

**SILENCE ISN'T SUSPICIOUS: WHY THE POST-ARREST  
PRE-MIRANDA CIRCUIT SPLIT IS UNFAIRLY  
PREJUDICIAL TO SUSPECTS WITH AUTISM SPECTRUM  
DISORDER**

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ABSTRACT

*In 1966, the Supreme Court issued its famous opinion in Miranda v. Arizona. The decision was considered a triumph for criminal suspects at the time. However, the aftermath of Miranda shows a lack of victory for criminal suspects, particularly when it comes to an absence of uniformity amongst circuit courts regarding whether post-arrest, pre-Miranda silence can be used as substantive evidence of guilt in a prosecutor's case-in-chief. The Supreme Court has denied the circuit courts an answer. In the midst of this confusion, although all criminal suspects may be prejudiced, those with Autism Spectrum Disorder (ASD) are at greater risk. Suspects with ASD may exhibit behaviors and responses, including silence, that are indicative of their disability, not of their guilt.*

*This Note examines the post-arrest, pre-Miranda circuit split as it relates to suspects with ASD. Ultimately, this Note argues that, for uniformity across the circuit courts, the Supreme Court must grant certiorari on a case with this issue, and affirmatively hold that silence cannot be used as substantive evidence of guilt in a prosecutor's case-in-chief. This Note also argues that law enforcement agencies must incorporate training programs specifically tailored to ASD. This*

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*way, suspects with ASD are more likely to be protected, not punished, when they come face to face with the criminal legal system.*

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## INTRODUCTION

Picture this: an eighteen-year-old with Autism Spectrum Disorder (ASD) opens the front door of his residence and finds multiple law enforcement officers standing in front of him.<sup>1</sup> The officers explain that they received a tip from the teen's friend claiming there may be pipe bombs in the teen's shed.<sup>2</sup> The teen, his mother, and the officers go to the shed, open the door, and check the stove.<sup>3</sup> There are bottles lying on their sides in the stove.<sup>4</sup> The teen's mother explains, "my son is autistic and he does not think of things, you know, like normal people would, to him he just put something in so it wouldn't leak out, he didn't think, you know, this is something that's going to look like a fuse."<sup>5</sup> The teen declines to explain why he made the bottles.<sup>6</sup> He asks if he is under arrest.<sup>7</sup> The officers say no and inform the teen that the Fire Chief is going to come to the residence.<sup>8</sup> The teen comments, "I haven't said that much, I've seen *Law and Order* so much."<sup>9</sup> Not long after the teen makes this statement, he is charged with possession of a destructive device.<sup>10</sup> In court, his counsel moves to suppress the physical evidence, specifically the bottles retrieved by the officers.<sup>11</sup> The trial court considers the fact that the teen has seen *Law and Order* and determines he waived his *Miranda* rights when he continued speaking to the officers.<sup>12</sup> The district court further holds the teen has not presented any evidence that suffering from ASD

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1. See *United States v. Gwathney-Law*, No. 1:15CR-00030 (GNS), 2016 WL 8606277, at \*1-3 (W.D. Ky. Dec. 1, 2016).

2. *Id.* at \*2.

3. See *id.* at \*3.

4. *Id.*

5. *Id.* (internal quotation marks omitted).

6. *Id.* at \*4.

7. *Id.* at \*5.

8. *Id.* at \*4-5.

9. *Id.* at \*4.

10. See *id.*

11. See *id.* at \*1.

12. *Id.* at \*11.

prevented him from understanding his *Miranda* rights.<sup>13</sup> The district court concludes that a custodial interrogation took place, and the teen subsequently waived his rights.<sup>14</sup> The motion to suppress the physical evidence is denied.<sup>15</sup>

This fact pattern is drawn from a district court case, and it is an example of how suspects with ASD may encounter the criminal legal system.<sup>16</sup> The suspect's knowledge of the television show *Law and Order* was used in the analysis of whether he knowingly, voluntarily, and intelligently waived his *Miranda* rights.<sup>17</sup> The teen was visibly anxious.<sup>18</sup> His mother informed the officers that he had ASD, so the officers were explicitly aware that the teen had a disability.<sup>19</sup> Yet, the evidentiary hearing was overwhelmingly favorable to the government.<sup>20</sup> Certainly, the charge against the teen was serious, and the officers had every reason to investigate to ensure public safety. Notwithstanding this fact, the line of questioning and the tactic of interrogation in the teen's home led the teen to feel a false sense of security.<sup>21</sup> Moreover, the officers initially told the teen he was not under arrest,<sup>22</sup> which arguably increased the teen's false sense of security and diminished the level of seriousness in the teen's mind. Shortly after the officers told the teen he was not under arrest, he was

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13. *Id.* ("Gwathney-Law has not presented any evidence to substantiate his bare assertion that being only [eighteen] years old and [having] autism . . . prevented him from understanding the *Miranda* warnings.").

14. *Id.* at \*12.

15. *Id.*

16. *See generally id.*

17. *See id.* at \*7-8 ("Specifically, the United States points out that Gwathney-Law told Officer Varyvoda that he had heard the rights before on *Law and Order* (a television show) and understood them.").

18. *See id.* at \*5 ("Officer Varyvoda's testimony and video footage indicates, after stepping out of the shed, he attempted to calm a visibly anxious Gwathney-Law and advise him about his *Miranda* rights . . . Officer Varyvoda then attempted to engage Gwathney-Law in small talk to calm a visibly anxious Gwathney-Law. However, Gwathney-Law blurted out 'oh God I'm so nervous right now.'").

19. *See id.* at \*3.

20. *See id.* at \*11-12.

21. *Id.* at \*4-5, \*12.

22. *Id.* at \*5.

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arrested.<sup>23</sup> The series of events, according to the record, created confusion for the teen, and his silence was ultimately used against him. This district court case highlights the procedural issues this Note seeks to address.<sup>24</sup>

This Note will analyze the intersection of disability rights and policing, specifically the ways in which ASD may impact suspects' ability to understand *Miranda* rights by focusing on the post-arrest, pre-*Miranda* timeframe. Currently, there is a circuit split on whether silence, specifically during this timeframe, may be used as substantive evidence of guilt. In *Gwathney-Law*, the case highlighted above, the teen was under custodial interrogation after he waived his *Miranda* rights.<sup>25</sup> He declined to explain why he made the bottles and maintained that he did not know why the bottles were in the stove.<sup>26</sup> His silence as a response to the officers' questions could be used against him in a prosecutor's case-in-chief at trial if the case was in a jurisdiction that admitted such silence.<sup>27</sup> Conversely, if the teen's case was in a jurisdiction that does not permit silence in a prosecutor's case-in-chief, the prosecutor would be limited to using silence for impeachment purposes only.<sup>28</sup> This hardly seems fair. The circuit split creates confusion, promotes inconsistency, and is unfairly prejudicial to criminal suspects with disabilities like ASD.

Part I of this Note will sketch the historical development of *Miranda* and the enduring post-arrest, pre-*Miranda* circuit split regarding whether silence can be used as substantive evidence of guilt. Part II will explore the intersection of disability, specifically ASD, and the criminal legal system. Part III proposes two remedies. First, the Supreme Court must grant

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23. See *id.* at \*4–5.

24. See generally *id.*

25. See *id.* at \*4–5, \*11.

26. See *id.* at \*4.

27. See Emily Locke, Comment, *The Incriminating Sound of Silence: A Need for Protection of Post-Arrest, Pre-Miranda Silence*, 100 NEB. L. REV. 524, 533 (2021) (discussing the allowance of post-arrest, pre-*Miranda* silence as evidence of guilt).

28. See *id.* at 530–31.

certiorari to resolve the split. Second, law enforcement agencies must incorporate training specifically tailored to promote effective policing with suspects with ASD. This Note concludes by explaining the importance of resolving the circuit split and enforcing stronger law enforcement agency training programs so suspects with ASD avoid unfair prejudice from the time of an arrest to being Mirandized.

### I. *MIRANDA* AND THE IMPLICATIONS OF THE ENDURING POST-ARREST, PRE-*MIRANDA* CIRCUIT SPLIT

The Fifth Amendment commands that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>29</sup> Although the inference is clear that there is a protection against self-incrimination, safeguards to protect such a right are non-existent in the Fifth Amendment.<sup>30</sup> *Miranda v. Arizona* emerged as a judicial remedy to this issue.<sup>31</sup> In *Miranda*, the Supreme Court held that detained criminal suspects, prior to law enforcement questioning, must be informed of their constitutional right to counsel and right against self-incrimination.<sup>32</sup> The Court reasoned the right against self-incrimination applies to situations other than court proceedings.<sup>33</sup> Moreover, the right “serves to protect persons in all settings in which their freedom of action is curtailed . . . from being compelled to incriminate themselves.”<sup>34</sup> The Court further held that in-custody interrogation is inherently coercive and compels suspects to speak; therefore, it is imperative that suspects are warned that they have the right to remain silent.<sup>35</sup>

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29. U.S. CONST. amend. V.

30. *See id.*

31. *See Miranda v. Arizona*, 384 U.S. 436, 469 (1966); *see also* Frank R. Herrmann & Brownlow M. Speer, *Standing Mute at Arrest as Evidence of Guilt: The “Right to Silence” Under Attack*, 35 AM. J. CRIM. L. 1, 16–17 (2008) (discussing the landmark *Miranda* case and its procedural safeguard implications).

32. *See Miranda*, 384 U.S. at 478–79.

33. *Id.* at 467.

34. *Id.*

35. *Id.* at 448–52, 479.

As a result, *Miranda* imposed procedural safeguards to protect the rights already afforded to suspects under the Fifth Amendment.<sup>36</sup> The Fifth Amendment continues to cause confusion because lower courts have been unable to deduce what the self-incrimination privilege is for and have failed to define its scope in a sensible way.<sup>37</sup>

*Miranda* is important because it attempts to serve as a reminder to law enforcement officers about the rights afforded to criminal suspects under the Fifth Amendment.<sup>38</sup> The majority opinion, written by Chief Justice Earl Warren, maintained that a suspect's right against self-incrimination has long been part of American law and principles.<sup>39</sup> It equalizes the vulnerability inherent in being detained, because if unchecked, there is a risk of government abuse during questioning.<sup>40</sup> When law enforcement officers question suspects in custody, without first *Mirandizing* them, there is a rebuttable presumption that any statements made by the suspects are involuntarily made.<sup>41</sup>

There is a longstanding history of compelled and coerced statements by suspects due to law enforcement tactics.<sup>42</sup> During the 1960s, citizens were especially dissatisfied with social and political conditions, and people were witness to much civil

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36. See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 883 (1995) (explaining *Miranda* is "rooted in" the Fifth Amendment's Self-Incrimination Clause); see also Locke, *supra* note 27, at 539–40 (noting that *Miranda* is a reminder, not a replacement, of the Fifth Amendment's Self-Incrimination Clause).

37. See generally Amar & Lettow, *supra* note 36.

38. See Locke, *supra* note 27, at 539 (explaining that the Fifth Amendment is the root of the Self-Incrimination Clause).

39. See *Miranda*, 384 U.S. at 439, 457–58.

40. See *id.* at 457–58.

41. See *id.* at 492 ("The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights.").

In dealing with custodial interrogation, [the Court] will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. *Id.* at 498.

42. See *id.* at 448–50, 453.

unrest.<sup>43</sup> As the Civil Rights Movement gained momentum, there were many protestors demonstrating against injustices.<sup>44</sup> The tension often led to incidents involving law enforcement officers.<sup>45</sup> Chief Justice Warren's majority opinion explicitly highlighted the high incidence of law enforcement violence and addressed the tactics designed to compel confessions from suspects.<sup>46</sup> To protect suspects' rights in the face of coercive techniques, the Court created procedural safeguards,<sup>47</sup> known colloquially as "*Miranda* Rights."<sup>48</sup>

The aftermath of *Miranda* was perhaps unexpected and unanticipated by the Warren Court.<sup>49</sup> President Nixon's nomination of Warren Burger ended the criminal justice reform period that made the Chief Justice both well-known and polarizing.<sup>50</sup> Chief Justice Burger was opposed to expanding the rights of suspects.<sup>51</sup> In 1971, in *Harris v. New York*, the Court held that a criminal defendant's confession taken without *Miranda* warnings could be used at trial to impeach the defendant.<sup>52</sup> As

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43. *Police: History*, JRANK, <https://law.jrank.org/pages/1644/Police-History-police-citizen-crisis-1960s.html> (last visited Apr. 6, 2023).

44. *Id.*

45. *See generally id.*

46. *See Miranda*, 384 U.S. at 439, 445–58.

47. *See id.* at 467–69.

48. *See What Are Your Miranda Rights?*, MIRANDAWARNING.ORG, <http://www.mirandawarning.org/whatareyourmirandarights.html> (last visited Apr. 6, 2023) ("You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?").

49. *See* ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* 274 (2020) (remarking that although *Miranda* was "one of more than six hundred criminal law decisions in the Warren era," a succeeding "Burger Court wasted no time in unraveling Warren-era criminal justice decisions").

50. *See id.*; David Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 406–07 (1982).

51. *See* Charles M. Lamb, *Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969*, 60 CORNELL L. REV. 743, 787 (1975) ("[Burger] responded critically when he perceived criminal suspects receiving broader protection of rights than the average citizen, and he found fault in legal technicalities which impede the workings of criminal justice.").

52. *Id.*; *see also Harris v. New York*, 401 U.S. 222, 222, 225–26 (1971).



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a result, self-incriminating statements taken without procedural safeguards found their way back into the courtroom.<sup>53</sup>

Additional scaling back occurred after *Harris*.<sup>54</sup> In 1977, in *Oregon v. Mathiason*, the Burger Court held *Miranda* does not apply when law enforcement officers call suspects in for questioning but do not arrest them or physically prevent them from leaving.<sup>55</sup> In 1984, in *New York v. Quarles*, the Burger Court created an exception to *Miranda* known as the public safety exception.<sup>56</sup> There, the Court held that law enforcement officers are permitted to question suspects without reading suspects their *Miranda* Rights when public safety concerns outweigh suspects' constitutional rights.<sup>57</sup> Law enforcement officers have taken advantage of this exception frequently.<sup>58</sup> As the years continued, the impact of *Miranda* declined.<sup>59</sup> Although *Miranda* narrowed the government's ability to question suspects without limitation, the procedural safeguards of *Miranda* drove law enforcement officers to develop new strategies.<sup>60</sup> To circumvent *Miranda*, law enforcement questioning in station rooms, squad cars, wiretaps, and other intrusions became popular.<sup>61</sup> However, even with an expansion of law

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53. See Sonenshein, *supra* note 50, at 417–19.

54. See COHEN, *supra* note 49, at 275; see also *Harris*, 401 U.S. at 225–26.

55. See *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977).

56. See *New York v. Quarles*, 467 U.S. 649, 656 (1984).

57. See *id.* at 656–57.

58. See, e.g., Tasnim Motala, *Circumventing Miranda: The Public Safety Exception in the War on Terror*, 5 VA. J. CRIM. L. 100, 118 (2017) (“In *Quarles*, the Court allowed a perceived threat to take precedence over criminal defendants’ constitutional rights. This departure from *Miranda* set a dangerous precedent, the consequences of which we see today in the evisceration of *Miranda* rights for terror suspects.”); Matthew Specht, *Quarrelling About Public Safety: How a Reverse Miranda Warning Would Protect the Public and the Constitution*, 45 STETSON L. REV. 177, 185–86 (2016) (“While lower courts infrequently encounter government attempts to invoke the [public safety] exception, it has been expanded over time.”).

59. See Motala, *supra* note 58, at 115 (“The recent jurisprudence favors police enforcement—a departure from *Miranda*’s goal of protecting suspects from custodial interrogation unless they voluntarily and knowingly waive their constitutional rights.”).

60. See Amar & Lettow, *supra* note 36, at 860, 873 (discussing “underground” interrogation techniques).

61. See *id.* at 860 (listing “less-than-civilized” interrogation methods).

enforcement tactics, *Miranda* remains good law.<sup>62</sup> Law enforcement and the courts must give *Miranda* the full effect the Warren Court intended it to have.<sup>63</sup>

#### A. An Overview of the Circuit Split

In addition to the scaling back of *Miranda*, a circuit split emerged regarding post-arrest, pre-*Miranda* silence and whether that silence can be used as substantive evidence of guilt in a prosecutor's case-in-chief.<sup>64</sup> Notably, pre-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt, regardless of jurisdiction.<sup>65</sup> In 2013, in *Salinas v. Texas*, the plurality decision held that a suspect's refusal to answer a law enforcement officer's questions during a non-custodial, pre-*Miranda* interrogation is admissible as substantive evidence of guilt in a prosecutor's case-in-chief.<sup>66</sup> This decision created new rules about the admissibility of silence.<sup>67</sup> *Salinas* highlighted that "the privilege against self-incrimination was not self-executing."<sup>68</sup> To claim the privilege, suspects must "invoke it."<sup>69</sup> *Salinas* is significant to the framework regarding the admissibility of silence.<sup>70</sup> Ultimately, the Court held

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62. See generally Tierney Sneed & Ariane de Vogue, *Supreme Court Limits Ability to Enforce Miranda Rights*, CNN, <https://www.cnn.com/2022/06/23/politics/supreme-court-miranda-rights/> (June 23, 2022, 1:32 PM) (discussing the Court's recent holding in *Vega v. Tekoh*, whereby CNN Supreme Court analyst, Steve Vladeck, said "[t]oday's ruling doesn't get rid of the *Miranda* right."). The author of this Note would like to point out that the recent *Vega v. Tekoh* decision held that individuals cannot sue a police officer under federal civil rights laws for violating their right against self-incrimination by failing to Mirandize them. See *Vega v. Tekoh*, 142 S. Ct. 2095, 2099 (2022). This issue, while related to *Miranda* warnings discussed in this Note, is not dispositive to this Note's analysis and proposals.

63. See generally *Miranda v. Arizona*, 384 U.S. 436, 467–70 (1966).

64. See Locke, *supra* note 27, at 525–26.

65. See *Salinas v. Texas*, 570 U.S. 178, 181–83 (2013).

66. See *id.*

67. See Andrew M. Hapner, *You Have the Right to Remain Silent, but Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas*, 66 FLA. L. REV. 1763, 1765–66 (2014) (discussing the aftermath of the *Salinas* decision).

68. See *id.* at 1765; see also *Salinas*, 570 U.S. at 181.

69. See *Salinas*, 570 U.S. at 181 (holding that "a witness who desires . . . protection 'must claim it'"); see also Hapner, *supra* note 67, at 1765.

70. Hapner, *supra* note 67, at 1763.

pre-custody pre-*Miranda* silence is admissible unless suspects previously invoked their right to remain silent.<sup>71</sup>

The Court has not addressed post-arrest, pre-*Miranda* silence.<sup>72</sup> The circuit split is centered on whether administering *Miranda* warnings triggers the right to remain silent.<sup>73</sup> The Fourth, Fifth, Eighth, and Eleventh Circuits hold that post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt.<sup>74</sup> These circuit courts found *Miranda* warnings to be dispositive.<sup>75</sup> They relied on cases such as *Doyle v. Ohio*<sup>76</sup> and *Jenkins v. Anderson*,<sup>77</sup> reasoning that because suspects did not receive any warnings, there cannot be any Fifth Amendment violations.<sup>78</sup> The jury can infer guilt from post-arrest silence, and for these circuit courts, custody itself was not seen as dispositive.<sup>79</sup>

Conversely, the Seventh, District of Columbia, and Ninth Circuits hold post-arrest, pre-*Miranda* silence is not admissible

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71. See *Salinas*, 570 U.S. at 181, 188.

72. See *Hapner*, *supra* note 67, at 1772.

73. See *id.*

74. See, e.g., *United States v. Love*, 767 F.2d 1052, 1054 (4th Cir. 1985) (holding the agent's testimony that the defendants made no effort to explain their presence on the night of their arrest when neither defendant had been given any *Miranda* warnings at the time the agent observed their silence did not warrant a mistrial); *United States v. Wright*, 777 F.3d 769, 772, 777–79, 782 (5th Cir. 2015) (holding the officers' failure to provide *Miranda* warnings did not require suppression of a defendant's incriminating statements); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (holding testimony about defendant's silence after arrest, but before *Miranda* warnings, did not violate the right against self-incrimination); *United States v. Suarez*, 162 F. App'x 897, 902–03 (11th Cir. 2006) (holding the agent's testimony that defendant lowered his head during arrest and prior to receiving *Miranda* warnings was not an improper comment about defendant's silence).

75. See, e.g., *Wright*, 777 F.3d at 772, 777–79, 782; *Osuna-Zepeda*, 416 F.3d at 844; *Suarez*, 162 F. App'x at 902–03; see also *Hapner*, *supra* note 67, at 1772–73.

76. See *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (holding *Miranda* warnings are intended to protect the Fifth Amendment rights of the accused by informing the accused of his right to remain silent).

77. See *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (holding the use of defendant's pre-arrest silence for impeachment purposes does not present "fundamental unfairness").

78. See *Hapner*, *supra* note 67, at 1768.

79. *Id.* at 1773.

as substantive evidence of guilt at trial.<sup>80</sup> These circuit courts viewed the right to remain silent as a constitutional right, and held that *Miranda* merely supplements that constitutional right.<sup>81</sup> For most of these circuit courts, custody is dispositive because custody triggers Fifth Amendment protection.<sup>82</sup> Therefore, in these jurisdictions, the protection against self-incrimination is triggered by custodial arrest, not by the formal *Miranda* warnings.<sup>83</sup>

Although the Court did not take a stance regarding post-arrest, pre-*Miranda* silence in *Salinas*, it implied it is problematic to use *Miranda* warnings as the sole dispositive factor to determine the admissibility of substantive evidence of guilt.<sup>84</sup> When suspects are unwarned of their rights, they are not required to invoke the privilege against self-incrimination.<sup>85</sup> *Salinas* reiterated this stance that the Fifth Amendment protects suspects in such a circumstance.<sup>86</sup> Fifth Amendment issues are raised when silence is used against suspects to suggest consciousness of guilt.<sup>87</sup> Inevitably, if silence is used as substantive evidence of guilt at trial, suspects will have no choice but to testify at trial.<sup>88</sup> Once they testify, they

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80. See, e.g., *United States v. Hernandez*, 948 F.2d 316, 322–24 (7th Cir. 1991) (holding the prosecution’s use of a defendant’s refusal to speak post-arrest, pre-*Miranda* violated his privilege against self-incrimination); *United States v. Moore*, 104 F.3d 377, 386–87 (D.C. Cir. 1997) (holding the prosecution’s use of a defendant’s post-arrest, pre-*Miranda* silence as substantive evidence of guilt violated the privilege against self-incrimination); *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000) (holding the district court erred when it admitted evidence of the defendant’s post-arrest, pre-*Miranda* silence).

81. See *Hapner*, *supra* note 67, at 1773–74.

82. *Id.*

83. *Id.*

84. See *Salinas v. Texas*, 570 U.S. 178, 188–90, 188 n.3 (2013) (holding that the prosecution’s reference to defendant’s post-arrest, pre-*Miranda* silence did not violate due process, but the Court declined to answer whether a prosecutor’s use of a defendant’s post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination).

85. See *Hapner*, *supra* note 67, at 1773–74.

86. See *Salinas*, 570 U.S. at 184.

87. See Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 261–62 (2016) (citing *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010)) (discussing the issues that arise under the Fifth Amendment).

88. See, e.g., *Doyle v. Ohio*, 426 U.S. 610, 615–20 (1976).

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immediately become subject to impeachment, which opens the door for the prosecution and abruptly closes the door on the right against self-incrimination.<sup>89</sup>

B. *The Intersection of Miranda Rights and Law Enforcement Procedures*

*Miranda* has unintentionally created a stage in arrest proceedings during which law enforcement officers may violate suspects' Fifth Amendment rights against self-incrimination.<sup>90</sup> As a result, law enforcement officers have leeway to circumvent Fifth Amendment protection. However, the Warren Court intended for the *Miranda* warnings to serve as reminders to law enforcement officers.<sup>91</sup> *Miranda* was revolutionary, in part, because it detailed the warning every police department in the country was required to deliver to suspects.<sup>92</sup> Nevertheless, the warnings morphed into a timing issue that continues to perpetuate confusion regarding the extent of suspects' rights.<sup>93</sup>

*Miranda* was, and continues to be, tested by law enforcement.<sup>94</sup> For example, a law enforcement tactic known as "question-first" was developed as an attempt to avoid the

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89. See, e.g., *id.*

90. See, e.g., *United States v. Wright*, 777 F.3d 769, 777 (5th Cir. 2015) (holding where a suspect is not in custody, his Fifth Amendment rights do not attach even though police may question him); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (finding no prosecutorial misconduct for testimony concerning the defendant's silence during and just after his arrest); *United States v. Suarez*, 162 F. App'x 897, 902 (11th Cir. 2006) (holding silence in the course of on-the-scene questioning of citizens during the fact-finding process does not trigger *Miranda*).

91. See Erwin O. Switzer, *Applying Criticisms of the Warren Court to the Burger Court: A Case Study of Richmond Newspapers, Inc. v. Virginia*, 5 U. ARK. LITTLE ROCK L. REV. 203, 205–08 (1982) (discussing criticism that the Warren Court was "behaving like a legislature" with its changes to criminal procedure); Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of Miranda and Why it Remains Vital Today*, 40 VAL. U. L. REV. 685, 703 (2006).

92. See Howard & Rich, *supra* note 91, at 692–93.

93. See Megan E. Wamsley, Case Note, *You [Might] Have the Right to Remain Silent: Examining the Miranda Problem*, 84 U. CIN. L. REV. 923, 935 (2016) (discussing the unintended consequences of the unclear timing issue).

94. See Howard & Rich, *supra* note 91, at 699–700 (discussing the impact of *Miranda* in the twenty-first century).

*Miranda* strictures.<sup>95</sup> This tactic was used by law enforcement officers because they could ask questions, receive incriminating responses, Mirandize the suspects, and then ask the exact same questions to elicit the same incriminating responses.<sup>96</sup> In *Missouri v. Seibert*, the Court held in its plurality opinion “the technique of interrogating in successive, unwarned[,] and warned phases raises a new challenge to *Miranda*,” and does not qualify as a *Miranda* exclusion.<sup>97</sup> The Court’s decision focused “on whether the *Miranda* warning, when given midstream, was truly effective.”<sup>98</sup> The two-step “question-first” interrogation technique rendered *Miranda* warnings ineffective.<sup>99</sup> This decision introduced yet another step of inquiry regarding whether suspects voluntarily waived their *Miranda* rights.<sup>100</sup>

Even with the reaffirmation of *Miranda*, the fabric of *Miranda* remains confusing. The central underpinning of *Miranda* is to ensure suspects are aware of their rights and are given a chance to waive those rights knowingly, intelligently, and voluntarily.<sup>101</sup> Justice Clark’s dissent in *Miranda* remains relevant today, noting that “detection and solution of crime is . . . a difficult and arduous task requiring determination and persistence . . . of all responsible officers.”<sup>102</sup> This Note does not ignore the fact that law enforcement officers retain the ability to investigate, question, and take statements and confessions of

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95. See *id.* at 700; see also Ave Mince-Didier, *Tactics Police Use to Get a Confession*, NOLO, <https://www.criminaldefenselawyer.com/resources/criminal-defense/defendants-rights/tactics-police-use-get-a-confession> (last visited Jan. 24, 2023) (“Informal questioning can also occur any time a person interacts with an officer.”).

96. See Howard & Rich, *supra* note 91, at 701.

97. See *Missouri v. Seibert*, 542 U.S. 600, 609–13 (2004).

98. Stewart J. Weiss, *Missouri v. Seibert: Two-Stepping Towards the Apocalypse*, 95 J. CRIM. L. & CRIMINOLOGY 945, 945 (2005) (citing *Seibert*, 542 U.S. at 614).

99. See *id.* at 945–46.

100. *Id.* at 946.

101. See, e.g., Howard & Rich, *supra* note 91, at 703 (discussing how the purpose of *Miranda* is to inform suspects of their rights so they can make informed decisions whether to waive those rights or not); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

102. *Miranda*, 384 U.S. at 502 (Clark, J., concurring in part and dissenting in part) (quoting *Haynes v. Washington*, 373 U.S. 503, 514–15 (1963)).

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suspects.<sup>103</sup> Notwithstanding this recognition, it is imperative that law enforcement officers abide by the Fifth Amendment and supplemental *Miranda* rights afforded to suspects.

## II. THE INEVITABLE OVERLAP BETWEEN ASD AND THE CRIMINAL LEGAL SYSTEM

“As calls for criminal justice reform grow,” it is important to recognize “populations who experience disproportionate harm in the [criminal legal] system.”<sup>104</sup> Individuals with disabilities like ASD are highly likely to endure negative encounters with the U.S. criminal legal system.<sup>105</sup> For example, high rates of poverty, unemployment, and disability-related behaviors expose suspects with ASD to an increased risk of disproportionate harm.<sup>106</sup> Confusion about and during police interrogations may lead suspects with ASD to either provide a false confession to law enforcement officers or simply appear to have a guilty or disconnected demeanor.<sup>107</sup> Stimming, or repetitive self-stimulatory body movements,<sup>108</sup> “can be mistaken for suspicious or drug-related behavior,”<sup>109</sup> and

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103. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1063–64 (1998) (discussing the challenges law enforcement departments face in the wake of *Miranda*).

104. Jennifer C. Sarrett & Alexa Ucar, *Beliefs About and Perspectives of the Criminal Justice System of People with Intellectual and Developmental Disabilities: A Qualitative Study*, SOC. SCI. & HUM. OPEN, Feb. 6, 2021, at 1, 1.

105. *Id.*

106. See *id.* at 2.

107. *Id.*

108. Lori Smith, *What is Stimming?*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/319714> (Apr. 29, 2022) (“Stimming is self-stimulatory behavior that normally involves repetitive body movements or repetitive movement of objects . . . . Autistic people of any age may stim occasionally or constantly in response to excitement, happiness, boredom, stress, fear, and anxiety. They may also stim during times when they are feeling overwhelmed.”).

109. *Law Enforcement and Autism: Why It's an Issue and What To Do*, INT'L BD. OF CREDENTIALING & CONTINUING EDUC. STANDARDS (June 22, 2020), <https://ibcces.org/blog/2020/06/22/law-enforcement-autism-why-important/>.

elopement, or wandering,<sup>110</sup> may lead police to search for someone who does not want to be found.<sup>111</sup> In many of these types of situations, individuals with ASD perceive the situation different from the way a law enforcement officer would.<sup>112</sup>

A. *How ASD Behaviors Can Impact Law Enforcement Proceedings*

Awareness of ASD has increased in the United States.<sup>113</sup> ASD “is a developmental disability caused by differences in the brain,” and “[p]eople with ASD often have problems with social communication and interaction, and restricted or repetitive behaviors or interests.”<sup>114</sup> The first studies of the prevalence in ASD were conducted in the 1960s and 1970s.<sup>115</sup> The reported estimates were in the range of two to four cases per 10,000 children.<sup>116</sup> This led to the impression that ASD was rare.<sup>117</sup> In the 1980s and 1990s, diagnostic criteria for ASD expanded.<sup>118</sup> By 2002, the range in the United States was six to seven cases per 1,000 children.<sup>119</sup> These numbers depict a thirty-fold increase from the first studies and found the prevalence of ASD is three to four times higher for boys.<sup>120</sup> It is likely that the rise in ASD prevalence can be attributed to the broadening diagnostic

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110. Ronit Molko, *Wandering Off: Understand Elopement in Autistic Individuals*, FORBES (Feb. 21, 2019, 4:50 PM), <https://www.forbes.com/sites/forbesbooksauthors/2019/02/21/wandering-off-understand-elopement-in-autistic-individuals/> (“Elopement, or wandering, as it is often called, is an important safety issue for individuals with autism . . . . This term describes the tendency for an individual to leave the safety of a known environment . . . .”).

111. *Law Enforcement and Autism: Why It's an Issue and What To Do*, *supra* note 109.

112. *See id.*

113. *See* Jessica Wright, *The Real Reasons Autism Rates Are Up in the U.S.*, SCI. AM. (Mar. 3, 2017), <https://www.scientificamerican.com/article/the-real-reasons-autism-rates-are-up-in-the-u-s/>.

114. *What Is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/Ncbddd/autism/facts.html> (Dec. 9, 2022).

115. NAT'L ACADS. OF SCIS., ENG'G, AND MED., *MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN* 242 (Thomas F. Boat & Joel T. Wu eds., 2015).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*



criteria and the consensus that ASD is a spectrum.<sup>121</sup> Other factors like “improvements in screening and services for children with ASD and increases in specific risk factors for ASD” also contributed to the increased prevalence.<sup>122</sup>

In 2000, the Centers for Disease Control and Prevention (CDC) began tracking the prevalence in ASD every other year through the Autism and Developmental Disabilities Monitoring Network.<sup>123</sup> With every report, the number of diagnoses has grown.<sup>124</sup> On March 27, 2020, the CDC published its prevalence report on the number of children diagnosed with ASD, and once again, the number has increased.<sup>125</sup> This report demonstrates that “the number of eight-year-old children diagnosed is . . . [one] in [fifty-four].”<sup>126</sup> The rate released in 2018 was one in fifty-nine.<sup>127</sup> As prior studies have demonstrated, boys are identified at higher rates than girls.<sup>128</sup> It is unclear whether the increase in ASD prevalence is “attributable to a[n] . . . increase in the risk of developing ASD or solely to changes in community awareness and identification patterns.”<sup>129</sup>

The significance of ASD infiltrating the criminal courts cannot be ignored because there is a growing population of diagnosed people on the spectrum. Motivation, intent, mental capacity, and perception relating to an offense are not prototypical of someone without ASD.<sup>130</sup> Because of the “exponential increase

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121. *Id.* at 242–43.

122. *Id.* at 243.

123. CDC Report States That Prevalence Rate Increase, with 1 in 54 Children Diagnosed with Autism Spectrum Disorder, AUTISM SOCIETY (Mar. 26, 2020), <https://www.autism-society.org/releases/cdc-releases-new-prevalence-rates-of-people-with-autism-spectrum-disorder/> [<https://web.archive.org/web/20220721131120/https://www.autism-society.org/releases/cdc-releases-new-prevalence-rates-of-people-with-autism-spectrum-disorder/>].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See Jeffrey A. Cohen, Thomas A. Dickerson & Joanne Matthews Forbes, *A Legal Review of Autism, a Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 ALB. L. REV. 389, 413 (2013) (discussing how motivation, intent, mental capacity, and perception relating to an offense may require a different method of evaluation if someone has ASD).

in ASD diagnoses, it is without question that we can expect to see a rise in ASD related controversies within, and which directly affect, our legal system.”<sup>131</sup> The ever-changing landscape of ASD and the law requires continued analysis.

Discrimination against individuals with disabilities, including ASD, exists and perpetuates the disproportionate harm to which individuals with ASD are exposed.<sup>132</sup> Challenges including sensory awareness, semantic misunderstandings, the inability to handle changes to routine or environment, and little to no understanding of non-verbal communications are highly influential on individuals with ASD when they are placed in unfamiliar territory, like being arrested.<sup>133</sup>

A common misunderstanding arises when individuals with ASD appear to be antisocial or closed off, when in fact, their response is merely a manifestation of their disability causing social misunderstandings.<sup>134</sup> Individuals with ASD often experience a change in emotions when they are in unfamiliar surroundings; they may be upset, scared, angry, or anxious.<sup>135</sup> Additionally, individuals with ASD struggle to maintain eye contact and respond with silence when they are fearful or confused.<sup>136</sup> These typical diagnostic behaviors can easily mislead a law enforcement officer or investigator.<sup>137</sup> Officers or investigators may think suspects exhibiting these behaviors are rude, disinterested, evasive, or belligerent, leading to the

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131. *Id.* at 422 (discussing the increase of ASD diagnoses and the inevitable interaction with the criminal justice legal system).

132. See Sarrett & Ucar, *supra* note 104, at 1–2.

133. See Cohen et al., *supra* note 130, at 413.

134. *Id.*

135. See *Challenging Behavior: Autistic Children and Teenagers*, RAISING CHILD. NETWORK, <https://raisingchildren.net.au/autism/behaviour/understanding-behaviour/challenging-behaviour-asd> (Nov. 18, 2020).

136. See *Challenging Behavior: Autistic Children and Teenagers*, *supra* note 135; Marina Sarris, *The Stigma of Autism: When All Eyes Are Upon You*, KENNEDY KRIEGER INST. (Jan. 15, 2015), <https://www.kennedykrieger.org/stories/interactive-autism-network-ian/autism-stigma>.

137. See Cohen et al., *supra* note 130, at 414–15.

conclusion they must have something to hide.<sup>138</sup> Additionally, standard questioning tactics that utilize a certain level of trickery can confuse suspects with ASD, and confusion may cause them to produce misleading or false statements, or refrain from answering questions at all.<sup>139</sup> All of this may be interpreted as evidence of guilt.<sup>140</sup>

When legal situations arise, individuals with ASD may not understand the situation like others, so their reactions and responses cannot be lumped into the same category as individuals without ASD.<sup>141</sup> Researchers from the A.J. Drexel Autism Institute at Drexel University, an organization built around “a public health science approach to understanding and addressing the challenges of autism spectrum disorders,”<sup>142</sup> published “research that identified the experiences of autistic individuals . . . across their interactions with the criminal justice system through analysis of a statewide survey in Pennsylvania.”<sup>143</sup> The study sample consisted of 3,902 individuals, representing 47% of the total 8,240 respondents to the 2018 survey conducted by Pennsylvania Autism Needs Assessment (PANA).<sup>144</sup> “A total of 839 respondents reported information about their criminal justice system interaction

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138. See DENNIS DEBBAUDT, INTERVIEW AND INTERROGATION OF PEOPLE WITH AUTISM, <https://www.polfed.org/WestMids/media/1938/interview-and-interrogation-of-people-with-autism.pdf>; Kirsten S. Railey, Abigail M. A. Love & Jonathan M. Campbell, *A Systematic Review of Law Enforcement Training Related to Autism Spectrum Disorder*, 35 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 221, 221–22 (2020) (discussing how law enforcement officers misinterpret behaviors displayed by individuals with ASD, which can lead to negative outcomes).

139. See Monique Chiacchia, *Autism Spectrum Disorder and the Criminal Justice System*, PURDUE GLOB. (Apr. 5, 2016), <https://www.purdueglobal.edu/blog/criminal-justice/autism-and-the-criminal-justice-system/>; DEBBAUDT, *supra* note 138.

140. See Chiacchia, *supra* note 139.

141. See Cohen et al., *supra* note 130, at 413.

142. Diana L. Robins, *Welcome from the Director*, A.J. DREXEL AUTISM INST., <https://drexel.edu/autisminstitute/about/welcome/> (last visited Jan. 25, 2023).

143. *How Do Autistic Individuals Interact with the Criminal Justice System?*, DREXEL NEWS (Nov. 11, 2021), <https://drexel.edu/news/archive/2021/November/How-Do-Autistic-Individuals-Interact-with-Criminal-Justice-System/>.

144. Kaitlin H. Koffer Miller, Alec Becker, Dylan Cooper & Lindsay Shea, *Justice System Interactions Among Autistic Individuals: A Multiple Methods Analysis*, 68 CRIME & DELINQ. 1579, 1583 (2022); *How Do Autistic Individuals Interact with the Criminal Justice System?*, *supra* note 143.

through the free-text [response option].”<sup>145</sup> The survey found that autistic males were almost twice “as likely to be stopped and questioned by police, arrested or charged, while females were at 32% greater odds of being the victim of a crime.”<sup>146</sup> Moreover, 25% of respondents reported being an offender, meaning there was an “incident[] where the individual was a suspect of or committed a crime or other act that resulted in involvement with the justice system.”<sup>147</sup> Although this study supports the fact that offenders have ASD, “there is no evidence to suggest that [ASD individuals] are any more likely to commit crimes than those who are not on the spectrum.”<sup>148</sup> Therefore, the intent must be considered and evaluated differently.

In another study, five individuals with “Asperger’s,”<sup>149</sup> who were repeat offenders, were studied.<sup>150</sup> This study “emphasized the deficits of those with Asperger’s disorder, including impairments in social interaction, verbal and non-verbal communication, and rigidity in behavior.”<sup>151</sup> For the five individuals studied, they all “believed to a greater or lesser extent that their actions were appropriate and justified responses to the situation.”<sup>152</sup> Different communication and comprehension impact an individual who is faced with

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145. *How Do Autistic Individuals Interact with the Criminal Justice System?*, *supra* note 143; Koffer Miller et al., *supra* note 144, at 1590.

146. *How Do Autistic Individuals Interact with the Criminal Justice System?*, *supra* note 143; Koffer Miller et al., *supra* note 144, at 1589–90.

147. *How Do Autistic Individuals Interact with the Criminal Justice System?*, *supra* note 143; Koffer Miller et al., *supra* note 144, at 1592.

148. Lindsay M. Salseda, Dennis R. Dixon, Tracy Fass, Deborah Miora & Robert A. Leark, *An Evaluation of Miranda Rights and Interrogation in Autism Spectrum Disorder*, 5 RSCH. AUTISM SPECTRUM DISORDERS 79, 80 (2011).

149. *Asperger’s Syndrome*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Asperger%27s%20syndrome> (last visited Jan. 25, 2023) (defining Asperger’s as “an autism spectrum disorder that is characterized by impaired social interaction, by repetitive patterns of behavior and restricted interests, by normal language and cognitive development but poor conversational skills and difficulty with nonverbal communication . . .”).

150. Justin B. Barry-Walsh & Paul Mullen, *Forensic Aspects of Asperger’s Syndrome*, J. FORENSIC PSYCHIATRY & PSYCH., Mar. 2004, at 1.

151. Salseda et al., *supra* note 148, at 80; Barry-Walsh & Mullen, *supra* note 150, at 2.

152. Barry-Walsh & Mullen, *supra* note 150, at 10.

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potentially waiving *Miranda* rights.<sup>153</sup> Therefore, individuals with ASD are at a higher risk of being exploited.<sup>154</sup>

B. *ASD May Impact Suspects' Ability to Understand Miranda Warnings, Which May Lead to Inadvertent Waivers*

The difficulties and challenges individuals with ASD face regarding comprehension and social cues present obvious problems when tasked with comprehending *Miranda* rights. The *Miranda* progeny is confusing, and the existing circuit court split further exacerbates this confusion.<sup>155</sup> Individuals with ASD are more vulnerable in the criminal legal system and often lack the required comprehension skills and social understandings when faced with a question about an offense.<sup>156</sup> Some of the behaviors of individuals with ASD are not dissimilar to stereotypical behaviors of a guilty person.<sup>157</sup> Law enforcement officers “may struggle to differentiate those behaviors typical of an individual with . . . ASD and the prototypical conduct of an offender.”<sup>158</sup> Combining the circuit split with a rise in ASD diagnoses, law enforcement officers have a heightened responsibility to understand ASD because they are likely to encounter suspects with ASD.<sup>159</sup> Therefore, measures should be required to avoid misinterpretations regarding behavior and characteristics typical of individuals with ASD.<sup>160</sup>

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153. See Salseda et al., *supra* note 148, at 82–84; see also discussion *infra* Section II.B.

154. See Cohen et al., *supra* note 130; Sarrett & Ucar, *supra* note 104, at 1–2.

155. See Wamsley, *supra* note 93, at 929–30 (describing the circuit split which stems from differing interpretations of “custody” in a *Miranda* analysis).

156. See Sarrett & Ucar, *supra* note 104, at 4–5; see also Sophia Calton & Guy Hall, *Autistic Adults and Their Experiences with Police Personnel: A Qualitative Inquiry*, 29 *PSYCHIATRY, PSYCH. & L.* 274, 275–76 (2022).

157. See Sarrett & Ucar, *supra* note 104, at 5–6; see also Calton & Hall, *supra* note 156, at 284.

158. Cohen et al., *supra* note 130, at 414–15.

159. See Kirsten Scheil Railey, *An Exploration of Law Enforcement Officers' Training Experiences, Training Needs, and Interactions Related to Autism Spectrum Disorder 1–2* (Apr. 8, 2019) (Ph.D. dissertation, University of Kentucky) (on file with UKnowledge, University of Kentucky) (explaining that law enforcement officers “routinely encounter people who have a range of disabilities” and “[m]any behaviors displayed by individuals with ASD can be misinterpreted by [law enforcement officers]”).

160. Cohen et al., *supra* note 130, at 414–15.

C. *Understanding ASD: Looking Through the Lens of Law Enforcement Officers*

Individuals with ASD suffer from an increased risk of interacting with law enforcement officers as suspects.<sup>161</sup> However, “individuals with developmental disabilities are seven times more likely to interact with law enforcement officers” when compared to individuals without an intellectual disability.<sup>162</sup> Importantly, law enforcement officers are typically the “first point of contact” within the criminal legal system for individuals with ASD.<sup>163</sup> It is crucial that law enforcement officers are able to recognize signs and symptoms of individuals with ASD, so that they can utilize techniques to de-escalate, mitigate, and effectively communicate in those situations.<sup>164</sup>

The involvement of individuals with ASD in the criminal legal system is not minimal.<sup>165</sup> The National Longitudinal Transition Study looked at such involvement and found that by ages twenty-one to twenty-two, approximately 20% of young adults with ASD had been stopped and questioned by police, and almost 5% had been arrested.<sup>166</sup> Recent studies analyzed law enforcement officers’ understanding of ASD and their interactions with individuals with ASD.<sup>167</sup> The findings revealed that “officers are generally not knowledgeable about ASD” and many officers “report[ed] concerns about how to handle situations involving [people with ASD].”<sup>168</sup>

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161. See Railey, *supra* note 159, at 42.

162. *Id.* at 17, 41 (explaining that a thorough “review of the efficacy of ASD-specific law enforcement training” is necessary).

163. Calton & Hall, *supra* note 156, at 277.

164. See Railey, *supra* note 159, at 15–16, 72, 96.

165. See Sarrett & Ucar, *supra* note 104, at 1.

166. See Julianna Rava, Paul Shattuck, Jessica Rast & Anne Roux, *The Prevalence and Correlates of Involvement in the Criminal Justice System Among Youth on the Autism Spectrum*, 47 J. AUTISM & DEV. DISORDERS 340, 343 (2017).

167. Audrey Christiansen, Nori M. Minich & Marie Clark, *Pilot Survey: Police Understanding of Autism Spectrum Disorder*, J. AUTISM & DEV. DISORDERS, March. 8, 2021, at 1, 2.

168. *Id.*

Formal law enforcement training on a disability like ASD is varied.<sup>169</sup> For example, in Michigan, training on mental health and development disabilities is a three-hour course for law enforcement officers.<sup>170</sup> That course “provides definitions, identifies common behaviors, defines an officer’s legal authority to act, and outlines ways to appropriately respond in situations involving individuals with [mental health] illness and/or [developmental disabilities]” including ASD.<sup>171</sup> Florida passed a bill in 2017 “requiring the Florida Department of Law Enforcement to establish a continued employment training component for officers specific to ASD.”<sup>172</sup> As the Florida bill rolled out and the statewide training initiatives began, a study was conducted to survey a group of officers regarding their awareness of ASD and their interactions and incidents with individuals with ASD.<sup>173</sup> The survey found “three-quarters of the officers had not previously received ASD-specific training, although half had been involved in an incident with a[] person [with ASD].”<sup>174</sup> This number is significant and showcases the lack of training that exists at the state policing level.

In addition to some state-implemented measures, there are individual efforts to provide ASD-specific training.<sup>175</sup> In Massachusetts, the Autism and Law Enforcement Education

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169. See Jacob M. Laan, Rebecca V. Ingram & Marc D. Glidden, *Law Enforcement Training on Mental Disorders and Autism Spectrum Disorders in the Southeastern United States*, 6 J. GLOB. INTEL. & POL’Y 51, 51 (2013) (“Results of this analysis indicated that law enforcement training in each state was inconsistent with existing guidelines for training in these areas.”).

170. Christiansen et al., *supra* note 167, at 2; see also Brittany Flowers, *MSP Troopers to Take Part in Autism Awareness Training*, WOOD TV, <https://www.woodtv.com/news/michigan/msp-troopers-to-take-part-in-autism-awareness-training/> (Mar. 31, 2021, 6:32 AM).

171. Christiansen et al., *supra* note 167, at 2; Flowers, *supra* note 170.

172. Christiansen et al., *supra* note 167, at 2.

173. *Id.*

174. *Id.* (citing Lauren Gardner, Jonathan M. Campbell & June Westdal, *Brief Report: Descriptive Analysis of Law Enforcement Officers’ Experiences with and Knowledge of Autism*, 49 J. AUTISM & DEV. DISORDERS 1278, 1281 (2019)).

175. See, e.g., ALEC (*Autism and Law Enforcement Education Coalition*) *Training Note New Location*, ASS’N OF DEV. DISABILITIES PROVIDERS, <https://www.addp.org/event/alec-autism-and-law-enforcement-education-coalition-training-note-new-location> (last visited Apr. 6, 2023) (advertising an opportunity to “get local police and fire department[s] ready to best accommodate individuals with autism”).

Coalition (ALEC) partners with law enforcement officers to provide ASD-specific training.<sup>176</sup> In Cleveland, Ohio, an officer may take a Crisis Intervention Team training, which is a voluntary forty-hour, one-week seminar.<sup>177</sup> The Cleveland training offered a one-hour lecture about developmental disabilities.<sup>178</sup> Although these efforts are a starting point, there is an overwhelming lack of guidance, training programs, and educational initiatives amongst law enforcement agencies nationwide about ASD and how to effectively police individuals with ASD.<sup>179</sup>

The glaring gap in ASD law enforcement training programs exposes individuals with ASD to disproportionate harm and unfair prejudice in the criminal legal system.<sup>180</sup> A pilot survey assessed this gap.<sup>181</sup> The survey looked at the experiences of Cleveland law enforcement officers related to individuals with ASD by assessing their “prior experience, knowledge, and comfort” and their “ability to identify autistic persons.”<sup>182</sup> The results from this survey revealed law enforcement officers’ understanding and additional officer training sessions about ASD are lacking.<sup>183</sup> Fifty-one officers completed the pilot survey, and of those officers, 52.9% reported prior ASD training, 31.4% reported personal experience with ASD, and 56.9% reported low overall knowledge of ASD.<sup>184</sup> The officers with prior training reported higher comfort and knowledge,

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176. See *ALEC First Responder Training*, LIFEWORKS, <https://lifeworksarc.org/service/alec-first-responder-training/> (last visited Apr. 6, 2023).

177. See Christiansen et al., *supra* note 167, at 2.

178. *Id.*

179. *Id.* at 2–3.

180. See *id.* at 1, 7.

181. *Id.* at 1.

182. *Id.* at 2.

183. *Id.* at 4–5; Elissa Ball & Jaelyn Jeffrey-Wilensky, *Why Autism Training for Police Isn't Enough*, SPECTRUM (Nov. 26, 2020), <https://www.spectrumnews.org/news/why-autism-training-for-police-isnt-enough/> (“Many police departments offer autism training, but the sessions are often optional and vary wildly in length, format and quality . . . . Cash-strapped police departments tend to lump it in with mental-illness training to save money and time . . .”).

184. Christiansen et al., *supra* note 167, at 1, 4, 6.



and officers with personal experiences related to ASD were more likely to recognize signs and features of ASD in the pilot's test vignettes.<sup>185</sup> The survey also revealed that most officers recognized that techniques such as "creating a calm environment and clear and simple instructions" would be beneficial for an individual with ASD.<sup>186</sup> However, "officers were unsure of techniques that could make a situation worse, such as intense eye contact, extra officers, use of open-ended questions, and the use of physical touch or restraint."<sup>187</sup> Officers were also unsure about using alternative communication devices, like visuals or auxiliary aids, and felt that nonverbal individuals with ASD caused a barrier to their work, misplacing and shifting blame onto nonverbal ASD individuals.<sup>188</sup>

Additionally, some officers struggled to identify individuals with ASD because some individuals have subtle symptoms of ASD, which elevates the risk of placing them in adverse situations with police.<sup>189</sup> Overall, this particular pilot survey "highlights the need for training for police officers in working with individuals with ASD, as officers surveyed expressed both interest in further training as well as self-identified neutral comfort and knowledge."<sup>190</sup> The survey supports the fact that police interaction with individuals with ASD is neither minimal nor slight, as this survey alone—even with a small sample—demonstrates 50% of the officers involved had interacted with an individual with ASD.<sup>191</sup>

Although law enforcement officers are trained to respond to a crisis or emergency with certain protocol, the protocol may not be the best option when interacting with an individual with ASD.<sup>192</sup> Because officers are typically the first point of contact in

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185. *Id.* at 6.

186. *Id.* at 7.

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *See id.* at 6 (discussing officers' difficulties in identifying techniques that can worsen a situation, such as extra officers or restraints).

the criminal legal system, it is critical that they have working knowledge of ASD, such as the ability to recognize the signs, symptoms, and behaviors of ASD, and acknowledge that ASD is a spectrum with an evolving diagnostic criterion.<sup>193</sup>

### III. RESOLVING THE POST-ARREST, PRE-MIRANDA CIRCUIT SPLIT

A prosecutor's use of suspects' post-arrest, pre-Miranda silence against them at trial violates their Fifth Amendment right against self-incrimination.<sup>194</sup> Suspects' rights to remain silent should be triggered when they are in custody; it should not depend on a prophylactic, supplemental rule in *Miranda*.<sup>195</sup> If a *Miranda* warning is what triggers Fifth Amendment protections, then suspects with ASD may suffer many inequities.<sup>196</sup> Law enforcement officers may purposefully delay *Miranda* warnings to increase the odds that suspects' silence can be used by the prosecution as substantive evidence of guilt.<sup>197</sup> Therefore, suspects are undeniably disadvantaged if they are in a jurisdiction that permits their silence to be used in a prosecutor's case-in-chief. Finally, this Note argues suspects with ASD are unfairly prejudiced and unduly vulnerable in post-arrest, pre-Miranda situations.

The Supreme Court must grant certiorari on a case with this issue and hold silence cannot be used as substantive evidence of guilt. The result of such a holding would decrease confusion and immediately create uniformity across all circuits.<sup>198</sup> Additionally, to prevent unfair prejudice against suspects with ASD,<sup>199</sup> law enforcement officers should require training specifically geared toward mitigating situations with suspects who exhibit signs of ASD. The purpose of the Fifth Amendment privilege against self-incrimination is to protect people's

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193. *See id.* at 1.

194. *See* Locke, *supra* note 27, at 548.

195. *See* discussion *supra* Part I.

196. *See* discussion *infra* Section III.B.

197. *See* Locke, *supra* note 27, 544–45.

198. *See* Wamsley, *supra* note 93, at 923.

199. *See* Sarrett & Ucar, *supra* note 104, at 1–2.

liberties by placing the burden on the government to prove the suspects' guilt using freely obtained evidence.<sup>200</sup> It is sensible to demand a higher standard of law enforcement training to ensure Fifth Amendment protection exists and suspects with ASD are covered.<sup>201</sup>

#### A. *Why the Circuit Split Must Be Resolved*

For decades, circuit courts have diverged as to whether the prosecution may use silence as substantive evidence of guilt.<sup>202</sup> The result of this divide is a lack of uniformity.<sup>203</sup> The Supreme Court deepens this divide by declining to grant certiorari on this issue to resolve the split and provide an answer that can be applied uniformly across all jurisdictions.<sup>204</sup> The Supreme Court should grant certiorari to a case posing this very issue, and the Court should hold that suspects' right to remain silent begins immediately when they are in custody, not when they are read their *Miranda* rights.

The Fifth Amendment is the anchor to the right against self-incrimination.<sup>205</sup> Any limit on the right to remain silent limits the right against self-incrimination.<sup>206</sup> When suspects are compelled to testify at trial to explain and defend their silence post-arrest, they immediately open the door to impeachment.<sup>207</sup> Usually, defendants do not testify in a criminal trial.<sup>208</sup> As a result, the prosecution will strategically challenge the defendant's credibility.<sup>209</sup> Alternatively, "[t]he customary defense tactic of remaining silent to avoid impeachment . . . creates a [different type of] risk."<sup>210</sup> A jury may conceivably

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200. See Amar & Lettow, *supra* note 36, at 878.

201. See Christiansen et al., *supra* note 167, at 6–7.

202. See Wamsley, *supra* note 93, at 923.

203. See *id.*; see also Hapner, *supra* note 67, at 1772–74.

204. See Wamsley, *supra* note 93, at 923.

205. See U.S. CONST. amend. V.

206. See Hapner, *supra* note 67, at 1773–74.

207. See Doyle v. Ohio, 426 U.S. 610, 611 (1976); see also Hapner, *supra* note 67, at 1776.

208. See Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 416 (2021).

209. See *id.*

210. Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 399 (2018).

view a defendant's silence as an admission of guilt, rather than as a protection of a constitutional right against self-incrimination.<sup>211</sup>

Courts should read the right to remain silent as a constitutional right under the Fifth Amendment. *Miranda* should not replace the Fifth Amendment, and it should not be an alternative to the Fifth Amendment. Although *Miranda* warnings require law enforcement officers to expressly inform suspects of their right to remain silent,<sup>212</sup> that does not mean the only starting point to that right is with a *Miranda* warning. The Warren Court created procedural safeguards in *Miranda* to further protect an existing and extremely vulnerable right.<sup>213</sup> The purpose of such warnings is to ensure suspects in coercive settings, like custodial interrogations, can decide to either waive or invoke the right to remain silent.<sup>214</sup>

The *Miranda* Court explicitly wrote that "the Fifth Amendment privilege is available *outside of criminal court proceedings* and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."<sup>215</sup> The Court did not explicitly exclude post-arrest settings other than custodial interrogations.<sup>216</sup> Therefore, post-arrest, pre-*Miranda* questioning on a street corner should fall under the protection. More broadly, *Miranda* protection should be afforded to all people by the Fifth Amendment.

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211. See *id.* at 399, 407–10.

212. See *Miranda v. Arizona*, 384 U.S. 436, 471–72 (1966).

213. See COHEN, *supra* note 49, at 274.

214. See Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO STATE J. CRIM. L. 163, 164–65, 172–73 (2007).

215. *Miranda*, 384 U.S. at 467 (emphasis added).

216. See *id.*

1. *When has a statement been compelled?*

Many courts have tried to define what constitutes a compelled statement.<sup>217</sup> The voluntariness test is one method used to distinguish whether a confession was made voluntarily or involuntarily.<sup>218</sup> The idea behind this test is that the coercive methods to elicit an incriminating response are antithetical to the values of the criminal legal system.<sup>219</sup> The prosecution, after all, must prove guilt beyond a reasonable doubt with untainted evidence.<sup>220</sup>

An arrest, on its own, may be enough to compel suspects to speak, or not to speak, depending on the circuit.<sup>221</sup> In the jurisdictions that hold the right to remain silent arises only upon the reading of *Miranda* rights, not speaking is enough to be used against a suspect.<sup>222</sup> For example, when a law enforcement officer informs suspects of the charges, thereby initiating an arrest, and suspects do not say anything, that silence speaks loudly at trial in jurisdictions that permit such silence as substantive evidence of guilt.<sup>223</sup> Moreover, interactions at the scene of an arrest are important to consider. If a law enforcement officer finds a drug substance at the scene of the arrest, suspects likely feel compelled to act surprised, confused, or ignorant to avoid evincing signs of guilt.<sup>224</sup> If suspects opt not to show any emotion and make no sound, expression, or facial reaction to the discovery, then a prosecutor can and will use that silence as substantive evidence of guilt in

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217. See Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 467–69 (2005) (discussing the voluntariness test); see also Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 642–43 (2006) (discussing the implications of the voluntariness test).

218. See Godsey, *supra* note 217, at 467–69.

219. See Locke, *supra* note 27, at 541.

220. See Amar & Lettow, *supra* note 36, at 924.

221. See Locke, *supra* note 27, at 542.

222. See Donald P. Judges & Stephen J. Cribari, *Speaking of Silence: A Reply to Making Defendants Speak*, 94 MINN. L. REV. 11, 23 (2009) (discussing the right to remain silent in inherently coercive situations).

223. See Locke, *supra* note 27, at 542.

224. See *id.* at 543.

the jurisdictions that currently permit such silence to be admissible.<sup>225</sup>

The problem is clear: no matter what, suspects are vulnerable under the current legal framework of post-arrest, pre-*Miranda*.<sup>226</sup> If suspects remain silent, the prosecution can use that silence to suggest they had knowledge of the illegal activity.<sup>227</sup> That suggested knowledge can be used to imply consciousness of guilt.<sup>228</sup> If suspects assert that they did not know about the criminal activity, then the prosecution will try to impeach them.<sup>229</sup> If suspects admit to knowing about the criminal activity, they inevitably are opening the door to consciousness of guilt.<sup>230</sup> In all these scenarios, suspects self-incriminate.<sup>231</sup> The Fifth Amendment is designed to protect against this, but the muddled timeframe under *Miranda* is preventing such a protection to apply uniformly to arrested suspects.<sup>232</sup>

This Note does not turn a blind eye to the criticism of *Miranda*. Critics have claimed *Miranda* handcuffed the police, because law enforcement officers are limited from solving a substantial number of crimes, imposing a social cost.<sup>233</sup> However, this argument ignores that the *Miranda* Court unearthed evidence of clear unconstitutional coercive techniques used by law enforcement.<sup>234</sup> Society has a vested interest in crimes being

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225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.*

229. See *id.*

230. See *id.*

231. See *id.*

232. See *id.* at 525, 533, 543.

233. See Cassell & Fowles, *supra* note 103, at 1060–65 (discussing the detrimental impact of *Miranda* on police clearance rates); see also Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 773 (2009) (criticizing *Miranda* as a “spectacular failure”); Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 528–29 (2002) (discussing the ways for law enforcement to disregard *Miranda* requirements, such as delaying *Miranda* warnings).

234. See COHEN, *supra* note 49, at 274.

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solved correctly.<sup>235</sup> Law enforcement officers are more likely to elicit false confessions under certain conditions of interrogation,<sup>236</sup> and individuals with disabilities like ASD are more easily pressured.<sup>237</sup> Moreover, society sees the news stories about catastrophic results that sprung from law enforcement officers incorrectly assessing situations.<sup>238</sup> There is a societal interest against these law enforcement miscalculations and a strong interest for better policing to increase accurate crime solving by way of non-compelled statements.<sup>239</sup> However, this Note recognizes that it was and is challenging to perfect how to determine whether a statement was compelled.

2. *The Supreme Court should prohibit post-arrest, pre-Miranda silence in a prosecutor's case-in-chief*

The right to remain silent is protected under the Fifth Amendment.<sup>240</sup> When suspects are in custody, they have a

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235. See Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 332 (2009) ("False confessions raise important questions for social scientists, mental health professionals, policy-makers, and the public.").

236. JAMES ORLANDO, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH., INTERROGATION TECHNIQUES 1, 3–6 (2014), <https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0071.pdf> (discussing the interrogation method widely used by police officers across the country and the method's ability to elicit false confessions from innocent suspects).

237. See Calton & Hall, *supra* note 156, at 276 ("Autistic persons can often find conflict with others, or perceived conflict, distressing and overwhelming. This is especially so when they are interacting with a person who is perceived to be in a position of authority. The desire to avoid conflict has been suggested to increase an autistic's willingness to comply with the demands or agree with the version of events . . .").

238. See, e.g., Michelle Riddlehoover, *Need for Critical Thinking in Police Training*, FED. BUREAU OF INVESTIGATION L. ENFORCEMENT BULL. (May 7, 2020), <https://leb.fbi.gov/articles/perspective/perspective-need-for-critical-thinking-in-police-training> ("Societal perception and media presentation always may prove challenging for agencies. By promoting critical thinking, rather than rote direction-following, throughout officers' careers, leaders can empower them to make and explain unbiased decisions.").

239. See *id.*

240. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

choice to remain silent or to speak.<sup>241</sup> The goal of the Fifth Amendment protection, and the supplemental support found in *Miranda*, is to keep the burden on “the government to prove [suspects’] guilt,” using “freely obtained evidence.”<sup>242</sup> *Miranda* reminds law enforcement officers they must “inform [suspects] of their right to remain silent . . . before engaging in . . . interrogation.”<sup>243</sup> Law enforcement officers in the Fourth, Eighth, and Eleventh Circuits may be disincentivized from informing suspects of their *Miranda* rights in a reasonable amount of time post-arrest.<sup>244</sup> By delaying *Miranda* warnings, suspects are subject to a longer period for which silence can be used against them.<sup>245</sup> Incriminating silence is more likely to happen if there is more time between an arrest and *Miranda* warnings.<sup>246</sup> Due to the circuit split, there is a glaring inequity arising from the varied interpretations of when suspects’ right to remain silent is protected.<sup>247</sup>

Not only may law enforcement officers take advantage of this post-arrest pre-*Miranda* timeframe if they are in jurisdictions that admit silence as substantive evidence of guilt at trial, but the suspects are also going to suffer from confusion.<sup>248</sup> A glaring problem arises if suspects assume their silence is protected, when in fact it is not, if they are in a jurisdiction that falls on the side of permitting such silence at trial as evidence of guilt.<sup>249</sup> “[T]he gap in time between arrest and *Miranda* warnings” poses a threat to suspects’ inherent right to remain silent that is

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241. See Locke, *supra* note 27, at 529.

242. *Id.* at 548.

243. *Id.* at 544.

244. See *id.* at 533 (“The Fourth Circuit, Eighth Circuit, and Eleventh Circuit are among the federal circuit courts of appeals that permit the prosecution to introduce a defendant’s post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief.”).

245. See *id.* at 533–35.

246. See *id.* at 533–34.

247. See *id.* at 533–38 (discussing the circuit court split regarding post-arrest, pre-*Miranda* silence).

248. See *id.* at 544–45.

249. See *id.* at 542.



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established and rooted in the Fifth Amendment, and supplemented by *Miranda*.<sup>250</sup>

B. *How the Circuit Split is Unfairly Prejudicial to Suspects with ASD*

The unclear language surrounding *Miranda* becomes more complicated when suspects have a disability like ASD.<sup>251</sup> The circuit split is detrimental to such suspects because, in a jurisdiction that permits silence as substantive evidence of guilt, they must proclaim their innocence at the moment they are taken into custody, or else their silence may be used as evidence of guilt.<sup>252</sup> In these instances, suspects with ASD may remain silent or respond affirmatively to end the questioning, even if they did not commit an offense, and both types of responses can be used against them at trial if they are in a jurisdiction that permits pre-*Miranda* silence.<sup>253</sup>

Additionally, even though *Miranda* warnings have been written into American culture, and most people are aware of their right to remain silent,<sup>254</sup> individuals with ASD may not share that common knowledge and subsequent common understanding.<sup>255</sup> This renders suspects with ASD even more disadvantaged in protecting their own rights as compared to other members of society.<sup>256</sup>

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250. See *id.* at 545.

251. See, e.g., Gwyneth C. Rost & Karla K. McGregor, *Miranda Rights Comprehension in Young Adults with Specific Language Impairment*, 21 AM. J. SPEECH-LANGUAGE PATHOLOGY 1, 7–8 (2012) (“An adequate understanding of *Miranda* warnings is related to a person’s language abilities. . . . [However,] [s]ociety as a whole is likely unaware of the struggles that people with language impairment face . . . .”) (emphasis added).

252. See Herrmann & Speer, *supra* note 31, at 27–28.

253. See Alice S. North, Ailsa J. Russell & Gisli H. Gudjonsson, *High Functioning Autism Spectrum Disorders: An Investigation of Psychological Vulnerabilities During Interrogative Interview*, 19 J. FORENSIC PSYCHIATRY & PSYCH. 323, 331 (2008); see generally Locke, *supra* note 27.

254. Locke, *supra* note 27, at 525.

255. See Salseda et al., *supra* note 148.

256. Sarrett & Ucar, *supra* note 104, at 1–2.

1. *Law enforcement agencies are failing suspects with ASD*

The duty of law enforcement officers is to serve their community, ensure public safety, and aid in times of emergency.<sup>257</sup> Law enforcement officers are trained to perceive “lack of eye contact,” repetitive words and actions, elopement, and withdrawn behaviors as suspicious behavior.<sup>258</sup> In response, law enforcement officers sometimes use force and restraint to take control of a situation and person.<sup>259</sup> A failure to recognize symptoms and behavioral responses in individuals with ASD may result in the incorrect treatment of the individuals.<sup>260</sup> Custody can often be traumatic and stressful for individuals with ASD, particularly those with sensory challenges.<sup>261</sup> Law enforcement agencies, if “managed properly, have the capacity to [exhibit effective policing] in a manner that [increases] public trust.”<sup>262</sup> “Law enforcement is not doing its job if the public as a whole or in part believes the police are not effective, ethical, or respectful.”<sup>263</sup>

As a result of these responses and lack of awareness of ASD, law enforcement officers must receive thorough ASD training.<sup>264</sup> Although some departments have encouraged

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257. See Katherine K.M. Stavropoulos, *Law Enforcement and Autism: Why Training Is Needed*, PSYCH. TODAY (June 26, 2020), <https://www.psychologytoday.com/us/blog/neuroscience-in-translation/202006/law-enforcement-and-autism-why-training-is-needed>.

258. *Id.*; see generally Sarrett & Ucar, *supra* note 104, at 2 (discussing the reasons why individuals with disabilities are at risk for disproportionate treatment and harm in the justice system).

259. See *Police Interaction with Autistic Persons: The Need for Training*, 7 AMS. FOR EFFECTIVE L. ENF'T MO. L.J. 101, 106 (2009).

260. See generally Ridlehoover, *supra* note 238 (discussing the training needed for police officers to be able to observe situations and quickly make informed decisions).

261. See *When Autism and Law Enforcement Meet*, SPECTRUM (Nov. 26, 2020), <https://www.spectrumnews.org/features/legacy-special-reports/when-autism-and-law-enforcement-meet/>.

262. U.S. DEP'T OF JUST., OFF. CMTY. ORIENTED POLICING SERVS., STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE 12 (2009), <https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf>.

263. *Id.* at 13.

264. See, e.g., Mona Magno-Veluz, *The Police Need Autism Training*, RAPPLER (May 29, 2021, 8:15 AM), <https://www.rappler.com/voices/ispeak/opinion-police-need-autism-training/>

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officers to attend community-sponsored programs, foundational change within law enforcement departments is necessary when it comes to fundamental ASD training.<sup>265</sup>

## 2. *Suggested remedies for law enforcement agencies*

ASD training should be required for both new officers and seasoned officers because, as explained, ASD is complex and dynamic—it is not a static disability.<sup>266</sup> Staying abreast of developments in this condition requires extra effort by law enforcement agencies to ensure their training is extensive, thorough, and up to date. Since ASD is known to be common and to occur on a spectrum, law enforcement officers need knowledge and information in order to prevent routine calls from escalating into devastating events.<sup>267</sup> The training should explain that adults and children with ASD act differently, particularly with self-coping strategies, such as elopement and wandering.<sup>268</sup> Additionally, trainings should include scenario-based practices, and law enforcement agencies should refer to experts or individuals with ASD to discuss and communicate what appropriate responses are available to them, recognizing that individuals with ASD will have their own individualized reaction to a stressful situation.<sup>269</sup> This Note is not proposing that law enforcement agencies be trained for every single behavioral response. Rather, this Note proposes incorporating training specifically tailored to ASD. This type of training can help officers develop effective communication

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(stating that individuals with autism can exhibit small acts of aggression that can be misinterpreted by the police).

265. *See id.*

266. *See* NAT'L ACADS. OF SCIS., ENG'G, AND MED., *supra* note 115, at 242–43; *see also* Sarrett & Ucar, *supra* note 104, at 5.

267. *Law Enforcement and Autism: Why It's an Issue and What to Do*, *supra* note 109 (“Now that we know that autism is common[] and comes in all the hues and shades of a broad human spectrum, we need to give law enforcement officers the knowledge that they need to avoid turning a routine call into a life-altering calamity.”).

268. *See Wandering & Elopement*, AUTISM UP, <https://autismup.org/uploads/documents/Wandering-Elopement.pdf> (last visited Apr. 6, 2023).

269. *See, e.g.,* Magno-Veluz, *supra* note 264; Ball & Jeffrey-Wilensky, *supra* note 183.

tactics and behaviors to neutralize scenarios arising from encounters with individuals with ASD.<sup>270</sup>

There have been efforts to inform individuals with ASD and their families about how to interact with law enforcement.<sup>271</sup> For example, “[t]he National Autism Association has a . . . toolkit called, ‘Meet the Police,’ which is designed for [both] individuals with ASD and their caregivers.”<sup>272</sup> However, the burden to resolve this issue should not solely fall on individuals with ASD. The burden should predominantly fall on law enforcement agencies to implement effective training to not only better prepare officers on how to interact with suspects with ASD but also how to identify whether suspects may have ASD in the first place.

The International Board of Credentialing and Continuing Education Standards (IBCCES) provides an “autism training and certification” course for law enforcement.<sup>273</sup> Over twenty years ago, IBCCES assembled leaders and experts to address the growing need for certification programs in ASD, and other cognitive disorders.<sup>274</sup> There is already an available training program, where officers can “learn what autism is, how to communicate and interact with autistic individuals, and best practices on safety and de-escalating in specific scenarios.”<sup>275</sup> This training program was created by both experts and adults with ASD,<sup>276</sup> which is a thoughtful and useful combination to build understanding and teach effective communication strategies between law enforcement officers and suspects with ASD. This training program is another example of existing opportunities for law enforcement agencies to capitalize on and build upon. The burden on law enforcement agencies is low and

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270. See Magno-Veluz, *supra* note 264.

271. See Stavropoulos, *supra* note 257.

272. See *id.*

273. *Law Enforcement and Autism: Why It's an Issue and What To Do*, *supra* note 109.

274. *Who We Are*, INT'L BD. OF CREDENTIALING & CONTINUING EDUC. STANDARDS, <https://ibcces.org/about/> (last visited Apr. 6, 2023).

275. *Autism Training & Certification for Law Enforcement*, INT'L BD. OF CREDENTIALING & CONTINUING EDUC. STANDARDS, <https://ibcces.org/law-enforcement/> (last visited Apr. 6, 2023).

276. *Id.*

the payoff would be high if all agencies require such training programs.

Another resource for law enforcement agencies to refer to is the non-profit organization, Police Autism Community Training (PACT).<sup>277</sup> PACT “advocat[es] and rais[es] awareness about [ASD] in [the] community.”<sup>278</sup> The main mission is to assist first responders, which may include law enforcement officers, “on how to better support” those with ASD on scene.<sup>279</sup> The organization supports people with ASD “in gaining the skills needed to be prepared for emergencies and safe in their interactions with first responders.”<sup>280</sup> PACT has designed training with a parent and sibling of individuals with ASD, along with a community group, and has already trained 1,000 officers in Kentucky.<sup>281</sup> The available training is not limited to Kentucky and can be adapted to meet a specific law enforcement agency’s needs.<sup>282</sup> The fact that organizations like PACT exist supports the idea that uniform law enforcement training is not an overreach or idyllic aspiration.<sup>283</sup> It can happen and lead to effective results.

Training should be mandatory across the country, to ensure a uniform approach to effective policing. There have been far too many violent interactions between law enforcement officers and individuals with ASD.<sup>284</sup> Generally, violent encounters

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277. PACT, POLICE AUTISM CMTY. TRAINING, <https://www.pactautism.com/> (last visited Apr. 6, 2023).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See id.*

283. *See, e.g., id.; Law Enforcement and Autism: Why It’s an Issue and What To Do, supra* note 109.

284. *See, e.g., Ball & Jeffrey-Wilensky, supra* note 183. Specifically:

In 2015, for example, New York Police Department officers beat and injured Troy Canales, a Black autistic teen who was sitting outside his home, according to a lawsuit. In 2017, Lindsey Beshai Torres called for an ambulance when her autistic son was having a meltdown; instead, two Worcester, Massachusetts, officers arrived and knelt on the [ten]-year-old’s body as they handcuffed him, another lawsuit alleges. In 2018, a school resource officer in Statesville, North Carolina, handcuffed, restrained[,] and taunted a [seven]-year-old autistic boy who was agitated after switching to a new

with law enforcement officers have made headlines in recent years, and a call for reform is ripe.<sup>285</sup> There is an emerging consensus “that police training on autism should be standardized across departments, involve autistic people and their families,” and that training sessions should be regular.<sup>286</sup>

This Note does not ignore the impact and burden the proposed training may have on law enforcement agencies.<sup>287</sup> Proper training requires trainers who offer specialized, comprehensive lessons.<sup>288</sup> The training must include information about how officers can “identify signs and symptoms of” intellectual disabilities and how to implement “a range of stabilization and de-escalation techniques.”<sup>289</sup> The officers must “learn about disposition options, community resources, and legal issues.”<sup>290</sup> Most officers undergo Crisis Intervention Team (CIT) Training already, which typically is “an extensive [forty]-hour curriculum taught over five consecutive days.”<sup>291</sup> The CIT course walks through understanding mental illness and includes practice sessions for officers to role-play scenarios involving people with mental illnesses.<sup>292</sup> During CIT training, officers meet “mental health professionals, consumers[,] and family members.”<sup>293</sup> To fully

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medication. And in 2019, police in Brooklyn Center, Minnesota, shot and killed Kobe Heisler, an autistic [twenty-one]-year-old.

*Id.*; see also Elona Neal, *A History of Police Violence in America*, STACKER (Apr. 29, 2022), <https://stacker.com/stories/4365/history-police-violence-america> (detailing “[fifty] chronological events showing the history of police violence in the United States”).

285. See Neal, *supra* note 284.

286. See Ball & Jeffrey-Wilensky, *supra* note 183.

287. See Aamer Madhani, *Police Departments Struggle To Get Cops Mental Health Training*, USA TODAY, <https://www.usatoday.com/story/news/nation/2016/10/02/police-departments-struggle-cops-mental-health-training/91297538/> (Oct. 2, 2016, 2:01 PM).

288. See *id.*

289. *Training: Police-Mental Health Collaboration (PMHC) Toolkit*, U.S. DEP’T OF JUST.: BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/pmhc/training> (last visited Apr. 6, 2023); see also Madhani, *supra* note 287.

290. *Training: Police-Mental Health Collaboration (PMHC) Toolkit*, *supra* note 289.

291. *Id.*

292. See *id.*

293. *Id.*

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satisfy the goals of CIT training, training for ASD suspects is necessary.

Officers also typically undergo mental health first aid training.<sup>294</sup> This is usually “an eight-hour course specifically designed for [law enforcement] officers, first responders, [and] corrections officers” to improve their knowledge and understanding of mental illnesses.<sup>295</sup> First aid is often a primer for mental health calls.<sup>296</sup> Additionally, many law enforcement agencies include CIT training in recruit academy training, so officers are trained before officially beginning their assignment.<sup>297</sup>

Although all these training programs are essential, not every agency offers such extensive training, and most fall short of sufficient training specifically tailored to ASD.<sup>298</sup> Law enforcement agencies should not be deterred from implementing such trainings out of concern for the burden it would place on them.<sup>299</sup> Since law enforcement officers already undergo a certain amount of training, it would not be unduly burdensome for officers to undergo supplemental training specifically incorporating information about ASD.<sup>300</sup> The

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294. *See id.*

295. *Training: Police-Mental Health Collaboration (PMHC) Toolkit*, *supra* note 289.

296. *See id.*

297. *See id.*

298. Ball & Jeffrey-Wilensky, *supra* note 183 (“Many police departments offer autism training, but the sessions are often optional and vary wildly in length, format and quality.”).

299. *See Improve Department Training with a Cost-Effective Learning Platform*, POLICE ONE ACAD., <https://www.policeoneacademy.com/blog/improve-department-training-with-a-cost-effective-learning-platform/> (last visited Apr. 6, 2023).

300. *See generally* Nick Chown, Dennis Debbaudt, Luke Beardon, Kleio Cossburn & Jack Scott, *Autism and Operational Policing*, in *HANDBOOK OF AUTISM SPECTRUM DISORDER AND THE LAW 1*, 10–11 (Fred R. Volkmar, Rachel Loftin, Alexander Westphal & Marc Woodbury-Smith eds., 2021). “Given the already heavy training burden on police officers, the issue of mainstreaming autism awareness within the police service through training delivery should be approached sensitively.” *Id.* Ways to do this include:

- (1) An efficient and effective means of mainstreaming training in a specific area such as autism is to embed such training within existing training program[s] . . . . ;
- (2) [A] variety of delivery mechanisms . . . . ;
- (3) First responders do not need to be experts in Autism[;]

benefit outweighs any administrative backlog because additional training will only create better-trained, better-prepared, and better-informed officers.<sup>301</sup>

Lastly, when law enforcement agencies implement additional training policies and procedures specifically tailored to ASD, the agencies must ensure their officers are aware of, and understand, the unfair prejudice suspects with ASD are subjected to in court.<sup>302</sup> All officers should be mindful that suspects with ASD may not be exhibiting behavior of guilt, but rather their behavioral condition may cause silence.<sup>303</sup> Training is a simple and effective way to ensure that the moment criminal suspects encounter police, law enforcement officers are acutely aware of any signs or symptoms of a disability like ASD, which may greatly influence the way officers conduct next steps, from investigation, to custodial interrogation, to reading suspects their *Miranda* rights.<sup>304</sup> When officers are better trained about a disability like ASD, the criminal legal system significantly improves.

#### CONCLUSION

Although the *Miranda* decision is arguably one of the most well-known criminal justice decisions in American history, the Supreme Court has handed down multiple decisions concerning the scope and application of *Miranda*, creating a nuanced understanding of *Miranda* and the procedural

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(4) Training should encompass the range of disabilities (developmental, learning[,] etc.) and mental illness that first responders may come across in the course of their duties;

(5) Training should incorporate best advice on tactics to be used[;]

(6) Trainees should have the opportunity to interact with autistic individuals.

*Id.*

301. See, e.g., *Improve Department Training with a Cost-Effective Learning Platform*, *supra* note 299.

302. See Calton & Hall, *supra* note 156, at 276 (“[T]he satisfaction levels of autistic persons and their parents regarding their experiences and treatment throughout court proceedings were significantly lower than the satisfaction levels of the CJS personnel involved.”).

303. See *supra* Section II.A.

304. See *supra* Part II.



safeguards the decision sought to impose.<sup>305</sup> Yet those decisions have failed to address a glaring circuit split that detrimentally impacts the rights of criminal suspects with ASD.<sup>306</sup> The resulting circuit split regarding whether silence may be used as substantive evidence of guilt has created a schism that continues to challenge and question the scope of the procedural safeguards originated in the *Miranda* decision.<sup>307</sup>

Compounded with the circuit split is the exponential increase in ASD diagnoses in the past decade.<sup>308</sup> As a result of this increase, the likelihood of law enforcement interacting with suspects with ASD increases.<sup>309</sup> Some suspects with ASD are unfairly prejudiced under the current circuit split.<sup>310</sup> The Supreme Court should grant certiorari to a case with this issue, and reject post-arrest, pre-*Miranda* silence as substantive evidence of guilt.<sup>311</sup> Additionally, law enforcement agencies across the country should implement and enhance law enforcement training policies and procedures regarding ASD specifically.<sup>312</sup> By implementing the proposals set forth in this Note, the circuit split will immediately dissolve, and law enforcement officers will be better equipped to manage situations involving suspects with ASD.<sup>313</sup> As a result, suspects with ASD will receive better treatment in the criminal legal system, and overall, awareness of ASD will substantially

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305. See, e.g., *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Mandujano*, 425 U.S. 564 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

306. See *supra* Part III; see also *Washington*, 431 U.S. 181; *Wong*, 431 U.S. 174; *Mathiason*, 429 U.S. 492; *Doyle*, 426 U.S. 610; *Mandujano*, 425 U.S. 564; *Beckwith*, 425 U.S. 341; *Baxter*, 425 U.S. 308; *Mosley*, 423 U.S. 96; *Hass*, 420 U.S. 714; *Tucker*, 417 U.S. 433; *Harris*, 401 U.S. 222.

307. See *supra* Part I; see also *supra* Section III.A.

308. See *supra* Section II.A; see also *supra* Part I.

309. See *supra* Section II.A–B.

310. See *supra* Section III.B; see also *supra* Section II.A–B.

311. See *supra* Section III.A.

312. See *supra* Section III.B.

313. See *supra* Sections III.A.2, III.B.2.

improve.<sup>314</sup> Restoring *Miranda* protections to their intended strength benefits everyone, especially those with ASD.<sup>315</sup>

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314. See *supra* Parts I, III.

315. See *supra* Parts I–II; see also *supra* Part III.