testimonial and thus not protected by the privilege against self-incrimination); *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (explaining that because a suspect is explicitly warned that "anything he says may be used against him . . . a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant"); *Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (holding that the *Miranda* warning is not limited to the crime for which the defendant is in custody); cf. *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) (noting that while the Sixth Amendment right to counsel is offense-specific, the *Miranda* right to counsel is "broader (because it relates to interrogation regarding any suspected crime)"). Arguably, this rule can be derived from *Miranda* itself. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement may be used as evidence against him.") emphasis added). That is, suspects have a right to be warned that they enjoy a right to remain silent not just before questioning about the crime for which they were arrested but before "any questioning." *Id.* Suspects also have a right to be warned not just that a statement about the crime for which they are arrested may be used as evidence against them but "any statement." *Id.* Further, suspects are not warned that they have a right to remain silent about only the crime for which they are arrested. Rather, they have a right to remain silent. Period. Were it otherwise, informing suspects that they have the right to remain silent and then prosecuting them for their failure to speak (about crimes for which they were not arrested) would constitute entrapment. See *infra* notes 237-240 and accompanying text for a discussion of entrapment.

⁵⁵ *Quarles*, 467 U.S. at 649-50 (concluding that *Miranda* warnings need not be given to make a statement admissible when the arresting officer has a reasonable fear for public safety); see LAFAYE ET AL., CRIMINAL PROCEDURE, *supra* note 41, § 6.7(b), at 456-57 (explaining the *Quarles* holding).

admissible at trial and preventing a public danger.⁵⁶ Suspects with vital information necessary to avoid a public danger are more likely to talk if not Mirandized,⁵⁷ and the police avoid that dilemma if suspects' unMirandized statements are admissible. This public safety exception has been applied to a wide variety of perils ranging from a single individual in jeopardy to threats of terrorism affecting many.⁵⁸ The *Quarles* public safety exception — making pre-Mirandized statements admissible — has been extended by two federal circuits.⁵⁹ On the ground that the public danger is the same whether arising before or after *Miranda* warnings are issued, the *Quarles* public safety exception extends to the admissibility of post-Mirandized statements (despite suspects having initially invoked their *Miranda* rights).⁶⁰

But neither the *Quarles* public safety exception nor its extension applies to our conflict between constitutional rights to remain silent and

⁵⁶ The Court explained its solution to prevent forcing officers to choose as follows:

We decline to place officers . . . in the untenable position of having to consider . . . whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Quarles, 467 U.S. at 657-58.

⁵⁷ *Id.* at 657 (“[I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in *Quarles*’ position might well be deterred from responding.”).

⁵⁸ See, e.g., *United States v. Ferguson*, 702 F.3d 89, 94, 96 (2d Cir. 2012) (concluding that the *Quarles* public safety exception applied because the officer “had an objectively reasonable need to protect . . . the public from immediate harm” (emphasis added) (internal quotation marks omitted)); *United States v. Estrada*, 430 F.3d 606, 613 (2d Cir. 2005) (holding that *Quarles* applied when police feared for their own safety); Joanna Wright, Note, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296, 1297 (2011) (discussing a case in which the court refused to exclude pre-Mirandized testimony of a terrorist which led to the diffusing of a pipe bomb).

⁵⁹ See *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (agreeing in principle to extending the *Quarles* exception but not on the facts of the instant case); *United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989) (“The same considerations that allow the police to dispense with providing *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel.”).

⁶⁰ *Mobley*, 40 F.3d at 692 (“[T]he danger does not abate with *Miranda* warnings and assertions. Very simply, there is no temporal relationship between the ongoing exigency and the timing of a *Miranda* refusal.”); *DeSantis*, 870 F.2d at 541 (same); *Trice v. United States*, 662 A.2d 891, 895 (D.C. 1995) (same).

omission liability for two reasons. First, the public safety exception and its extension make only *statements* by suspects — whether pre- or post-Mirandized — admissible against them at trial.⁶¹ In our example, the mother in police custody makes no statement; the mother remains silent. With no statement to be made admissible, neither the *Quarles* public safety exception nor its extension applies. Second, in the public safety exception cases, the police are aware of the public safety risk.⁶² In our example, the police are unaware of any such risk (and thus fail to elicit statements that would be admissible). Therefore, neither the public safety exception nor its extension precludes *Miranda*'s constitutional right to remain silent from providing a complete defense to omission liability for serious crimes including murder.

B. Fifth Amendment Privilege Against Self-Incrimination

Like *Miranda*, the Fifth Amendment privilege against self-incrimination includes both a right to remain silent and bars such silence from being used against the defendant at trial.⁶³ As the Court in *Malloy v. Hogan* explained, it is “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”⁶⁴ While generally thought to be the same right to remain silent, the Court has declared that *Miranda* “sweeps more broadly than the Fifth Amendment.”⁶⁵ For our purposes, there are two principal differences. First, while *Miranda*'s right is conditioned on the occurrence of a custodial interrogation,⁶⁶ the Fifth Amendment right's requirements include a reasonable fear of self-incrimination.⁶⁷ Second, while there is no exception to *Miranda*'s right to remain silent (the *Quarles* public safety exception only applies if the suspect speaks),⁶⁸ immunity provides an exception to the Fifth

⁶¹ See *Quarles*, 467 U.S. at 649-50; *Trice*, 662 A.2d at 895.

⁶² See *Quarles*, 467 U.S. at 656 (requiring that the questions asked by the police be “reasonably prompted by a concern for the public safety”).

⁶³ See *Garner v. United States*, 424 U.S. 648, 653 (1976) (ruling that defendants have an absolute right to remain silent under the Fifth Amendment if they are compelled to testify without immunity); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding that the Fifth Amendment provides a right to remain silent); see also *supra* notes 40–41 and accompanying text.

⁶⁴ *Malloy*, 378 U.S. at 8.

⁶⁵ *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

⁶⁶ See *supra* notes 48–50 and accompanying text.

⁶⁷ See *infra* notes 120–30 and accompanying text.

⁶⁸ See *supra* note 54 and accompanying text.

Amendment right to remain silent.⁶⁹ The following chart depicts some basic similarities and differences between the two different rights to remain silent.

	<i>Miranda</i>	Fifth Amendment
Triggering requirements	Custodial interrogation ⁷⁰	Reasonable fear of self-incrimination et al. ⁷¹
Constitutional right?	Yes ⁷²	Yes ⁷³
Can post-arrest silence be used against the defendant?	No (despite the arresting officer having a reasonable fear of danger to the public) ⁷⁴	No, unless immunity ⁷⁵

⁶⁹ See *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (discussing constitutionality of use and derivative use immunity); *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892) (discussing constitutionality of transactional immunity).

⁷⁰ See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980) (holding that *Miranda* warnings must be given to persons in custody and being interrogated).

⁷¹ See, e.g., *Hibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 190 (2004) (concluding that a Fifth Amendment right to remain silent requires the claimant to have a reasonable fear of self-incrimination).

⁷² See, e.g., *Dickerson v. United States*, 530 U.S. 428, 428 (2000) (holding that *Miranda* is a constitutional right which Congress may not overrule).

⁷³ See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (confirming that the Fifth Amendment privilege against self-incrimination is a constitutional right).

⁷⁴ See, e.g., *New York v. Quarles*, 467 U.S. 649, 649-50 (1984) (concluding that *Miranda* warnings need not be given to make a statement admissible when the arresting officer has a reasonable fear for public safety); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) (holding that the fact that a defendant stood mute cannot be used against him at trial).

⁷⁵ See, e.g., *Kastigar v. United States*, 406 U.S. 441, 448-53 (1972) (ruling that use immunity requires a witness or defendant to testify).

Does the right pertain to crimes other than the crime for which the suspect is arrested?	Yes ⁷⁶	Yes ⁷⁷
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The Fifth Amendment privilege provides that “[n]o person . . . shall be compelled in any Criminal Case to be a witness against himself.”⁷⁸ Enjoying the privilege’s protections may require satisfaction of as many as five components.⁷⁹

1. The “[n]o person” language generally limits the privilege to real or natural persons and excludes artificial persons like corporations.⁸⁰
2. The compulsion requirement includes both formal compulsion — the threat of incarceration — as well as the informal compulsion that may be inherent in a custodial interrogation.⁸¹
3. The Supreme Court has construed the “any Criminal Case” language to allow the privilege to be exercised in contexts either civil or criminal but only when the disclosures would incriminate in a current or future criminal proceeding.⁸²

⁷⁶ See, e.g., *Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (concluding that *Miranda* applies to crimes other than the crime for which the person is in custody).

⁷⁷ See, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 598-99, 599 n.13 (1990) (finding a suspect’s answers to questions unrelated to the crime charged was protected by the privilege against self-incrimination).

⁷⁸ U.S. CONST. amend. V. For a seminal case construing the privilege, see generally *Hoffman v. United States*, 341 U.S. 479 (1951) (explaining that a witness may invoke the privilege when such witness has reasonable cause to apprehend danger of self-incrimination by answering a question).

⁷⁹ Cf. JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, UNDERSTANDING CRIMINAL PROCEDURE § 23.04, at 413-17 (7th ed. 2017) [hereinafter DRESSLER ET AL., CRIMINAL PROCEDURE] (identifying four separate elements).

⁸⁰ See *Bellis v. United States*, 417 U.S. 85, 90 (1974) (“[T]he organization itself is not entitled to claim any Fifth Amendment privilege . . .”).

⁸¹ See *infra* notes 96–98 and accompanying text.

⁸² See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to

4. “[W]itness” refers to a person whose communications are testimonial;⁸³ testimonial evidence is generally distinguished from physical evidence.⁸⁴

5. The “against himself” language refers to self-incrimination.⁸⁵

Because the first and third components are easily satisfied, the most common approach is to analyze a Fifth Amendment privilege claim around three elements: compelled, testimonial self-incrimination.⁸⁶

1. Compulsion Element

Compulsion is state-created pressure or coercion — physical or mental — that is sufficient to undermine the voluntariness of the decision either to provide evidence or instead to remain silent.⁸⁷ The “paradigm of compulsion” is the threat of incarceration.⁸⁸ For example, the threat of incarceration for contempt of court for a subpoenaed witness refusing to testify clearly satisfies the compulsion element.⁸⁹ Criminal statutes threatening incarceration for non-compliance, or “statutory compulsion” as the Court terms it,⁹⁰ also constitutes this

him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”).

⁸³ See, e.g., *United States v. Hubbell*, 530 U.S. 27, 34 (2000) (“The word ‘witness’ in the constitutional text limits the relevant category of compelled incriminating communications to those that are ‘testimonial’ in character.”).

⁸⁴ See, e.g., *Schmerber v. California*, 384 U.S. 757, 761-62 (1966) (holding that the privilege protects not against compelled production of physical evidence but rather against compelled testimony).

⁸⁵ See, e.g., *Fisher v. United States*, 425 U.S. 391, 396, 408 (1976) (ruling that the Fifth Amendment, with the words “against himself,” protects against compelled self-incrimination).

⁸⁶ See, e.g., *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004) (citing *Hubbell*, 530 U.S. at 34-38) (“To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.”); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1262 (1988) (observing that the three elements are required to satisfy a Fifth Amendment privilege claim).

⁸⁷ See, e.g., *Fisher*, 425 U.S. at 397 (“The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege.”).

⁸⁸ LAFAYE ET AL., CRIMINAL PROCEDURE, *supra* note 41, § 2.10(b), at 120 (“The paradigm of compulsion is . . . a court order . . . with an unjustified failure to comply [with it] . . . result[ing] in incarceration.”).

⁸⁹ See, e.g., *Fisher*, 425 U.S. at 409 (“A subpoena served on a taxpayer requiring him to produce an accountant’s workpapers in his possession without doubt involves substantial compulsion.”).

⁹⁰ *United States v. Knox*, 396 U.S. 77, 82 (1969).

form of compulsion.⁹¹ To illustrate, the Supreme Court ruled in *Leary v. United States* that compliance with “the Marihuana Tax Act compelled petitioner to expose himself to a ‘real and appreciable’ risk of self-incrimination.”⁹² Though threat of incarceration is the paradigm, the Court has found arguably lesser forms of compulsion such as loss of employment,⁹³ loss of a professional license,⁹⁴ and ineligibility to hold public office also to suffice.⁹⁵ Under *Miranda*, a custodial interrogation is presumed to involve compulsion.⁹⁶ This “informal compulsion”⁹⁷ is to be contrasted with the formal compulsion of “the law formally threatening sanctions for a failure to reveal information that could be incriminating.”⁹⁸

In our imperiled infant example, the mother faced both types of compulsion. In addition to the informal compulsion of a custodial interrogation, the mother faced the formal compulsion of statutes or principles of omission liability threatening incarceration for failing to reveal self-incriminating information.

But not all state-created pressure satisfies the compulsion element.⁹⁹ Charging or sentencing concessions may pressure a defendant into admitting guilt (thereby self-incriminating), but in the give and take of plea bargaining that pressure does not constitute sufficient compulsion.¹⁰⁰ Loss of prison privileges and transfer to a maximum

⁹¹ See, e.g., *id.* (denying Fifth Amendment privilege claim because defendant “has taken a course other than the one that the statute [requiring disclosure] was designed to compel”).

⁹² *Leary v. United States*, 395 U.S. 6, 16 (1969).

⁹³ *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (holding that, absent immunity, police officers may not be fired for availing themselves of their Fifth Amendment privileges).

⁹⁴ See, e.g., *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (“The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege.”).

⁹⁵ *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-09 (1977) (finding loss of eligibility to hold office as sufficient compulsion for a Fifth Amendment privilege violation).

⁹⁶ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (referring to “the inherent compulsions of the interrogation process”).

⁹⁷ *Id.* at 461.

⁹⁸ LAFAVE ET AL., *CRIMINAL PROCEDURE*, *supra* note 41, § 2.10(b), at 121.

⁹⁹ See, e.g., *McKune v. Lile*, 536 U.S. 24, 41 (2002) (“It is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free.”).

¹⁰⁰ *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978) (holding that “plea bargain[s] are important components of this country’s criminal justice system” and thus are not sufficient compulsion to qualify as a Fifth Amendment violation); *Brady v. United States*, 397 U.S. 742, 753-54 (1970) (“Brady’s plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial.”).

security prison may induce a prisoner to admit responsibility for uncharged sex offenses (thereby self-incriminating) pursuant to a prison rehabilitation program, but in the special context of prison do not constitute compulsion.¹⁰¹ Similarly, the Court found no compulsion where clemency would likely be denied unless the prisoner submitted to an interview creating the risk of self-incrimination and prosecution for additional charges.¹⁰² None of these instances of insufficient compulsion, however, applies to our imperiled infant example.

2. Testimony Element

Testimonial statements or evidence communicate thoughts, beliefs, or facts and spring from cognitive processes of the mind.¹⁰³ Most verbal statements — either oral or written — are testimonial.¹⁰⁴ But verbal statements that merely identify physical characteristics like the sound of one’s voice or one’s handwriting — rather than the content of one’s mind — are not testimonial.¹⁰⁵ Most non-verbal conduct is not testimonial. Standing in a line-up, giving blood samples, and performing field sobriety tests are not testimonial (even if self-incriminating).¹⁰⁶ But some non-verbal conduct may be testimonial.¹⁰⁷

¹⁰¹ See *McKune*, 536 U.S. at 38 (denying compulsion because “this Court has recognized that lawful conviction and incarceration necessarily place limitations on the exercise of a defendant’s privilege against self-incrimination”).

¹⁰² *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 287-88 (1998) (holding that the state-created pressure threatening denial of clemency did not qualify as unconstitutional compulsion).

¹⁰³ See *Doe v. United States*, 487 U.S. 201, 210 (1988) (“[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”).

¹⁰⁴ See *id.* at 213 (“There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts.”).

¹⁰⁵ See, e.g., *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (“[A handwriting exemplar], in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic [that is not testimonial].”); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (“[V]oice as an identifying physical characteristic [is not testimonial].”); *Schmerber v. California*, 384 U.S. 757, 764 (1966) (finding that “to write or speak for identification” is not testimonial).

¹⁰⁶ *Pennsylvania v. Muniz*, 496 U.S. 582, 603 (1990) (physical sobriety tests not testimonial); *Wade*, 388 U.S. at 222 (line-up not testimonial); *Schmerber*, 384 U.S. at 765 (blood sample not testimonial).

¹⁰⁷ See, e.g., *Muniz*, 496 U.S. at 595 n.9 (“[Testimonial evidence includes] both verbal and nonverbal conduct; nonverbal conduct contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.”).

Nodding or shaking one's head, suggesting assent or dissent,¹⁰⁸ as well as production of a document, article, or item that by its very production speaks to its existence, source, or authenticity are testimonial.¹⁰⁹

Remaining silent, though obviously protected by the Fifth Amendment,¹¹⁰ is conceptually awkward to establish as testimonial.¹¹¹ Most courts finding violations of the Fifth Amendment privilege when the defendant remained silent simply ignore the testimonial component.¹¹² For example, the Court in *Griffin v. California* found that the defendant's Fifth Amendment privilege was violated when the prosecution and trial judge made negative comments to the jury as to the defendant's remaining silent and declining to testify without undertaking an analysis of how the defendant's silence was testimonial.¹¹³

¹⁰⁸ *Schmerber*, 384 U.S. at 761 n.5 (“A nod or head-shake is as much a ‘testimonial’ or ‘communicative’ act in this sense as are spoken words.”).

¹⁰⁹ *United States v. Hubbell*, 530 U.S. 27, 41 (2000) (holding that the act of production may be testimonial in establishing “the existence, authenticity, and custody of items”).

¹¹⁰ The Supreme Court has in numerous cases held that the Fifth Amendment gives a person the absolute right to remain silent in the face of government compulsion. *See Gardner v. Broderick*, 392 U.S. 273, 276 (1968) (holding that, absent immunity, a person may not be compelled to testify); *supra* note 63 and accompanying text. While exercise of the right to silence may be burdened with adverse consequences in some limited contexts, it cannot be used to prove the defendant's guilt at trial. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 287-88 (1998) (holding that silence in a clemency interview could be used against the defendant by the clemency board without violating the Fifth Amendment); *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) (“A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege [of the Fifth Amendment right to remain silent.]”); *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) (upholding the constitutionality of the prosecution's use of defendants' silence to impeach their credibility when they take the stand in their own defense); *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976) (ruling that a negative inference from defendant's silence in the special context of a prison disciplinary hearing was not a violation of the Fifth Amendment).

¹¹¹ *See Stuntz, supra* note 86, at 1228 (“[No one] could argue persuasively that . . . the elements of Fifth Amendment law . . . fit neatly into an internally consistent, sensible whole.”).

¹¹² *See, e.g., Leary v. United States*, 395 U.S. 6, 9-54 (1969) (finding a Fifth Amendment privilege violation despite failing to analyze whether the testimonial element was satisfied); *Haynes v. United States*, 390 U.S. 85, 86-101 (1968) (same); *Grosso v. United States*, 390 U.S. 62, 63-72 (1968) (same); *Marchetti v. United States*, 390 U.S. 39, 39 (1968) (same).

¹¹³ *Griffin v. California*, 380 U.S. 609, 613 (1965) (holding that negative comments by the prosecutor and court on the defendant's silence at trial violated Fifth Amendment privilege despite not analyzing whether that silence was testimonial).

But more recently the Court has suggested a more straightforward approach. A defendant's silence is testimonial if what compliance with the statute compels or requires is testimonial (regardless of whether the defendant complied or remained silent).¹¹⁴ Applying this approach to our imperiled infant example, the mother's silence was testimonial. Compliance with the duty imposed by omission liability required disclosure of the existence and location of the imperiled infant. Such disclosure of information and belief, revealing the contents of the mother's mind, would clearly qualify as testimonial.

One might object that some courts have construed defendants' silence and noncompliance with criminal statutes as nontestimonial. Defendants charged with the aggravated offense of carrying drugs (or other contraband) into a correctional facility after having been arrested with the contraband on their person and involuntarily taken to jail have claimed a Fifth Amendment privilege violation.¹¹⁵ The only way they could avoid committing the offense, they argued, would be to self-incriminate (after their arrest and before being taken to prison) as to the lesser included offense of simple possession of the drugs.¹¹⁶ Though three courts have accepted the Fifth Amendment claim,¹¹⁷ three different courts denied the claim as failing to satisfy the testimonial element.¹¹⁸ Each court denying the claim reasoned that the defendant was prosecuted "not because he gave or refused testimony under official

¹¹⁴ *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004) (assessing whether defendant's silence satisfied the testimonial element of a Fifth Amendment privilege claim by assessing whether the statements or actions required by the statute — what the defendant would have said or done if in compliance with the statute — were testimonial).

¹¹⁵ For cases finding the Fifth Amendment claim persuasive, see *State v. Cole*, 164 P.3d 1024, 1025-26 (N.M. Ct. App. 2007) (declining to disturb the lower court's holding that "the State cannot force Defendant to choose between admitting to possession of a controlled substance and being charged with introducing that substance into a correctional facility, and . . . Defendant may not be penalized in any way for refusing to incriminate himself"); *State v. Sowry*, 803 N.E.2d 867, 870 (Ohio Ct. App. 2004) (ruling the Fifth Amendment to "prohibit compulsion of that kind"); *State v. Tippetts*, 43 P.3d 455, 457 n.2 (Or. Ct. App. 2002) (noting that the state did not dispute that the Fifth Amendment "prevent[s] the state from forcing defendant to choose between admitting to possession of a controlled substance and being charged with introducing that substance into a correctional facility").

¹¹⁶ See, e.g., *People v. Gastello*, 232 P.3d 650, 653 (Cal. 2010) (explaining defendant's Fifth Amendment claim); *People v. Low*, 232 P.3d 635, 654 (Cal. 2010) (same).

¹¹⁷ See *supra* note 115.

¹¹⁸ See *Gastello*, 232 P.3d at 653-56 (denying Fifth Amendment claim); *Low*, 232 P.3d at 647-50 (same); *State v. Barnes*, 747 S.E.2d 912, 921 n.12 (N.C. Ct. App. 2013) (same).

compulsion, but because he engaged in the nontestimonial criminal act of knowingly entering the jail in possession of a controlled substance.”¹¹⁹ As a result, according to the objection, the mother’s silence also fails to satisfy the testimonial element. The objection is unpersuasive, however, because the cases are distinguishable. Unlike the defendants in the above cases, the mother is not being prosecuted on the basis of culpable commission of affirmative acts. Rather, prosecution is for the failure to affirmatively act — that is, the refusal to give testimony under official compulsion.

3. Self-Incrimination Element

The self-incrimination element requires that the compelled testimonial evidence create a risk of exposing the person to a criminal charge.¹²⁰ Generally, the risk must be “reasonable”;¹²¹ it must be “substantial and ‘real,’ and not merely trifling or imaginary.”¹²² However, there are four features of this element that broaden what qualifies as self-incriminating.

1. The testimonial evidence need not in fact be incriminating but merely pose a “risk”¹²³ of “possibly,”¹²⁴ or “tend[ing]”¹²⁵ to being, or that which the defendant “reasonably believes could be,”¹²⁶ incriminating.

¹¹⁹ *Low*, 232 P.3d at 648-49 (quoted approvingly by *Gastello*, 232 P.3d at 655 and *Barnes*, 747 S.E.2d at 921 n.12). For a thoughtful analysis of how these courts have misapplied criminal law’s fundamental voluntary act requirement, see Charlie Rosebrough, Comment, *The Voluntary Act Requirement in Prison Contraband Cases*, 62 ST. LOUIS U. L.J. 739, 753-62 (2018).

¹²⁰ *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004) (denying Fifth Amendment challenge to statute requiring disclosure of defendant’s name because such disclosure “presented no reasonable danger of incrimination”).

¹²¹ *Id.*

¹²² *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *accord* *Minor v. United States*, 396 U.S. 87, 98 (1969) (denying Fifth Amendment privilege claim because the defendant’s situation “present[ed] only ‘imaginary and insubstantial’ hazards of incrimination, rather than the ‘real and appreciable’ risks needed”).

¹²³ *Fisher v. United States*, 425 U.S. 391, 400 (1976).

¹²⁴ *Hoffman v. United States*, 341 U.S. 479, 488 (1951).

¹²⁵ *Ohio v. Reiner*, 532 U.S. 17, 22 (2001) (per curiam).

¹²⁶ *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

2. Even persons claiming to be innocent may successfully exercise the privilege.¹²⁷
3. “[S]tatements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating” satisfy the element.¹²⁸ That is, even statements not incriminating on their face are nonetheless construed as incriminating if they “would furnish a link in the chain of evidence needed to prosecute.”¹²⁹
4. Fear of self-incrimination need not be the exclusive motive of the defendant; mixed motives that merely include the fear of self-incrimination suffice.¹³⁰

In our imperiled infant example, the mother clearly satisfies this element. When defendants are silent, as is the mother, courts analyze not whether the defendant actually self-incriminated but rather whether what compliance the statute compelled was self-incriminating.¹³¹ Omission liability imposing a duty to prevent harm did require disclosing the existence and location of the imperiled infant. That disclosure of the imperiled infant is not itself incriminating does not bar the claim, because it provides a link to the clearly incriminating evidence of the contraband in the car.¹³²

One might object that various cases denying a Fifth Amendment privilege claim because the self-incrimination element was not satisfied are applicable to the imperiled infant example. A “stop and identify” statute requiring persons to disclose their name to police did not violate the Fifth Amendment privilege because the defendant refused out of

¹²⁷ See, e.g., *Reiner*, 532 U.S. at 21 (“[W]e have emphasized that one of the Fifth Amendment’s basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances.” (internal quotation marks omitted)).

¹²⁸ *United States v. Hubbell*, 530 U.S. 27, 37 (2000).

¹²⁹ *Hoffman*, 341 U.S. at 486; *accord Kastigar*, 406 U.S. at 445.

¹³⁰ See *Leary v. United States*, 395 U.S. 6, 28-29 (1969) (holding that the defendant’s prosecution for failing to pay a transfer tax on a marijuana sale, both because of a reasonable fear of self-incrimination and a principled objection to the criminalization of marijuana, violated the Fifth Amendment privilege).

¹³¹ See, e.g., *id.* at 16 (“[T]he Marihuana Tax Act compelled petitioner to expose himself to a ‘real and appreciable’ risk of self-incrimination.”); *Haynes v. United States*, 390 U.S. 85, 97 (1968) (“The hazards of incrimination created by the registration requirements can thus only be termed ‘real and appreciable.’”); *Grosso v. United States*, 390 U.S. 62, 66-67 (1968) (“[The defendant] is obliged, on pain of criminal prosecution, to provide information which would readily incriminate him.”); *Marchetti v. United States*, 390 U.S. 39, 48 (1968) (same).

¹³² See *supra* notes 128–29 and accompanying text.

principle and not because of any fear of self-incrimination.¹³³ The Court conceded that merely disclosing a name might well be self-incriminating in other circumstances.¹³⁴ In contrast, the mother actually and reasonably does fear self-incrimination. A statute requiring the defendant to register the possession of an automatic firearm did not violate the privilege, because such registration could not be self-incriminating in as much as the registration statements enjoyed a form of immunity.¹³⁵ In contrast, the mother lacks immunity, and thus the statements compelled by omission liability are capable of being self-incriminating. A statute requiring filing tax returns on income, even if illegally earned, did not violate the Fifth Amendment privilege because the defendant failed to file the entire return where only some portions of the return required self-incrimination.¹³⁶ In contrast, there was no way for the mother partially to fulfill the duty to prevent harm under omission liability without self-incriminating as to other crimes. Thus the objection fails.

4. Exceptions

Some cases deny Fifth Amendment privilege claims under rationales entirely outside the analysis of the three elements. “[N]either the text nor the spirit of the Fifth Amendment privilege against compulsory self-incrimination confers a privilege to lie.”¹³⁷ As the Supreme Court has

¹³³ *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 190 (2004) (finding that rather than refusing to disclose because of fear of self-incrimination, “petitioner refused to identify himself only because he thought his name was none of the officer’s business”).

¹³⁴ *Id.* at 191 (“[A] case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.”).

¹³⁵ See *United States v. Freed*, 401 U.S. 601, 606 (1971) (holding that the Fifth Amendment privilege “claimant is not confronted by . . . hazards of incrimination . . . by reason of the statutory barrier against use [of claimant’s statements] in a prosecution [against the claimant]”). Immunity removes the capacity of a statement to be self-incriminating. *Hiibel*, 542 U.S. at 190 (“Suspects who have been granted immunity from prosecution may, therefore, be compelled to answer; with the threat of prosecution removed, there can be no reasonable belief that the evidence will be used against them.” (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972))).

¹³⁶ *United States v. Sullivan*, 274 U.S. 259, 263 (1927) (“If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in his return, but could not on that account refuse to make any return at all.”). The Court suggested that the defendant might have avoided liability by filing the return but not answering the self-incriminating questions. *Id.* (holding that the defendant would have enjoyed the Fifth Amendment privilege by filing the return but refusing to answer incriminating questions).

¹³⁷ *Brogan v. United States*, 522 U.S. 398, 404 (1998).

held, “proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.”¹³⁸ The Court has also denied Fifth Amendment protection to filing false documents with the government¹³⁹ and to making unsworn false statements to federal investigators, even the so-called “exculpatory no.”¹⁴⁰ Numerous state courts have denied Fifth Amendment privilege claims when defendants entering prison falsely claim that they have neither drugs nor any other contraband in their possession.¹⁴¹ Because the mother remained silent thereby making no false statements, these cases are inapplicable. The privilege also is inapplicable if waived — either affirmatively or indirectly by speaking.¹⁴² Because the mother remained silent, there is no waiver, and these cases are inapplicable.

Several cases have denied Fifth Amendment privilege claims when the legal authority requiring disclosure is operating in a regulatory context unrelated to the enforcement of criminal laws.¹⁴³ Some of these cases concede the required disclosure is self-incriminating but invoke the regulatory context as the basis for an exception to the privilege.¹⁴⁴

¹³⁸ *United States v. Apfelbaum*, 445 U.S. 115, 117 (1980).

¹³⁹ *See, e.g., United States v. Knox*, 396 U.S. 77, 82 (1969) (concluding that the Fifth Amendment does not grant the privilege to file false documents).

¹⁴⁰ *Brogan*, 522 U.S. at 408. The “exculpatory no” doctrine sought to exclude a suspect’s mere denial of guilt from the reach of the statute criminalizing making false statements to federal investigators. *Id.* at 401.

¹⁴¹ *See State v. Alvarado*, 200 P.3d 1037, 1043 (Ariz. Ct. App. 2008) (denying Fifth Amendment privilege claim because the Fifth Amendment privilege does not confer a right to lie); *People v. Ross*, 162 Cal. App. 4th 1184, 1191-92 (Cal. Ct. App. 2008) (same); *State v. Fowle*, 819 S.E.2d 719, 722 (Ga. Ct. App. 2018) (same); *Taylor v. Commonwealth*, 313 S.W.3d 563, 566 (Ky. 2010) (same); *State v. Cargile*, 916 N.E.2d 775, 777 (Ohio 2009) (same); *State v. Carr*, No. M2007-01759-CCA-R3-CD, 2008 WL 4368240, at *7 (Tenn. Crim. App. March 23, 2009) (same); *Herron v. Commonwealth*, 688 S.E.2d 901, 907-08 (Va. Ct. App. 2010) (same).

¹⁴² *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (“An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.”); *see also Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that suspects’ waivers are valid even if they are unaware of the crime for which they are being interrogated).

¹⁴³ *See Stuntz, supra* note 86, at 1282-83 (explaining the regulatory decisions of the Court as ad hoc decisions prioritizing the needs of law enforcement over Fifth Amendment concerns).

¹⁴⁴ *See, e.g., Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555-56 (1990) (holding that court order requiring mother to produce their child, even if the act of production is testimonial and self-incriminating, does not violate the Fifth Amendment privilege because of the non-criminal, regulatory context); *Shapiro v. United States*, 335 U.S. 1, 32 (1948) (ruling that a regulation requiring defendant to maintain and produce

Another case invokes the non-criminal, regulatory context not as an exception but instead as the basis for why the disclosure carries an insufficient risk of self-incrimination.¹⁴⁵ Either way, such cases are distinguishable from the imperiled infant example. Statutes and principles of criminal omission liability for murder are obviously criminal, not regulatory.

5. Defense to Omission Liability

As established by the above analysis of the three elements of a Fifth Amendment privilege claim, the mother clearly satisfies each of the three elements. Further, none of the cases denying a Fifth Amendment claim based either on non-satisfaction of one of the elements or for reasons apart from the elements is applicable to the mother's situation. What then are the consequences of a valid Fifth Amendment privilege — satisfying the requisite elements — conflicting with criminal omission liability?

The Supreme Court and lower courts have held the Fifth Amendment privilege to be a complete defense to criminal omission liability.¹⁴⁶ In *Marchetti v. United States* and its companion case, *Grosso v. United States*, the Court ruled that defendants charged with the criminal omission offenses of failing to pay a wagering tax and failing to register

public records, even if self-incriminating, does not violate the privilege because of the non-criminal, regulatory context exception).

¹⁴⁵ See, e.g., *California v. Byers*, 402 U.S. 424, 431 (1971) (holding that a hit and run statute requiring persons to disclose their name and address when involved in an automobile accident did not violate the Fifth Amendment privilege because it did “not entail the kind of substantial risk of self-incrimination . . . [necessary to satisfy the element because] the statutory purpose is noncriminal”).

¹⁴⁶ See, e.g., *Haynes v. United States*, 390 U.S. 85, 86-87 (1968) (ruling that the defendant's conviction for possession of a firearm was unconstitutional for violating the Fifth Amendment privilege); *United States v. King*, 402 F.2d 694, 697 (9th Cir. 1968) (reversing the defendant's conviction for failing to report a bank robbery because the defendant had a reasonable fear of self-incrimination); *State v. Akins*, 423 P.3d 1026, 1034 (Idaho 2018) (holding a reporting statute unconstitutional as applied to a defendant with a reasonable fear of self-incrimination charged with a felony for failure to report the location of a dead body); *State v. Conquest*, 377 A.2d 1239, 1242 (N.J. Super. Ct. Law Div. 1977) (ruling that the defendant's conviction for failure to report an arson and murder was unconstitutional when the defendant had a reasonable fear of self-incrimination); *State v. Wardlow*, 484 N.E. 2d 276, 277 (Ohio Ct. App. 1985) (concluding that the defendant's conviction for failing to report a crime was unconstitutional for violating the privilege); see also Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 589-90 (2000) (discussing under what circumstances a mandatory reporting statute can violate the privilege).

before accepting wagers had a Fifth Amendment defense to their criminal omission liability.¹⁴⁷ The Court reasoned that compliance with the omission registration offenses would self-incriminate as to the criminal offense of wagering itself.¹⁴⁸ Similar to the *Marchetti* and *Grosso* reasoning, the Court in *Haynes v. United States* held that, because registering as an owner of a firearm in compliance with one provision of a firearm registration statute posed a significant risk of self-incriminating as to violation of other provisions of the same statute, the statute was unconstitutional as applied, and the Fifth Amendment was a complete defense to criminal omission liability for failing to register.¹⁴⁹ In *Leary v. United States*, the Court found the defendant's conviction for the criminal omission offense of failing to pay a transfer tax on a marijuana sale unconstitutional as applied for violating the Fifth Amendment privilege against self-incrimination.¹⁵⁰ The information obtained by payment of the tax, made available to federal and state law enforcement, was self-incriminating as to criminal offenses of marijuana possession.¹⁵¹

The reasoning and precedents of *Marchetti*, *Grosso*, *Haynes*, and *Leary* apply to the conflict between omission liability and the right to remain silent depicted in the imperiled infant example. Omission liability for murder compels the mother to make testimonial statements as to the existence and location of the imperiled infant. Such statements pose a reasonable risk of self-incrimination because they will provide a link to evidence suggesting the commission of other crimes. As a result, the mother satisfies the elements of a Fifth Amendment privilege violation. By violating the privilege, criminal omission liability for murder for the

¹⁴⁷ *Marchetti v. United States*, 390 U.S. 39, 60-61 (1968) (“This defense should have reached both the substantive counts for failure to register and to pay the occupational tax, and the count for conspiracy to evade payment of the tax.”); *Grosso v. United States*, 390 U.S. 62, 63-64 (1968) (affirming the holding in *Marchetti*); see also *Leary v. United States*, 395 U.S. 6, 28 (1969) (explaining the holding of *Marchetti* as “the right not to be criminally liable for one’s previous failure to obey a statute which required an incriminatory act”).

¹⁴⁸ *Marchetti*, 390 U.S. at 51 (“The question is not whether petitioner holds a ‘right’ to violate state law, but whether, having done so, he may be compelled to give evidence against himself.”).

¹⁴⁹ *Haynes*, 390 U.S. at 100 (“We hold that a proper claim of the constitutional privilege against self-incrimination provides a *full defense* to prosecutions.” (emphasis added)).

¹⁵⁰ *Leary*, 395 U.S. at 53-54 (reversing defendant’s conviction for failing to pay a transfer tax on a marijuana sale).

¹⁵¹ *Id.* at 29 (“[P]arts of petitioner’s testimony clearly indicate that he also was influenced by an apprehension that by trying to pay the tax he might incriminate himself.”).

mother is unconstitutional as applied. The Fifth Amendment privilege supplies a complete defense to omission liability for murder that imposes a duty to self-incriminate.

C. First Amendment Right Not to Speak

Independently from *Miranda* and the Fifth Amendment privilege, the First Amendment also provides a right to remain silent. It mandates that “Congress shall make no law . . . abridging the freedom of speech.”¹⁵² Though its positive right to free speech is better known, the First Amendment’s negative “right to refrain from speaking at all”¹⁵³ is nonetheless well established.¹⁵⁴ “Speech compulsions, the [Supreme] Court has often held, are as constitutionally suspect as are speech restrictions.”¹⁵⁵ For example, in *Miami Herald Publishing Co. v. Tornillo*, the Court reviewed a statute requiring newspapers to publish the responses by political candidates to criticisms and attacks on their record.¹⁵⁶ In affirming the newspaper’s First Amendment right not to speak, the Court found the statute unconstitutional.¹⁵⁷

¹⁵² U.S. CONST. amend. I.

¹⁵³ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

¹⁵⁴ *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014) (holding that requiring physicians to display sonograms and descriptions of fetuses to a woman seeking an abortion violated the physicians’ First Amendment right not to speak); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 475 (1995) (“[T]he compelled speech is presumptively invalid under the Free Speech Clause.”); Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 *RUTGERS L. REV.* 123, 124 (1999) (explaining the compelled expression doctrine and its relation to the First Amendment); see, e.g., Larry Alexander, *Compelled Speech*, 23 *CONST. COMMENT.* 147, 148 (2006) (discussing the major compelled speech Supreme Court cases); see also Caroline Mala Corbin, *Compelled Disclosures*, 65 *ALA. L. REV.* 1277, 1277 (2014) (noting the recent frequency of compelled speech cases).

¹⁵⁵ Eugene Volokh, *The Law of Compelled Speech*, 97 *TEX. L. REV.* 355, 355 (2018). For Supreme Court cases establishing the right, see, for example, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (reversing a state commission’s decision requiring a utility company to donate space in its bills to messages that were not its own); *Wooley*, 430 U.S. at 715 (holding a criminal statute that compelled persons to maintain a political viewpoint on their license plates was unconstitutional as applied); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (concluding that forcing students to salute the American flag unconstitutionally infringed upon their First Amendment right not to speak).

¹⁵⁶ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 243-44 (1974) (“The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.”).

¹⁵⁷ *Id.* at 258.

Speech compelled by criminal statutes may also be unconstitutional. At least one federal district court upheld a challenge to a statute requiring a convicted sex offender to include “CRIMINAL SEX OFFENDER” on his driver’s license because it arguably compels speech.¹⁵⁸ Similarly, a court has struck down an ordinance that “compel[led] sex offenders to speak [by] mandating that they post a sign [during Halloween] that there is ‘no candy or treats at this residence.’”¹⁵⁹ As a result, the First Amendment, as well as the *Miranda* right and the Fifth Amendment privilege against self-incrimination, provide the mother (in the imperiled infant example) with a right to remain silent and thus a complete defense to criminal omission liability.

Let us consider some possible objections. One might object based on the First Amendment’s “clear and present danger” exception.¹⁶⁰ As is well known, persons may not yell “fire” in a crowded theater.¹⁶¹ The test for clear and present danger is “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”¹⁶² The government can thus punish “those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means.”¹⁶³ The imperiled infant, the objection might maintain, constitutes a clear and present danger and thus an exception to any First Amendment right not to speak.

The objection is unpersuasive for several reasons. First, cases invoking the clear and present danger exception rely on suspects’ affirmative acts, i.e., speech.¹⁶⁴ Indeed, there appears to be no case holding that the “clear and present danger” exception to the First Amendment even applies to those exercising their First Amendment

¹⁵⁸ *Doe v. Marshall*, No. 2:15 CV-606-WKW, 2018 WL 1321034, at *13, *36-37 (M.D. Ala. Mar. 14, 2018).

¹⁵⁹ *Doe v. City of Simi Valley*, No. CV 12-8377 PA, 2012 WL 12507598, at *3, *9 (C.D. Cal. Oct. 29, 2012).

¹⁶⁰ LAFAVE ET AL., *CRIMINAL PROCEDURE*, *supra* note 41, § 23.1(b), at 1320 (discussing cases holding that the “clear and present danger” test is an exception to the Free Speech Clause).

¹⁶¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

¹⁶² *Dennis v. United States*, 341 U.S. 494, 510 (1951).

¹⁶³ *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

¹⁶⁴ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (discussing “speech brigaded with action”); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (addressing a communicative act).

right to refrain from speaking.¹⁶⁵ In contrast to the cases applying the exception, the mother refrains from speaking. Still, one might object, were a court to address the applicability of the exception to compelled speech there is no reason to maintain that the exception would apply any differently than with abridgments of speech. But a concurring opinion from the Second Circuit suggests the objection may be unpersuasive: “government compulsion to speak (or indeed to act) may well be *more* strictly limited than government compulsion not to speak (or act).”¹⁶⁶ The opinion cited other Second Circuit cases that have reasoned that mandatory injunctions (requiring some positive act) are more rigidly scrutinized than prohibitory injunctions.¹⁶⁷ Furthermore, the public safety exception to *Miranda* also applies only to affirmative statements, not to silence.¹⁶⁸ As a result, the inapplicability of the clear and present danger exception to compelled speech may not be happenstance but is instead principled. Second, the exception involves danger to the public at large.¹⁶⁹ In contrast, the danger in the imperiled

¹⁶⁵ Though there are no cases applying the exception to the First Amendment right *not* to speak, there is a plethora of cases holding that the First Amendment right to speak does not vitiate criminal statutes. *See, e.g.,* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995) (the government “may, and does, punish fraud directly”); Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (“The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials.”); *Rice*, 128 F.3d at 248 (analyzing federal circuit cases holding that affirmative speech acts are not protected by the First Amendment when there is a danger to the public at large).

¹⁶⁶ *Jackler v. Byrne*, 658 F.3d 225, 245-46 (2d Cir. 2011) (Sack, J., concurring).

¹⁶⁷ *Id.* at n.1 (citing *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 405-06 (2d Cir. 2011) (“The burden [for obtaining an injunction] is even higher on a party like [the appellant] that seeks ‘a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo.’” (citation omitted)) and *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (characterizing the standard for mandatory injunctions as “more rigorous” than that for prohibitory injunctions)).

¹⁶⁸ *See supra* notes 154–58 and accompanying text.

¹⁶⁹ *See, e.g.,* *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (upholding defendant’s conviction for conspiring to organize the Communist Party of the United States, an arguable danger to the community at large); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“For these reasons any attempt to restrict [the liberties of the First Amendment] must be justified by *clear public interest*, threatened not doubtfully or remotely, but by clear and present danger.” (emphasis added)); *Schneiderman v. United States*, 320 U.S. 118, 157 (1943) (“There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of *public disorder*.” (emphasis added)); *Schneenck v. United States*, 249 U.S. 47, 52-53 (1919) (affirming defendant’s conviction for conspiring to violate the Espionage Act of 1917, which would affect the public at large).

infant example applies merely to a single individual. Because the clear and present danger exception is inapplicable, the objection that the exception would preclude the First Amendment right not to speak as being a complete defense to the mother's omission liability is unpersuasive.

Another possible objection concerns the distinction between the compelled expression or exchange of ideas and the compelled utterance of facts. Utilizing this distinction, some lower courts have applied strict scrutiny only to compelled ideas but have applied a lower level of scrutiny to compelled facts.¹⁷⁰ Under these different levels of scrutiny, compelled ideas are presumptively unconstitutional and compelled facts are presumptively constitutional.¹⁷¹ What omission liability compels from the mother is the existence and location of the imperiled infant. As compelling facts, the objection would maintain, a First Amendment challenge to the mother's omission liability would likely fail.

The objection, however, is unpersuasive for several reasons. First, the Supreme Court made this compelled idea/compelled fact distinction irrelevant in *Riley v. National Federation of the Blind of North Carolina, Inc.*¹⁷² As the Court explained, "a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of 'fact,' since either form of compulsion burdens protected speech."¹⁷³

¹⁷⁰ For a discussion on the difference between courts' scrutiny of statutes compelling statements of ideas versus statutes compelling statements of facts, see Volokh, *supra* note 155, at 379-82.

¹⁷¹ See, e.g., *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 86 (Cal. 2013) ("Although defendants object to being *compelled* to transmit the study reports to their clients, the fact of compulsion alone, which exists in equal measure when government requires a public disclosure, is not sufficient to trigger the 'exacting' scrutiny applied . . . [by the Supreme Court].").

¹⁷² 487 U.S. 781, 782 (1988) (holding that compelled speech is just as constitutionally protected as compelled silence); see also *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("As FAIR points out [citing *Riley*], these compelled statements of fact . . . like compelled statements of opinion, are subject to First Amendment scrutiny."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid[.]"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); *Jackler v. Byrne*, 658 F.3d 225, 245-46 (2d Cir. 2011) (Sack, J., concurring) (reasoning that the distinction between compelled ideas and compelled facts is constitutionally insignificant and that "government compulsion to speak (or indeed to act) may well be *more* strictly limited than government compulsion not to speak (or act)").

¹⁷³ *Riley*, 487 U.S. at 782.

Since strict scrutiny clearly applies to compelled statements of ideas, and the Court has ruled there is no valid distinction between compelled statements of ideas and facts, therefore strict scrutiny would also apply to compelled statements of fact. Because strict scrutiny is “strict in theory, fatal in fact”¹⁷⁴ and a “virtual death-blow” to the statute or State action,¹⁷⁵ the presumptively unconstitutional burdening of the mother’s First Amendment right to refrain from speaking would not survive strict scrutiny.¹⁷⁶ Second, two recent Second Circuit cases found compelled statements of fact to be unconstitutional under the First Amendment. In *Burns v. Martuscello*, the court held that it was improper for a prison guard to penalize a prisoner for not serving as his informant (by making statements of fact as to other prisoners).¹⁷⁷ Using broad language, the Second Circuit reasoned that “compelled speech presents a unique affront to personal dignity,” and “the individual’s right to ‘freedom of mind’ must be jealously guarded.”¹⁷⁸ In a similar case, the Second Circuit held that a police officer had a First Amendment right not to speak when he chose not to make false statements of fact to the government.¹⁷⁹ The officer in the case claimed he had been subjected to retaliation for refusal to make a false statement in connection with a civilian complaint for the use of excessive force by a fellow police officer.¹⁸⁰ Third, noted First Amendment scholar Eugene Volokh

¹⁷⁴ Gerald Gunther, *The Supreme Court: 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹⁷⁵ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16–30, at 1089 (1st ed. 1978).

¹⁷⁶ Under strict scrutiny, a law or State action is presumptively unconstitutional unless “necessary to promote a compelling governmental interest.” *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). “Strict scrutiny means that the State’s system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a ‘heavy burden of justification.’” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (quoting *Dunn v. Blumenstein*, 405 U.S. 330, 343 (1972)).

¹⁷⁷ *Burns v. Martuscello*, 890 F.3d 77, 88 (2d Cir. 2018) (“And, in light of the unobtrusive but foundational nature of the right not to speak, we think it clear that inmates generally retain a First Amendment interest in declining to speak.”).

¹⁷⁸ *Id.* at 85.

¹⁷⁹ *Jackler v. Byrne*, 658 F.3d 225, 234 (2d Cir. 2011) (“[W]e conclude that the claim that defendants caused Jackler to be fired in retaliation for his refusals to obey their instructions to retract his truthful filed Report and file a false report is not beyond the scope of the First Amendment.”).

¹⁸⁰ *Id.* at 229 (“[Defendants] violated [plaintiff’s] First Amendment right to freedom of speech by causing the termination of his employment in retaliation for his refusals to make false statements in connection with an investigation into a civilian complaint alleging use of excessive force by a Department officer.”). The Second Circuit held that,

suggests that the First Amendment right not to speak could invalidate criminal reporting statutes (compelling statements of fact) as unconstitutional.¹⁸¹ As a result, the compulsion of what would be the mother's statements of fact likely is unconstitutional by violating the First Amendment right not to speak, which thereby provides a complete defense to omission liability.

In sum, all three constitutional rights — the *Miranda* right to remain silent, the Fifth Amendment privilege against compelled self-incrimination, and the First Amendment right not to speak — provide complete defenses to criminal omission liability for serious offenses, including murder, that impose a duty to speak.

II. OMISSION LIABILITY FOR MURDER CONFLICTING WITH RIGHTS TO REMAIN SILENT

The previous Part established that a criminal law duty to speak may conflict with each of the three constitutional rights to remain silent. In particular, in the imperiled infant example, the mother's constitutional right to remain silent might serve as a complete defense to murder liability for failing to save the infant. After briefly distinguishing between liability based on affirmative acts versus failing to act, this Part sets out the six principal bases for criminal omission liability. Demonstrating the breadth of the conflict between omission liability imposing a duty to speak and the constitutional rights to remain silent, this Part shows the conflict arising not just with respect to the mother and parental duty but with respect to all six bases imposing a legal duty to act.

In general, criminal liability requires an *actus reus*, or guilty act, as well as a contemporaneous *mens rea*, or culpable mental state.¹⁸² Typically, the *actus reus* is positive: a person affirmatively does

because the officer would have been exposed to criminal liability for speaking, the officer had a First Amendment right not to speak. *Id.* at 239-40. The court draws upon the right of every citizen not to give evidence to an investigating police officer. *Id.* at 239. The court did not explain whether this reasonable fear of self-incrimination is required for all First Amendment compelled speech cases or just this one.

¹⁸¹ Eugene Volokh, *Do Laws Requiring People to Report Crimes Violate the First Amendment?*, REASON (Sept. 26, 2018, 4:03 PM), <https://reason.com/2018/09/26/do-laws-requiring-people-to-report-crime/> [<https://perma.cc/8B63-GH2B>] (observing that the language from *Burns* could be applied to reporting statutes).

¹⁸² WAYNE LAFAYE, PRINCIPLES OF CRIMINAL LAW § 5.3(a), at 234, 250 (3d ed. 2017) (“With those crimes that require some mental fault . . . [there must be] an act or omission.”); Alexander F. Sarch, *Knowledge, Recklessness and the Connection Requirement Between Actus Reus and Mens Rea*, 120 PENN STATE L. REV. 1, 1 (2015) (noting that the *actus reus* and *mens rea* must “concur with” each other).

something the criminal law prohibits.¹⁸³ Less commonly, the *actus reus* is negative: a person fails to do something the criminal law requires.¹⁸⁴ As distinct from affirmative or positive acts, these negative acts are termed omissions.¹⁸⁵ Such failures to act only result in omission liability if the person is physically able to perform the act.¹⁸⁶ The origin of omissions as a moral concept — responsibility for what we fail to do — is ancient. Moses from the Judaic Old Testament instructed the Israelites when they left Egypt: “[I]f it was known that the bull had the habit of goring, yet the owner did not keep it penned up [and it injured another’s bull], the owner must pay, animal for animal, and take the dead animal in exchange.”¹⁸⁷ Many years later, James, the brother of Jesus, stated in the Christian New Testament: “[W]hoever knows the right thing to do and fails to do it, for him it is sin.”¹⁸⁸ Omissions as a legal concept date at least as far back as 1587, when the Northern Circuit in Great Britain held an animal’s owner liable for homicide after the owner, who knew the animal was dangerous, failed to monitor and control it.¹⁸⁹

In some cases, a defendant’s course of conduct includes both affirmative acts and omissions. Consider the imperiled infant example. The father’s basis for homicide liability is either the affirmative act of negligently leaving the infant in the car or the father’s intentional omission — the failure to fulfill the parental duty to prevent harm to

¹⁸³ LAFAYE, CRIMINAL LAW, *supra* note 13, at 408.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., Peter R. Glazebrook, *Criminal Omissions: The Duty Requirement in Offenses Against the Person*, 76 L.Q. REV. 386, 386-87 (1960) (observing that omissions, “especially in connection with homicide and other injuries to the person,” are “severely circumscribed in extent,” and are nonexistent “without a legal duty to act”); F. M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493, 1500 (1994) (analyzing the moral difference between omissions and actions).

¹⁸⁶ *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992) (finding that omissions “have as an essential element [the defendant’s] failure to do an act that he is [capable] of performing”); MODEL PENAL CODE § 2.01 (AM. L. INST., Proposed Official Draft 1962) (requiring for liability “the omission to perform an act of which [the defendant] is physically capable”); DRESSLER, CRIMINAL LAW, *supra* note 8, § 9.07(A)(1), at 103 (finding omission liability possible “assuming that she was physically capable of performing the act”) (emphasis omitted); ROBINSON & CAHILL, *supra* note 11, § 3.4, at 142 (referring to the “requirements for omission liability — the requirements of (1) a legal duty (2) that one is capable of performing”).

¹⁸⁷ *Exodus* 21:36 (New International).

¹⁸⁸ *James* 4:17 (English Standard).

¹⁸⁹ See Glazebrook, *supra* note 185, at 388 (noting that “the owner of an animal which he knew to be dangerous but which he allowed to wander abroad was held criminally liable for a death caused by it”).

their infant. Unless felony murder applied, charging based on the negligent affirmative act would be for a lesser form of homicide — negligent homicide or involuntary manslaughter. Because the father intentionally failed to obtain aid for their infant, charging based on the omission could be for a higher level of homicide — murder.¹⁹⁰

In addition to differing seriousness of charge, whether the father is charged based on an affirmative act or omission will have differing constitutional implications. If charged for the omission, the father will have a constitutional claim — just like the mother — that the right to remain silent was violated.¹⁹¹ If instead charged for the affirmative act, the father will have no claim that the constitutional right to remain silent was violated. The criminalization of the father's affirmative act does not criminalize the father's silence; it criminalizes the father's affirmative conduct prior to the father's silence. However, the constitutional defense can be foreclosed in that way neither for the mother nor in the examples presented in this Part. The examples are constructed so that the actors commit no culpable affirmative act that provides an alternative to the omission as a basis for prosecution.

In modern criminal law, omissions are based on a legal (not merely a moral) duty to act.¹⁹² There are six common bases generating legal duties to act affirmatively to prevent harm to another; the failure to fulfill any one of them gives rise to criminal omission liability: (i) status relationship, including parent to child and spouse to spouse, (ii)

¹⁹⁰ When a person commits both a culpable omission and a culpable affirmative act, liability for the omission may be more severe. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 249 (10th ed. 2017) (explaining that when an omission is committed with a more culpable *mens rea* than an affirmative act, such as when a person negligently pushes someone into a pond that does not know how to swim and intentionally refuses to save them, the omission charge carries a higher sentence).

¹⁹¹ See LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 3.5(f), at 222 (observing that the privilege's "limitation upon the permissible reach of the substantive criminal law" is with respect to omissions, not affirmative acts). LaFave explains as follows:

The thrust of this substantive law aspect of the privilege against self-incrimination is that the failure to do something, such as to register or to pay a tax, may not be punished as a crime when the obligation to so act carries with it a real and appreciable hazard that the individual will thereby incriminate himself by providing information which may be used to support other criminal prosecutions.

Id.

¹⁹² See LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 137-38 (1987) (discussing the difference between a moral and legal duty to act); see also LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a), at 410 ("A moral duty to take affirmative action is not enough to impose a legal duty to do so.").

controlling the conduct of another, including parents being responsible for their child's acts, (iii) creation of a peril (by an affirmative act), (iv) voluntary assumption of care and seclusion, (v) a statute expressly creating a duty, and (vi) a contract expressly creating a duty.¹⁹³

What follows is a brief account of these six principal types of omission-based criminal liability predicated on a legal duty. Each type is illustrated by an example establishing the conflict between omission liability (that creates a duty to speak) and the constitutional right to be silent.

A. Status Relationship

One form of a legal duty to act to prevent harm is based on particular status relationships. Status relationships creating such a legal duty include parent to child, spouse to spouse, lover to lover, ship captain to crew, and employer to employee.¹⁹⁴ For example, parents refusing to call a doctor to aid their sick child who subsequently dies may face omission liability for homicide based on the harm resulting from the failure to fulfill the duty created by the status relationship.¹⁹⁵ Similarly, ship captains are guilty of homicide if they do not attempt to save their crew members who die from going overboard and drowning.¹⁹⁶ Employers face homicide liability for failing to render assistance to dying employees.¹⁹⁷

To illustrate this duty conflicting with the constitutional right to remain silent, consider the imperiled infant example.¹⁹⁸ Charged with

¹⁹³ See *State v. Sherman*, 266 S.W.3d 395, 404-05 (Tenn. 2008) (identifying six different legal duties to act); *State ex rel. Kuntz v. Mont. Thirteenth Jud. Dist. Ct.*, 995 P.2d 951, 955-56 (Mont. 2000) (listing seven common law bases for legal duties to act); cf. LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a), at 410-16 (identifying seven bases for a criminal law duty to act).

¹⁹⁴ See, e.g., LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a), at 410-15 (recognizing the types of status relationships that impose a legal duty to act).

¹⁹⁵ See, e.g., *Commonwealth v. Breth*, 44 Pa. C.C. 56, 57, 68 (Pa. C. 1915) (holding a parent liable for homicide when the parent refused to call the doctor for their dying child, instead believing that prayer would be sufficient); *Queen v. Downes*, 1 Q.B.D. 25, 25-26 (1875) (same).

¹⁹⁶ See, e.g., *United States v. Knowles*, 26 Fed. Cas. 800, 801-03 (N.D. Cal. 1864) (acknowledging that ship captains have a duty to attempt to save their crew members who fall overboard).

¹⁹⁷ See, e.g., *Queen v. Brown*, 1 Terr. L. Rep. 475, 476 (Can. 1893) (holding that an employer had duty to rescue employee); KATZ, *supra* note 192, at 137 (citing example of an artisan found guilty of homicide for refusing to render aid to the artisan's dying apprentice).

¹⁹⁸ See *supra* notes 7-12 and accompanying text.

murder by omission for failing to fulfill a status relationship duty, the mother asserts as a defense the constitutional rights to remain silent. The mother's liability for murder by omission (stemming from the failure to speak) is unconstitutional as applied because it violates the constitutional rights to remain silent.

B. Control of Conduct of Others

A status relationship duty may entail the additional duty to control the conduct of others. If A owes a legal duty to prevent harm to B due to a status relationship with B, A may also owe a duty to the general public to prevent B from harming others.¹⁹⁹ For example, an employer who is a passenger in a car can be guilty of manslaughter for failing to control their speeding employee, the chauffeur, who kills another.²⁰⁰ Parents owe a legal duty to protect third persons from their children.²⁰¹

To illustrate this duty conflicting with the constitutional rights to remain silent, consider the following example based on a recent Supreme Court case.²⁰² The FBI asks a wife to inform on the estranged husband who the FBI suspects is a terrorist plotting to assassinate a business leader. Taking the wife into custody at the local FBI branch, the FBI threatens the wife with placement on the No-Fly list if the wife fails to inform. The wife reasonably fears that informing on the husband's activities may suggest that the wife is sufficiently proximate to and knowledgeable of the husband to have a duty to take steps to prevent the husband from harming third parties. Months later, to overcome the wife's reluctance to cooperate, the FBI arrests the wife for providing material aid to a terrorist for forwarding the estranged husband's mail to an anonymous post office box and Mirandizes the wife. Reasonably fearing self-incrimination and relying on the right to

¹⁹⁹ See generally LAFAYE, CRIMINAL LAW, *supra* note 13, § 6.2(a)(6), at 415-16 (explaining the duty to control the conduct of others in various circumstances).

²⁰⁰ See, e.g., *Moreland v. State*, 139 S.E. 77, 77-79 (Ga. 1927) (holding defendant liable for failing to control speeding chauffeur who caused a fatal accident).

²⁰¹ See, e.g., S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123, 1125 (1991) ("A parent not only has a duty to act affirmatively to safeguard his children, but he also has a duty to safeguard third persons from his children." (quotation omitted)); Ellenmarie Shong, *The Legal Responsibility of Parents for Their Children's Delinquency*, 6 FAM. L.Q. 145, 156 (1972) ("The law too has, in one manner or another, long viewed parents as responsible for their children.").

²⁰² See *Tanzin v. Tanvir*, 141 S. Ct. 486, 487 (2020) (holding that the Religious Freedom Restoration Act's "express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities").

remain silent, the wife intentionally decides to remain silent, not assist the FBI, and not take any steps to prevent the husband from harming third parties. The wife is placed on the No-Fly list. While the wife is being interrogated, the husband's terrorist plot succeeds in killing the business leader. The wife is charged with the business leader's murder by omission for intentionally failing to fulfill the duty to protect third persons from the husband. The wife's constitutional rights to remain silent provide a complete defense by rendering the liability for murder by omission unconstitutional as applied.

C. Creation of Peril

Endangering another through affirmative acts triggers a legal duty to prevent or minimize harm to the endangered person.²⁰³ By failing to fulfill that duty, the endangering person faces criminal omission liability. For example, intentionally failing to rescue a traumatized rape victim who jumped or fell into a river, the rapist was held liable for murder by omission.²⁰⁴ Shooting an unlawful aggressor in justified self-defense may trigger a duty for the lawful self-defender to obtain medical aid for the wounded aggressor.²⁰⁵ If the aggressor dies from the wound, the self-defender's failure to fulfill this duty may result in omission liability for homicide.²⁰⁶ Even innocently or accidentally creating a peril for another person triggers a duty in some jurisdictions to render aid to the imperiled victim.²⁰⁷ Therefore, one who accidentally collides with

²⁰³ See, e.g., *United States v. Hatatley*, 130 F.3d 1399, 1403, 1406 (10th Cir. 1997) (finding that the defendant violated duty to rescue man the defendant had beaten and left for dead); LAFAYETTE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a)(5), at 415 ("The clearest case of [duty based upon creation of peril] is that in which the defendant is himself at fault in creating the danger. But there may perhaps be a duty to act even if the defendant innocently creates the situation of danger . . .").

²⁰⁴ See, e.g., *Jones v. State*, 43 N.E.2d 1017, 1018 (Ind. 1942) ("[O]ne who by his overpowering criminal act has put another in danger of drowning has a duty to preserve her life[.]").

²⁰⁵ See, e.g., *State ex rel. Kuntz v. Mont.* Thirteenth Jud. Dist. Ct., 995 P.2d 951, 956, 958-59 (Mont. 2000) (holding that a girlfriend fatally injuring a boyfriend in justified self-defense had a duty to provide medical aid to the boyfriend).

²⁰⁶ See *id.* at 959 (holding that failure to fulfill duty to render aid rendered defendant liable for boyfriend's death).

²⁰⁷ E.g., DRESSLER, *CRIMINAL LAW*, *supra* note 8, § 9.07(A)(2)(c)(i), at 104 (reasoning how even innocent acts that create peril can trigger a duty to rescue); KADISH ET AL., *supra* note 190, at 249 (discussing how an accidental creation of peril can still result in criminal liability for negligent homicide).

another causing them to fall into the ocean and drown may face omission liability for homicide for failing to render aid.²⁰⁸

To illustrate creation-of-a-peril omission liability conflicting with the constitutional rights to remain silent, consider the following example based on a state supreme court case.²⁰⁹ Unlawfully attacked by a housemate, the victim stabs the housemate in justified self-defense. Without immediate medical aid, the housemate will die from blood loss. Having placed the housemate in peril, the victim has a duty to prevent any further harm to the housemate. On the way to a neighbor (who is a doctor) to obtain medical aid for the housemate, the victim is stopped by the police who are responding to a 911 call from another neighbor who heard the dispute. Seeing the victim covered in blood and holding a bloody knife, the police arrest and Mirandize the victim. While in custody and being questioned by the police as to the location of the housemate, the victim cannot directly obtain medical aid for the housemate. The only way the victim can fulfill the duty to prevent further harm is by informing the police of the housemate's location so that they can supply medical aid. Not wanting to self-incriminate and relying on the right to remain silent, the victim intentionally fails to inform the police, thereby allowing the housemate to die. A police investigation establishing that the stabbing was justified self-defense precludes liability for the victim's affirmative act. Charged with murder by omission for failing to fulfill the duty to prevent harm after creating a peril, the victim asserts as a defense the constitutional rights to remain silent. Liability for murder by omission through creation of a peril is unconstitutional as applied by violating the victim's constitutional rights to remain silent.

D. *Voluntary Assumption of Care*

Although generally there is no duty to render assistance to an imperiled stranger, commencing or undertaking steps to save the stranger may trigger a legal duty to continue to provide aid.²¹⁰ If providing only some aid puts the victim in a worse position than if no aid at all was provided, then the failure to continue that aid may result

²⁰⁸ See KADISH ET AL., *supra* note 190, at 249 (explaining that accidentally pushing someone into the water triggers a duty to rescue that person).

²⁰⁹ See *Kuntz*, 995 P.2d at 959-60 (holding that a duty to render aid arises when a person justifiably wounds an aggressor).

²¹⁰ See LAFAVE, *CRIMINAL LAW*, *supra* note 13, § 6.2(a)(4), at 414 (“Although one might not, as an original matter, have a duty to act to rescue a stranger in peril, yet once he undertakes to help him he may have a duty to see the job through.”).

in omission liability.²¹¹ Therefore, the voluntary assumption of custody and care of an imperiled child may trigger the legal duty.²¹²

Illustrating both this duty and the constitutional rights to remain silent, suppose a considerably intoxicated college student leaves a party late at night and sees an injured stranger lying on the sidewalk passed out.²¹³ Before walking to the college health clinic to obtain medical aid for the stranger, the student moves the stranger from the sidewalk and props them up against a tree. Briefly regaining consciousness, the stranger grips the student's arm and implores, "Don't leave me." The student replies, "Don't worry, I am going to get help." While the tree provides a small measure of comfort, the stranger is now no longer readily visible from the street, and there is less likelihood of any other passerby rendering aid. On the way to the clinic, the student is stumbling and weaving along the street and is stopped by a police officer who observes their inebriated condition. The officer arrests the student for public intoxication, Mirandizes them, and takes them to jail.

The student has a criminal law duty and constitutional rights that conflict. By voluntarily assuming care of the stranger and secluded the stranger from where others might have supplied aid, the student has a duty to continue providing aid. In police custody, the only way that the student can aid the stranger and fulfill the duty is to inform the police of the stranger's location. But the student reasonably fears that if they inform the police, then either too much time has passed and the stranger is now dead or the stranger is still alive but will tell the police that the student abandoned them. Either way, the student reasonably fears facing omission liability for violating the duty under the voluntary assumption of care basis. Fearing self-incrimination and relying on the right to remain silent, the student intentionally fails to inform the police of the stranger's whereabouts. While police interrogate the student, the stranger dies. Charged with murder by omission, the student asserts as a defense the constitutional rights to remain silent. Because liability for murder by omission on the basis of voluntary assumption of care imposes a duty on the student to speak, it is unconstitutional as applied by violating the constitutional rights to remain silent.

²¹¹ See DRESSLER, CRIMINAL LAW, *supra* note 8, § 9.07(A)(2)(c)(ii), at 104-05 (discussing the duty to render aid exists when another is placed in worse circumstances).

²¹² See, e.g., *Cornell v. State*, 32 So. 2d 610, 610-12 (Fla. 1947) (holding a grandmother having custody over a child guilty of manslaughter for becoming sufficiently drunk to allow the child to be smothered to death).

²¹³ Thanks to Jami King for developing this example.

E. Statute/Court Order

Statutes provide the basis for a legal duty to act affirmatively.²¹⁴ Common examples include income earners paying taxes, drivers stopping at the scenes of accidents in which they are involved, and in several states, being a good samaritan.²¹⁵ Such drivers failing to fulfill their duty to render assistance to any victims injured in the accident that subsequently die from their injuries may face liability for homicide by omission through their violation of the hit-and-run statute.²¹⁶ In addition to statutes, court orders also provide a basis for a legal duty to act.²¹⁷ For example, a parent whose child dies after refusing to comply with a court order to turn over the child to the authorities can be liable for homicide.²¹⁸

Illustrating both this duty and the rights to remain silent, consider the following variation on a Supreme Court case.²¹⁹ A court conditions a parent's continuing child custody on the parent both passing drug tests and keeping the child away from drug users. Suspecting the parent's violation of the order and the child's death, the child protective services agency obtains a court order commanding the parent to produce the child in court. Fearing being declared unfit and losing custody of the child, the parent non-negligently places the child with a loving relative who lives in a remote location out of state. Though loving, the relative has very recently developed a serious drug addiction of which neither the parent nor anyone else in the family is (or reasonably should have been) aware. Just after a friend informs the parent of the relative's drug addiction, but before the parent can retrieve

²¹⁴ See DRESSLER, CRIMINAL LAW, *supra* note 8, § 9.07(B), at 105-06 (explaining how a statute can be the basis for a duty to act); LAFAVE, CRIMINAL LAW, *supra* note 13, § 6.2(a)(2), at 412-13 ("A statute . . . sometimes imposes a duty to act to help another in distress.").

²¹⁵ See, e.g., DRESSLER, CRIMINAL LAW, *supra* note 8, § 9.07(B), at 105-06 (discussing "Bad Samaritan" laws).

²¹⁶ See LAFAVE, CRIMINAL LAW, *supra* note 13, § 6.2(a)(2), at 412-13 ("Thus it is commonly provided that a driver involved in an automobile accident must stop and render whatever assistance is necessary to others who may be injured in the accident.").

²¹⁷ *Id.* at 413 ("No doubt a duty to act may be imposed by a non-criminal statute, by an ordinance, or by an administrative regulation or order.").

²¹⁸ See, e.g., *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 563 (1990) (Marshall, J., dissenting) (arguing that the mother possibly not only faced criminal abuse and neglect for her alleged mistreatment of her child and failure to produce her child at court, but also that the mother could be charged with homicide); see also *State v. Doyen*, 676 A.2d 345, 347 (Vt. 1996) (holding that the failure to turn over a child pursuant to a court order "can fairly be considered a criminal omission").

²¹⁹ This is a variation of the facts from *Bouknight*, 493 U.S. at 549.

the child from the relative's remote location, the police arrest, Mirandize, and jail the parent.

The parent has a criminal law duty to speak and constitutional rights to remain silent that conflict. The parent has a duty under the court order to act affirmatively so that the child is not in the company of drug users. While in jail the parent cannot retrieve the child as planned. The only way that the parent can fulfill the duty is by telling the police where they can retrieve the child. But the parent reasonably fears that by informing the police of the child's location, the police will discover the relative's drug addiction, the parent will be found to have violated the court order, and thus will lose custody of the child. Both fearing self-incrimination and relying on the right to remain silent, the parent intentionally declines to alert the police to the child's location. While the parent is in jail and being interrogated, the relative goes on another drug binge, leaving the child alone and helpless. The child dies from neglect. Charged with murder by omission based on the intentional failure to fulfill the duty imposed by the court order, the parent asserts as a defense the constitutional rights to remain silent. Liability for murder by omission because of the parent's failure to speak is unconstitutional as applied by violating the constitutional rights to remain silent.

F. Contract

A legal duty to act affirmatively may stem from a contract.²²⁰ The failure to fulfill the duty may lead to omission liability for any resulting harm. For example, a lifeguard has a legal duty to aid a drowning swimmer based on the lifeguard's employment contract.²²¹ Also based on an employment contract, a railroad gateman has a legal duty to lower the gate when a train crosses a road; they can be held liable for homicide if the train kills car passengers due to negligently failing to fulfill their duty.²²² Note that the victim need not be a party to the contract for omission liability to attach.²²³

²²⁰ LAFAVE, CRIMINAL LAW, *supra* note 13, § 6.2(a)(3), at 413 ("The duty to act to aid others may arise . . . out of contract.").

²²¹ *Id.* (explaining the duty to act based on a lifeguard contract).

²²² *See, e.g.*, *State v. Benton*, 187 A. 609, 610, 612-14, 617-18 (Del. 1936) (holding a railroad employee liable for failing to warn the public about an approaching train based on an employment contract); *State v. Harrison*, 152 A. 867, 868-69 (N.J. 1931) (holding that a railroad employee was liable based on an employment contract for failure to lower the gates for an approaching train).

²²³ LAFAVE, CRIMINAL LAW, *supra* note 13, § 6.2(a)(3), at 413-14 ("For a duty to act, by virtue of a contract, to exist, the victim need not be one of the contracting parties.");

To illustrate this basis for omission liability conflicting with the constitutional rights to remain silent, suppose a recent immigrant is babysitting a cousin's toddler child (who requires medication every three hours) while both parents are out of the country on a safari vacation. Falsely suspecting drug dealing, the police spot the babysitter on the street just steps outside the cousin's home, which the babysitter momentarily and non-negligently has left to pick up the newspaper. Unaware that the suspect is the sole caregiver for a toddler now alone and vulnerable inside the house, the police arrest, Mirandize, and jail the babysitter. Reasonably believing there may be illegal drugs in the cousin's home and fearing being falsely convicted of a drug offense and deported if the police enter the cousin's house to save the toddler, the babysitter relies on the right to remain silent and intentionally fails to inform the police or anyone else about the toddler. During the lengthy custodial interrogation, the toddler misses several required doses of medication and dies. Charged with murder by omission based on the intentional failure to fulfill the contractual duty to prevent harm to the toddler,²²⁴ the babysitter asserts as a defense the constitutional rights to remain silent. Liability for murder by omission because of the babysitter's failure to speak is unconstitutional as applied for violating the constitutional rights to remain silent.

III. SCOPE AND RESOLUTIONS OF THE CONFLICT

The previous Part demonstrated that the conflict between the constitutional rights to remain silent and criminal liability for murder that imposes a duty to speak occurs under all six bases for a legal duty to act giving rise omission liability. To resolve this conflict, appreciating its scope is helpful. This Part first explicates the necessary and sufficient conditions and circumstances for the conflict to arise. Next, it proposes possible resolutions and assesses how comprehensively they address the wide variety of conflicts that can result.

see, e.g., State v. O'Brien, 32 N.J.L. 169, 170-72 (N.J. 1867) (utilizing an omission-based theory stemming from an employment contract, the court found a train switchman liable for manslaughter for failing to switch tracks which led to the death of a victim who was not a party to the contract).

²²⁴ *See, e.g., People v. Wong*, 588 N.Y.S.2d 119, 124 (App. Div. 1992) (“[T]he contractual babysitting agreement involved in this case . . . created legal duties of care which were substantially coextensive with those which would be borne by a parent.”), *rev'd on other grounds*, 619 N.E.2d 377 (N.Y. 1993).

A. *Scope of Conflict*

Courts and commentators have addressed only a small part of this conflict. They have considered only two of the constitutional rights to remain silent as a complete defense to omission liability, only one basis for omission liability, and only with respect to comparatively minor criminal offenses, such as those involving reporting and registration.²²⁵ But as Parts I and II established, conflicts arise through three different rights to remain silent and six different bases of omission liability giving rise to a duty to speak. As a result, there are eighteen different bases for conflict. Additionally, these conflicts do not involve merely minor criminal offenses but serious offenses, including murder. Because of this wide diversity of possible conflicts, any comprehensive resolution must address all six bases for criminal omission liability, all three rights to remain silent, and include serious offenses such as murder.

In general, the conflict occurs when (1) criminal omission liability imposes a duty on an actor to prevent harm to another, (2) a physical constraint limits an actor's ability to fulfill that duty to only one way — speaking, and (3) the actor exercises a constitutional right to remain silent. Because the source of neither the physical constraint nor the right to remain silent need involve the police, police involvement is not necessary for the conflict to arise. But all the examples in Part II involve the police because police involvement both reduces the number of ways actors can fulfill their criminal law duty to one — speaking — and increases the constitutional rights to remain silent to three. Prior to being arrested and Mirandized, the actors could fulfill the criminal law duty in a variety of ways without speaking and lack three different rights to remain silent. Thus, police involvement is not a necessary condition for the conflict to occur, but it does increase the scope of the conflict.

Depending on the facts of the examples, the conflicts can be comparatively easier or more difficult to resolve. One such variable involves the nature of the conduct — whether involving culpable affirmative acts or a failure to act alone. Consider the example of the father negligently leaving their infant in the hot car. Prosecuting not on

²²⁵ As discussed in Sections I.B.5 and I.C, courts and commentators have addressed how the Fifth Amendment privilege against self-incrimination and the First Amendment right to refrain from speaking may provide a defense to omission liability. But they only address omission liability based on a statute. They fail to address the other five types of omission liability this Article does address. Furthermore, they focus on comparatively minor offenses involving reporting and registration. Only one scholar has previously addressed offenses outside of reporting and registration. See Stewart, *supra* note 31, at 410-15. But she neither addressed particularly serious offenses nor the *Miranda* and First Amendment bases for the right to remain silent. See *id.*

the basis of the omission but instead on the affirmative act of child neglect avoids the conflict. Prosecuting the affirmative act alone is not criminalizing the father's silence. In contrast, prosecuting the mother does not afford such an easy way to avoid the conflict. Because the mother does not commit any culpable affirmative acts endangering their infant prior to arrest, the prosecutor can charge based on the omission only. As a result, the conflict between the duty to speak and the right to remain silent arises and cannot be avoided by an alternative basis for prosecution.

Another variable is whether an actor enjoys all or only some of the three rights to remain silent. Consider the following variations on the imperiled infant example. Suppose the mother lacked a reasonable fear of self-incrimination, thereby precluding the Fifth Amendment right. If so, a resolution is easier because it need address only the *Miranda* and First Amendment rights. Suppose instead the mother is not subjected to a custodial interrogation (a condition for the *Miranda* right to apply²²⁶). If so, a resolution is also easier because it need address only the Fifth and First Amendment rights. Suppose instead of a lone infant in the car, there was a bomb set to detonate that threatened the public at large. The public nature of the threat arguably triggers the clear and present danger exception, thereby arguably precluding a First Amendment right to refrain from speaking.²²⁷ If so, a resolution is also easier because it need address only the *Miranda* and Fifth Amendment rights. A resolution is more difficult when, as in the original example, the mother enjoys all three rights. For that example, any resolution must create an exception to all three constitutional rights to remain silent.

As a result, the conflict will be the sharpest and a resolution most difficult when the actor's culpable conduct consists of only a failure to act and the actor enjoys all three rights to remain silent. The next Section presents possible resolutions of the conflict. Their success or failure will be assessed by their capacity to resolve the sharpest and most difficult form of the conflict.

B. Resolutions of Conflict

If we value innocent human lives over the rights to remain silent, there are five principal ways to attempt resolution of the conflict. The first four are unsuccessful; the fifth succeeds but incurs substantial costs. It necessitates making changes to as many as five entrenched areas

²²⁶ See *supra* note 48 and accompanying text.

²²⁷ See *supra* note 169 and accompanying text.

of constitutional law, including the iconic and celebrated language of the *Miranda* warning.

If instead we value the rights over lives, or the costs of valuing lives over the rights are too great, then we need do nothing. The rights to remain silent remain a complete defense to omission liability not only for minor offenses but also for serious offenses, including murder. Criminal law omission liability involving a duty to speak conflicting with the constitutional rights to remain silent is unconstitutional as applied. But this resolution comes with its own obvious cost: are we willing to allow innocents to die and their killers to get away with murder?

1. Lives Trump the Right

This Section presents the five principal ways to attempt to resolve the conflict if we decide that lives trump the rights. First, further extend the *Quarles* public safety exception so that it applies even if the police are unaware of a public danger. Second, implement use restrictions on, or use immunity for, any statements providing helpful information as to public perils. Third, extend the clear and present danger exception to the First Amendment so that it applies to both the negative right to refrain from speaking and perils to a single individual. Fourth, eliminate all three rights to remain silent when individuals are endangered. Fifth, both eliminate all three rights to remain silent in situations of danger and alter the language of the *Miranda* warning. However, none of these resolutions is entirely satisfactory. They are either ineffective or too costly.

a. Further Extend Quarles Public Safety Exception

The *Quarles* public safety exception and its extension by two federal circuit courts allow both pre- and post-Mirandized statements to be admissible at trial against the defendant if the police have a reasonable belief that there is a public safety situation.²²⁸ Neither resolves the conflicts in Part II, because, in part, the police are unaware of the public peril. For example, the police are unaware of the imperiled infant alone in the hot car. Therefore, one possible resolution would be to eliminate the *Quarles* requirement that the police need be aware of a public peril.

²²⁸ *New York v. Quarles*, 467 U.S. 649, 656 (1984) (“[W]e do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”); *supra* notes 58–59 and accompanying text.

This solution likely would enjoy scholarly support, as many have suggested that the *Quarles* exception to *Miranda* is either good policy²²⁹ or might be expanded given the right circumstances. Yale Kamisar, Susan Klein, and George Thomas have all suggested that the Fifth Amendment privilege against self-incrimination, protected by the *Miranda* warning, would allow the police to exercise physical coercion against a witness to locate a ticking time bomb in a school full of children.²³⁰ While our proposed solution does not involve physical coercion by the police, this scholarly endorsement of that seemingly extreme measure underscores the view that at least in some situations lives should trump the rights.²³¹

This proposed further extension of *Quarles*, however, is no solution. It applies only in those instances where the suspect speaks and discloses the public danger. It is no solution whatsoever to those instances, as in the above examples of conflict in Part II, where suspects fail to speak and remain silent. Thus, this proposed further extension shares the same deficiency as *Quarles* and its current extension: all three apply only if suspects speak. None applies if suspects remain silent and there are no statements to be admitted at trial to establish their guilt.

²²⁹ See, e.g., Bruce Ching, *Mirandizing Terrorism Suspects? The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 622-23 (2014) (maintaining that the doctrines of self-defense, defense of others, and the rescue doctrine warrant the admissibility of pre-Mirandized statements); William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 596 (1985) (arguing that pre-Mirandized statements as to a public peril should be admissible evidence against the defendant).

²³⁰ See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1062-63 (2001) (arguing that no constitutional right is absolute and that the Fifth Amendment may justify a limited amount of coercion to save innocent victims); George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1086 n.23 (2001) (noting that the Fifth Amendment does not prohibit coercion if the public safety rationale is compelling enough, and attributing the same idea to Yale Kamisar, the leading scholar of *Miranda*).

²³¹ See, e.g., Tasnim Motala, *Circumventing Miranda: The Public Safety Exception in the War on Terror*, 5 VA. J. CRIM. L. 100, 120-21 (2017) (discussing the October 21, 2010, FBI memorandum which authorized FBI agents to interrogate terrorist suspects without Mirandizing them in order to facilitate the suspect's speech and gather intelligence information).

b. Immunize Statements Compelled by Statutes Violating Fifth Amendment Privilege

As an alternative to finding statutes that conflict with the Fifth Amendment privilege against compelled self-incrimination unconstitutional as applied, the privilege can be equally honored by prospectively barring use of or immunizing any testimonial statements such statutes compel. By doing so, the statements can no longer be self-incriminating. Compelling testimonial statements that are no longer self-incriminating fails to violate the Fifth Amendment privilege against self-incrimination. In cases where the Supreme Court found statutes unconstitutional as applied for violating the Fifth Amendment privilege, the Court considered, but rejected, the remedy of a judicially created use restriction or immunity.²³² Some lower courts, however, have endorsed the remedy.²³³ And the Court has endorsed a statutorily-created use restriction.²³⁴ Though successful in avoiding conflicts based on the Fifth Amendment, this resolution does nothing to preclude the conflicts arising from either the *Miranda* or First Amendment right to remain silent. Neither is conditioned on satisfaction of the self-incrimination element.²³⁵ As a result, the proposed resolution fails.

²³² See *Leary v. United States*, 395 U.S. 6, 26-27 (1969) (declining “to avoid this constitutional difficulty by placing restrictions upon the use of information” compelled by the statute); *Haynes v. United States*, 390 U.S. 85, 99 (1968) (refusing the State’s suggestion “to avoid the constitutional difficulties . . . by imposing restrictions upon the use by state and federal authorities of information obtained” by compliance with the statute); *Grosso v. United States*, 390 U.S. 62, 69 (1968) (declining to impose the restrictions because “it would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper”); *Marchetti v. United States*, 390 U.S. 39, 58-60 (1968) (rejecting the United States’ request “to permit continued enforcement of the [statute], despite the demands of the constitutional privilege, by shielding the privilege’s claimants through the imposition of restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the [statute]”).

²³³ See, e.g., *McKune v. Lile*, 224 F.3d 1175, 1192 (10th Cir. 2000) (approving “use immunity”), *rev’d on other grounds*, 536 U.S. 24 (2002); *California v. Byers*, 458 P.2d 465, 561 (Cal. 1969) (endorsing a “use restriction”), *rev’d on other grounds*, 402 U.S. 424 (1971).

²³⁴ See *United States v. Freed*, 401 U.S. 601, 606 (1971) (“[The Fifth Amendment privilege] claimant is not confronted by . . . hazards of incrimination . . . by reason of the statutory barrier against use [of claimant’s statements] in a prosecution [against the claimant].”).

²³⁵ See *supra* notes 3, 48 and accompanying text.

c. *Extend Clear and Present Danger Exception*

The clear and present danger exception to the First Amendment²³⁶ could be made applicable to the Part II examples if the exception was extended in two ways. First, extend its present application beyond the positive right to free speech so that it also includes the negative right to refrain from speaking. Second, extend its present application beyond perils to the general public so that it also includes a single endangered individual. Extending the exception in these two ways would make it applicable to the examples in Part II. With the extended exception precluding the actors in Part II from enjoying a First Amendment right to refrain from speaking, the First Amendment right not to speak no longer conflicts with omission liability imposing a duty to speak. Though successful in avoiding conflicts based on the First Amendment, this resolution does nothing to preclude the conflicts arising from either the *Miranda* or Fifth Amendment right to remain silent. The proposed resolution is thus no solution.

d. *Eliminate the Rights to Remain Silent in Public Safety Situations*

The drawbacks of the previous proposed resolutions suggest this next one: eliminate all three rights to remain silent in a public safety context. By eliminating the rights, actors would no longer rely on their rights to remain silent and would be more likely to disclose public dangers to the police. The infant and other innocent lives imperiled in the above examples would more likely be saved. The mother and the others in Part II would seemingly not be able to get away with murder.

Despite implementation of the proposed resolution, however, they might still be able to get away with murder. Eliminating the rights to remain silent but retaining the *Miranda* warning is problematic. Informing suspects via a *Miranda* warning that they have the right to remain silent and then prosecuting them for their very silence constitutes entrapment. Generally, an entrapment defense requires that (1) a government agent induced the defendant to commit the crime;²³⁷ (2) the defendant, or a reasonable person, would not have committed

²³⁶ See *supra* notes 171–172 and accompanying text.

²³⁷ See, e.g., *United States v. Isnadin*, 742 F.3d 1278, 1297 (11th Cir. 2014) (“The entrapment defense involves . . . [g]overnment inducement of the crime.”); *United States v. Fedroff*, 874 F.2d 178, 181 (3d Cir. 1989) (holding that “inducement” is a necessary element of the entrapment defense).

the crime absent the inducement;²³⁸ (3) the government agent made the inducement in order to obtain evidence against the defendant;²³⁹ and (4) the defendant had no predisposition to commit the crime.²⁴⁰

Under the proposed resolution, the mother and other actors in the above examples in Part II would clearly satisfy the requirements for an entrapment defense. First, the police induced them to fail to fulfill their duty to prevent harm to their victims — the *Miranda* warning informed them they could permissibly remain silent, and they did just that. Second, they explicitly relied on their rights to remain silent and thus would not have committed the omission crime absent the inducement. Third, the police made the inducement so that anything the arrestees said could be used as evidence against them at trial. Fourth, none had a predisposition to commit the omission crime — any intent to allow harm to another came after the *Miranda* warning and not before.

While the proposed resolution succeeds in foreclosing a right to remain silent defense, it ultimately fails to induce disclosures of public dangers. It forecloses one defense but creates another — the entrapment defense. And the entrapment defense would equally allow the Part II actors to get away with murder.

e. Both Eliminate the Rights to Remain Silent and Alter the Miranda Warning

To avoid triggering the problem of the previous resolution — an entrapment defense — yet another resolution would be both to eliminate all three rights to remain silent in a public safety situation and to alter the *Miranda* language. Altering the language of the *Miranda* warning would preclude triggering an entrapment defense. The resolution would successfully foreclose the rights to remain silent from being a defense as well as trigger no new defense.

Though successful in ensuring that lives prevail over rights, the resolution creates several significant problems. First, changing the

²³⁸ See, e.g., *Sorrells v. United States*, 287 U.S. 435, 458-59 (1932) (ruling that the entrapment defense is available only if the defendant committed the crime “because of instigation and inducement by a government officer”).

²³⁹ See DRESSLER ET AL., *CRIMINAL PROCEDURE*, *supra* note 79, § 27.01, at 517 (“[T]he defendant . . . would not have committed the offense but for the inducement.”).

²⁴⁰ See, e.g., *Jacobson v. United States*, 503 U.S. 540, 550-51 (1992) (reversing defendant’s conviction because the defendant was not predisposed to commit the crime charged); *United States v. Russell*, 411 U.S. 423, 433 (1973) (affirming the longstanding rule that lack of predisposition is an element of the defense of entrapment) (citations omitted); Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 55-56 (1987) (observing lower court holdings that lack of predisposition is an element of the entrapment defense).

language of the *Miranda* warning carries substantial costs. The *Miranda* warning has perhaps become the most famous words the Supreme Court has ever uttered in its 200-plus-year history. Thanks to media depictions of the warning, people around the world know of the American right of an arrestee to remain silent.²⁴¹ The Court itself has stressed the importance of preserving the language.²⁴² The power and value of the language stem from its simplicity and clarity.²⁴³ What would become of this simplicity and clarity under the proposed resolution if the warning became: “You have the right to remain silent. *Maybe*.” Or, “You have the right to remain silent *unless . . .*” followed by a long string of various circumstances and conditions.

Second, eliminating the rights to remain silent when there is a public peril would create confusion. Citizens would need to know whether or not a peril exists in order to know whether or not they have a right to remain silent. Because this is a legal determination, citizens would have to know the vagaries of ever-fluctuating case law to determine whether or not they have a right to remain silent. As Joshua Dressler characterizes it, “The Court has not clarified the boundaries of the public-safety exception, leaving it to lower courts to reach conflicting fact-sensitive outcomes.”²⁴⁴ If courts struggle to agree on whether a given situation is or is not a sufficient public safety issue to trigger the *Quarles* exception, how could we expect ordinary citizens to know? Though this would not be a problem for the actors in the above examples — they clearly know an infant or other victim is imperiled — it would be for almost everyone else being arrested. In considering a similar proposal to create an exception to *Miranda*, the Court summarily rejected it: “[T]he doctrinal complexities that would confront the courts if we accepted petitioner’s proposal (an exception for misdemeanor

²⁴¹ Cf. *Brogan v. United States*, 522 U.S. 398, 405 (1998) (noting that in “the modern age of frequently dramatized ‘Miranda’ warnings,” lack of awareness of the right is “implausible”).

²⁴² See, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 609 (1990) (Marshall, J., concurring in part and dissenting in part) (highlighting “*Miranda*’s fundamental principle that the doctrine should be clear so that it can be easily applied by both police and courts”); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (“*Miranda*’s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation [of a suspect].”); *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (noting one purpose of clear rules surrounding *Miranda* warnings is “to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”).

²⁴³ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (referring to *Miranda*’s clarity as its “crucial advantage”).

²⁴⁴ DRESSLER ET AL., CRIMINAL PROCEDURE, *supra* note 79, § 24.11(A), at 467.

traffic offenses) would be Byzantine.”²⁴⁵ Doing so would “seriously . . . impair the simplicity and clarity of the holding of *Miranda*.”²⁴⁶

Third, the proposed resolution would require as many as five separate changes to entrenched areas of constitutional law: (i) eliminating the *Miranda* right to remain silent in a public safety situation, (ii) eliminating the Fifth Amendment basis for that right, (iii) eliminating the First Amendment basis for that right, (iv) altering the iconic language of the *Miranda* warning, and (v) eliminating the State’s inability to use defendants’ pretrial silence against them at trial. A resolution requiring as many as five changes to five different entrenched areas of constitutional law is a tall order.

2. The Rights Trump Lives: Do Nothing

The practical difficulty of making as many as five changes to constitutional law, including altering the revered *Miranda* language, suggests the final resolution: doing nothing. Both the rights to remain silent and the language of the *Miranda* warning remain as is, thereby allowing the rights to be a complete defense to omission liability. When omission liability requires the defendant to speak and constitutional law affords the right to remain silent, omission liability — even for serious offenses including murder — is unconstitutional as applied. The resolution fulfills the view that the Fifth Amendment privilege against self-incrimination “cannot be abridged.”²⁴⁷

Of course, the problem with this resolution is that it values the rights over innocent human lives. Are we truly willing to sacrifice innocent lives for the rights? Are we truly willing to let actors like the mother in the imperiled infant example to get away with murder — to commit murder by *Miranda* and by other rights to remain silent?

CONCLUSION

There is no clearly right way to resolve the conflict between serious criminal liability imposed for failing to speak and constitutional law

²⁴⁵ *Berkemer*, 468 U.S. at 431.

²⁴⁶ *Id.* at 432.

²⁴⁷ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). For other statements as to the absolute nature of the right to remain silent, see *id.* at 467 (maintaining that the right must be “fully honored”); *id.* at 476 (“[The right] protects the individual from being compelled to incriminate himself *in any manner*” (emphasis added)); *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (“A defendant may not be compelled to be a witness against himself *in any respect*.” (emphasis added)); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (characterizing the right as “unfettered”).

affording us rights to remain silent. When criminal offenses are minor, unlike the mother's killing of the imperiled infant, the Supreme Court's position that criminal omission liability infringing on the right is unconstitutional as applied seems clearly correct. But when the stakes are innocent human lives, like the imperiled infant, and exercise of the rights allow defendants, like the mother, to literally get away with murder, the constitutional rights trumping the criminal law's protection of innocent human life is less clear. Arguably, the value of the infant's life should exceed the rights. But even so, there is no cost-free way to implement such a resolution. Doing so may require making as many as five different changes to five different well-established areas of constitutional law. And one of those changes is to perhaps the most famous words the Supreme Court has ever uttered. It is difficult to countenance the police issuing a *Miranda* warning burdened with ambiguity and complexity: "You have the right to remain silent, *maybe*." Or, "You have the right to remain silent *unless . . .*" followed by a long list of conditions and circumstances. Even if the value of lives ordinarily exceeds the value of rights, is this cost of valuing lives over these rights too great?