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Silence

Marcy Strauss

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Silence is Golden; Closed Lips hurt no one, speaking may; Speech is of time, silence is of eternity; For words divide and rend, but silence is most noble till the end; And silence like poultice comes to heal the blows of sound; Be silent and safe, silence never betrays you.[1]

I. INTRODUCTION

John Smith is arrested for murder. At his trial, Smith takes the stand and admits that he killed the victim, but asserts for the first time that it was in self-defense. During cross-examination, the prosecutor asks the following questions in an attempt to discredit Smith's testimony:

Q: And did you immediately go to the police and tell them that you had been attacked and acted solely in self-defense?

A: No, I didn't.

Q: In fact, after you were arrested five days later, did you tell the police this story you're telling now—that you acted in self-defense?

A: No.[2]

In closing argument, the prosecutor relies heavily on Smith's failure to assert that he acted in self-defense prior to his testimony at trial in an attempt to impeach the credibility of the defendant. In

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1. Commonwealth v. Dravecz, 227 A.2d 904, 907 (Pa. 1967) (quoting Swiss inscription from Sartor Resartus, bk. iii, chap. iii).

2. Adapted from Jenkins v. Anderson, 447 U.S. 231, 233-34 (1980).

essence, the government's argument is that Smith's silence—his failure to provide exculpatory evidence prior to trial—demonstrates the falsity of his defense and impeaches his credibility. Thus, the government asserts that admission of such evidence fosters the truth-seeking function of the trial.

On the other hand, Smith's silence prior to trial may be explainable for any number of reasons separate from the truth or falsity of the self-defense rationale. He may have been frightened, shocked, or fearful after the attack, and when dealing with the police. Additionally, and more importantly, Smith was under no duty to provide explanations to the police, or to come forward with his defense. To the contrary, he may have a constitutional right to remain silent under the Fifth Amendment. If so, does using Smith's silence to impeach his testimony violate either the Fifth Amendment's privilege against self-incrimination, or the Due Process guarantee of fundamental fairness? Does the answer depend on whether or not Smith was arrested when his "silence" occurred? Moreover, does it matter whether Smith had been given his Miranda warnings and had therefore been told explicitly about his right to remain silent?[3]

This Article attempts to provide answers to these questions by exploring the issue of when a defendant's silence may be used against him[4] in a criminal trial either for impeachment purposes or to establish the elements of the crime.[5] Such a question is especially

3. For a discussion of the Miranda warnings and the genesis of the rule see Dickerson v. United States, 530 U.S. 428 (2000), upholding Miranda warnings as constitutionally required; Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987); and also Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998).

4. Defendants will be referred to throughout this Article as "he" or "him." In the hundreds of cases I read in preparing this Article, all but a handful of the defendants were male. Thus, for simplicity's sake, the male pronoun will be used throughout the Article.

5. Impeachment is used to attack the veracity of a witness, most typically by showing a prior inconsistent statement. *See* DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 5.10 (Supp. 2001). The theory of impeachment through prior inconsistent statements is not that the substance of the trial testimony is untrue, but rather that the contradiction between the statement made previously and the statement given at trial casts doubt on the credibility of the witness. *See* Doyle v. Ohio, 426 U.S. 610, 616 (1976); Note, *Protecting* Doyle *Rights After* Anderson v. Charles*: The Problem of Partial Silence*, 69

salient today for several reasons. First, there is significant disagreement among the appellate courts, particularly with respect to the use of prearrest, pre-Miranda silence introduced to prove the government's case-in-chief.[6] And even in the one area which appears settled—the admissibility of postarrest, post-Miranda silence—there is distinct rumbling for change, including at the highest level. Although the Supreme Court held almost twenty-five years ago that the Due Process Clause precludes the introduction of an arrested suspect's silence after he has been given Miranda warnings, the Supreme Court has recently indicated a desire to reconsider that holding.[7]

Thus, this Article attempts a comprehensive examination of the various rules involved in the evidentiary use of a defendant's silence. Moreover, it explores the purposes for introducing the evidence—whether to impeach or establish substantive evidence of guilt. The Due Process protection of the Fourteenth Amendment and the Fifth Amendment's guarantee against self-incrimination will also be analyzed. Additionally, this Article considers the admissibility of pretrial silence under state constitutional and evidence law.

Besides describing the current state of the law, this Article will also attempt to address the key normative questions: What should be the rule governing the use of silence in a criminal trial? What rule maximizes the goals of truth seeking while maintaining fidelity to the relevant constitutional and evidentiary rules?

Part II catalogues the courts' approaches to the admissibility of silence and will explain the rules at the federal and state level governing the use of silence in three settings: (1) postarrest and post-Miranda; (2) postarrest but pre-Miranda; and (3) prearrest and pre-Miranda. Part III argues that viewed as a whole, the current rules do

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VA. L. REV. 155, 155 n.1 (1983) [hereinafter *Protecting* Doyle *Rights*].

Alternatively, silence may be introduced in the case-in-chief, as evidence of guilt. For example, the government might try to argue that an innocent man would protest his arrest, or would exclaim his innocence.

6. The appellate courts are now divided 4-3 against admissibility.

7. *See* Portuondo v. Agard, 529 U.S. 61, 74 (2000) ("Although there might be reason to reconsider *Doyle*, we need not do so here."). Moreover, in the course of the decision, the Court seemed to undercut the central premise of *Doyle*: "It is *possible* to believe that [the Miranda warnings] contained an implicit promise that his choice of the option of silence would *not* be used against him." *Id.* at 75 (first emphasis added).

not make sense. Arguing that consistency is important, this Article suggests a cohesive, consistent set of rules governing this area. The central conclusion is that the courts—including the Supreme Court—have taken the wrong Due Process approach, and that a better one is to emphasize the inherent ambiguity in the meaning of silence. Additionally, the Fifth Amendment should be read broader than most courts read it now in order to preclude the introduction of pretrial silence.

But first, a word about "silence." There is surprisingly little discussion in the case law and commentary about what precisely constitutes a comment about the defendant's silence.[8] On the one hand, it is clear that if the defendant stands mute at all times, and the prosecutor later questions the police officer: "Did the suspect say anything?" it evokes comment on the suspect's silence.[9] Moreover, in

8. *See* Wainwright v. Greenfield, 474 U.S. 284, 295 n.13 (1986); United States v. Rivera, 944 F.2d 1563, 1569 (11th Cir. 1991) ("Although both logic and common sense dictate that 'silence' is more than mere muteness, there is no definite outer boundary in determining what types of nonverbal conduct or demeanor, whether assertive or nonassertive, a prosecutor may permissibly comment on without running afoul of the dictates of *Miranda*."). Even in Doyle v. Ohio, 426 U.S. 610 (1976), the seminal Supreme Court case on the use of postarrest, post-Miranda silence, the meaning of silence is somewhat obscure. The Court analyzed the issue as though both defendants had remained mute, describing the case as one involving cross-examination of a person "who remain[s] silent" after police informed him of his Miranda warnings. *Id.* at 620 (Stevens, J., dissenting). While one defendant said nothing, the other asked the arresting officers, "[W]hat's this all about?" When told the reason for the arrest, he responded, "[Y]ou got to be crazy." *Id.* at 623 n.4 (Stevens, J., dissenting); *see also* Anderson v. Charles, 447 U.S. 404, 407 n.2 (1980) (quoting the dialogue between the defendants and the prosecutor during cross-examination); *Protecting* Doyle *Rights*, *supra* note 5, at 159 n.33 (stating that Doyle's initial response was disbelief, but he said nothing about any other issue that later emerged in trial).

9. Even if the meaning of silence could be determined, moreover, there is an additional question about what constitutes an impermissible *use* of that silence. Several courts have held that merely mentioning silence inadvertently in the course of a narrative (i.e., describing the arrest process) does not pose any constitutional problems. *See, e.g.*, Haberek v. Maloney, 81 F. Supp. 2d 202, 208-10 (D. Mass. 2000) (stating that Due Process does not forbid all mention of Miranda warnings and a defendant's response to them at trial); Putman v. Turpin, 53 F. Supp. 2d 1285, 1303-04 (M.D. Ga. 1999); McFarland v. State, 989 S.W.2d 899, 907 (Ark. 1999) (stating that inadvertent mention of defendant's invocation is not a constitutional violation); State v. Harmon, 956 P.2d

some circumstances, there is no doubt that words can be treated like silence. For example, if, in response to police questioning, the defendant says: "I want my lawyer," or "I wish to remain silent," the government may not ask about, or comment upon, the defendant's words.[10] To elicit testimony in court that these words were spoken is a comment on silence.

What if the government wants to inquire about nonverbal conduct or demeanor? For example, what if the prosecutor argues that the suspects did not look surprised when large amounts of cocaine were discovered in their belongings? Should this be viewed as conduct separate from silence, or a comment that the defendant is "acting" silent and therefore potentially excludable? The courts have not yet decided.[11]

Finally, how should omission in the context of other statements be treated? What if the defendant spoke to the police, and the prosecution wants to bring out the fact that he said x, but not y? For

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262, 269 (Wash. 1998) (stating that inadvertent mention of defendant's invocation is not a constitutional violation); *cf.* Noland v. French, 134 F.3d 208, 216-17 (4th Cir. 1998) (discussing the same question with respect to the use of assertion of silence to establish sanity).

10. *Wainwright*, 474 U.S. at 295 n.13 ("[S]ilence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted."); *accord* United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987); State v. Woods, 542 N.W.2d 410 (Neb. 1996) (illustrating that the right to refuse to give a taped statement is treated as silence); *see also* Combs v. Coyle, 205 F.3d 269, 278-86 (6th Cir. 2000) (stating the same rationale as *Wainwright*); *cf.* Hill v. Turpin, 135 F.3d 1411, 1414 (11th Cir. 1998) (holding that silence includes a post-Miranda invocation of the right to counsel); Coppola v. Powell, 878 F.2d 1562, 1562 (1st Cir. 1989) ("And if you think I'm going to confess to you, you're crazy" was treated as invoking Fifth Amendment right and comment upon it was treated like a comment on the right to remain silent).

11. *See Rivera*, 944 F.2d at 1569; United States v. Wright, 47 M.J. 555, 558 (N-M. Ct. Crim. App. 1997) (stating that the fact that the defendant did not look surprised does not raise Fifth Amendment concerns because it is nontestimonial). *But see* United States v. Elkins, 774 F.2d 530, 538 (1st Cir. 1985) (indicating that the government cannot comment on the defendant's lack of surprise at the time of arrest). *Cf.* Kappos v. Hanks, 54 F.3d 365, 369 (7th Cir. 1995) (arguing that defendant's refusal to answer questions and his exit from police station were "actions," not silence). The Seventh Circuit noted that such a distinction did not make sense: "A voiced refusal to cooperate or acts indicating such a refusal are the equivalent of invoking the right of silence, and prosecutors may not comment on them in the circumstances present here." *Id.*

example, imagine a suspect told the police that the person he shot had been coming on to his daughter. At trial, the suspect gave a different explanation: He testified that he shot the person because he was afraid; the person had a reputation for violence and was associated with the Mafia. Can the prosecutor at trial, after eliciting what the suspect actually told the police, then ask: "And did he say anything else?" Or is a question concerning what was not said a question on silence, no different than simply asking if the defendant said anything about the crime?[12]

There is some disagreement about the scope of silence when the suspect does talk, albeit incompletely to the police. The Supreme Court considered this issue in a per curiam opinion in *Anderson v. Charles*.[13] There, the defendant, who was arrested in a stolen car and charged with murdering the car's owner, told the police that he had stolen the car from a particular location.[14] At trial, the defendant said he had actually stolen the car from a different, exculpatory location.[15] Under cross-examination, the prosecutor asked why he had omitted that information from his prior statement.[16] The defendant responded that he did not think it was important because he had been arrested for murder, not auto theft, and that later his attorney told him not to say anything.[17]

The Supreme Court held that this cross-examination, considered as a whole, did not constitute an unfair use of silence, because the prosecutor was simply attempting to obtain an explanation for a prior inconsistent statement, and not trying to draw meaning from the silence.[18] The Supreme Court concluded: "Each of two inconsistent

12. These facts are adapted from State v. Smith, 573 So. 2d 306 (Fla. 1990). The facts there were a bit more sordid, because the daughter (stepdaughter actually) was now the live-in lover of the man charged with the shooting. *See id.* at 308.

13. 447 U.S. 404 (1980) (per curiam).

14. *See id.* at 405-06.

15. *See id.*

16. *See id.*

17. *See id.* at 406.

18. *See id.* at 409; *accord* Rowan v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984); United States v. Goldman, 563 F.2d 501, 505 (1st Cir. 1977). *See generally* David J. Skalka, Note, *Defining Silence Under* Doyle v. Ohio, *Has the Nebraska Supreme Court Become an Impregnable Citadel of Technicality?*, State v. Woods, 30 CREIGHTON L. REV. 171 (1996) (discussing the protection

descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But [our precedents do] not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case."[19]

So then what is silence? What seems on face value to be a simple question in reality is a more complicated proposition. If a suspect fails to make any statement, or fails to come forward to explain himself, the suspect surely is staying "silent." Beyond the situation where a suspect stays mute, or asserts his right to remain silent, the question must be addressed contextually, taking into account the likely purpose of the question, and the likely reaction of the jury. The ultimate consideration must be whether the government is attempting to call attention to a prior inconsistent statement, or instead, whether the question or comment is designed to suggest an inference of guilt from the silence itself.[20] Or, as some courts have asked, are

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given to a defendant's silence under *Doyle* and the limits the court subsequently placed in its holding).

19. *Anderson*, 447 U.S. at 409; *see also* People v. Quintana, 665 P.2d 605, 610 n.7 (Colo. 1983) ("The failure to make any statement should be distinguished from the situation where an accused does make a statement . . . but . . . omits significant details which are later included in a subsequent statement . . . . The omission of a significant detail . . . is in the nature of a prior inconsistent statement.").

20. *See* United States v. May, 52 F.3d 885, 890 (10th Cir. 1995); United States v. Scott, 47 F.3d 904, 906-07 (7th Cir. 1995); United States v. Ramos, 932 F.2d 611, 616-17 (7th Cir. 1991); United States v. Mora, 845 F.2d 233, 235-36 (10th Cir. 1988); *see also* Thomas v. State, 726 So. 2d 357, 358 (Fla. Dist. Ct. App. 1999) (per curiam) (indicating that police testimony that defendant had no response to one question in the middle of an interview was not impermissible comment on defendant's right to remain silent). But see *People v. Hurd*, 62 Cal. App. 4th 1084, 1093-94, 73 Cal. Rptr. 2d 203, 209 (1998), where the court took a different position than the cases which have held that a defendant who chooses to answer some questions can still claim a constitutional violation when government refers to his "partial" silence. The court held that "[a] defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights." *Id.* at 1093, 73 Cal. Rptr. 2d at 209. In this case, the defendant, who was accused of shooting his wife, talked freely about his relationship with his wife, and explained how the shooting occurred with a diagram, but refused to demonstrate the shooting. *See id.* The court concluded, "[h]aving talked, what he said or omitted must be judged on its merits or demerits. . . ." *Id.* at 1094, 73 Cal. Rptr. 2d at 209. It should be noted, however, that the suspect was repeatedly warned by officers that his

the prosecutor's comments or questions "fairly susceptible of being interpreted by the jury as a comment on the right of silence."[21] Introducing evidence of "formalistic silence"—the implicit silent statement that "not x" is false which accompanies every statement that "x is true"—should not be considered as the use of silence.[22]

II. THE ADMISSIBILITY OF SILENCE: AN EXPLORATION OF THE CURRENT LAW

As previously alluded to, the rules concerning the use of the defendant's silence turn on *when* that silence occurred. The Supreme Court holds that silence that takes place after issuing Miranda warnings is inadmissible for any purpose—impeachment or substantive evidence of guilt. Silence that occurs in the absence of Miranda warnings, however, is constitutionally admissible for impeachment purposes, subject to exclusion by the court under the rules of evidence. Whether silence before Miranda warnings have been issued can be used in the case-in-chief has not been addressed by the Supreme Court, and the lower courts have reached conflicting results.

A. Postarrest, Post-Miranda Silence: Doyle v. Ohio[23]

1. Impeachment

Can the government impeach a suspect for failing to say something when that silence occurred after the police arrested the suspect and informed the suspect of a right to remain silent? In *Doyle v. Ohio*, the Supreme Court considered this precise question.[24] There, two suspects—Doyle and Wood—were arrested and charged with selling ten pounds of marijuana to Bonnell, an informant.[25] They were arrested shortly after the sale took place, and given Miranda

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refusal to show how the shooting occurred would be used against him. *See id.* at 1094 n.4, 73 Cal. Rptr. 2d at 209 n.4.

21. *Smith*, 573 So. 2d at 317.

22. *See Anderson*, 447 U.S. at 409; *Protecting* Doyle *Rights*, *supra* note 5, at 171.

23. 426 U.S. 610 (1976). To understand the decisions regarding silence during the other stages, the analysis needs to start with postarrest because the reasoning in the other areas draws on the Supreme Court analysis in *Doyle*.

24. *See id.*

25. *See id.* at 611.

warnings.[26] Although the police did not witness the sale, the police searched the car and uncovered the money that the informant presumably used to make a purchase.[27]

At trial, the defendants took the stand and admitted to everything but the ultimate fact: that they sold the marijuana. Rather, the defendants argued that the informant was trying to frame them and that it was the informant who was selling the marijuana to them.[28] Doyle testified that Bonnell grew angry when Doyle changed his mind about the purchase and claimed that Bonnell then threw the money in his car. Confused about why Bonnell would give them money when the drug sale was aborted, the defendants argued that they were trying to catch up with Bonnell to ask him about the money when the police pulled them over.[29]

As the Supreme Court noted, this explanation by the defendants "presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it."[30] Thus, the prosecutor attempted to undercut the explanation through cross-examination, particularly questioning why the defendants had not told the frame-up story to the police officer who first arrested them.[31] For example, the prosecutor queried: "Mr. Wood, if . . . you are innocent, when [the police officer] arrived on the scene why didn't you tell him [you were set up]?"[32] Objections to these questions were overruled, and both Doyle and Woods were convicted.[33]

The Supreme Court held that impeachment use of the defendant's postarrest silence violated the Due Process Clause of the Fourteenth Amendment.[34] The court emphasized two reasons why Due

26. *See id.* at 612.
27. *See id.* at 611-12.
28. The informant, like so many, had an extensive criminal past, and thus this was not out of the realm of possibilities. Moreover, none of the four narcotic agents involved in the arrest could see who had passed the marijuana to whom. *See id.* at 611-12 n.2.
29. *See id.* at 613.
30. *Id.*
31. *See id.* at 613-14.
32. *Id.* at 614.
33. *See id.*
34. The Supreme Court only considered the Due Process Clause violation and did not reach the question of whether the Fifth Amendment right against

Process was infringed. First, postarrest, post-Miranda silence is inherently ambiguous: "Silence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every postarrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[35]

Second, the Supreme Court stressed that the warnings carry at least an implicit assurance that silence will not be used against the arrestee—that the exercise of the right to remain silent carries no penalty. If impeachment were allowed based on silence, therefore, the defendant would be penalized for relying on the assurances of the government. "In such circumstances," the court opined, "it would be fundamentally unfair and a deprivation of [D]ue [P]rocess to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[36] Thus, even though recognizing the importance of cross-examination, and the possibility that the truth-seeking function might be frustrated, the Supreme Court held that the impeachment use of the defendant's silence at the time of arrest and after receiving Miranda warnings was unconstitutional.[37]

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self-incrimination was infringed, despite the fact that the briefs of the parties addressed the right against self-incrimination. *See Doyle*, 426 U.S. at 616 n.6; Brief for Petitioners at 26, Doyle v. Ohio, 426 U.S. 610 (1976) (No. 75-5014). Justice Stevens in his dissent did consider the Fifth Amendment arguments even though the majority did not, and found they were wanting. *See Doyle*, 426 U.S. at 628 (Stevens, J., dissenting); *see also* Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 302 nn.104-05 (discussing the rationale in *Doyle* that using defendant's silence for impeachment purposes constitutes an impermissible penalty on the exercise of the privilege against self-incrimination).

35. *Doyle*, 426 U.S. at 617.

36. *Id.* at 618. As Justice White noted in an earlier concurrence, anyone would reasonably conclude from the Miranda warnings that the silence would not be used against him. *See* United States v. Hale, 422 U.S. 171, 182-83 (1975); *see also* Portuondo v. Agard, 529 U.S. 61, 75 (2000) ("It is possible to believe that [the Miranda warnings] contained an implicit promise that his choice of the option of silence would *not* be used against him."); *cf.* Johnson v. United States, 318 U.S. 189, 197 (1943) (arguing that it is unfair to allow comments on privilege when the judge had told the defendant he could rely on it). The point was not that everyone who chose to remain silent actually relied on the warnings, but that it is unfair to foster reliance.

37. The Supreme Court remanded the case, noting that the state had not claimed that the use of such evidence was harmless error. *See Doyle*, 426 U.S. at 619-20; *see, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993) (arguing that the *Doyle* error fits within a category of constitutional violations which

There is one exception, however, to this blanket prohibition on use: if the defendant himself puts silence into question, either by raising the issue first,[38] or by testimony that stands in direct contradiction to silence.[39] For example, if the suspect testified that he told the police about his exculpatory information,[40] or that he fully cooperated with the police,[41] evidence of postarrest, post-Miranda silence is admissible to contradict those assertions. As noted in *Doyle*, "[i]t goes almost without saying" that in these situations, the "fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest."[42]

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are called "trial error," and thus must be shown to be harmless beyond a reasonable doubt); *see also* United States v. Balter, 91 F.3d 427, 437-40 (3d Cir. 1996) (noting that the prosecution's impeachment use of defendant's post-Miranda silence could not be distinguished from that in *Doyle* and would thus be unconstitutional). Thus, a *Doyle* violation will not be grounds for reversal if the evidence against the defendant is overwhelming, United States v. Dunbar, 767 F.2d 72, 76 (3d Cir. 1985), or if the reference to silence is insignificant. *See* Lane v. State, 708 So. 2d 206, 209-10 (Ala. Crim. App. 1997); *see also* United States v. Chavez, 193 F.3d 375, 379 (5th Cir. 1999) ("*Doyle* violations often result in reversal, premised as they are on the constitutional right to silence."). *See generally* J. Thomas Sullivan, *The "Burden" of Proof in Federal Habeas Litigation*, 26 U. MEM. L. REV. 205 (1995) (discussing shifts in the federal habeas petitioner's burden of demonstrating a right to relief in federal claims raised by state inmates in federal habeas proceedings).

38. *See* State v. Wilcox, No. 03C01-9808-CR-00314, 1999 WL 894861, at *14 (Tenn. Crim. App. 1999) (indicating that the defendant testified that he invoked the right to remain silent and denied that he made statements to police); State v. Sadowski, 805 P.2d 537, 546 (Mont. 1991) (stating that *Doyle* does not apply when the defendant raises the issue of silence as proof of his innocence).

39. *See Doyle*, 426 U.S. at 619-20 n.11.

40. *See* Earnest v. Dorsey, 87 F.3d 1123, 1135 (10th Cir. 1996) (indicating that at trial, when the defendant testified that he told everyone he was innocent, testimony that he remained silent, or did not proclaim innocence, was admissible).

41. *See* United States v. Reveles, 190 F.3d 678, 685 (5th Cir. 1999) (stating that post-Miranda silence is admissible to rebut the defendant's claim that he stood ready to cooperate at all times); People v. Vanover, 505 N.W.2d 21, 23-24 (Mich. Ct. App. 1993).

42. *Doyle*, 426 U.S. at 619-20 n.11; *see* State v. Strouse, 992 P.2d 158, 163 (Idaho 1999) (holding that the *Doyle* exception did not apply); *cf.* People v. Allen, 505 N.W.2d 869, 872 (Mich. Ct. App. 1993) (*Doyle* exception applies when the defendant testified that it was his first opportunity to tell his version of the events).

An analogous exception exists to the rule established in *Griffin v. Cali-*

2. Case-in-chief

If a statement cannot be used for impeachment purposes under *Doyle,* is such evidence admissible in the case-in-chief? The intuitive answer would be no, and indeed both state and federal courts have excluded evidence of postarrest, post-Miranda silence under *Doyle* when used to show substantive evidence of guilt.[43]

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fornia, 380 U.S. 609 (1965), which barred the government from commenting on or otherwise using the defendant's failure to take the stand and testify at a criminal trial. A prosecutor is not prevented from referring to the defendant's silence at trial when the defense counsel argues that the defendant has not been allowed by the government to give his side of the story. *See* United States v. Robinson, 485 U.S. 25, 33-34 (1988). The Supreme Court recognized that there may be some cost when the defendant chooses to remain silent in this situation, but it declined to expand *Griffin* to preclude a fair response by the prosecutor in such circumstances. *See id.*

43. *See Doyle*, 426 U.S. at 628 (Stevens, J., dissenting). Even the three dissenters in *Doyle* would not allow silence to be admissible in the case-in-chief. *See id.* at 633-36 (Stevens, J., dissenting); United States v. Moreno, 185 F.3d 465, 472 (5th Cir. 1999) (using postarrest, post-Miranda silence in the case-in-chief is a constitutional violation); United States v. Tenoreo, 69 F.3d 1103, 1106-07 (11th Cir. 1995) (holding that after Miranda warnings have been given, the government cannot fairly use a defendant's silence against him at trial as evidence of guilt); *see also* Freeman v. Class, 95 F.3d 639, 644 (8th Cir. 1996) (holding that when a prosecutor, on his own initiative, asks the jury to draw a negative inference from the defendant's silence, the privilege against compulsory self-incrimination is violated); Earnest v. Dorsey, 87 F.3d 1123, 1134-35 (10th Cir. 1996) (disallowing the use of post-Miranda silence in the case-in-chief, even if it is a prior inconsistent statement); United States v. Gant, 17 F.3d 935, 941 (7th Cir. 1994) (stating that once a defendant receives Miranda warnings, the use of postarrest silence to impeach an exculpatory story given at trial is fundamentally unfair and violates Due Process); United States v. Szymaniak, 934 F.2d 434, 439 (2d Cir. 1991) ("It follows [from *Doyle*] that statements of a suspect's intent to remain silent are inadmissible in the government's case-in-chief."); Matire v. Wainwright, 811 F.2d 1430, 1435-36 (11th Cir. 1987) (holding that an officer's testimony, regarding postarrest and post-Miranda silence, was not harmless error where it was emphasized by the prosecutor as evidence of sanity); United States v. Shue, 766 F.2d 1122, 1132 (7th Cir. 1985) (holding that the prosecutor's reference in closing argument that silence is inconsistent with innocence is reversible error); Alo v. Olim, 639 F.2d 466, 468 (9th Cir. 1980) (stating that the use of a defendant's post-Miranda silence during an arrest for impeachment purposes violates the Due Process Clause); United States v. Lynch, 908 F. Supp. 284 (D.V.I. 1995) (holding that the government's use of evidence that the defendant refused to make a monitored telephone call to the codefendant did not violate the defendant's right against self-incrimination or Due Process); Franklin v. Duncan, 884 F. Supp. 1435, 1446 (N.D. Cal. 1995) ("It is a fundamental principle of

Such a principle was embraced by the Supreme Court in *Wainwright v. Greenfield.*[44] There, Greenfield was arrested for sexual battery two hours after the assault took place.[45] After being given Miranda warnings, Greenfield stated that he understood those rights, and wanted to talk to an attorney before making a statement.[46] Over the next few hours, several others read him his Miranda rights, and each time he repeated his request for an attorney.[47] At trial, Greenfield pleaded not guilty by reason of insanity.[48]

In its case-in-chief, the prosecutor introduced the evidence of the detectives, who testified about Greenfield's invocation of his right to counsel.[49] In closing argument the prosecutor suggested that Greenfield's repeated refusal to answer questions and his numerous requests for counsel were inconsistent with his claim of insanity.[50] Greenfield was found guilty, and sentenced to life imprisonment.[51]

After noting that this case, unlike *Doyle,* involved the use of silence as affirmative proof in the government's case-in-chief and not

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[D]ue [P]rocess that the government cannot use, at trial, a defendant's post-Miranda silence as substantive evidence of guilt."); State v. Jones, 648 So. 2d 472, 479 (La. Ct. App. 1994) (finding that the "reasoning in *Doyle* should apply with even stronger force" when silence is used in the case-in-chief); State v. Evans, 633 P.2d 83 (Wash. 1985) (holding that the police officer's testimony regarding the defendant's postarrest silence was inadmissible); State v. Davis, 686 P.2d 1143 (Wash. App. 1984) (extending *Doyle* to prohibit both impeachment and substantive use of postarrest silence after Miranda warnings).

44. 474 U.S. 284 (1986).

45. *See id.* at 286.

46. *See id.*

47. *See id.*

48. *See id.* at 285.

49. *See id.* at 286. "Under Florida law, when a defendant pleads not guilty by reason of insanity and when his evidence is sufficient to raise a reasonable doubt about his sanity, the State has the burden of proving sanity beyond a reasonable doubt." *Id.*

50. *See id.* at 287.

51. *See id.* The prosecutor argued: "He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say, 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act." *Id.* at 287 n.2.

for impeachment, the Supreme Court then found that such a distinction is irrelevant.[52] As the court concluded:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.[53]

Thus, after Miranda warnings have been given, the government cannot fairly use a defendant's silence in any way at trial. Use of silence to impeach a defendant's testimony or as substantive evidence of guilt in the government's case-in-chief is constitutionally impermissible under the Due Process Clause of the Fourteenth Amendment once the suspect has been Mirandized.[54]

B. Postarrest, Pre-Miranda Silence

The Supreme Court in *Doyle* was careful to limit its holding and restrict its analysis to one situation only: the use of postarrest, post-Miranda silence. Since 1976 the courts have grappled with the application of the principles in *Doyle* to situations where Miranda

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52. *See id.* at 292. The state argued in part that *Doyle* is distinguishable because the suspect's comprehension of his Miranda warnings as evidenced by silence is far more probative of sanity than of the commission of an underlying offense. Thus, *Doyle's* rationale that the evidence is insolubly ambiguous does not apply here. The Supreme Court held that it "need not evaluate the probative value of respondent's silence to reject this argument" because the main rationale of *Doyle* rested on the inherent unfairness of the government using silence after assuring that it would not, not the ambiguity of the evidence. *See id.* at 293-94.

53. *Id.* at 292.

54. *See id.* A similar rule is codified in the military rules of evidence. *See* MIL. R. EVID. 301(f)(3) ("[I]f an accused exercised . . . his constitutional right to remain silent . . . that fact may not be used as evidence against the accused.").

warnings have not been given or where the defendant has not even been arrested. What happens if the suspect is arrested, but not yet read his Miranda warnings? Does *Doyle* apply? Various courts have considered the use of silence in these circumstances both for impeachment purposes and for use in the case-in-chief. The bottom line: The use of silence to impeach does not violate the U.S. Constitution but may violate state constitutional and evidentiary principles,[55] while the use of silence in the government's case-in-chief is still in dispute.

1. Impeachment

a. federal constitutional limitations

In *Fletcher v. Weir*,[56] the Supreme Court, in a short per curiam opinion, considered the application of *Doyle* when the suspect was arrested but it appeared that no Miranda warnings were given by the arresting officer prior to the silence. In *Fletcher,* Weir stabbed the victim during a fight and then left the scene without reporting the incident to the police.[57] At his trial for intentional murder, Weir admitted the stabbing, but claimed that it was an accident and that he acted in self-defense.[58] When Weir took the stand, the prosecutor asked why he had not offered the exculpatory explanation to the arresting officer. Weir responded, "I didn't feel I ought to tell them anything."[59] Weir was ultimately convicted of first degree manslaughter.[60]

The Court of Appeals for the Sixth Circuit relied on *Doyle* in finding that the use of the postarrest silence violated the Due Process

55. Evidentiary issues are not explicitly considered in this section. However numerous state cases' evidentiary decisions are referenced in Part III.

56. 455 U.S. 603 (1982).

57. *Id. See generally* David E. Melson, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572 (1982) (arguing that the benefits of impeachment should be balanced against individual rights concerns).

58. *Fletcher*, 455 U.S. at 603.

59. *See* Weir v. Fletcher, 658 F.2d 1126, 1131 (6th Cir. 1981).

60. *See id.* at 1127.

Clause of the Fourteenth Amendment.[61] The Supreme Court reversed, finding that the Sixth Circuit gave an "overly broad reading to our decision in *Doyle v. Ohio*."[62] In essence, the Supreme Court distilled *Doyle* to only one principle: The government may not induce silence by implicitly assuring the defendant that his silence would not be used against him, and then breaking such a promise.[63] Any concern about the unfairness of using silence because of its inherent ambiguity was delegated to the realm of evidence law, not constitutional doctrine. Thus, the Supreme Court concluded:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.[64]

b. state constitutional limits on postarrest, pre-Miranda silence: a critique of Fletcher

In *Fletcher* the Supreme Court provided very little analysis as to why reading Miranda warnings is the dispositive factor in determining fundamental fairness. Also, the court failed to consider possible

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61. *See id.* at 1131.

62. *Fletcher*, 455 U.S. at 604.

63. *See id.* at 605-06; *see also* Wainwright v. Greenfield, 474 U.S. 284, 294 (1986) ("For the ambiguity of the defendants' silence in *Doyle* merely added weight to the Supreme Court's principle rationale, which rested on the implied assurance contained in the *Miranda* warning."); Anderson v. Charles, 447 U.S. 404, 407-08 (1980) ("*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.") (citations omitted); Splunge v. Parke, 160 F.3d 369, 372 (7th Cir. 1998) ("Although *Doyle* and its precursor [*Hale*] suggest that the problem with any reference to silence is its 'insoluble ambiguity,' the Supreme Court jettisoned this justification in [*Fletcher*].") (citations omitted); *cf.* Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (quoting the principle in *Doyle* that it is unfair to use a statement after reliance).

64. *Fletcher*, 455 U.S. at 607.

self-incrimination problems with permitting the admission of such evidence. Not surprisingly, several state courts have interpreted their own constitutional provisions to preclude the introduction of postarrest, pre-Miranda silence for impeachment purposes.[65]

In rejecting the Supreme Court's conclusion in *Fletcher*, these state courts relied on several arguments. First, they disagreed with the premise in *Doyle* and *Fletcher* that the actual giving of Miranda warnings is determinative.[66] According to these state courts, the same right is being asserted by the defendant whether or not Miranda warnings are provided, i.e., the right to remain silent. The reading of warnings does not add or subtract from an individual's right against

65. *See* Nelson v. State, 691 P.2d 1056, 1059 (Alaska Ct. App. 1984) (concluding that under Art. 1, § 9 of the Alaska Constitution, a person under arrest cannot normally be impeached by the fact that he was silent following his arrest); Lee v. State, 422 So. 2d 928, 930 (Fla. Dist. Ct. App. 1982) (noting that a state can place greater restrictions than federal courts can on the use of postarrest silence under the Federal Constitution); Sanchez v. State, 707 S.W.2d 575, 579 (Tex. Crim. App. 1986) (reading Texas Constitution to prohibit postarrest, pre-Miranda silence and finding that the right to remain silent arises at the moment of arrest); *see also* State v. Maness, 1990 Tenn. Crim. App. LEXIS 65 (stating that a postarrest, pre-Miranda statement is not admissible under the state constitution); State v. Davis, 686 P.2d 1143, 1145 (Wash. Ct. App. 1984) (holding that the trial court's consideration of a juvenile's postarrest silence violated the state due process guaranty). Some states, however, are not allowed, or choose not, to read their constitutional protections broader than the federal interpretation. *See* People v. Givens, 482 N.E.2d 211, 221 (Ill. App. Ct. 1985) (stating that Illinois consistently follows the U.S. Supreme Court); State v. Hunt, 323 S.E.2d 490, 492 (N.C. Ct. App. 1984) ("We are not aware of any decision of the Supreme Court of North Carolina that would place more or heavier burdens on the State's right to cross examine a testifying defendant than those imposed by the Supreme Court of the United States."). California state courts have held that postarrest, pre-Miranda silence is not admissible. *See* People v. Fondron, 157 Cal. App. 3d 390, 395, 204 Cal. Rptr. 457, 461 (1984). However, in 1982, Proposition 8 was adopted, declaring that the exclusionary rule applies only to matters for which federal law prohibits admission. *See* People v. O'Sullivan, 217 Cal. App. 3d 237, 244-45, 265 Cal. Rptr. 784, 788 (1990).

66. *See, e.g.*, State v. Hoggins, 718 So. 2d 761, 768-70 (Fla. 1998) (finding that postarrest silence, even absent Miranda warnings, violates the state's protection against self-incrimination); *cf.* Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995) (extending the right to remain silent even to prearrest: "Since the right to remain silent is a self-executing right, an accused is presumed to be exercising the right by his silence, prearrest and pre-*Miranda* when questioned by the state's agents for purposes of a criminal investigation.").

self-incrimination. These courts point out that distinguishing between circumstances when the rights are read or not makes little sense because the rights embodied in *Miranda* are so well-known.[67] Indeed, in *Fletcher* itself, it can be presumed that Weir knew his rights even though the police did not read them to him since he had been arrested two times previously.

Thus, in either case—when rights are read, or when they are not—the defendant presumptively may be relying on those rights in maintaining his silence. As the Supreme Court of Nevada noted:

> [T]he *Miranda* warnings and an arrestee's right to remain silent have been widely publicized via the media, so that in many cases, the silence of an unwarned arrestee will be based on his personal knowledge of his *Miranda* rights; therefore, the "implicit assurance" of *Doyle* that his silence will not be used against him is inherently present.[68]

The Court of Appeals of Washington agreed with this reasoning:

> There is no logic in protecting a defendant advised of his rights and not an unadvised defendant. Both defendants are exercising the same constitutional right. The arrest itself is governmental action which enshrouds a defendant with the constitutional right to remain silent . . . . We hold that the use of a defendant's postarrest silence, regardless of whether such silence follows *Miranda* warnings, is

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67. *See* Weisselberg, *supra* note 3, at 110 ("*Miranda v. Arizona* may be the United States Supreme Court's best-known decision. Anyone who has watched a television police drama during the last thirty years undoubtedly has heard the famous warnings . . . ."). Even as early as 1981, the Fifth Circuit noted that "[t]hose warnings are well-established and mechanical in nature. Most ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite them as well as any police officer." United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981); *see also* Aaron R. Pettit, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L. J. 181, 217 (1997) ("Most Americans can recite the *Miranda* warnings by heart. . . .").

68. Coleman v. State, 895 P.2d 653, 657 (Nev. 1995); *cf. Nelson*, 691 P.2d at 1059 (commenting on the prohibited use of postarrest silence); *Lee*, 422 So. 2d at 930 (affirming the prohibition against use of postarrest silence); Sanchez, 707 S.W.2d at 579 (affirming an implicit right to remain silent under the Texas Constitution).

> fundamentally unfair and violates the due process clause of the Washington Constitution, art. 1, § 3.[69]

Besides noting that the distinction between warned and unwarned defendants is unprincipled, some state courts have eschewed limiting the *Doyle* right only to post-Miranda situations out of fear that such a rule might encourage the police to withhold the giving of Miranda warnings. In other words, if the silence of an arrested, unwarned suspect can be used for impeachment, police officers might delay reading the Miranda warnings in the hope that the silence can be used against the defendant.[70] Eliminating the distinction between postarrest, post-Miranda silence and postarrest, pre-Miranda silence,

> foreclose[s] any inducement to police to engage in gamesmanship—dispensing with a *Miranda* advisement where they suspect that the arrestee would refuse to talk anyway, or asking no questions immediately after the arrest in order to use a defendant's silence against him, but later giving a *Miranda* warning in order to secure a statement.[71]

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69. *Davis*, 686 P.2d at 1146; *see also* Webb v. State, 347 So. 2d 1054, 1056 (Fla. Dist. Ct. App. 1977) ("[W]hile *Miranda* warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for fear of self-incrimination, then the mere fact the police call his attention to that right does not elevate it to any higher level."); Commonwealth v. Turner, 454 A.2d 537, 540 (Pa. 1982) ("We do not think that the accused should be protected only where there is governmental inducement of the exercise of the right. We acknowledge that this position is more restrictive than that taken in *Fletcher v. Weir* . . . . However, we decline to hold, under the Pennsylvania Constitution, that the existence of *Miranda* warnings, or their absence, affects a person's legitimate expectation not to be penalized for exercising the right to remain silent.").

70. *See Davis*, 686 P.2d at 1146.

71. *Coleman*, 895 P.2d at 657; *see also Protecting* Doyle *Rights*, *supra* note 5, at 155 (discussing the constitutional limits placed on a prosecutor's use of postarrest silence to impeach a partially silent defendant). This argument assumes that police officers are aware of the distinction between *Doyle* and *Fletcher*. Moreover, it assumes that police officers will engage in a calculated determination of whether the suspect's silence will aid law enforcement (assuming the defendant takes the stand and says something that can be impeached) and further, that this benefit to police will outweigh the danger that any statement made by the defendant might be inadmissible because of the lack of Miranda warnings. *But see* Harris v. New York, 401 U.S. 222, 225

In sum, with respect to impeachment, federal law regarding postarrest silence is clear: Under *Doyle*, if Miranda warnings are issued, the admission of evidence of silence violates the Due Process Clause. If no Miranda warnings are issued, under *Fletcher* there is no federal constitutional prohibition to the admission of such evidence. Admissibility of evidence of silence thus turns solely on whether Miranda warnings are given.

Although federal constitutional law permits the admission of postarrest, pre-Miranda silence, state constitutional law may in fact preclude the introduction of such evidence. That is, some state courts have construed their constitutional provisions of Due Process or right against self-incrimination to preclude the introduction of postarrest, pre-Miranda silence.

2. Case-in-chief

The Supreme Court has never considered whether admission of a defendant's postarrest, pre-Miranda silence for purposes of establishing the government's case-in-chief is constitutional. Admission of evidence of silence in the case-in-chief potentially poses a more difficult question than impeachment. For example, impeachment obviously occurs only after the defendant takes the stand and arguably lies; the interest in preventing the acceptance of perjured testimony may be sufficient to justify the introduction of otherwise inadmissible evidence.[72] Or, some may believe that the defendant who takes the stand and testifies waives his Fifth Amendment rights, and thus evidence that may otherwise be constitutionally protected can now be introduced.[73] Given these factors, have the courts treated evidence of postarrest, pre-Miranda silence for establishing guilt the same as for impeachment? Several appellate courts have addressed that issue, with varying results.

Most recently, the Ninth Circuit faced this question in *United States v. Whitehead*.[74] There, Timothy Whitehead was arrested for importation of marijuana shortly after he and his brother attempted to

(1971) ("[B]enefits of this [impeachment] process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby.").

72. *See Harris*, 401 U.S. at 224-26.

73. *See infra* note 256 and accompanying text.

74. 200 F.3d 634 (9th Cir. 2000).

drive into the United States from Mexico.[75] During that entry, the immigration officer noted that there were no clothes nor anything visible in Whitehead's car; when Whitehead opened the trunk in response to a request by the official, the trunk was also empty.[76] Finding this suspicious, and believing that Whitehead was acting nervous, the official referred Whitehead to a secondary inspection.[77] There, a narcotics-detecting dog alerted to the rear of Whitehead's car.[78]

At that point, Whitehead and his brother were placed in custody.[79] Subsequently, customs officers searched Whitehead's car, frisked and searched Whitehead's wallet and shoes, and had him remove his belt while Whitehead remained silent.[80] Inside the rear bumper of the car, the customs officer found brick-shaped packages wrapped in cellophane; inside was a green leafy substance that later proved to be marijuana.[81]

During the trial, the officer was asked repeatedly whether Whitehead ever asked what was found, what was "going on," or why he was being arrested. In response to all these questions, the officer answered no. During closing argument, the prosecutor then argued to the jury that Whitehead stayed silent because he was guilty:

> What do you do [when you've been detained and frisked and searched]? . . . What would anyone of us do? What is going on here? What the heck is going on? Why I am [sic] being treated like this? Why am I being arrested? But you don't say that, if you know; and the defendant didn't say a word because he knew. He knew there were drugs in the car.[82]

The Ninth Circuit held that such a line of inquiry, and such comments by the prosecutor violated the defendant's Fifth

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75. *See id.* at 636.
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.* at 637.
80. *See id.* at 636-37.
81. *See id.* at 637. To be specific, the inspectors found 54.85 pounds of marijuana worth approximately $35,000. *See id.* at 639.
82. *Id.* at 638. Whitehead never took the stand, exercising his right to remain silent at trial. *See id.* at 639.

Amendment rights.[83] "'The fact of silence in the face of arrest' . . . could not be used as substantive evidence of guilt, because that would 'act [] as an impermissible penalty on the exercise of the . . . right to remain silent.'"[84]

Courts in the Seventh Circuit and the District of Columbia Circuit have also held that postarrest silence is inadmissible in the case-in-chief.[85] For example, in *United States v. Moore*,[86] the police stopped a car driving at a high rate of speed and passing through several red lights without stopping.[87] The driver of the car, Opio Moore, agreed to a search of the car.[88] In that search the officers found several loaded weapons, including a semi-automatic pistol, and a large quantity of cocaine around the car's battery.[89] Shortly thereafter, Moore was arrested and later charged with unlawful possession with

83. *See id.* But the Ninth Circuit did not overturn the conviction; though it was error to admit evidence, it was harmless error—it did not affect the outcome. Comments on the defendant's failure to speak were scant, and the reference to the silence was incidental. Although the prosecutor's reference to the defendant's silence in closing argument was more significant, the independent overwhelming physical evidence of guilt was determinative. *See id.*

84. *Id.* at 638 (quoting Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978)).

85. *See* United States v. Moore, 104 F.3d 377, 384-89 (D.C. Cir. 1997); United States v. Hernandez, 948 F.2d 316, 322-24 (7th Cir. 1991); *see also* People v. Wanke, 726 N.E.2d 142 (Ill. App. Ct. 2000) (holding that the prosecutor's use of evidence that the defendant invoked his privilege against self-incrimination was plain error). In *Wanke*, the State argued that the fact that the defendant invoked his privilege against self-incrimination showed he was lucid, and thus disputed his insanity defense. The court held that the invocation before the reading of Miranda warnings was irrelevant:

> For the State to argue that there is a difference between pre- and post-*Miranda* warnings is of no moment in this case. The issue here is not the voluntariness of defendant's statement. It involves the State using defendant's silence to prove that he was sane at the time of the incident. The State cannot use defendant's silence as knowledge of his guilt. By doing so, the State improperly uses defendant's exercise of a fundamental constitutional right as a proxy for sanity.

Id. at 145.

86. 104 F.3d 377 (D.C. Cir. 1997).

87. *See id.* at 380.

88. *See id.*

89. *See id.*

intent to distribute cocaine, and using and carrying a firearm during a drug trafficking offense.[90]

At trial, when asked if Moore said anything when the drugs and guns were found in the car, the officer answered, "No."[91] In closing argument, the prosecutor tried to use this silence to imply knowledge of guns and drugs, and hence, that Moore was guilty of the offense of possession: "[I]f Moore didn't know the stuff was underneath the hood, [he] would at least look surprised. [He] would at least [have] said, 'Well, I didn't know it was there.'"[92]

The District of Columbia Court of Appeals held that such use of the defendant's silence violated the Fifth Amendment guarantee against self-incrimination.[93] Although recognizing that no Supreme Court case has explicitly ruled on pretrial silence and the Fifth Amendment, the District of Columbia Court of Appeals noted that the Supreme Court has made clear that the protection of the Fifth Amendment extends backward at least to the time of custodial interrogation.[94] Moreover, the appellate court found that the right should extend even further—at least to the time of custody:

> Although in the present case, interrogation per se had not begun, neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion would unduly burden the Fifth Amendment privilege. Additionally, a prosecutor's comment on a defendant's post-custodial silence unduly burdens that defendant's Fifth Amendment right to remain silent at trial, as it calls a jury's further attention to the fact that he has not arisen to remove

90. *See id.* at 379-80.
91. *See id.* at 384.
92. *Id.* The defense objected to these comments, but the judge overruled the objection.
93. *See id.* at 389.
94. *See id.* at 385.

> whatever taint the pretrial but post-custodial silence may have spread. We therefore think it evident that custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*. Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening "silence" that could then be used against the defendant.[95]

Nor did the court find persuasive the fact that Moore had not yet received any Miranda warnings. According to the appellate court, the fact that the government has not provided the suspect with a litany of his rights does not deny that those rights exist under the Fifth Amendment.[96] Thus, the court concluded that "[t]he silence of an arrested defendant . . . is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice."[97]

On the other hand, the Eleventh Circuit Court of Appeals admitted evidence of silence during the postarrest, pre-Miranda period. In *United States v. Rivera*,[98] a customs inspector stopped three individuals traveling from Colombia at the Miami airport. After some routine questions were asked and answered, the customs official decided to examine each individual's luggage.[99] Inspection of the bags revealed in each case an "obvious" false bottom; after puncturing the bottoms with a screwdriver, white powder which later proved to be cocaine was evident. The three individuals were then placed under arrest, and read their Miranda rights.[100] A further search of the luggage then ensued, and additional drugs were discovered.[101]

At trial the customs official wanted to testify about the defendants' silence—indeed, their indifference during the search and after the arrest.[102] The appellate court held that the inspector's testimony regarding the group's reaction to the search prior to the issuance of Miranda warnings was admissible: "Schor's testimony about Vila's

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95. *Id.*
96. *See id.* at 386-87.
97. *Id.* at 387. The court explicitly left the question of Fifth Amendment rights for prearrest silence to another day. *See id.* at 387-88.
98. 944 F.2d 1563 (11th Cir. 1991).
99. *See id.* at 1565-66.
100. *See id.*
101. *See id.*
102. *See id.* at 1567-68.

reaction to his initial questioning prior to inspection of the . . . luggage [comes prearrest] and therefore was not improper. In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given."[103]

Although the Eleventh Circuit admitted postarrest, pre-Miranda silence in the government's case-in-chief, the persuasiveness of the opinion is open to question. First, the court reached its conclusion with almost no analysis, simply stating the holding quoted above. Second, its support for admitting such evidence in the case-in-chief consisted of two cases which considered only the question of admissibility of evidence of silence for impeachment purposes: *Jenkins v. Anderson* and *Fletcher v. Weir*.[104]

C. Prearrest, Pre-Miranda Silence

What rules govern a prearrest situation, which is typically prior to any issuance of Miranda warnings?[105] For example, what if the government wants to introduce the fact that prior to his arrest the suspect never came forward to explain a criminal act, while at the trial he claims to have acted in self-defense?[106] Or, what if the silence occurs when the suspect is not in custody, but is being

103. *Id.* at 1568 n.11 (citing *Fletcher*, 455 U.S. at 603).

104. *See id.* at 1568 nn.10-11 (citing Jenkins v. Anderson, 447 U.S. 231 (1980) which held that prearrest silence may be used to impeach a criminal defendant's credibility); *see also Fletcher*, 455 U.S. at 607 (asserting that a defendant is not denied Due Process under the Fourteenth Amendment by the prosecution's use of postarrest silence for impeachment purposes where the record did not indicate a Miranda warning); Pettit, *supra* note 67, at 192-93 (stating that in *Jenkins* the prosecution cross-examined the defendant about the defendant's prearrest silence in not going to the police to explain the occurrence). According to *Jenkins* a prosecutor may use prearrest silence to impeach a defendant's credibility if he takes the stand in his defense. *See Jenkins*, 447 U.S. at 238-40.

105. Miranda warnings are not required to be given unless the defendant is subject to custodial interrogation. But when Miranda warnings are given prearrest, these cases will likely be considered under *Doyle*. *See* Kappos v. Hanks, 54 F.3d 365, 368-69 (7th Cir. 1995) (stating that even if an arrest has not occurred, *Doyle* is applicable if Miranda warnings had been given); United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (presenting an example of a prearrest situation where the suspect was given his Miranda warnings).

106. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231, 231 (1980).

questioned by the police?[107] Can silence in those circumstances be used against him? Again, the courts have considered this question with respect to both impeachment and use of the evidence in the case-in-chief.

1. Impeachment

a. federal constitutional principles

In 1980, the Supreme Court considered whether the Fifth or Fourteenth Amendment precluded the use of the defendant's prearrest silence to impeach a criminal defendant's credibility.[108] In *Jenkins v. Anderson* the defendant was accused of first degree murder in the stabbing death of Doyle Redding.[109] Although Redding was killed on August 13, 1974, Jenkins did not turn himself in until two weeks later.[110] At trial, he argued that he acted in self-defense, and that Redding had attacked him first with a knife.[111] During cross-examination, the prosecutor questioned Jenkins about his failure to report the incident and his defense to the police:

> Q: And I suppose you waited for the Police to tell them what happened?
>
> A: No.
>
> Q: Did you ever go to a Police Officer or to anyone else [besides your probation officer]?
>
> A: No, I didn't.[112]

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107. Miranda warnings are only required to be issued when the suspect is subject to custodial interrogation. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984) (discussing the meaning of custody); Rhode Island v. Innis, 446 U.S. 291 (1980) (discussing the meaning of interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977).

108. *Jenkins*, 447 U.S. at 231.

109. *Id.* at 232.

110. *See id.*

111. *See id.* at 232-33. The defendant had reported to the police that Redding had robbed his sister; he argued that Redding in return attacked him in anger. The prosecution maintained that Jenkins murdered Redding in retaliation for the robbery. *See id.* at 232-33.

112. *Id.* at 233.

In closing argument, the prosecutor pointed out Jenkins' silence, noting that he had waited two weeks before doing anything.[113] Jenkins was convicted of manslaughter.[114]

The Supreme Court rejected any constitutional challenge to the admissibility of the evidence.[115] With respect to the Fifth Amendment, the court considered "whether compelling the election [to speak] impairs to an appreciable extent any of the policies behind the [Fifth Amendment]"[116] and the "legitimacy of the challenged governmental practice [of impeachment]."[117]

The court first rejected the notion that the values or policies of the Fifth Amendment right to remain silent are offended when a person is impeached with his prior silence.[118] However, it did so with almost no analysis; the court simply referred to past cases where it had upheld such a practice of impeachment.[119] In those cases, the court focused not on the decision to remain silent prior to arrest, rather, they were concerned with the right to remain silent *at trial.* In other words, the Supreme Court suggested:

> that a defendant's real dilemma lies in determining whether to testify or not; once a defendant has voluntarily taken the stand, the rule that he must testify fully does not significantly add to this dilemma and is indeed a defendant's obligation, as the privilege against self-incrimination 'cannot be construed to include the right to commit perjury.'[120]

Besides minimizing the burden on the right to silence and depicting it as acceptable given the purposes of the Fifth Amendment,

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113. *See id.* at 234.

114. *See id.*

115. *See id.* at 238-39 (citing 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1970)).

116. *Id.* at 236 n.3 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 23 (1973)). The Supreme Court noted that it was not clear whether the Fifth Amendment protects prearrest silence, but held that assuming it does the prosecutor's comments were constitutionally permissible.

117. *Id.* at 238 (citing *Chaffin*, 412 U.S. at 32 & n.20.

118. *See id.* at 236-38.

119. *See id.* at 237-38.

120. Combs v. Coyle, 205 F.3d 269, 281 (6th Cir. 2000) (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

the court also lauded the legitimacy of impeachment on cross-examination.

> Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process . . . . Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'[121]

Nor did the Supreme Court find persuasive the argument that use of prearrest silence violates notions of fundamental fairness guaranteed by the Fourteenth Amendment.[122] First, the court noted that the common law traditionally allowed witnesses to be impeached by their silence in appropriate circumstances.[123] Moreover, the court distinguished *Doyle* as applying only when there is government action inducing the defendant to remain silent.[124] Since here "[t]he failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings . . . the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment."[125]

Thus, a suspect's prearrest silence is admissible for impeachment purposes. Neither the Fifth nor the Fourteenth Amendment poses any obstacle to the use of silence in this context.

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121. *Jenkins*, 447 U.S. at 238 (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).

122. *See id.* at 238-39.

123. *See id.* at 239.

124. *See id.* at 239-40.

125. *Id.* at 240. Although Justice Powell wrote the majority opinions in both *Doyle* and *Jenkins*, "they lie in uneasy tension with each other . . . ." R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 60 (1981). As Professor Greenawalt explains, the reason may be that some justices who joined Powell in *Doyle* dissented in *Jenkins*, while some who joined the majority in *Jenkins* dissented in *Doyle*. "The opinions may have been tailored to capture the votes of the particular justices in each majority." *Id.* at 60 n.134.

b. state constitutional decisions

While *Jenkins* permits evidence of prearrest silence, the decision does not require state courts to do so.[126] Consequently, state courts are divided on this issue. The Georgia Supreme Court interprets its constitution to preclude admissibility of prearrest silence.[127] It held that "in criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative."[128] The court declared that in all subsequent cases, a comment like that made in the instant case "will not be allowed even where the defendant has not received Miranda warnings and where he takes the stand in his own defense."[129] Similarly, the Kentucky Court of Appeals held that the defendant was deprived of Due Process when the prosecution discussed his prearrest silence during closing arguments.[130] The court concluded that the prosecutor's comment regarding defendant's failure to profess his innocence when the police pulled him over was prejudicial.[131] The court, however, did not specify whether its holding was based on violation of the Fourteenth Amendment or Kentucky's own constitutional Due Process provision.

Alternatively, some state courts embrace *Jenkins*, holding that use of prearrest silence to impeach a defendant violates neither his Fifth nor Fourteenth Amendment rights. The Wisconsin Supreme Court found no violation of Due Process and refused to interpret the self-incrimination provision of the Wisconsin Constitution more liberally than the Fifth Amendment.[132] Failing to distinguish between prearrest and pre-Miranda silence, the court held that comment on

126. *See Jenkins*, 447 U.S. at 240.

127. *See* Mallory v. State, 409 S.E.2d 839, 843 (Ga. 1991).

128. *Id. But cf.* Mullinax v. State, 530 S.E.2d 255, 256-57 (Ga. Ct. App. 2000) (holding that prearrest evidence of silence was admissible because it was relevant to illustrate the circumstances of the arrest); Boykin v. State, 523 S.E.2d 605, 607 n.6 (Ga. Ct. App. 1999) (explaining that where evidence of prearrest silence was not barred because unlike *Mallory*, where defendant merely failed to contact the police, the defendant in *Boykin* failed to respond to officer's questions at the scene of the crime—thus, the evidence was admissible as part of the res gestae of the crime).

129. *Mallory*, 409 S.E.2d at 843.

130. *See* Churchwell v. Commonwealth, 843 S.W.2d 336, 338-39 (Ky. Ct. App. 1992).

131. *See id.* at 339.

132. *See* State v. Sorenson, 421 N.W.2d 77, 90 (Wis. 1988).

pre-Miranda silence is allowed once defendant elects to take the stand.[133] Barring such cross-examination would permit the defendant to "wrongfully manipulate the rules of evidence."[134] Furthermore, the court found that any potential prejudice created by such comment can be adequately remedied by defendant's counsel on redirect.[135]

2. Prearrest, pre-Miranda silence and the case-in-chief

a. federal law

There is no Supreme Court decision governing whether prearrest, pre-Miranda silence can be used not to impeach but to convict the defendant—as substantive evidence of guilt.[136] Until recently, the appellate courts were split: Three circuits held that the use of the defendant's prearrest silence violates the Fifth Amendment privilege against self-incrimination, and three other circuits held it did not.[137]

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133. *See id.* The court distinguished the case from *State v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982), where the defendant did not elect to testify and the court held that the Fifth Amendment prohibited references to his pre-Miranda silence.

134. *Id.*

135. *See id.*; *see also* Kidd v. State, 649 So. 2d 1304, 1307 (Ala. Crim. App. 1994) (holding that pursuant to *Jenkins*, comment on defendant's prearrest, pre-Miranda silence is permissible).

136. *See* United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996). In *Jenkins* the Supreme Court explicitly refused to decide whether prearrest silence can be used in the case-in-chief. *See Jenkins*, 447 U.S. at 236 n.2.

137. The First, Seventh, and Tenth Circuits had explicitly found a Fifth Amendment violation. *See, e.g.*, United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (holding that prearrest silence is inadmissible under the Fifth Amendment and principles of *Griffin*, but the error was harmless); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987). *But cf.* United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991) (finding that the defendant voluntarily gave the investigator some answers to questions, and refused to answer others; the court stated that defendants cannot selectively assert the same self-incriminating rights as those who take the stand).

The Second Circuit had expressed doubt whether evidence of prearrest silence is admissible. *See* United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) ("[W]e are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case-in-chief.").

Specifically, the First, Seventh, and Tenth Circuits had found that the introduction of a defendant's prearrest, pre-Miranda silence violated the Fifth Amendment, and the Second Circuit had at least expressed some leanings in that direction.

On the other hand, the Fifth, Ninth, and Eleventh Circuits found no constitutional violations in the admission of such evidence.[138] Finally, in February of 2000, the Sixth Circuit weighed in and, agreeing with the First, Seventh, and Tenth Circuits, held that the right to remain silent precluded the use of prearrest silence as substantive evidence of guilt.[139]

In the Sixth Circuit case, the defendant, Ronald Combs, was charged with murdering two women.[140] Almost immediately after the murders, a police officer who was near the scene of the crime shot him.[141] In the ambulance, on the way to the hospital, another officer asked him what happened.[142] Combs then told the officer to talk to his lawyer.[143]

At trial, Combs' attorney did not deny that Combs had used his gun; instead, he argued in defense that Combs was too intoxicated from alcohol and drugs to form the requisite mental state for

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The Fifth, Ninth, and Eleventh Circuits had held that there was no Fifth Amendment violation in these circumstances. *See* United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (holding, without much discussion, that the government may comment on a defendant's silence if it occurred prior to arrest, citing *Jenkins*).

The Ninth Circuit decision in *Oplinger* is interesting because as discussed supra, two years later, the appellate court held that the Fifth Amendment is violated with the use of postarrest, pre-Miranda silence introduced in the case-in-chief. *See* United States v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000); *supra* text accompanying notes 74-84. The court distinguished the situations by finding that prearrest, a suspect is under no compulsion to speak. *See Whitehead*, 200 F.3d at 639.

Some state courts have also considered this issue. *See, e.g.*, State v. Rowland, 452 N.W.2d 758, 763 (Neb. 1990) (holding that prearrest silence can be used for impeachment but not in the case-in-chief).

138. *See Oplinger*, 150 F.3d at 1066-67; *Rivera*, 944 F.2d at 1568; *Zanabria*, 74 F.3d at 593.

139. *See* Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000).

140. *See id.* at 278-79.

141. *See id.*

142. *See id.*

143. *See id.*

premeditated murder.[144] Although Combs did not testify, the defense called other witnesses to establish the extent of his alcohol and drug ingestion.[145]

To counter the defense, the government introduced the "talk to my lawyer" statement to show that Combs understood what he was doing.[146] The prosecutor explained in closing argument: "Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what is going on? Isn't that evidence that he realizes the gravity of the situation?"[147] Combs was convicted, and sentenced to death.[148]

The Sixth Circuit held that the introduction of the defendant's prearrest silence (here, invoking the right to an attorney)[149] violated the Fifth Amendment. The court first held that the privilege applies in the prearrest setting:

> The Supreme Court has given the privilege against self-incrimination a broad scope . . . it can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[150]

The privilege against self-incrimination, according to the Sixth Circuit, is not tied to any stage or venue—it inures whenever there is the danger that a person may be forced to incriminate himself. Thus, the appellate court found that the Fifth Amendment applies whenever an individual's comments could produce incriminating evidence, regardless of whether it is a pre- or postarrest setting.[151]

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144. *See id.* at 273.
145. *See id.*
146. *Id.* at 279.
147. *Id.*
148. *See id.* at 273.
149. The statement requesting an attorney is treated as "silence." *See supra* text accompanying note 10.
150. *Combs*, 205 F.3d at 283 (quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972)).
151. *See Combs*, 205 F.3d at 283. The court also suggests that even if the Fifth Amendment only applies postarrest, it would be applicable to Combs because he was effectively in custody when he made his "talk to my lawyer"

Once the Sixth Circuit concluded that the Fifth Amendment applied to Combs, the question became whether this right was violated by the admission of the evidence. To make that assessment, the appellate court utilized the two pronged test set forth in *Jenkins*, considering first, whether admitting the evidence would subvert the policies behind the constitutional provision, and second, whether the government's use of the evidence is a legitimate business practice.[152]

With regards to the first question, the court concluded that the use of prearrest silence "would substantially impair the policies behind the privilege."[153] As the appellate court explained:

> If . . . prearrest silence may be used as substantive evidence of guilt regardless of whether or not the defendant testifies at trial, then the defendant is cast into the very trilemma [of self-accusation, perjury or contempt]. Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon first contact with police or later at trial in order to explain the prior silence. Perhaps most importantly, use of a defendant's prearrest silence as substantive evidence of guilt substantially impairs the "sense of fair play" underlying the privilege. Unlike in the case of impeachment use, the use of a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each element of the crime.[154]

Moreover, the Sixth Circuit found that the use of the defendant's prearrest silence in the case-in-chief was not a legitimate government practice.[155] When used as substantive evidence of guilt, silence does not enhance the truth-seeking function. Because silence is inherently ambiguous the probative value of the evidence is extremely limited. The "use of prearrest silence may even subvert the truthfinding

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statement. *Id.* at 284.

152. *See id.* at 285.

153. *Id.*

154. *Id.* For further discussion of the values and policies behind the Fifth Amendment refer to notes 257-263 and accompanying text.

155. *See Combs*, 205 F.3d at 285.

process; because it pressures the defendant to explain himself" and thus increases the likelihood of perjury.[156]

Similarly, the Seventh Circuit relied on the Fifth Amendment in finding that prearrest silence was inadmissible. There, a fourteen-year-old boy suspected of brutally murdering two friends, refused to talk to the police prior to his arrest.[157] After police officers testified to his refusal, the prosecution argued in closing that this silence was indicative of guilt: "The defendant, what did he say . . . ? 'I don't want to talk about it. I won't make any statements.' This . . . apparent good friend . . . doesn't want to talk about it, doesn't want to help the police at that time . . . ."[158]

The appellate court noted that the right to remain silent applies prearrest: "The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings."[159] Because the right against self-incrimination attached, the prosecutor cannot invite the jury to draw an inference of guilt from defendant's invocation of that right. The appellate court analogized to the Supreme Court's holding in *Griffin v. California* that no inference of guilt can be drawn from an accused's failure to take the stand at trial.[160] While *Griffin* involved governmental use of the defendant's silence at trial, rather than silence which occurred when questioned by police prearrest, the Seventh Circuit concluded that these differences are irrelevant. The basic right against self-incrimination is the same in either case.[161]

Other appellate courts disagree with these decisions, holding that the use of prearrest silence poses no constitutional problems. For example, the Ninth Circuit considered the question of prearrest silence as substantive evidence of guilt in *United States v. Oplinger*.[162] William Oplinger was employed as a supply coordinator for

156. *Id.*
157. *See Savory*, 832 F.2d at 1017.
158. *Id.* at 1015.
159. *Id.* at 1017.
160. 380 U.S. 609, 615 (1965).
161. *See Lane*, 832 F.2d at 1017; *see also* United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (relying on *Griffin*).
162. 150 F.3d 1061 (9th Cir. 1998). As mentioned previously, the Ninth Circuit recently reaffirmed *Oplinger* in the course of finding that postarrest silence cannot be admitted in the government's case-in-chief. *See Whitehead*,

the Heritage Bank and thus was in charge of purchasing the supplies for Heritage's offices in Washington.[163] In 1995, his employer discovered evidence leading them to believe that Oplinger was engaged in theft. Specifically, Oplinger was believed to be purchasing unnecessary supplies from Costco, and then returning those supplies for cash refunds—which he pocketed.[164]

After the alleged theft was suspected by the company, two Heritage Bank officials met with Oplinger, showed him the documentation they uncovered and asked him to explain it.[165] When pressed for an explanation, Oplinger "leaned back in his chair, placed his hands over his eyes and said he did not know."[166] When the bank official told him that he would be fired if he could not account for the money, Oplinger simply repeated that he did not know.[167]

At trial, the bank official testified to Oplinger's comments (or lack thereof) at the meeting. Moreover, in closing argument, the prosecution commented upon Oplinger's behavior:

> It was explained to him, it would have to be reported to the FBI and the bank's regulators. Did he give a response or an explanation? No . . . . Did he rant and rave and scream about being charged unjustly with stealing? No . . . . Did he call Costco and scream about them lying to the bank about merchandise he was returning? No. Does this sound like the conduct of an innocent person? Of course it doesn't.[168]

The Ninth Circuit held that this use of prearrest, pre-Miranda silence as substantive evidence of guilt was constitutional.[169] When silence occurs in the period pre-custody, the appellate court held that it neither offends the Fifth Amendment nor Due Process to admit it in the government's case-in-chief. *Doyle* and the Due Process concerns expressed therein do not aid the defendant, because there was

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200 F.2d at 639 ("We strictly limited our ruling in *Oplinger* to the period '[p]rior to custody' . . . .").

163. *See Oplinger*, 150 F.3d at 1063-64.
164. *See id.* at 1064.
165. *See id.*
166. *Id.*
167. *See id.*
168. *Id.* at 1066.
169. *See id.* at 1066-67.

no governmental inducement to remain silent.[170] Nor is there any Fifth Amendment concern. Relying on Justice Stevens' concurring opinion in *Jenkins*, the court noted that the Fifth Amendment has never been applied to prevent the use of testimony which was not compelled.[171] Prior to custody, the government here made no effort to compel Oplinger to speak—he was under no official compulsion whatsoever, either to speak or to remain silent.[172]

Unlike in *Combs*, Oplinger was questioned before arrest by private parties, not government officials.[173] The appellate court recognized that this might be a significant distinction between its holding and those of the other circuits that have found a Fifth Amendment violation:

> Notably, perhaps, in [those cases where the Fifth Amendment was violated], the party seeking to assert the privilege against self-incrimination was questioned by a government official. . . . Such was not the case here. There was no government involvement in the meeting between Oplinger and his employers; it was strictly a matter of private concern between private individuals.[174]

Other circuit courts, however, have found no constitutional impediment to introducing prearrest silence even when government agents are involved. In *United States v. Zanabria,*[175] for example, Miguel Zanabria was arrested for possession of cocaine with intent to distribute after nearly three kilos of cocaine were found in his luggage during a customs search at Houston International Airport.[176] Although Zanabria did not testify, his wife took the stand and testified that Zanabria's actions were the product of duress: They owed money to a third person who had threatened harm against their daughter, and thus, Zanabria was importing the cocaine to pay off the debt and save his daughter.[177]

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170. *See id.* at 1067 n.5.
171. *See id.* at 1067.
172. *See id.*
173. *See id.* at 1064.
174. *Id.* at 1067 n.6 (citations omitted).
175. 74 F.3d 590 (5th Cir. 1996).
176. *See id.* at 592.
177. *See id.*

The arresting officer, however, testified that prior to his arrest, Zanabria did not mention any threats against his daughter, or that he needed any kind of help.[178] In closing argument, the prosecution reminded the jury that these alleged threats were never reported to authorities here or in Colombia (where the child was located).[179]

The appellate court held that the references to Zanabria's prearrest silence were not erroneous:

> [T]he record makes manifest that the silence at issue was neither induced by nor a response to any action by a government agent. The [F]ifth [A]mendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference.[180]

Thus, the federal appellate courts are split concerning the admissibility of prearrest silence in the case-in-chief. Seven circuits have reached this issue; four courts of appeal have held that evidence of silence cannot be used as substantive evidence of guilt, while three circuits find no constitutional limitations to the use of such evidence.

b. state courts' use of prearrest, pre-Miranda silence in the case-in-chief

Like their federal counterparts, the state courts are split on whether the use of prearrest silence as substantive evidence violates either the Fifth or Fourteenth Amendments or their own state constitutional provisions. For example, courts in New Jersey,[181] Maryland,[182] Vermont,[183] Wisconsin,[184] and Texas[185] have found no Fifth

178. *See id.* at 593.
179. *See id.*
180. *Id.*
181. *See* State v. Dreher, 695 A.2d 672, 702 (N.J. Super. Ct. App. Div. 1997); *see also* State v. Kiser, 683 A.2d 1021, 1029 (Conn. App. Ct. 1996) (holding that the *Doyle* rule has no application unless the defendant has remained silent in reliance on the implied assurance of the Miranda warnings).
182. *See* Key-El v. State, 709 A.2d 1305 (Md. 1998). In this case, the suspect was not in custody (he was in his home) and was not being interrogated by the police. He remained silent when his wife told the police, within his hearing range, that he had beaten her. Although the police officer was present, the

Amendment violation in the use of prearrest silence absent some government compulsion to speak. As the Wisconsin Supreme Court noted:

> If a situation is neither coercive nor curtails one's freedom of action . . . the right to silence is not implicated. If a defendant was silent in circumstances which did not trigger his or her right against compelled self-incrimination, the prosecution is free to comment on, or elicit testimony of, that silence.[186]

The Arizona Supreme Court held that prosecutorial comment on pre-Miranda silence either before or after arrest did not violate the Fourteenth Amendment.[187]

On the other hand, numerous state courts have held that admission of prearrest silence violates constitutional principles. For example, the state supreme courts in Washington[188] and Nebraska[189] found

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court found that the suspect was under no official compulsion to speak or to remain silent, and thus the use of his silence as evidence did not burden his Fifth Amendment rights. *See id.* at 1311.

183. *See* State v. Villarreal, 617 P.2d 541, 542 (Ariz. Ct. App. 1980) (stating that prearrest, pre-Miranda silence is not admissible in the case-in-chief when made to a police officer); State v. Houle, 642 A.2d 1178, 1181 (Vt. 1994) (stating that prearrest silence does not violate the Fifth Amendment without government compulsion to speak or remain silent in the case-in-chief); *see also* Commonwealth v. Cull, 656 A.2d 476, 481 n.5 (Pa. 1995) (indicating that the tacit admission rule is not allowed where the defendant is in police custody or in the presence of police officers because of the right against self-incrimination).

184. *See* State v. Adams, 584 N.W.2d 695, 699 (Wis. Ct. App. 1998).

185. *See* Harris v. State, 866 S.W.2d 316, 320 (Tex. App. 1993); Waldo v. State, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988).

186. *Adams*, 584 N.W.2d at 699.

187. *See* State v. Ramirez, 871 P.2d 237, 246 (Ariz. 1994) (en banc).

188. *See* State v. Easter, 922 P.2d 1285, 1290-91 (Wash. 1996); *see also* State v. Palmer, 860 P.2d 339, 349 (Utah Ct. App. 1993) (stating that Fifth Amendment rights exist prior to custodial interrogation; a contrary rule would encourage police to refrain from issuing Miranda warnings). The Minnesota courts have taken an interesting approach. They have held that the use of pre-Miranda, prearrest silence is inadmissible in the state's case-in-chief only when the defendant has been counseled by an attorney to remain silent. *See* State v. Dunkel, 466 N.W.2d 425, 428 (Minn. Ct. App. 1991).

189. *See* State v. Rowland, 452 N.W.2d 758, 762 (Neb. 1990) (stating that prearrest silence is admissible for impeachment but not for the case-in-chief, relying on Griffin v. California, 380 U.S. 609 (1965) and United States *ex rel*

that the Fifth Amendment did preclude use of prearrest silence in the case-in-chief.

Moreover, courts in Virginia[190] and Wyoming,[191] have interpreted their own state constitutional provisions to exclude the use of such evidence. In finding a violation under the Wyoming constitutional right against self-incrimination, the court stressed,

> [W]e discern no rational reason to limit the protection embracing the citizen's right to silence to the postarrest or post-Miranda situation. The constitutional right to silence exists at all times—before arrest, at arrest, and after arrest; before a Miranda warning and after it. The right is self-executing.
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> . . . [Thus] an accused is presumed to be exercising the right by his silence, prearrest and pre-Miranda when questioned by the state's agents for purposes of a criminal investigation. Accordingly, the prosecutorial use of the citizen's silence to infer the guilt of the citizen is constitutionally prohibited.[192]

Moreover, the court expressed some policy concerns for excluding prearrest silence:

> Under the erroneous view that no constitutional right to prearrest silence exists, a citizen who stands mute in the face of accusatory interrogation about the crime during a law enforcement investigation . . . is without constitutional protection. . . . Law enforcement personnel can time the citizen's arrest to occur after the citizen stands mute in the face of the accusation. This practice, which encourages manipulative timing of arrests, does not serve the constitutional provision's purpose of protecting the right to silence . . . . Permitting prosecutorial use of that silence discourages

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Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987)).

190. *See, e.g.*, Taylor v. Commonwealth, 495 S.E.2d 522, 529 (Va. Ct. App. 1998) (stating that the use of prearrest silence as substantive evidence of guilt violates the privilege against self-incrimination under Article I, Section 8 of Virginia Constitution).

191. *See, e.g.*, Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995); *see also* Clenin v. State, 573 P.2d 844, 846 (Wyo. 1978) (holding that under the state constitution, any comment on an accused's right to silence is prejudicial).

192. *Tortolito*, 901 P.2d at 390 (footnote omitted).

a law enforcement system's reliance upon extrinsic evidence independently secured through skillful investigation and, instead, encourages reliance upon compulsory self-disclosure.[193]

C. A Summary of the Rules

The various rules governing the use of pretrial silence are as follows: (1) Under *Doyle* postarrest, post-Miranda silence is not admissible for any purpose;[194] (2) Under *Fletcher*[195] postarrest, pre-Miranda silence is admissible for impeachment purposes (there is no federal Supreme Court case governing admission in the case-in-chief and the lower federal courts and state courts have reached conflicting conclusions with respect to this issue); (3) Prearrest, pre-Miranda silence is admissible under *Jenkins* for impeachment purposes.[196] Again, there is no Supreme Court decision concerning the case-in-chief and the lower federal and state courts are split.

III. TOWARDS A COHESIVE APPROACH: AN ANALYSIS OF THE RULES CONCERNING SILENCE

In the previous sections, the rules concerning silence in the various settings, pre- or postarrest, pre- or post-Miranda, were set forth. The essence of the rules is easily stated: Postarrest, post-Miranda silence is inadmissible for impeachment purposes or for use in the government's case-in-chief. Silence occurring before a suspect receives his Miranda warnings, however, is admissible for impeachment purposes, but may not be for the case-in-chief.

Here, these rules will be critically analyzed: Do the rules reflect the appropriate constitutional values and properly weigh the interests of society and individual rights? Moreover, the rules will be assessed for the value of consistency: Do they make sense as a whole scheme?

This Article concludes that the rules do not make sense. Rather than the confusing myriad of rules turning on whether the silence

193. *Id.*
194. *See* Doyle v. Ohio, 426 U.S. 610, 617-19 (1975).
195. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1981).
196. *See* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980).

was pre- or postarrest, or post-Miranda, and whether it is being used for impeachment or in the case-in-chief, this Article proposes a simple one: Pretrial silence should not be admissible based on the Due Process Clause and the Fifth Amendment.

First, this Article argues that the Due Process Clause should preclude the admission of evidence of silence, but not because the defendant "relied" on the government's promise. Rather, such evidence violates Due Process because it is inherently ambiguous. Additionally, the Fifth Amendment's guarantee against self-incrimination also precludes the introduction of evidence of pretrial silence whether used for impeachment or in the case-in-chief. Thus, this Article urges a reconsideration of the (cursory) analysis in *Fletcher,* arguing that the introduction of silence constitutes a penalty on the exercise of a constitutional right without any countervailing societal benefit.

A. Due Process and the Admission of Silence

Although the Supreme Court in *Doyle* suggested two justifications for excluding evidence of silence post-Miranda—the inherent ambiguity of silence, and reliance on the government's promise—subsequent cases made clear that only the latter mattered.[197] The Due Process analysis as currently articulated by the courts does not make sense because "reliance" is a weak basis for distinguishing between pre- and post-Miranda situations.

On the other hand, the "forgotten" justification—that the evidence is inherently ambiguous—does make sense and it should become the centerpiece of a viable Due Process claim. This justification, moreover, applies for silence which occurs pretrial, whether before or after the issuance of Miranda warnings.

1. A critical analysis of the "reliance" argument—should we distinguish between admissible and nonadmissible silence based on Miranda?

There is a strong argument to be made that a Due Process violation should not turn on whether police officers actually read a

197. *See, e.g., id.* at 240 (stating that Miranda warnings provide assurance that subsequent silence cannot be used against a person).

suspect the Miranda warnings. The essence of the Due Process violation expressed in *Doyle* is this: It is fundamentally unfair for a suspect to rely on the government's assurance that his silence will not be used against him to then be penalized for such silence.[198] When police officers read a suspect the Miranda rights and the suspect decides to stay silent, the suspect will be presumed to be relying on the government's promise not to use the silence against him.[199] To permit the government to use a person's silence against him in the face of such a promise is unfair.[200]

Isn't it possible, however, that a suspect who is not read his Miranda rights by the police is relying on those exact same—albeit unstated—assurances? As previously discussed, numerous courts—including the Supreme Court—and many scholars have noted that knowledge of the Miranda warnings have become a fixture of popular culture.[201] Thus, given this pervasive knowledge of the Miranda warnings, is the "unfair reliance" any different between the warned and unwarned defendant? Granted, the government is not explicitly promising the suspect that his silence will not be used against him. But the same is true even when Miranda warnings are read to a suspect. The promise itself is unstated—it is implicit. The Miranda warnings simply tell a person that he has the right to remain silent, and that should he speak, it could be used against him in a court of law. The implicit inference is that should he choose not to speak, it cannot be used against him. It seems disingenuous to claim that the government's promise must actually be spoken when in reality it has never been an explicit message.

198. *See Doyle*, 426 U.S. at 618.

199. *See id.* at 620 (Stevens, J., dissenting).

200. Subsequent Supreme Court decisions since *Doyle* have tried to minimize this element. Nonetheless, the *Doyle* court did place equal emphasis upon it.

201. *See* Brogan v. United States, 522 U.S. 398, 405 (1998) ("And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible."). The Supreme Court recently acknowledged that the warnings have entered the popular culture and are widely known. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000); Pettit, *supra* note 67, at 181 and accompanying text.

The weakness of the Due Process argument turning on the actual giving of Miranda warnings can be demonstrated by a few hypotheticals. Suppose, for example, that an arrested suspect is told by his attorney, and not the police, that he has the right to remain silent, which is precisely what he is advised to do. Under *Doyle,* he cannot make a Due Process argument, although presumably he is relying on the exact same implicit promise, albeit delivered by his attorney, and not the police. Yet isn't the reliance the same? Moreover, the probative value of the evidence is precisely the same. The probative value of silence certainly is no different when silence follows the Miranda warning given by the police rather than an attorney.[202]

Here is another example. What about an arrested suspect who, prior to receiving any Miranda warnings, blurts out to the police: "I know my rights. I'm not saying a word to you guys." And he doesn't. Is his silence any less a reliance on a presumed government promise that silence won't be used against him?[203] Is there any greater probative value to his silence than for a person who is read his rights and then remains mute? The answer to both questions

202. *See Protecting* Doyle *Rights, supra* note 5, at 161 n.37. *But see* State v. Crosby, 641 A.2d 406, 409-10 (Conn. App. Ct. 1994) (distinguishing *Leecan*); State v. Leecan, 504 A.2d 480, 488 (Conn. 1986) (stating that the advice given by a court or clerk was not the functional equivalent of Miranda warnings for *Doyle* purposes, and "neither the police nor any other government personnel . . . induced the defendant's postarrest silence because the defendant said he remained silent on the advice of his attorney). The Second Circuit, on habeas review, disagreed. *See* Leecan v. Lopes, 893 F.2d 1434, 1440 (2d Cir. 1990) (stating that "[t]he admonition Leecan concededly received from the judge at arraignment . . . is not materially distinguishable from a warning delivered by police prior to custodial interrogation"); *see also* State v. Lofquest, 418 N.W.2d 595, 596 (Neb. 1988) (indicating that the county judge's provision of Miranda warnings triggers *Doyle* rights). The courts in Minnesota have expanded the protection afforded the defendant to render inadmissible counseled prearrest, pre-Miranda silence. *See* State v. Billups, 264 N.W.2d 137, 139 (Minn. 1978) (stating that an attorney's warning to remain silent is equated with being given Miranda warnings). *But see* Grancorvitz v. Franklin, 890 F.2d 34, 43 (7th Cir. 1989) (stating that silence resulting from an attorney's advice "does not automatically transform silence into constitutionally protected silence").

203. Or, let's make it even harder. Suppose the suspect says: "I know my rights—you guys arrested me last week and told me them. So don't bother reading them to me—I'm saying nothing."

clearly is "no." No principled distinction in reliance and no meaningful difference in probative value is evident.

Assuming that concerns about fundamental fairness cannot turn on the factual happenstance that the police officer actually read the suspect the Miranda warnings, the question then becomes: Where do we draw the line? Consistency merely suggests that the distinction between pre- and post-Miranda is not a viable one; it does not suggest a resolution. One can be consistent at this point by either mandating the exclusion of evidence in both cases, or in neither.

The point is this: The reliance argument is a weak argument upon which to base the Due Process analysis. It is not a principled basis for distinguishing between pre- and post-Miranda situations. By itself, it cannot establish a line between the inclusion and exclusion of evidence. Moreover, it appears to be a particularly susceptible ground for change. If the government and courts want to include evidence of silence, then presumably all they need to do is add a sentence to the Miranda warnings: And if you do stay silent, this can be introduced if you take the stand in a subsequent trial. That may raise Fifth Amendment questions, as will be discussed below, but no longer is there any unfair reliance on the government's promise.[204] Thus, instead of relying on a reliance argument, the Due Process approach should return to its "roots": The inherent ambiguity of the evidence.

2. Evaluating the probative nature of the evidence—the inherent ambiguity of silence

In *Doyle* the Supreme Court held that Due Process was violated not only because it is unfair to punish someone for relying on a government promise, but also because the evidence of post-Miranda silence is so inherently ambiguous and prejudicial that its introduction violated fundamental fairness. Although subsequent courts have disregarded that latter point, it is an argument that is worthy of reconsideration. Moreover, the argument made in *Doyle* should be extended: The evidence of silence is inexorably ambiguous whether that silence occurred post-Miranda, pre-Miranda, or even prearrest.

204. *See* Snyder, *supra* note 34, at 295.

Silence is probative only in circumstances where, first, it would be expected that the person speak out, and second, when the only reasonable interpretation of the silence is one inconsistent with the person's statements at trial or with innocence.[205] Both of these assumptions are highly suspect.

Perhaps the easiest case to make is for the ambiguity of postarrest silence. Arrest is "not an occasion when circumstances naturally call upon a defendant to speak out."[206] As the Supreme Court noted: "At the time of arrest . . . innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute."[207]

Moreover, rarely will it be the case that silence is truly inconsistent with the trial statement—that there is no other explanation consistent with silence.[208] In most circumstances, a person's failure to respond to police inquiries, or the situation of arrest, is highly ambiguous.[209]

There are a number of factors that may motivate a person to remain silent besides tacitly admitting the truth of an accusation. For example, as mentioned earlier, a person may well be afraid, shocked, or intimidated, and thus, stay silent. The defendant may believe that

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205. *See, e.g.*, United States v. Hale, 422 U.S. 171, 176 (1975) (stating that the threshold inconsistency between silence and a statement at trial must be established or else silence lacks any probative value).

206. State v. Hoggins, 718 So. 2d 761, 771 (Fla. 1998).

207. *Hale*, 422 U.S. at 177. *Hale* was a postarrest, post-Miranda case decided before *Doyle*. Hale was arrested for robbery, taken to the police station, and advised of his right to remain silent. He was then searched, and found to possess $158 in cash. When asked by an officer, "Where did you get the money?" Hale did not respond. *Id.* at 174. At trial, Hale testified that his estranged wife had given him the money to purchase some money orders. On cross-examination, he admitted that he did not tell the police officer where the money was from because he "didn't feel that it was necessary at the time" to tell the officer. *Id.* The Supreme Court exercised its supervisory powers and reversed a federal court's decision to allow impeachment use of pretrial silence. The court concluded that the probative value of Hale's postarrest, post-Miranda silence was insignificant because Hale may have been intimidated by the setting, and he would not have expected the police to release him merely on the strength of his explanation. Any value to the evidence, moreover, was deemed outweighed by the danger of undue prejudice. *See id.* at 180.

208. *See* State v. Leecan, 504 A.2d 480, 484 (Conn. 1986).

209. *See Hale*, 422 U.S. at 176 ("In most circumstances silence is so ambiguous that it is of little probative force.").

speaking out would be futile[210] or may simply distrust the police.[211] Or, a suspect may simply remain silent because he has been instructed by his attorney to do so, or because he is aware of his Miranda rights and decides to invoke them. He may be afraid that he would incriminate others, or implicate himself in other crimes.[212] Finally, the suspect may believe that he has committed no crime, and thus has no need to explain himself.[213] He may, in fact, be unwilling to proclaim his innocence, out of righteous indignation at being accused of any wrongdoing. All of these reasons make any failure to speak inherently ambiguous, and, according to some state courts, render it impossible to conclude that the circumstances naturally call for a person to speak out.[214]

Thus when considering the admissibility of pre-Miranda silence, many state judges rely on these factors to find it inadmissible as a matter of state evidence law.[215] Typical of this approach is the

210. *See id.* at 179.

211. The distrust of certain police officers has been shown to be a legitimate concern lately, at least in Los Angeles. The so-called "Rampart" scandal, involving a Los Angeles police department in the Rampart division, has revealed, among other things, numerous police officers planting evidence on innocent defendants. The scandal has received significant national attention. *See* Symposium, *The Rampart Scandal: Policing the Criminal Justice System*, 34 LOY. L.A. L. REV. 537 (2001); Scott Glover & Matt Lait, *10 More Convictions Are Overturned Due to LAPD Probe*, L.A. TIMES, Jan. 26, 2000, at A8; *see also* People v. Fondron, 157 Cal. App. 3d 390, 399, 204 Cal. Rptr. 457, 463 (1984) (an individual may refrain from speaking because he believes it would be futile, or distrusts the police, and thus shuns any involvement or contact with them).

212. *Cf.* Webb v. State, 347 So. 2d 1054, 1055 (Fla. Dist. Ct. App. 1977) (when asked if he told the police about being elsewhere at the time of the crime, the defendant responded, "[W]ell, sir, I didn't tell the police anything because I have come to a realization that I just do not, I don't talk to the police when it involves anything that has to do with the possibility of me going to jail.").

213. *See* Farley v. State, 717 P.2d 111, 112 (Okla. Crim. App. 1986); *see also* People v. Conyers, 420 N.E.2d 933, 935 (N.Y. 1981) (detailing the reasons why a person may not speak).

214. *See, e.g.*, *Hoggins*, 718 So. 2d at 771.

215. *See, e.g.*, People v. Sheperd, 551 P.2d 210, 211-12 (Ct. App. Colo. 1976) (citing *Hale*, 422 U.S. at 195, that failure to come to police before arrest is inadmissible as evidence because it lacks probative value); *Farley*, 717 P.2d at 113 (holding that prearrest silence cannot be used to impeach because it is not probative); *Conyers*, 420 N.E.2d at 935-36 (stating that absent unusual cir-

decision in *Silvernail v. State*.[216] There, the defendant, Reginald Silvernail, allegedly engaged in a crime spree, including murder, with Richard Holland and Robert Hughes.[217] He was arrested, along with others, after Holland attempted to shoplift from a supermarket.[218] He was originally detained, and then arrested a short time later when the police learned he had an outstanding warrant for a misdemeanor.[219]

At the trial, Silvernail testified on his own behalf, and asserted a defense of duress.[220] He argued that the others were responsible for the murder, and that he helped load and unload the body only because Holland threatened that he was next if he did not participate.[221] Thus, Silvernail argued on the stand that he feared for his life.[222]

During cross-examination, Silvernail was asked about his failure to claim duress when he was first stopped by the police and when he was arrested:

> "Q: When Officer Gaines came . . . did you say to him, 'God, I'm glad you're here'.
>
> A: No. . . .
>
> Q: You never said, 'Gee, I'm relieved. You're finally here to help me,' right?
>
> A: No, I didn't say that."[223]

Silvernail was convicted of second-degree murder and kidnapping.[224]

The court found that the silence should not be admissible to impeach the defendant, concluding that "[a]t best, Silvernail's silence was highly ambiguous."[225] After detailing various reasons why a suspect might not assert a duress defense to the officers immediately upon arrest, the court noted that Silvernail's actions simply might

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cumstances, evidence of prearrest silence is inadmissible even when offered solely to impeach).

216. 777 P.2d 1169 (Alaska Ct. App. 1989).
217. *See id.* at 1171.
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.*
223. *Id.* at 1172-73.
224. *Id.* at 1172.
225. *Id.* at 1176.

have reflected his awareness of and reliance on his right to remain silent.[226] Or, Silvernail might have been afraid to discuss the murder, fearing that the police might not believe him.[227] Thus, the court concluded that "[a]ssuming Silvernail's claim of duress to have been true, it would hardly seem 'natural under the circumstances' . . . for him to have disclosed his claim to the police. To the contrary, the far more 'natural' decision may well have been to maintain a prudent silence for the time being."[228]

All of the above arguments concern postarrest silence—the question is whether the same considerations of probative value should be any different prearrest. Arguably, yes. While a suspect may not be expected to respond once arrested, the same assumption may not be true during an earlier and potentially less confrontational stage. Moreover, since Miranda warnings likely have not been given, suspects may not be relying on the right to remain silent. Accordingly, some courts have drawn a distinction between the probative value of statements made pre- and postarrest.

This distinction, however, is not warranted. Virtually all of the factors explaining why silence is inherently ambiguous in the postarrest context apply prearrest; indeed, some of the factors are even more salient before the arrest than after. For example, a person may be aware that he is under no obligation to speak at any time, not simply after an arrest, and may even feel less need to speak out in the prearrest stage. Some people are afraid and suspicious of the police, and may avoid any encounters—or cooperation—with such authority at any time.[229]

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226. *See id.* at 1178.

227. *See id.*

228. *Id.* (quoting *Hale*, 422 U.S. at 176). The court did note that the situation might have been different were he still under a threat from Holland at the time the police took him into custody. "Silvernail's silence might have been considerably less ambiguous if it appeared from his testimony that the police had rescued him from imminent peril. But this was not the case . . . . [A]t the time [they] were stopped, Silvernail no longer had any immediate cause to be fearful. He was aware that Holland had already been taken into custody and no longer posed a threat." *Id.*

229. *See supra* text accompanying note 211. Distrust of police is not a new phenomenon. Even in *Doyle*, when one defendant was asked why he did not provide his innocent explanation to the police, the defendant responded: "[I]n the last eight months to a year there has been so many implications . . . in the

Moreover, if the questioning occurs immediately after the criminal event, albeit prearrest, the shock and confusion may be even greater than that which is felt later.[230] Finally, the indignation that may explain a suspect's silence may be even greater prearrest, when the police simply may be responding to rumors or innuendo than hard facts. Thus, whether pre- or postarrest, the evidence of silence should be deemed inherently ambiguous, and hence, not probative.[231]

Of course, there are exceptional circumstances where the evidence of silence is probative. There may be unique cases where one is under some sort of duty to come forward and provide an explanation. For example, in one case the court found that the circumstances were such that the defendant—a police officer—was essentially under a duty to speak up before trial. [232] The police officer, charged with larceny, claimed at trial that he had been acting as an undercover agent when he took the money, and therefore, maintained that he had not obtained the money illegally.[233] The court permitted the prosecutor to introduce his failure to raise this defense pretrial, noting that the officer was under an obligation to inform his superiors of any undercover activities, and thus his silence in the face of accusations by fellow officers occurred in a setting where it was both unreasonable for a person not to speak, and highly relevant to the credibility of the defendant's trial testimony.[234]

Moreover, there may be circumstances where the above factors are not salient at all. For example, assume that pretrial a person

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paper and law enforcement that are setting people up and busting them for narcotics and stuff." *Doyle*, 426 U.S. at 625 n.4 (Stevens, J., dissenting).

230. *See* People v. DeGeorge, 541 N.E.2d 11, 14 (N.Y. 1989) (indicating that when questioned after the shooting, the defendant stated he was numb, scared, in a cold sweat, and unable to recall the conversation with police).

231. *See id.*; *see also Ex parte* Marek, 556 So. 2d 375, 382 (Ala. 1989) (eliminating the "tacit admission" rule as a matter of state evidence law); State v. Daniels, 556 A.2d 1040, 1046 (Conn. App. Ct. 1989) (stating that the presence of police and the emotional state of the victim rendered the defendant's choice to remain silent ambiguous); State v. Kelsey, 201 N.W.2d 921, 926-27 (Iowa 1972) (recognizing the ambiguity of prearrest silence and proscribing the use of tacit admission); Commonwealth v. Dravecz, 227 A.2d 904, 909 (Pa. 1967) (prohibiting tacit admission when the defendant is in police custody or in the presence of a police officer).

232. *See* People v. Rothschild, 320 N.E.2d 639, 639 (N.Y. 1974).

233. *See id.* at 640-41.

234. *See id.* at 641-42.

accuses a friend of taking money from her. The accused says nothing. While some righteous indignation may apply here, none of the other factors do. In other words, when a third party, not a police officer or a representative of the state, makes an accusation the silence may be more probative.

Consider another example where silence does not really involve the state. A man shoots another person, and claims at trial that he shot the victim by mistake—his gun went off accidentally. He is asked during cross-examination: Did you tell the police when arrested that you acted in self-defense? Answer—No. This is impermissible questioning because there are a multitude of reasons why a person might not speak to the police in this situation—the silence is inherently ambiguous. He may have felt frightened, afraid that the police would not believe him. He may have been told by a lawyer not to say anything. All of these explanations are totally consistent with the accident explanation.

But what if the following takes place during cross-examination:

Question: Did you know that the victim was alive after you shot him?

Answer: Yes.

Question: Did you get help for him—did you call a hospital or an ambulance?

Answer: No.

Is this line of questioning a violation of due process? Certainly not. First, it might not even be silence at all—it seems like those "what did you do next" questions.[235] Even if it is considered a use of silence—because after all the jury is being asked to draw an adverse inference from the defendant's nonaction and silence, it could be admissible. It may fall under the "duty" exception—a person who hurts another may have a duty not to cause further harm. More significantly, because it does not involve accusation by or involvement with the government, the factors suggesting that silence is not probative are not present.

Thus, except in those two extremely limited circumstances—when there is some independent duty to come forward, or where the alleged silence occurs after an accusation by a private person in

235. *See supra* text accompanying note 9.

circumstances where a response would normally be forthcoming—the evidence of silence is inherently ambiguous. Silence is simply not probative evidence.

Moreover, admission of such evidence also thwarts the truth-seeking function. The evidence is unduly prejudicial. Numerous courts have found that evidence of silence has significant potential for undue prejudice. As the Supreme Court itself recognized,

> The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.[236]

Hence, the introduction of such evidence does not enhance, but may even frustrate the truth-seeking function of the trial. Evidence of silence obfuscates the truth.

The above arguments attempt to show that the use of silence violates the Due Process Clause when used in any context at trial: impeachment or in the case-in-chief. Even if the Due Process arguments were found to be unpersuasive, there is an independent ground to exclude pretrial evidence of silence: The Fifth Amendment guarantee that individuals not be compelled to incriminate themselves.

B. The Fifth Amendment and Silence

Does the Fifth Amendment preclude the use of silence, either in the case-in-chief or for impeachment purposes? The Fifth Amendment provides that "[n]o Person . . . shall be compelled in any criminal case to be a witness against himself."[237] The Amendment was

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236. *Hale*, 422 U.S. at 180; *see also* Wills v. State, 573 A.2d 80, 85 (Md. Ct. Spec. App. 1990) (holding that in view of the potential for unfair prejudice to the defendant, the court erred in admitting evidence of a criminal defendant's silence); State v. Hoggins, 718 So. 2d 761, 772 (Fla. 1998) (noting that there was significant potential for prejudice against the accused). *See generally* Maria Noelle Berger, *Defining the Scope of the Privilege Against Self-Incrimination: Should Pre-Arrest Silence Be Admissible as Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015, 1040 (1999) ("In the case of silence, however, the inference of guilt is quite compelling. For many people, no innocent man would stand silent in the face of his accusers.").

237. U.S. CONST. amend. V.

"adopted in response to a long history of oppression of the individual by the state and today remains an important shield, protecting individuals against abuses of state authority."[238]

As many commentators have acknowledged, "[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights."[239] That is, despite—or perhaps in part because of—hundreds of books, articles, and cases discussing the origin and breadth of the Fifth Amendment, significant disagreement still persists concerning the scope and application of the right. This Article is not an attempt to solve the quagmire concerning the meaning of the right against self-incrimination. Rather, the issue here is, given the basic accepted precepts that do exist, when, if at all, silence should be admissible as evidence.[240]

To attempt to answer this question, two subsidiary issues need to be considered. First, when does the guarantee against self-incrimination apply? Assuming it applies pretrial, the second question becomes: Does the Fifth Amendment prevent the use of pretrial silence?

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238. Mary Shein, *The Privilege Against Self-Incrimination Under Siege:* Asherman v. Meachum, 59 BROOK. L. REV. 503, 503 (1993).

239. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995); *see* Marvin Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 197 (1979) ("Despite the facial clarity of this language, the amendment and its legal ancestors have always been shrouded in controversy."); *see also* Mark Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191, 194 (1978) ("[The] policy functions of the privilege have never been fully delineated or explained . . . .").

240. For excellent discussions about the history of the Fifth Amendment, see LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (Ivan R. Dee ed., 1999) (1968); R.H. Helmholz, *Origins of the Privilege Against Self Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994).

1. When does the Fifth Amendment apply?

There is no doubt that the Fifth Amendment protects a criminal defendant who chooses to remain silent at trial or at sentencing.[241] But does the Fifth Amendment apply pretrial? Contrary to the assertion of some courts, there is compelling evidence that the right against self-incrimination is not limited to the right of the suspect to remain silent in the criminal trial context.[242] Rather, the Supreme Court has clarified that it applies in noncriminal, nontrial-like settings. Thus, the privilege applies in administrative hearings, police stations, and in a person's home. A right against self-incrimination inures in any situation where a person might be forced to provide incriminating evidence against themselves. It therefore theoretically applies to a suspect's decision to remain silent at trial and before, postarrest and prearrest.

An interesting question is whether the Fifth Amendment applies in situations where the person doing the questioning is not a government official. For example, take the facts of *Oplinger*.[243] There, a suspected embezzler was being questioned by officials of his own company. Or, what about the person who is not subject to questioning by the police or even a third party, but who simply stays silent? In those cases the asserted silence is the person's failure to come forward and provide an exculpatory explanation for a crime, i.e., that he acted in self-defense. What if the state's argument is not only that the person did not come forward to tell the police, he did not in fact tell anyone about the purported defense?

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241. *See, e.g.*, Griffin v. California, 380 U.S. 609, 612-13 (1965). *But see* Mitchell v. United States, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) ("[T]he text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence.").

242. Indeed, many historians have written that Fifth Amendment rights were most needed at the pretrial stage: "[I]t was in pretrial proceedings that the full weight of the criminal process was enlisted behind the attempt to induce self-incrimination." Moglen, *supra* note 240, at 1094-95; *see also* Berger, *supra* note 236, at 1034. Historically, "it was common practice to recognize a right to remain silent where adequate evidence to accuse the suspect did not exist." *Id.*

243. United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998); *see supra* text accompanying notes 163-174.

Although some courts have held to the contrary, silence in these circumstances should still be considered protected by the Fifth Amendment. First, the Amendment applies even when it is "private people" asking the questions. After all, it fully applies in any civil case so long as the answer is potentially incriminating. As previously mentioned, the Supreme Court has recognized that the privilege can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . ."[244]

Moreover, the right against self-incrimination comes into play whenever a person decides not to speak out of fear that the response will incriminate him—even without any accusation. As Justice Marshall recognized, "A voluntary decision to speak also does not implicate the Fifth Amendment . . . . But to impose a duty to report one's own crime . . . would itself be to compel self-incrimination, thus bringing the Fifth Amendment into play."[245] Certainly, assessing a cost to someone who refrains from coming forward (preaccusation) to explain what happened is equivalent to imposing a duty; both raise significant concerns about self-incrimination.[246]

2. Does admission of evidence of silence violate the Fifth Amendment?

Given that the Fifth Amendment applies pretrial, the question still remains, does admitting evidence that the defendant stayed silent violate the Fifth Amendment? After all, the suspect is not being forced to talk; he may still choose to stand mute. Thus, does the Fifth Amendment bar such evidence? This Article asserts that the answer is yes because admission of the evidence constitutes an

244. Kastigar v. United States, 406 U.S. 441, 444-45 (1972); *see* Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 235 (1998) (The modern privilege is a "right of any witness or defendant to refuse to answer incriminating questions in any proceeding . . . ."). *But see* Amar & Lettow, *supra* note 239, at 858-59 (suggesting that the self-incrimination clause was historically addressed to formal testimonial compulsion in a judicial setting).

245. Jenkins v. Anderson, 447 U.S. 231, 251 n.4 (1980) (Marshall, J., dissenting).

246. For a discussion of the concerns regarding compelled self-admissions see Greenawalt, supra note 125.

impermissible burden on the pretrial right to remain silent and does not further the values of the Fifth Amendment.[247]

In *Griffin v. California*[248] the Supreme Court held that not only does the accused have the right not to testify, the government may not penalize that exercise of the right against self-incrimination by commenting upon the failure to take the stand. During closing argument in *Griffin*, the prosecutor emphasized the defendant's failure to explain the evidence: "These things he has not seen fit to take the stand and deny or explain . . . . And in the whole world, if anybody would know, this defendant would know."[249]

The Supreme Court held that such a comment violated the Fifth Amendment:

> For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly . . . . What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[250]

Of course, not all burdens on the exercise of a right constitute an unconstitutional penalty. The question then becomes: When is a burden impermissible? There does not appear to be a clear answer to this question.[251] In some respects, it may be a question of severity: How likely is it that someone, contemplating the possible admission of silence at trial, would feel compelled for that reason to forego the privilege against self-incrimination? This question is inherently unquantifiable; nonetheless it is reasonable to believe that the prospect

247. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (stating that the Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence").

248. 380 U.S. 609 (1965).

249. *Id.* at 611.

250. *Id.* at 614.

251. *See Jenkins*, 447 U.S. at 236 ("[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'") (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)).

of admission may indeed have a significant effect on the exercise of Fifth Amendment rights. Because evidence of silence is so damning, suspects may feel compelled to speak even in situations where silence would otherwise be maintained.

Indeed, the burden in this case may be even more significant than in *Griffin*.[252] As stated in *Griffin,* even without prosecutorial comment, a suspect knows that the jury is obviously aware of whether or not he or she takes the stand. The defendant thus already must include in his calculation whether remaining silent impacts the jury. In the case of pretrial silence, however, the jury has no access to that information if it is not admissible. It would not enter into the defendant's consideration in deciding whether to exercise the right to remain silent. Thus, in this respect, allowing in evidence of silence is a greater burden on the right than the burden found in *Griffin*.[253]

Additionally, or alternatively, an impermissible penalty may be determined as part of a weighing process. For example, a burden becomes an unconstitutional penalty if that burden is not justified by some state interest.[254] "Where burdening a constitutional right will not yield a compensating benefit . . . there is no justification for imposing the burden."[255]

In the case of admitting pretrial silence, there is no such compensating benefit. The main benefit to permitting evidence of silence at trial is promoting the truth-seeking function of the adversary process. Because evidence of silence is "inherently ambiguous," however, the interests of truth are not advanced by admission of the evidence. In fact, the interest of truth seeking may be subverted because of the unreliability of the evidence. The innocent are just as likely as

252. 380 U.S. 609 (1965).

253. *See* Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 146 n.241 (1978); *see also* Portuondo v. Agard, 529 U.S. 61, 65, 68 (2000) (declining to extend *Griffin* to the prosecutor's statements about the defendant's status as the last witness in a case).

254. *See Portuondo*, 529 U.S. at 76-88 (Ginsberg, J., dissenting); *see also*, Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 975 (1975) (concluding that unless the State can show that its interest in truthfulness would be advanced, use of silence is impermissible).

255. *Portuondo*, 529 U.S. at 79 (Ginsberg, J., dissenting).

the guilty to remain silent pretrial, yet the evidence damns all with a broad stroke.

Finally, a penalty may be unconstitutional if it "impairs to any appreciable extent any of the policies behind the rights involved."[256] There are a number of commonly asserted purposes or values of the Fifth Amendment. First, the guarantee against self-incrimination attempts to preserve human dignity and privacy by ensuring that a person is not the unwilling "instrument in his or her own condemnation."[257] Thus, it is oft said that the Fifth Amendment reflects "our unwillingness to subject [an individual] to the cruel trilemma of self-accusation, perjury or contempt."[258] Moreover, the right against self-incrimination also promotes individual dignity by helping to ensure that self-incriminating statements are not elicited by inhumane treatment or abuses.[259] Finally, the Fifth Amendment reserves to each individual a private enclave—a guarantee that certain private thoughts need not be revealed to the government.

Besides promoting human dignity, the Fifth Amendment represents an attempt to strike a proper balance in the criminal justice system between the individual and the power of the state. By not requiring the assistance of the accused, the Amendment ensures that "the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."[260] Thus, the right against self-incrimination rests in part on the notion that the government shoulder the complete load in criminal proceedings—

256. McGautha v. California, 402 U.S. 183, 213 (1971). The court in *Jenkins* combines the two approaches by asking "whether compelling the election to speak impairs to an appreciable extent any of the policies behind the [Fifth Amendment]" and the legitimacy of the government practice of impeachment. *Jenkins*, 447 U.S. at 236, 238.

257. Mitchell v. United States, 526 U.S. 314, 325 (1999).

258. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also* Miranda v. Arizona 384 U.S. 436, 460 (1966) (noting that the right against self-incrimination is "the essential mainstay of our adversary system").

259. *See* LEVY, *supra* note 240, at 430.

260. Culombe v. Connecticut, 367 U.S. 568, 582 (1961); *see also* Estelle v. Smith, 451 U.S. 454, 462 (1981) (stating that *Columbe* provides "[t]he essence of this basic constitutional principle").

relying on accusations proved by the government, not on inquisitions conducted by the state.[261]

Finally, the Fifth Amendment seeks to promote justice by excluding unreliable evidence. For example, by guaranteeing the right to remain silent, it may protect innocent defendants from convictions caused by "bad" performances on the witness stand.[262] By preventing evidence obtained through coercion or even torture, the amendment promotes the truth-seeking function of the criminal justice system. Professor Amar has argued that "reliability" is not simply one value of the Fifth Amendment, it is the predominant value: The "rationale of the Self-Incrimination Clause [is] best read [as] reliability. Compelled testimony may be partly or wholly misleading and unreliable; even an innocent person may say seemingly inculpatory things under pressure and suspicion and when flustered by trained inquisitors."[263]

Allowing the government to use a suspect's silence against that suspect in the case-in-chief or for impeachment purposes runs counter to virtually all these asserted values of the Fifth Amendment. First, it infringes on human dignity by subjecting a person to the cruel trilemma of perjury (via express denial of charges), silence (which becomes at the hands of the prosecutor an incriminating statement), or self-accusation. Second, it distorts the proper balance between individual and state by permitting the government to convict based not on its own efforts, but by employing the (implied) words of the suspect against him.

Finally, and perhaps most significantly, admission of pretrial silence contravenes the value of ensuring reliable evidence. As previously discussed, in virtually every circumstance silence is the antithesis of reliable evidence. It is not only nonprobative of guilt, it also is likely to be given undue weight by a jury. Thus, the admission of evidence of silence, like a confession abstracted after torture,

261. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961) ("[O]urs is an accusatorial and not an inquisitorial system"); *see also Murphy*, 378 U.S. at 55 (noting our nation's preference for an accusatorial rather than an inquisitorial system of criminal justice).

262. *See* Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 330-33 (1991).

263. Amar & Lettow, *supra* note 239, at 900-01.

has a significant potential to mislead the truth-seeking process, not enhance it.

3. A word about impeachment versus case-in-chief

Some may suggest that the above arguments have merit with respect to the admission of silence in the government's case-in-chief, but that they are not persuasive when silence is used for impeachment purposes.[264] It can be argued that impeachment should be treated differently for several reasons. First, a suspect who takes the stand waives his Fifth Amendment rights, and therefore, evidence of pretrial silence should not be excluded. Second, the courts have historically recognized a greater role for admission of evidence for impeachment purposes in order to ensure that the Fifth Amendment not be used as a "shield against contradiction of his untruths."[265] While both arguments have some validity, neither are ultimately persuasive.

First, a suspect concededly waives his right against self-incrimination when he takes the stand at trial. But this waiver should not be considered so all encompassing that it includes pretrial Fifth Amendment rights. As one scholar noted, "[t]he [F]ifth [A]mendment contains many 'discrete rights,' among them the right to postarrest silence and the right to silence at trial. A waiver by the defendant of one of these discrete rights does not [typically] constitute a waiver of others."[266]

What about the second argument—that other evidence has been admitted for impeachment purposes only and not in the case-in-chief, to ensure that the suspect does not commit perjury? For example, in *Harris v. New York*,[267] evidence obtained in violation of the Miranda warnings but otherwise voluntarily procured, was held admissible for purposes of impeaching the defendant's inconsistent trial testimony, even though it was unavailable in the case-in-chief.[268] More specifically, the defendant had been charged with making two sales of

264. *See, e.g.*, Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (distinguishing between the impermissible introduction of evidence of pretrial silence in the case-in-chief and the admission of the evidence for impeachment purposes).

265. Walder v. United States, 347 U.S. 62, 65 (1954).

266. Schiller, *supra* note 239, at 224.

267. 401 U.S. 222 (1971).

268. *See id.* at 226.

heroin to undercover officers. At trial, Harris took the stand and denied making one of the sales; he admitted making the other but claimed that it was baking powder, not heroin, in the bag.[269] On cross-examination, the government impeached his testimony with a prior inconsistent statement obtained in violation of Miranda.[270]

Admission of pretrial silence for impeachment purposes, however, is distinguishable from the situation in *Harris.* Indeed, the arguments in *Harris* support excluding evidence of silence. First, to the extent that the defendant has a Fifth Amendment right to stay silent pretrial, and not simply a Miranda right, admission of such evidence is a constitutional violation. That is analogous under *Harris* to allowing into evidence a coerced confession obtained in violation of the Fifth Amendment and not simply Miranda.[271]

Moreover, the court in *Harris* was persuaded to admit the prior statement for impeachment purposes precisely because such evidence was deemed reliable and essential to the integrity of the trial.[272] In *Harris*, the evidence consisted of a statement clearly contrary to the trial testimony. Harris told two different stories; he plainly lied at least once.

In dealing with silence, no such clear contradiction of testimony exists. Silence is simply not the equivalent of an inconsistent statement—it is inherently ambiguous. While keeping out the statement in *Harris* shields perjury and prevents the jury from considering reliable evidence, the same cannot be said about the introduction of evidence of silence. Rather, as previously argued, allowing in pretrial silence does not promote truth seeking, it promotes confusion and misjudgment.[273]

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269. *See id.*

270. *See id.*

271. *See* Agnellino v. New Jersey, 493 F.2d 714, 729 (3d Cir. 1974) (Seitz, J., concurring) ("To say that a defendant's silence in the face of accusation can be used to impeach his testimony would have the same effect as allowing impeachment use of coerced confessions.").

272. *See Harris*, 401 U.S. at 225 (indicating that the trial testimony contrasted sharply with the pretrial statement and the statement "undoubtedly provided valuable aid to the jury in assessing petitioner's credibility"); *see also* Greenawalt, *supra* note 125, at 61 (noting also that the *Harris* court determined "the additional deterrence gained by employment of the fruits of the violation did not warrant the restriction on impeachment use").

273. *See supra* Part III.B.1.a, and accompanying footnotes. *See generally,*

Finally, and ultimately however, the reason for not allowing the introduction of silence for any purpose, impeachment or otherwise is this: Admission of silence for impeachment purposes would too easily be (mis)used by the jury as evidence of guilt. That is, a jury would not simply use the evidence as hurting the defendant's credibility on a newly asserted alibi or defense—the jury is too easily led to a belief that no innocent person would stay silent. As Professor Schiller has noted, "[e]mpirical studies have cast doubt upon the ability of the jury to distinguish between (a) the prosecution using evidence of a person's prior silence as evidence of the untrustworthiness of his exculpatory trial testimony and (b) the prosecutor using the silence as substantive evidence of guilt."[274] Given the minimal, if any, probative value of evidence of silence, this risk is not worth taking.

IV. CONCLUSION

The current law on the use of pretrial silence is unduly confusing and wrong. The simple truth is that admission of evidence of silence, whether pre- or postarrest, whether pre- or post-Miranda, adds little to the truth-seeking process. Silence is inherently, insolubly ambiguous. Yet jurors typically ascribe great weight to such evidence. The result: introduction of evidence of silence violates the Fourteenth Amendment—it is fundamentally unfair and distorts the trial process.

Additionally, introduction of pretrial silence violates the Fifth Amendment guarantee against self-incrimination. Silence is not suspect: it is a right. Yet the current practice of admitting evidence of silence burdens that right. It penalizes individuals who choose not to assist the state in gathering evidence against them. Because such evidence invariably is used by the jury to assess guilt or innocence, it increases the likelihood that the "prosecution will secure a guilty

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Johnson v. Patterson, 475 F.2d 1066, 1068 (10th Cir. 1973) (following the rationale that silence does not bring a defendant's credibility into question).

274. Schiller, *supra* note 239, at 225; *accord* Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 972-73 (1975) (indicating that silence usually goes to an alibi or defense and therefore impeachment on an issue easily gets confused with guilt or innocence); Greenawalt, *supra* note 125, at 57.

verdict without, in fact, having proven the defendant's guilt beyond a reasonable doubt."[275]

Accordingly, this Article urges a single, simple rule: pretrial silence should not be admissible in the case-in-chief or for impeachment purposes.

275. Schiller, *supra* note 239, at 225.