Oklahoma Law Review

Volume 59 | Number 2

2006

Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt

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I. Introduction

Practically everybody knows that, at the time of arrest, anything a person says can be used against him in court.[1] But does everyone realize that not saying anything may also be used against the person being arrested? One can imagine a situation in which two criminal suspects run into a supposed "friend" who has become an informant to the police. One suspect begins to brag about the pair's latest crime spree, and the other suspect does not say a word but just stands there. After this encounter, the informant immediately reports to the police, who subsequently arrest the suspect that remained silent but fail to locate his boastful partner. At the trial, the prosecutor puts the informant on the stand and has the informant testify about the missing suspect's boastful statements and the defendant's silence. The prosecutor explains to the jury that the defendant would have denied any involvement in the crime spree if he was innocent and that the defendant's silence served as an admission of his involvement and guilt. Taking into consideration this damning evidence and the prosecutor's persuasive reasoning, the jury finds the defendant guilty because of what he did not say.[2]

The law of evidence for most jurisdictions provides that the failure to deny an accusation when it was natural to do so may be treated as an admission of the facts contained within the accusation.[3] The rationale behind this evidentiary

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* Winner, 2005-2006 Gene & Jo Ann Sharp Outstanding 2L Award. The author would like to thank Professor Mary Sue Backus for her helpful suggestions, encouragement, and guidance during the writing of this comment and Professor Mary Margaret Penrose for her insight and many invaluable lessons. The author would also like to extend gratitude to Dean William Murray Tabb, to the members of the 2005-2006 editorial board of the *Oklahoma Law Review*, and to his wonderful family for their support and encouragement throughout law school.

1. 2 CHARLES TILFORD MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 262, at 168 (John W. Strong ed., 5th ed. 1999); *see also* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1000 (2001) (suggesting that schoolchildren are more familiar with the *Miranda* warnings than they are with Lincoln's Gettysburg Address).

2. For an actual case with facts similar to those stated in this introductory hypothetical, see *United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976).

3. FED. R. EVID. 801 advisory committee's note; 2 MCCORMICK ET AL., *supra* note 1, § 262, at 167 (citing 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1071, at 102 (James Harmon Chadbourn ed., 4th ed. 1972)).

rule is that the person who remained silent in the face of an accusation has adopted the truth of the incriminating facts within that accusation, thereby admitting his guilt.[4] This rationale only applies to situations in which the accused person would reasonably be expected to deny the truth of the accusation against him. Thus, "[t]he essential inquiry in each case is whether a reasonable person under the circumstances would have denied the statement."[5] In the context of a criminal arrest, the questions become whether a reasonable person who is being placed under arrest would attempt to exculpate himself, and whether that person's failure to do so was an admission of guilt that the prosecutor could use as evidence in court.

Several factors complicate the use of silence as evidence of guilt in criminal cases, not the least of which is the criminal defendant's presumed knowledge of his rights under *Miranda v. Arizona*[6] when he is confronted by the police.[7] *Miranda* requires that, prior to police interrogation, a defendant who is under arrest be informed of the following:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and to have them present before and during questioning in the making of any statement. If you cannot afford an attorney, you are entitled to have an attorney appointed for you by the court and to have them present before and during questioning in the making of any statement.[8]

Most Americans have heard these warnings recited countless times on television shows like *Dragnet*, *Hawaii Five-O*, *Law and Order*, and *The Wire*.[9] If most people are at least generally aware of their right to remain silent, it follows that a reasonable person who is aware of this right might naturally exercise the right when faced with arrest, even before the express warning is

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4. *See* FED. R. EVID. 801(d)(2)(B); 2 MCCORMICK ET AL., *supra* note 1, § 262, at 167.

5. 2 MCCORMICK ET AL., *supra* note 1, § 262, at 169; *see also* FED. R. EVID. 801 advisory committee's note (calling for a case-by-case evaluation dependent on probable human behavior).

6. 384 U.S. 436 (1966).

7. FED. R. EVID. 801 advisory committee's note; 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168-69.

8. MSN Encarta, Miranda Warnings—Sound Clip, http://encarta.msn.com/media_461535168/Miranda_Warnings.html (last visited Oct. 23, 2006). The warnings quoted here provide a generic form of the *Miranda* warnings, which may actually vary in wording from jurisdiction to jurisdiction. See *Miranda*, 384 U.S. at 444, for the substance of the warnings that the U.S. Supreme Court requires.

9. *See* Leo, *supra* note 1, at 1000; Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU L. REV. 185, 185 (2000).

given. Thus, the use of a criminal defendant's post-arrest silence as substantive evidence of guilt is highly questionable, regardless of whether the defendant has received the requisite *Miranda* warnings.[10]

Again, one can imagine a situation in which an innocent criminal suspect is confronted by the police and told that he is under arrest for committing a certain crime. Perhaps the suspect is extremely cynical about police encounters because the police have historically discriminated against young men of his race. This cynicism makes him believe that the police will inevitably turn anything he says against him. Relying on this feeling and on his right to remain silent, which he learned about while watching television, the suspect decides not to say anything. The suspect also believes that this is the best strategy because he has heard through the grapevine that his brother was the real culprit in this crime. Not wishing to focus police attention on his relative and convinced that the state does not have a case against him, the suspect decides not to cooperate with the police even after talking with a lawyer. At trial, the prosecutor calls the arresting officer to testify about the defendant's failure to deny the accusation made by the officer at the time of arrest. Of course, the prosecutor intends to use the defendant's silence as proof of his guilt. Yet, in light of the sentiment for his brother and his suspicion of the police, it is clear why the defendant might remain silent although entirely innocent. The question remains whether the prosecutor's use of the defendant's silence should be tolerated by the court.

Although the U.S. Supreme Court has held that the use of post-*Miranda*[11] silence as substantive evidence of guilt "is an affront to the fundamental fairness that the Due Process Clause requires,"[12] the Court has never dealt with the issue of whether a criminal defendant's post-arrest, pre-*Miranda*[13] silence

10. *See* FED. R. EVID. 801 advisory committee's note ("In criminal cases . . . troublesome questions have been raised by decisions holding that failure to deny is an admission: . . . silence may be motivated by advice of counsel or realization that 'anything you say may be used against you' . . . ."). Interestingly, when the Advisory Committee spoke of a "realization," it did not specify whether it was referring to an inherent realization based on one's own knowledge or a subsequent realization based on hearing the *Miranda* warnings given by the police.

11. Throughout this comment, the term "post-*Miranda*" is used to describe that period after a person has received the *Miranda* warnings from a law enforcement officer, and does not refer to the era following the *Miranda* decision. Because the *Miranda* warnings are given upon arrest, the term "post-*Miranda*" also necessarily refers to a period of time that follows the point of arrest. *See Miranda*, 384 U.S. at 444.

12. Wainwright v. Greenfield, 474 U.S. 284, 291 (1986).

13. The term "post-arrest, pre-*Miranda*" refers to the period after a suspect has been arrested but before he has received the *Miranda* warnings.

may be used as evidence of guilt in the prosecution's case-in-chief.[14] Currently, there is a circuit split in the federal courts of appeals on the latter issue,[15] and it is possible that the U.S. Supreme Court may consider a case regarding this issue. This comment seeks to explain why the Supreme Court should find that the Federal Rules of Evidence and the U.S. Constitution prohibit prosecutors from using a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief.

Part II of this comment explores the use of silence as an adoptive admission of guilt in criminal cases and analyzes the effects *Miranda* has had on using silence when law enforcement officials make an accusation in the face of such silence. Part III surveys the Supreme Court's treatment of the evidentiary uses of a defendant's pretrial silence. Part IV examines the current split among the federal circuit courts of appeal regarding the use of post-arrest, pre-*Miranda* silence as evidence of guilt in the prosecution's case-in-chief. Finally, Part V discusses why the Constitution and the Federal Rules of Evidence appear to bar the use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in the prosecution's case-in-chief.

II. Evidentiary Use of Silence in Criminal Cases

The evidentiary use of silence in criminal cases is a complex topic to discuss because it must be approached from many different angles. The different issues surrounding the evidentiary use of silence, discussed herein, involve the general principles regarding the use of silence as an adoptive admission of fact, the problems that may arise with such evidentiary use of silence, and the impact of *Miranda v. Arizona* on the evidentiary use of silence in criminal cases. After discussing these more general issues, the evidentiary use of silence since the *Miranda* decision can be explored more fully as it relates to post-arrest, pre-*Miranda* silence.

A. The Evidentiary Use of Silence as Adoptive Admissions

The use of silence at trial must comport with both evidentiary and constitutional law.[16] In federal cases, this requires that the use of silence

14. Valentine v. Alameida, Nos. 04-55208, 04-55365, 2005 WL 1899321, at *2 (9th Cir. Aug. 8, 2005) (stating that "there is no precedent that is clearly applicable to these facts").

15. *See infra* Part IV.

16. *See* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980) (holding "that the use of prearrest silence to impeach a defendant's credibility does not violate the Constitution" while also stating that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial"); Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant's Prearrest Silence*, 63 BROOK. L. REV. 897, 941 (1997) (stating that the federal government and the states have a

comply with the Federal Rules of Evidence (FRE) and with the applicable constitutional provisions. In state cases, however, the FRE are inapplicable because the supervisory authority of the U.S. Supreme Court — which promulgates the FRE — only extends to the lower federal courts and not to the state courts.[17] Thus, when reviewing cases that originate in state courts, federal courts can only determine whether the use of silence as substantive evidence of guilt is a violation of federal constitutional law.[18] Nevertheless, it is still useful to explore the impact of the FRE on the evidentiary use of silence in both federal and state trials because many states have modeled their evidentiary codes after the FRE, thereby extending the FRE's impact beyond the federal courtroom.[19]

Under FRE 801(d)(2)(B), a statement is admissible as evidence if it "is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth."[20] This means that an accusation made in the presence of the accused will not be excluded from evidence if the accused adopts or acquiesces to the truth of the accusatory statement. The accused can manifest his adoption of the truth of any statement in a variety of manners,[21] and silence is one means by which he can admit to the truth of the content of a statement.[22] Such use of silence is based on the premise that a party is expected

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legitimate interest in "presenting evidence from which a jury may conclude the defendant's guilt beyond a reasonable doubt . . . when the inculpatory evidence is admissible under the applicable evidentiary rules and does not violate a constitutional mandate").

17. *See* Carlisle v. United States, 517 U.S. 416, 426 (1996); 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, 1574 (1982) (discussing the applicability of the Federal Rules of Evidence in cases addressing the use of prior silence for impeachment).

18. Melson, *supra* note 17, at 1574 (citing JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, HANDBOOK ON CONSTITUTIONAL LAW ch. 1 (1978)).

19. Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 789-90 (2002) (stating that thirty-nine states have followed the federal model as of 2001). For example, the FRE have been substantially incorporated into Oklahoma law. *See* 12 OKLA. STAT. §§ 2101-3009 (2001 & Supp. 2005).

20. FED. R. EVID. 801(d)(2)(B) (defining the statement as non-hearsay and thereby exempting it from the "Hearsay Rule" in FED. R. EVID. 802).

21. Methods by which the accused can adopt the truth of an accusation include any action or inaction that tends to prove his belief in the truth of the accusation. This would include verbal affirmation, in which the accused audibly agrees with the content of the accusation; nonverbal affirmation, in which the accused signals his agreement with the content of the accusation through a smile, a nodding of the head, or some other similar motion; and silence when silence is not the expected response.

22. FED. R. EVID. 801 advisory committee's note.

to deny statements containing untruthful assertions of fact.[23] Because the accused has effectively become a witness against himself, there is no concern about the accusation being used as evidence against him, even when the person who made the accusation is not available to testify in court.[24] Thus, all possible hearsay concerns regarding such an accusation are eliminated, and the accusation is treated as nonhearsay.[25]

B. Problems Surrounding the Use of Silence as Adoptive Admissions

In criminal cases, admissions through silence are generally admissible into evidence because the criminal defendant against whom the statements are used has, through his silence, adopted them as his own and has essentially become a witness against himself.[26] Application of the rule of adoptive admissions in criminal cases, however, raises several concerns. First, silence is inherently ambiguous, and the inference of guilt is only one of many possible conclusions that can be drawn from a criminal defendant's silence.[27] In *United States v. Hale*,[28] the U.S. Supreme Court was presented with the issue of whether the federal government could use a criminal defendant's post-*Miranda* silence on cross-examination to impeach the defendant's direct testimony.[29] Justice Thurgood Marshall, in writing a majority opinion that provoked no dissents from his colleagues, found that "[i]n most circumstances silence is so ambiguous that it is of little probative force."[30] Justice Marshall continued:

> At the time of arrest and during custodial interrogation, innocent and guilty alike — perhaps particularly the innocent — may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply

23. 2 MCCORMICK ET AL., *supra* note 1, § 262, at 167 (citing 4 WIGMORE, *supra* note 3, § 1071, at 102); *see also* FED. R. EVID. 801 advisory committee's note.

24. *See* United States v. Kehoe, 310 F.3d 579, 591 (8th Cir. 2002).

25. FED. R. EVID. 801(d).

26. *Kehoe*, 310 F.3d at 591.

27. FED. R. EVID. 801 advisory committee's note; United States v. Hale, 422 U.S. 171, 176 (1975); 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.21, at 158 (5th ed. 2001); 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168.

28. 422 U.S. 171.

29. *Id.* at 173.

30. *Id.* at 176.

> react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.[31]

Justice Marshall made it clear that there are numerous incentives for remaining silent that make the inference of guilt precarious, to say the least.

A second cause for concern related to the use of silence as an adoptive admission of guilt is the unusual opportunity for the manufacturing of evidence.[32] If a defendant justifiably remains silent in the face of a false accusation and that silence is nevertheless used against him at trial, the jury may be misled by the facts that have been manufactured within the accusation.[33] So long as the defendant does not respond to an accusation made against him, the jury might assume the truth of all the facts alleged in the accusation — even if the defendant had a perfectly valid reason for remaining silent.[34] Thus, such use of silence as evidence of guilt may lead to impermissible and incorrect inferences being drawn by the jury and for the jury.

A third concern, which is discussed more extensively below,[35] is raised by the constitutional limitations on referring to a criminal defendant's silence that emanate from *Miranda v. Arizona* and its progeny.[36] Because *Miranda* recognized that a criminal defendant has the right to remain silent, a criminal defendant's silence in the face of an accusation made by law enforcement authorities may not be used against him without forcing him to explain his silence, thereby infringing upon his privilege against self-incrimination.[37]

Although the courts have adopted various safeguards against the misuse of silence,[38] these three concerns still raise significant questions about the use of

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31. *Id.* at 177 (citation omitted).

32. FED. R. EVID. 801 advisory committee's note; 3 GRAHAM, *supra* note 27, § 801.21, at 158; 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168.

33. *See* People v. Bennett, 110 N.E.2d 175 (Ill. 1953). In that case, the state prosecutor read an accusatory statement to the defendant, Bennett, that had been made outside of his presence by an eyewitness to his alleged crime of selling stolen goods. *Id.* at 178. Because the defendant had previously denied the charges made against him by the state prosecutor, the appellate court recognized that the defendant should not have been expected to deny the accusation that was used against him at trial. *Id.* Thus, at trial, the jury had impermissibly been allowed to consider evidence contained within the accusation that could have been wholly fabricated by the eyewitness. *See id.* at 178-79.

34. *See id.* at 178-79.

35. *See infra* Part III.C.

36. FED. R. EVID. 801 advisory committee's note; 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168.

37. FED. R. EVID. 801 advisory committee's note; 3 GRAHAM, *supra* note 27, § 801.21, at 158; *see also* 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168.

38. 2 MCCORMICK ET AL., *supra* note 1, § 262, at 168-69 ("[C]ourts have evolved a variety of safeguards against misuse: (1) the statement must have been heard by the party claimed to have acquiesced; (2) it must have been understood by the party; and (3) the subject matter must

silence as substantive evidence of guilt, especially when police officers are present at the time an accusatory statement is made.[39] In *Miranda*, the Court addressed some of the constitutional concerns regarding the reliability of a criminal defendant's express admission of guilt when it is obtained during custodial interrogation by the police, and *Miranda*'s holding has had serious effects on the treatment of adoptive admissions of guilt through silence.

C. The Ramifications of Miranda v. Arizona *on the Evidentiary Use of Silence*

In the summer of 1966, Chief Justice Earl Warren delivered the Supreme Court's controversial decision in *Miranda v. Arizona*.[40] The *Miranda* decision evaluated an express admission of guilt that police officers obtained from the defendant, Ernesto Miranda, during an "incommunicado" interrogation.[41] Police arrested Miranda at his home and took him to the Phoenix police station on charges of kidnapping and rape.[42] After two hours of isolated questioning, police secured a written confession from Miranda.[43] The police, however, failed to warn Miranda of his right to have counsel present during questioning.[44] The written confession was admitted into evidence at Miranda's jury trial over the objection of his counsel, and Miranda was subsequently found guilty of kidnapping and rape.[45] The Supreme Court of Arizona, relying on the U.S.

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have been within the party's knowledge. . . . (4) Physical or emotional impediments to responding must not be present. (5) The personal makeup of the speaker . . . or the person's relationship to the party or the event . . . may be such as to make it unreasonable to expect a denial. (6) Probably most important of all, the statement itself must be such as would, if untrue, call for a denial under the circumstances.").

39. *Id.* at 169.

40. 384 U.S. 436 (1966). The *Miranda* decision was so controversial that Richard Nixon and George Wallace, the conservative Republican and Independent presidential candidates in the 1968 election respectively, used it as an example of the excesses of the Warren Court. Thus, they presented themselves as the sort of president who would appoint conservative justices to the Supreme Court, justices who would roll back the liberal agenda of the Warren Court. *See* George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 10-12 (2000).

41. *Miranda*, 384 U.S. at 491-92. The term "incommunicado" is an adjective that means "[w]ithout any means of communication." BLACK'S LAW DICTIONARY 780 (8th ed. 2004). When used in reference to an interrogation, it denotes intense questioning of a person in custody who is only allowed to communicate with the law enforcement officers that are questioning him.

42. *Miranda*, 384 U.S. at 491-92.

43. *Id.*

44. *Id.* at 491.

45. *Id.* at 492.

Supreme Court decision in *Escobedo v. Illinois*,[46] held that Miranda's constitutional right to counsel had not been violated because Miranda had not specifically requested counsel.[47] The U.S. Supreme Court granted certiorari in Miranda's case to clarify its earlier holding in *Escobedo* that had "appl[ied] the privilege against self-incrimination to in-custody interrogation."[48]

The *Miranda* Court discussed the resemblance of incommunicado interrogation to physical brutality, both of which can induce coerced confessions, and held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination."[49] The Court proceeded to define the procedural safeguards that would be required: "Prior to any questioning, the person must be warned that he has a right to remain silent, [and] that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[50] Furthermore, a defendant may prevent questioning at any point by indicating his desire to remain silent.[51] The Court also provided that a defendant may waive these rights so long as his waiver has been voluntarily, intelligently, and knowingly made.[52] Thus, *Miranda* created a constitutional right to remain silent during custodial interrogation.

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46. 378 U.S. 478 (1964). In *Escobedo*, the criminal defendant, a twenty-two-year-old Mexican immigrant, was subjected to custodial interrogation and denied the assistance of his retained counsel, who was at the police station for four and one-half hours and was prevented from seeing his client during that time. *Id.* at 482. The Court held that the incriminating statement made by Escobedo, which he had intended to be exculpatory, could not be used against him at criminal trial because he had been denied the assistance of counsel. *Id.* at 490-91.

47. *Miranda*, 384 U.S. at 492. In 1964, the *Escobedo* Court held:

> [W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, *the suspect has requested and been denied an opportunity to consult with his lawyer*, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . .

Escobedo, 378 U.S. at 490-91 (emphasis added). Thus, the phrasing of the holding in *Escobedo* seemingly made the request of counsel and the other conditions conjunctive conditions for violating the Sixth Amendment.

48. *Miranda*, 384 U.S. at 441.

49. *Id.* at 444.

50. *Id.*

51. *Id.* at 473-74.

52. *Id.* at 444.

Because of most of *Miranda*'s progeny, one might argue that the right to remain silent is not a constitutional right.[53] In 2000, however, in *Dickerson v. United States* the U.S. Supreme Court reiterated the constitutional importance of *Miranda*, stating that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively."[54] Therefore, a criminal defendant still has an absolute right to remain silent in the face of custodial interrogation, and that right of silence is underscored by the warnings required by *Miranda*.[55]

Miranda has had profound ramifications on the evidentiary use of silence at trial. The limitations *Miranda* placed on custodial interrogation challenged the propriety of using a defendant's failure to deny an accusation as an admission of guilt, especially when the accusation "is made under the auspices of law enforcement personnel."[56] After *Miranda*, a criminal defendant's silence became even more ambiguous because such silence might "be motivated by advice of counsel or realization that 'anything [he] say[s] may be used against [him].'"[57] Furthermore, evidentiary use of a criminal defendant's silence during custodial interrogation created a no-win situation for the defendant in which

53. History shows that the Berger and Rehnquist Courts have counterbalanced the liberal activism of the Warren Court in several areas, and this trend is quite obvious when it comes to *Miranda*. In the years since *Miranda*, the Court has carved out several exceptions to *Miranda*'s requirements. *See* United States v. Patane, 542 U.S. 630 (2004) (holding that the privilege against self-incrimination is not implicated when "voluntary" statements obtained in violation of *Miranda* lead to physical evidence); Pennsylvania v. Muniz, 496 U.S. 582 (1990) (holding that incriminating utterances obtained in violation of *Miranda* are admissible when they are the source of real or physical evidence rather than communicative of testimonial evidence); New York v. Quarles, 467 U.S. 649 (1984) (holding that statements obtained from a criminal defendant in violation of *Miranda* did not violate his privilege against self-incrimination when public safety was endangered); Harris v. New York, 401 U.S. 222 (1971) (holding that statements obtained from a criminal defendant in violation of *Miranda* could still be used for impeachment purposes if the defendant takes the stand). The Court also referred to the *Miranda* warnings in numerous decisions as "prophylactic" rules that "were not themselves rights protected by the Constitution." Michigan v. Tucker, 417 U.S. 433, 444 (1974); *see, e.g.*, Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights."); Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").

54. Dickerson v. United States, 530 U.S. 428, 444 (2000).

55. *See Miranda*, 384 U.S. at 444. In *Miranda*, the majority required that "fully effective means [be] devised to inform accused persons of *their right of silence*," which seems to imply a right that they already possess. *Id.* (emphasis added).

56. 3 GRAHAM, *supra* note 27, § 801.21, at 158; *see also* 2 MCCORMICK ET AL., *supra* note 1, § 262, at 169.

57. FED. R. EVID. 801 advisory committee's note; *see also* Doyle v. Ohio, 426 U.S. 610, 617 (1976).

either his silence or his own statements might seemingly be used against him.[58] Because of its ramifications, *Miranda* has forced the U.S. Supreme Court to reevaluate the evidentiary use of silence in the context of criminal cases.

III. Evidentiary Use of Silence After Miranda

The progression of individual criminal cases through the courts has forced the U.S. Supreme Court to address the implications of *Miranda* on the prosecution's evidentiary use of a defendant's silence for both impeachment and substantive purposes. The distinction between the two evidentiary purposes is rather subtle but deserves explanation.

A defendant's silence can only be used against him for impeachment purposes if he testifies at his own trial.[59] If the defendant takes the stand in his own defense after failing to deny any accusations made against him until then, the prosecution might impeach any exculpatory information he gives on the stand with his silence, thereby demonstrating the inconsistency between the guilt to be inferred from his silence and the innocence to be inferred from his statements. In various factual settings, the Supreme Court addressed the issue of whether such use of a criminal defendant's silence for impeachment purposes is prohibited under evidentiary or constitutional law.[60]

If the prosecution wishes to use a criminal defendant's silence for the substantive purpose of proving guilt, then the prosecution must attempt to present the evidence during its case-in-chief. To accomplish this, the prosecutor would usually call the arresting officer as a witness and have him testify about the defendant's silence at the time of arrest.[61] Then during closing arguments, the prosecutor would remind the jury of the officer's testimony and tell the jury that, if the defendant was truly innocent, he would have proclaimed his innocence at the time of his arrest. The Supreme Court has addressed this issue, whether such use of a criminal defendant's silence as substantive

58. 3 GRAHAM, *supra* note 27, § 801.21, at 158; *see also* FED. R. EVID. 801 advisory committee's note ("[E]ncroachment upon the privilege against self-incrimination seems inescapably to be involved").

59. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) ("[W]e do not believe that it violates due process of law for a State to permit cross-examination as to postarrest [pre-*Miranda*] silence when a defendant chooses to take the stand."). See *Reagan v. United States*, 157 U.S. 301, 305 (1895), for the general proposition that a criminal defendant who testifies at trial may have his credibility impeached on cross-examination.

60. *See Fletcher*, 455 U.S. 603; Jenkins v. Anderson, 447 U.S. 231 (1980); *Doyle*, 426 U.S. 610; United States v. Hale, 422 U.S. 171 (1975). See *infra* Part III.A for further discussion of such instances.

61. For some instances where the prosecution called the arresting officer, see *Wainwright v. Greenfield*, 474 U.S. 284, 286-87 (1986); *United States v. Frazier*, 394 F.3d 612, 616 (8th Cir. 2005); and *United States v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997).

evidence of guilt is prohibited under evidentiary or constitutional law, in only limited factual settings.[62]

A. Evidentiary Use of Silence for Impeachment Purposes

In past cases where it has considered the issue, the U.S. Supreme Court permitted the evidentiary use of a criminal defendant's silence for impeachment purposes except in cases where the giving of the *Miranda* warnings preceded the silence.[63] The basis for deeming the use of post-arrest, post-*Miranda* silence as fundamentally unfair was an implicit assurance to those who receive the warnings that "silence will carry no penalty."[64] Thus, the Court recognized the paradox that *Miranda* created and that Justice White recognized in his concurring opinion in *United States v. Hale*:

> When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here *that his silence, as well as his words, could be used against him at trial*.[65]

Although impeachment use of a defendant's post-*Miranda* silence may be fundamentally unfair, the Court has held in cases involving pre-*Miranda* silence that "inquiry into prior silence [is] proper because '[t]he immunity from giving [self-incriminating] testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness.'"[66] Furthermore, because the defendant is treated like any other witness and the "[c]ommon law traditionally has allowed

62. *See Greenfield*, 474 U.S. 284; Griffin v. California, 380 U.S. 609 (1965). See *infra* Part III.B for further discussion of such instances.

63. *See Fletcher*, 455 U.S. 603; *Jenkins*, 447 U.S. 231; *Doyle*, 426 U.S. 610.

64. *Doyle*, 426 U.S. at 618; *see also* Malloy v. Hogan, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—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*." (emphasis added)).

65. *Doyle*, 426 U.S. at 619 (emphasis added) (quoting *Hale*, 422 U.S. at 182-83 (White, J., concurring)).

66. *Jenkins*, 447 U.S. at 235 (second alteration in original) (quoting Raffel v. United States, 271 U.S. 494, 496-97 (1926)).

witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted," a defendant may be impeached using silence that precedes the *Miranda* warnings without being deprived of due process.[67] In other words, if the defendant does not want the prosecution to draw attention to the fact that he remained silent at the time of arrest, then the defendant should not take the stand in his own defense. The Court has further held that impeachment use of a defendant's pre-arrest, pre-*Miranda* silence does not violate his Fifth Amendment privilege against self-incrimination.[68] Again the Court's reasoning in allowing the silence to be used for impeachment hinged on the fact that the defendant had chosen to testify: "*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.'"[69] Thus, when reviewing impeachment cases regarding either pre-*Miranda* or post-*Miranda* silence, the Court has always stressed the implications of the defendant's choice to take the stand[70] and the presence or absence of "affirmative assurances embodied in the *Miranda* warnings."[71]

B. Use of Silence as Substantive Evidence of Guilt

The U.S Supreme Court has addressed the use of silence as substantive evidence of guilt in some situations, but not as extensively as it has addressed the use of silence for impeachment purposes. The substantive use of silence has only been addressed as it pertains to a criminal defendant's post-arrest, post-*Miranda* silence or to his silence at trial.[72]

In *Wainwright v. Greenfield*[73] the Court held that it was fundamentally unfair and a deprivation of due process for the prosecution to comment on a criminal defendant's silence if that silence followed the warnings required by *Miranda*.[74] The defendant, Greenfield, was arrested for sexual battery when his victim

67. *Id.* at 239 (quoting 3A WIGMORE, *supra* note 3, § 1042, at 1056).

68. *Id.* at 237-38.

69. *Id.* (emphasis added) (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).

70. *See id.* at 235, 237-38; *Doyle*, 426 U.S. at 616-17.

71. Fletcher v. Weir, 455 U.S. 603, 607 (1982); *see also Jenkins*, 447 U.S. at 240 ("In this case, no governmental action induced petitioner to remain silent before arrest."); *Doyle*, 426 U.S. at 618 ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.").

72. *See* Wainwright v. Greenfield, 474 U.S. 284 (1986); Griffin v. California, 380 U.S. 609 (1965).

73. 474 U.S. 284.

74. *Id.* at 292.

returned to the vicinity of the crime scene with a police officer two hours later.[75] The officer gave Greenfield the warnings required by *Miranda*, and Greenfield expressed his desire to speak with an attorney.[76] Greenfield received the warnings twice more — once on the drive to the police station and once after arriving there.[77] Both times Greenfield expressed his desire to confer with counsel.[78] At trial, Greenfield pled not guilty by reason of insanity.[79] The prosecution, to meet its burden in proving Greenfield's sanity, introduced testimony in its case-in-chief from the officers who gave the *Miranda* warnings. The officers testified to Greenfield's silence and his desire to speak with an attorney.[80] In his closing argument, the prosecutor suggested that Greenfield's desire to speak with an attorney before talking with police was evidence of his sanity at the time of the crime.[81] The Supreme Court held that the use of Greenfield's post-*Miranda* silence to defeat his plea of insanity was fundamentally unfair and was thus a violation of his right to due process.[82] The Court again recognized "the implicit assurance contained in the *Miranda* warnings 'that silence will carry no penalty,'" which it had earlier identified in *Doyle*.[83]

In *Griffin v. California*,[84] the Court held that the prosecution's use of a criminal defendant's silence at trial in its case-in-chief as substantive evidence of guilt violated the defendant's Fifth Amendment privilege against self-incrimination.[85] The state of California prosecuted the defendant, Griffin, for the murder of a woman who had last been seen with him in the alley where the woman's body was later found.[86] In its closing argument, the prosecution emphasized Griffin's failure to testify on his own behalf, claiming that it proved his guilt.[87] Griffin was convicted and received the death penalty.[88] After recognizing that the assertion of the privilege against self-incrimination had been circumvented and perceiving several possible reasons for Griffin's refusal

75. *Id.* at 286.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 285.
80. *Id.* at 286-87.
81. *Id.* at 287.
82. *Id.* at 292.
83. *Id.* at 290; *see* Doyle v. Ohio, 426 U.S. 610, 618 (1976).
84. 380 U.S. 609 (1965).
85. *Id.* at 615.
86. *Id.* at 611.
87. *Id.* at 610-11.
88. *Id.* at 611.

to testify, the U.S. Supreme Court held that the Fifth Amendment barred the prosecution from commenting on Griffin's refusal to take the stand.[89]

The Court has never squarely addressed the prosecution's substantive use of a criminal defendant's pre-arrest, pre-*Miranda* silence as proof of guilt. Rather, the Court explicitly noted that the subject was not broached in *Jenkins v. Anderson*,[90] a case that addressed the use of pre-arrest, pre-*Miranda* silence for impeachment purposes:

> Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent.[91]

Thus, the Court saved the issue for another day.

Several federal circuit courts of appeal, however, have addressed the issue. The First, Sixth, Seventh, and Tenth Circuits have held that a defendant's pre-arrest silence cannot be used as substantive evidence of guilt without violating his Fifth Amendment privilege against self-incrimination.[92] These circuits primarily relied upon *Griffin v. California*, which discussed the use of post-*Miranda* silence as substantive evidence of guilt, rather than on the *Doyle v. Ohio* line of cases, which discussed the use of silence for impeachment purposes.[93] The reason for this reliance was twofold. First, the defendants had not testified at trial. Therefore, the justification of treating him as any other witness was absent.[94] Second, the pre-arrest silence was not used to impeach but rather to prove guilt in the prosecution's case-in-chief.[95] In contrast, the

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89. *Id.* at 614-15.

90. 447 U.S. 231 (1980).

91. *Id.* at 236 n.2.

92. Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).

93. *Combs*, 205 F.3d at 281-82; *Burson*, 952 F.2d at 1201; *Coppola*, 878 F.2d at 1567; *Savory*, 832 F.2d at 1017.

94. *Coppola*, 878 F.2d at 1567 ("The broad rule of law we take from [*Raffel* and *Griffin*] . . . is that where a defendant does not testify at trial it is impermissible to refer to any fifth amendment rights that defendant has exercised." (citation omitted)).

95. *Burson*, 952 F.2d at 1201 ("The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised. To be sure, exceptions exist to this rule, such as the use of silence for impeachment in certain circumstances, but such exceptions have no applicability to the case before us.").

Fifth, Ninth, and Eleventh Circuits have held that the Fifth Amendment privilege against self-incrimination does not prohibit the use of pre-arrest silence as substantive evidence of guilt.[96] Those circuits relied largely upon the reasoning in *Jenkins v. Anderson*, which addressed the use of pre-arrest, pre-*Miranda* silence for impeachment purposes.[97] Like the U.S. Supreme Court in *Jenkins*, the Fifth, Ninth, and Eleventh Circuits reasoned that commenting on a defendant's silence was only precluded if the defendant had already received the implicit assurance in the *Miranda* warnings that his silence would not be used against him.[98] Apparently, the Fifth, Ninth, and Eleventh Circuits did not care to distinguish *Jenkins* on the basis that it only addressed the use of pre-arrest silence for impeachment purposes. Nevertheless, the circuits remain split on the issue of the prosecution's use of pre-arrest silence as evidence of guilt during its case-in-chief. Although this comment does not attempt to address the issue of using pre-arrest silence as substantive evidence of guilt, the discussion surrounding that issue has played a role in the debate surrounding the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt, which is the focus of this comment.

The prosecution's use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt is the only other issue regarding the evidentiary use of a criminal defendant's silence that the U.S. Supreme Court has not addressed. Rather, this issue has been left for the circuit courts of appeals to evaluate. Seven of the thirteen circuits have reached the issue, with the respective rulings creating a three-to-four circuit split.[99] In light of the current disagreement on the issue, the Supreme Court may soon be forced to resolve the dispute between the circuits. The remainder of this comment is devoted to an analysis of the substantive use of post-arrest, pre-*Miranda* silence as proof of guilt and argues against permitting the use of such evidence.

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96. United States v. Oplinger, 150 F.3d 1061 (9th Cir. 1998); United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).

97. *Oplinger*, 150 F.3d at 1066; *Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568.

98. *Oplinger*, 150 F.3d at 1066 ("[T]he privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."); *Zanabria*, 74 F.3d at 593 ("The fifth amendment protects against compelled self-incrimination but does not . . . 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."); *Rivera*, 944 F.2d at 1568 ("The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings.").

99. *See infra* Part IV.

*IV. Use of Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*

Post-arrest, pre-*Miranda* silence involves the silence of a criminal defendant that occurred between the point he was placed in custody and the time he was given the *Miranda* warnings that made him aware of his right to remain silent and assured him that anything he said may be used against him. Unlike the images portrayed on television, where a law enforcement officer gives the *Miranda* warnings as he is handcuffing the "bad guy," law enforcement officers often wait to give the warnings to a defendant until they are ready to commence questioning.[100] This delay, which may be strategically employed by the police, typically gives the defendant an opportunity to make an inculpatory statement before his interrogation, such as during the ride to the police station.[101] Thus, when a court is presented with the issue of whether the prosecution may comment on the defendant's post-arrest, pre-*Miranda* silence in its case-in-chief, the defendant's silence typically occurred during the period of time when the police hoped that the defendant would spontaneously incriminate himself.

As previously stated, the U.S. Supreme Court has never decided a case involving the prosecution's use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief.[102] A divergence of opinion on the issue exists among the federal circuit courts of appeals.[103] The Fourth, Fifth, Eighth, and Eleventh Circuits have all held that the prosecution's use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt is constitutionally permissible.[104] The Seventh, Ninth, and the D.C. Circuits have all held, however, that the prosecution's comments on post-arrest, pre-*Miranda* silence in its case-in-chief are constitutionally barred.[105] A closer look at the cases from each circuit reveals the divergent reasoning on this issue.

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100. *See, e.g.*, United States v. Osuna-Zepeda, 416 F.3d 838, 844 (8th Cir. 2005).

101. Prosecutorial use of a criminal suspect's spontaneous inculpatory statements, made without law enforcement officers saying or doing anything that would be reasonably likely to elicit such a statement, does not violate the holding of *Miranda*. Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Furthermore, such statements are certainly admissible under the Federal Rules of Evidence. *See* FED. R. EVID. 801(d)(2)(A).

102. *See supra* note 14 and accompanying text.

103. Valentine v. Alameida, Nos. 04-55208, 04-55365, 2005 WL 1899321, at *2 (9th Cir. Aug. 8, 2005); United States v. Frazier, 394 F.3d 612, 619 (8th Cir. 2005).

104. United States v. Garcia-Gil, No. 03-41142, 2005 WL 1274503, at *1 (5th Cir. May 27, 2005); *Frazier*, 394 F.3d 612; United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); United States v. Love, 767 F.2d 1052 (4th Cir. 1985).

105. United States v. Bushyhead, 270 F.3d 905 (9th Cir. 2001); United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000); United States v. Whitehead, 200 F.3d 634 (9th Cir. 2000); United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997); United States v. Hernandez, 948 F.2d 316 (7th Cir. 1991).

*A. Federal Circuits that Permit the Use of Post-Arrest, Pre-*Miranda *Silence as Substantive Evidence of Guilt*

In 1985, the Fourth Circuit held in *United States v. Love*[106] that testimony regarding the post-arrest, pre-*Miranda* silence of the two defendants was properly admitted.[107] The defendants, Love and Youngblood, were involved in cocaine trafficking and other related offenses.[108] Acting on an informant's tips, authorities were able to intercept the drugs and the drug smuggler before the rendezvous with Love and Youngblood could occur at the drug smuggler's farm.[109] Authorities were also waiting at the farm when Love and Youngblood arrived, where the pair was immediately detained.[110] After advising them that they "could leave if they helped the officers determine that they were at the farm innocently and were not involved in the drug smuggling operation," Love and Youngblood remained silent.[111] Aware that Love was likely involved in the smuggling operations, authorities eventually arrested him and Youngblood.[112] At trial the prosecution presented testimony that Love and Youngblood had remained silent and had not explained their presence at the drug smuggler's farm.[113] On appeal to the Court of Appeals for the Fourth Circuit, the defendants challenged the testimony regarding their post-arrest, pre-*Miranda* silence, although the constitutional basis of their challenge was not specified.[114] The court, relying on the U.S. Supreme Court's reasoning in *Doyle v. Ohio* and its progeny, held that the testimony regarding the defendants' silence was properly admitted because they had not yet received the *Miranda* warnings.[115]

In 1991, the Eleventh Circuit held in *United States v. Rivera*[116] that the admission of testimony regarding a defendant's pre-*Miranda* silence did not violate a his right to the due process of law.[117] The defendants, Rivera, Vila, and Stroud, were returning from Colombia to Miami when they were stopped by a U.S. Customs agent who suspected that they were smuggling drugs.[118] The Customs agent directed the group to an inspection area, where he discovered

106. 767 F.2d 1052.
107. *Id.* at 1063.
108. *Id.* at 1055.
109. *Id.* at 1057.
110. *Id.* at 1058.
111. *Id.*
112. *Id.*
113. *Id.* at 1063.
114. *Id.*
115. *Id.*
116. 944 F.2d 1563 (11th Cir. 1991).
117. *Id.* at 1567-68.
118. *Id.* at 1565.

cocaine in Stroud's luggage.[119] The group showed no surprise and remained silent.[120] The agent then placed Stroud, Rivera, and Vila in separate rooms, arrested them, and gave them their *Miranda* warnings before searching their bags and finding cocaine in each one.[121] During the defendants' trial, the prosecution presented the agent's testimony regarding Vila's silence and indifference throughout the encounter and later referred to the silence in its closing argument.[122] On review before the Court of Appeals for the Eleventh Circuit, Vila contended that she had been deprived of due process because of the comments regarding her post-arrest, post-*Miranda* silence.[123] Although the court acknowledged that prosecutorial comments on Vila's post-*Miranda* silence were problematic, the court found that such errors were harmless because the prosecutorial comments on Vila's pre-arrest silence and her post-arrest, pre-*Miranda* silence were permissible.[124] In arriving at the conclusion that prosecutorial comments on post-arrest, pre-*Miranda* silence were proper, the court relied upon the reasoning from the *Doyle* line of cases that a person's silence is not protected until after they have received the implicit assurance in the *Miranda* warnings that their silence would not be used against them.[125]

In January 2005, the Eighth Circuit held in *United States v. Frazier*[126] that "the use of [a defendant's post-arrest, pre-*Miranda*] silence in the [prosecution's] case-in-chief as evidence of guilt did not violate his Fifth Amendment rights."[127] The defendant, Frazier, was transporting a controlled substance in a U-Haul truck when he was pulled over by law enforcement officers who suspected that he was trafficking drugs.[128] When the officers found the controlled substance in the back of the truck, they arrested Frazier.[129] Frazier remained silent and showed no surprise when he was arrested.[130] The prosecution introduced evidence at trial concerning Frazier's post-arrest, pre-

119. *Id.*
120. *Id.* at 1565-66.
121. *Id.*
122. *Id.* at 1567.
123. *Id.*
124. *Id.* at 1567-68.
125. *Id.* at 1568 n.12 ("The vital distinction for our purposes . . . is not when Vila was arrested or technically in custody, but when she was given her *Miranda* warnings and thereby given the implicit assurance that her silence would not be used against her."). Specifically, the court relied on *Fletcher v. Weir* in arriving at its conclusion regarding post-arrest, pre-*Miranda* silence. *Id.* at 1568 n.11.
126. 394 F.3d 612 (8th Cir. 2005).
127. *Id.* at 620.
128. *Id.* at 616.
129. *Id.* at 615-16.
130. *Id.* at 616.

Miranda silence, and the prosecution further noted in its closing argument that such silence was indicative of guilt.[131] On appeal before the Court of Appeals for the Eighth Circuit, Frazier argued that the prosecution's use of his post-arrest, pre-*Miranda* silence in its case-in-chief violated his Fifth Amendment privilege against self-incrimination.[132] Despite Frazier's argument that his silence was not used for impeachment purposes, the court applied the *Doyle* line of cases that permitted the use of silence for impeachment purposes as long as the *Miranda* warnings did not precede that silence.[133] In further support of its holding, the court cited *Fletcher v. Weir*,[134] a Supreme Court case based on *Doyle*, stating that custody alone does not implicitly induce a defendant to remain silent and that the assurances embodied in the *Miranda* warnings were required to find that Frazier was under official compulsion to speak.[135] Thus, because Frazier had not yet received the *Miranda* warnings, the Eighth Circuit held that his Fifth Amendment privilege against self-incrimination had not been violated.

Seven months later, the Eighth Circuit applied its reasoning from *Frazier* in a second case involving the same issue, *United States v. Osuna-Zepeda*:[136] "As in *Frazier*, when Osuna-Zepeda was arrested 'there was no governmental action at that point inducing his silence,' and Osuna-Zepeda 'was under no government-imposed compulsion to speak.'"[137] Acting on an informant's tip, police observed a drug sale involving the defendant, Osuna-Zepeda, and two other men, Padilla-Armenta and Meehan, over the security system at a local Target store.[138] Although Osuna-Zepeda did not play any role in the actual exchange of money for drugs, evidence revealed that he had conversed with the seller in Spanish regarding the price of the drugs.[139] Once the transaction was complete, the police located the three men and took them to the Target security room.[140] The three were subsequently incarcerated and charged with conspiracy to sell methamphetamines, but because Meehan and Padilla-Armenta pled guilty, Osuna-Zepeda was the only defendant tried for the offense.[141] During the prosecution's case-in-chief, the arresting officer testified that none of the

131. *Id.* at 618.
132. *Id.* at 617.
133. *Id.* at 618-19.
134. 455 U.S. 603 (1982).
135. *Frazier*, 394 F.3d at 619.
136. 416 F.3d 838 (8th Cir. 2005).
137. *Id.* at 844 (quoting *Frazier*, 394 F.3d at 620).
138. *Id.* at 840.
139. *Id.* at 840-41.
140. *Id.* at 840.
141. *Id.*

defendants said anything while in custody in the Target security room.[142] The jury convicted Osuna-Zepeda for conspiracy to distribute methamphetamines.[143] On appeal before the Court of Appeals for the Eighth Circuit, Osuna-Zepeda claimed, inter alia, that the admission of testimony regarding his post-arrest, pre-*Miranda* silence violated his Fifth Amendment privilege against self-incrimination.[144] Because the Eighth Circuit found no factual distinctions between Osuna-Zepeda's case and *Frazier*, it refused to recognize that Osuna-Zepeda's Fifth Amendment rights had been violated.[145]

In May 2005, the Fifth Circuit delivered its decision in *United States v. Garcia-Gil*,[146] joining the Fourth, Eighth, and Eleventh Circuits in permitting prosecutorial use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. In this case, the Border Patrol stopped Garcia-Gil, a Mexican citizen, for suspected drug possession.[147] Agents discovered twenty kilograms of cocaine hidden in the seat of the truck Garcia-Gil was driving.[148] After Garcia-Gil was placed under arrest, he said nothing but, instead, turned around and placed his hands behind his back.[149] Garcia-Gil was then handcuffed and given the *Miranda* warnings.[150] Garcia-Gil subsequently attempted to explain to authorities that the truck had been loaned to him by a friend and that he was going to Houston for the sole purpose of purchasing appliances.[151] At trial, the prosecution used Garcia-Gil's post-arrest, pre-*Miranda* silence to prove his guilt on the drug possession charge.[152] On review before the Court of Appeals for the Fifth Circuit, Garcia-Gil argued that his Fifth Amendment rights were violated by the use of his post-arrest, pre-*Miranda* silence as evidence of guilt.[153] Relying on *Brecht v. Abrahamson*,[154] a U.S. Supreme Court case addressing the use of post-*Miranda* silence for impeachment purposes, the Fifth Circuit found that pre-*Miranda* silence was generally "probative and [did] not rest on any implied assurance by law enforcement authorities that it will carry no penalty."[155] Therefore, "[t]he admission of evidence that a defendant

142. *Id.* at 841.
143. *Id.* at 840.
144. *Id.* at 841.
145. *Id.* at 844.
146. No. 03-41142, 2005 WL 1274503, at *1 (5th Cir. May 27, 2005).
147. *Id.* at *1-*2.
148. *Id.* at *3.
149. *Id.*
150. *Id.*
151. *Id.* at *4.
152. *Id.* at *12.
153. *Id.*
154. 507 U.S. 619 (1993).
155. *Garcia-Gil*, 2005 WL 1274503, at *13-*14 (quoting *Brecht*, 507 U.S. at 628).

remained silent on arrest and before a *Miranda* warning turns on fact specific weighing by the trial judge."[156] Although Garcia-Gil argued that his silence could only properly be used for impeachment purposes, the Fifth Circuit gave no merit to his argument because the court had already held in *United States v. Zanabria*[157] — a case addressing the use of a criminal defendant's *pre-arrest* silence as substantive evidence of guilt — that the Fifth Amendment did not prohibit prosecutorial comment on everything giving rise to an incriminating inference.[158] Thus, the Fifth Circuit determined that, because Garcia-Gil failed to show how the testimony prejudiced him, the district court judge had properly admitted the testimony.[159]

A closer inspection of the cases emerging from the Fourth, Fifth, Eighth, and Eleventh Circuits reveals some common bases for permitting the prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief. First, although these cases addressed the use of a criminal defendant's silence *for the substantive purpose* of proving guilt, all of the circuits relied on the Supreme Court's reasoning in *Doyle v. Ohio* and its progeny, which permitted the use of a criminal defendant's silence *for impeachment purposes* except where the *Miranda* warnings preceded such silence.[160] Second, because of their reliance on cases dealing with the evidentiary use of silence for impeachment purposes, each of the circuits emphasized the fact that a defendant is not induced to remain silent until he has received the *Miranda* warnings.[161] Thus, unless he has received the *Miranda* warnings, a defendant cannot rely on the implicit assurance that silence carries no penalty under the Due Process Clause,[162] and he cannot argue that the prosecution's use of his silence at trial created a compulsion to speak in violation of the Self-Incrimination Clause.[163] As the following portion of this comment discloses, the other three circuits that have addressed the issue have

156. *Id.* at *14 (quoting United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995)).

157. 74 F.3d 590 (5th Cir. 1996).

158. *Garcia-Gil*, 2005 WL 1274503, at *15.

159. *Id.*

160. *Id.* at *13-*14 (relying on *Brecht*, 507 U.S. 619); United States v. Frazier, 394 F.3d 612, 619-20 (8th Cir. 2005) (relying on *Fletcher v. Weir*, 455 U.S. 603 (1982), and *Jenkins v. Anderson*, 447 U.S. 231 (1980)); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (relying on *Fletcher*, 455 U.S. 603, and *Jenkins*, 447 U.S. 231); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (relying on *Fletcher*, 455 U.S. 603, and *Doyle v. Ohio*, 426 U.S. 610 (1976)).

161. *Garcia-Gil*, 2005 WL 1274503, at *13; *Frazier*, 394 F.3d at 619; *Rivera*, 944 F.2d at 1568 n.12; *Love*, 767 F.2d at 1063.

162. *See, e.g.*, *Rivera*, 944 F.2d at 1567-68.

163. *See, e.g.*, *Frazier*, 394 F.3d at 620.

considered and rejected both of these premises for permitting the prosecution to use post-arrest, pre-*Miranda* silence as substantive evidence of guilt.

*B. Federal Circuits that Prohibit the Use of Post-Arrest, Pre-*Miranda *Silence as Substantive Evidence of Guilt*

In 1991, the Seventh Circuit held in *United States v. Hernandez*[164] that the prosecution's use of a defendant's refusal to speak with police after his arrest but before receiving the *Miranda* warnings violated the Fifth Amendment privilege against self-incrimination.[165] In *Hernandez*, an undercover DEA agent arranged to sell cocaine to the defendant, Hernandez, at a Denny's restaurant near Chicago's O'Hare International Airport.[166] During surveillance, authorities observed Hernandez drive to the gas station next to Denny's, where he met the other defendant, Parrish.[167] After entering Parrish's car, Hernandez reemerged with a white object and drove back to Denny's.[168] The undercover agent then arrived and asked Hernandez for the money, and Hernandez gave the agent a white bag containing the money.[169] Immediately following the exchange, Hernandez and Parrish were arrested for conspiracy to possess and distribute cocaine.[170] Parrish remained silent when he was arrested, although he later made some statements after being given the *Miranda* warnings.[171] At trial the judge permitted the prosecution, in its case-in-chief, to elicit testimony from the arresting officer regarding Parrish's failure to speak when he was first told that he was under arrest.[172] Later during the defense's case-in-chief, Parrish testified that he had met Hernandez at the gas station "to sell him a car and to take the car for a 'test drive.'"[173]

On review before the Court of Appeals for the Seventh Circuit, Parrish argued that his Fifth Amendment privilege against self-incrimination and his right to due process were violated by the prosecution's use of his post-arrest, pre-*Miranda* silence in its case-in-chief.[174] Because Parrish had taken the stand after the prosecution offered its evidence, there was a question whether the prosecution had properly used the silence for impeachment purposes or

164. 948 F.2d 316 (7th Cir. 1991).
165. *Id.* at 322-23.
166. *Id.* at 317.
167. *Id.*
168. *Id.* at 317-18.
169. *Id.* at 318.
170. *Id.* at 317-18.
171. *Id.* at 322.
172. *Id.*
173. *Id.* at 321.
174. *Id.* at 320-22.

improperly used it as substantive evidence of guilt.[175] The court determined that "[t]he fact that Mr. Parrish later took the stand does not allow the prosecutor to introduce impeaching evidence in its case-in-chief."[176] The court held that Parrish's case was covered by the principles stated in *United States ex rel. Savory v. Lane*, which found that the prosecution's use of pre-arrest silence as substantive evidence of guilt was a violation of the Fifth Amendment privilege against self-incrimination.[177] In *Savory*, the Seventh Circuit had recognized a defendant's constitutional right to say nothing regarding allegations against him that existed prior to defendant's receipt of the *Miranda* warnings.[178] Although the court had acknowledged in *Savory* that the determination of whether the prosecution could use a criminal defendant's silence for impeachment purposes hinged on whether the defendant had received the *Miranda* warnings, the court stated that a distinction based on whether the *Miranda* warnings had been given was only important for impeachment cases, where the defendant has exposed himself to such measures by taking the stand.[179] Furthermore, the court noted in *Hernandez* that there were many innocent reasons why a person might remain silent when he is arrested.[180] As a result of these determinations, the Seventh Circuit held that Parrish's Fifth Amendment privilege against self-incrimination had been violated because the district judge had allowed the prosecutor to use the defendant's silence as evidence of guilt.[181] The court subsequently affirmed Parrish's conviction, however, because the constitutional error was harmless and did not contribute to Parrish's conviction.[182]

In the 1997 case of *United States v. Moore*,[183] the D.C. Circuit also held that the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the defendant's Fifth Amendment privilege against self-incrimination.[184] In that case, a police officer had stopped Moore for speeding and for running several red lights.[185] When the officer asked Moore to exit the vehicle, Moore acquiesced and subsequently raised his

175. *See id.* at 323.
176. *Id.*
177. *Id.*; *see also* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987).
178. *Savory*, 832 F.2d at 1018.
179. *Id.* at 1017-18.
180. *Hernandez*, 948 F.2d at 325.
181. *See id.* at 322-23.
182. *Id.* at 324-25.
183. 104 F.3d 377 (D.C. Cir. 1997).
184. *Id.* at 387.
185. *Id.* at 380.

hands.[186] The officer noticed an empty shoulder holster under Moore's armpit and further noticed that the car had several bullet holes.[187] Once additional police officers arrived, they searched the car and discovered three loaded guns and some cocaine under the hood of the car.[188] When the police discovered the guns and drugs under the hood, Moore and his two passengers said nothing.[189] Moore was arrested and charged with several drug-related and firearm-related crimes.[190] In its case-in-chief, the prosecution elicited testimony from the arresting officer regarding Moore's post-arrest silence and later suggested in its closing argument that Moore's silence was indicative of his guilt.[191] Moore was convicted on all counts, and he appealed his conviction to the D.C. Circuit Court of Appeals on several grounds.[192]

On appeal, Moore claimed that the prosecutor was improperly permitted to comment on his post-arrest silence.[193] Quoting *Miranda*, the court observed that "the Supreme Court has elsewhere made clear that 'the prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation' when he was 'under police custodial interrogation.'"[194] Although police questioning had not yet begun at the time Moore remained silent, the court believed that nothing prevented it from finding that the right to remain silent attached at the time Moore was taken into custody.[195] The court considered whether the reasoning in *Doyle* and its progeny — which permitted the use of a defendant's silence for impeachment purposes unless such silence followed receipt of the *Miranda* warnings — applied to Moore's case.[196] Because the case before it did not involve use of the defendant's silence for impeachment, the court rejected the applicability of the reasoning from the *Doyle* line of cases,[197] stating that "the significance of the *Miranda* warnings in establishing the ability of the prosecution to use the

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 384.
190. *Id.* at 379.
191. *Id.* at 384.
192. *Id.* at 380.
193. *Id.* at 384.
194. *Id.* at 385 (quoting Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966)).
195. *Id.* ("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. . . . We therefore think it evident that custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*.").
196. *Id.* at 385-87.
197. *Id.* at 387.

defendant's silence is limited to impeachment."[198] Thus, because Moore was in custody at the time he remained silent, his right to remain silent had attached.[199] Unwilling to rely on cases addressing the use of silence for impeachment purposes, the court turned to the reasoning of *Griffin v. California*, which prohibited the use of a defendant's silence at trial for substantive purposes of proving guilt.[200] Thus, Moore's Fifth Amendment rights were violated when the prosecution commented on his silence in its case-in-chief.[201] In further support of its holding, the court also reasoned that allowing a prosecutor to comment on the post-arrest silence of a criminal defendant "calls a jury's . . . attention to the fact that [the defendant] has not [taken the stand] to remove whatever taint the pretrial but post-custodial silence may have spread," thereby further burdening his Fifth Amendment privilege against self-incrimination.[202] Although Moore's conviction was not reversed because the court found that the constitutional error was not the determining factor for the jury's finding of guilt,[203] the D.C. Circuit Court of Appeals became the second federal court of appeals to hold that the prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the defendant's Fifth Amendment privilege against self-incrimination.

In 2000, the Ninth Circuit Court of Appeals delivered its opinion in *United States v. Whitehead*,[204] joining the D.C. and Seventh Circuits in prohibiting the prosecution's use of post-arrest, pre-*Miranda* silence for substantive purposes of proving guilt in its case-in-chief.[205] Immigration and Naturalization Service officers stopped Whitehead as he attempted to pass through a port of entry on his way from Mexico to California.[206] Officers sent Whitehead to a secondary inspection point because he appeared nervous, his vehicle was unusually empty, and a drug-sniffing dog indicated the presence of narcotics toward the rear of the vehicle.[207] When Whitehead and his passenger were taken into custody and frisked, Whitehead said nothing.[208] At Whitehead's trial for importation and possession of marijuana, the prosecutor elicited testimony from the arresting INS officer regarding Whitehead's silence at the time of his arrest and

198. *Id.* at 386.
199. *Id.* at 385.
200. *Id.*; *see also* Griffin v. California, 380 U.S. 609 (1965).
201. *Moore*, 104 F.3d at 385.
202. *Id.*
203. *Id.* at 389-90.
204. 200 F.3d 634 (2000).
205. *Id.* at 638-39.
206. *Id.* at 636.
207. *Id.*
208. *Id.* at 636-37.

suggested to the jury during closing arguments that such silence proved the defendant's guilt.[209] The jury convicted Whitehead of importing narcotics into the country with the intent to distribute.[210]

On review before the Court of Appeals for the Ninth Circuit, Whitehead argued that the district court erred in admitting evidence of his post-arrest, pre-*Miranda* silence during the prosecution's case-in-chief and closing argument. Although it had previously held in *United States v. Oplinger*[211] that the prosecution's use of a defendant's pre-arrest, pre-*Miranda* silence as substantive evidence of guilt did not violate the Fifth Amendment,[212] the Ninth Circuit was unwilling to extend this rule past the point of custody.[213] The court relied instead on the reasoning of its decision in *Douglas v. Cupp*[214] and stated that "regardless whether the *Miranda* warnings were actually given, comment on the defendant's exercise of his right to remain silent was unconstitutional."[215] Thus, the court held that the government's comment on Whitehead's silence violated his rights under the Fifth Amendment.[216]

In 2001, the Ninth Circuit applied the reasoning of *Whitehead* in *United States v. Velarde-Gomez*[217] and held that a defendant's rights under the Fifth Amendment are violated "[w]hether the government argues that [the] defendant remained silent or describes the defendant's state of silence."[218] In *Velarde-Gomez*, the court addressed the issue of whether the prosecution could describe the demeanor and actions of a defendant during his silence.[219] The defendant, Velarde-Gomez, had been stopped by a U.S. Customs agent while entering the United States from Mexico because the agent had suspicions regarding the ownership of the defendant's automobile.[220] The Customs agent directed Velarde-Gomez to a secondary inspection area, where sixty-three pounds of marijuana was discovered in the vehicle's gas tank.[221] When agents informed Velarde-Gomez that the marijuana had been found, "Velarde did not speak or physically respond."[222] At trial, the district court permitted the prosecution to

209. *Id.* at 637-38.
210. *Id.* at 636.
211. 150 F.3d 1061 (9th Cir. 1998).
212. *Id.* at 1067.
213. *Whitehead*, 200 F.3d at 639.
214. 578 F.2d 266 (9th Cir. 1978).
215. *Whitehead*, 200 F.3d at 638 (citing *Douglas*, 578 F.2d at 267).
216. *Whitehead*, 200 F.3d at 639.
217. 269 F.3d 1023 (9th Cir. 2001), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000).
218. *Id.* at 1032.
219. *See id.* at 1030-32.
220. *Id.* at 1026.
221. *Id.*
222. *Id.*

elicit testimony during its case-in-chief from the arresting agent regarding the lack of response from Velarde-Gomez and to comment in its closing argument on his calmness at the time of arrest.[223] On appeal before the Ninth Circuit, Velarde-Gomez challenged the prosecution's use of his nonresponsiveness as "demeanor" evidence under the Fifth Amendment.[224]

As the court discussed the issue in *Velarde-Gomez*, it expanded the reasoning first enunciated in *Whitehead* to prohibit the prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence for substantive purposes of proving guilt. The court reasoned that because "'[t]he warnings mandated by [*Miranda* are] a prophylactic means of safeguarding Fifth Amendment rights,' they are not the genesis of those rights."[225] Therefore, the right to remain silent arises when a criminal defendant is taken into custody.[226] Thus, regardless of whether the defendant has received the *Miranda* warnings, the prosecution cannot comment on the defendant's exercise of his right to remain silent without violating the Fifth Amendment.[227] In *Velarde-Gomez*, the court held that, because there was no difference between arguing that a defendant remained silent and describing his state of silence, the prosecution's comments upon the lack of response from Velarde-Gomez for substantive purposes of proving guilt violated his Fifth Amendment privilege against self-incrimination.[228]

One week after issuing its opinion in *Velarde-Gomez*, the Ninth Circuit Court of Appeals delivered its opinion in *United States v. Bushyhead*.[229] Bushyhead differed significantly from both *Whitehead* and *Velarde-Gomez* because the defendant in *Bushyhead* actually made an incriminating statement as he asserted his right to remain silent.[230] Thus, the Ninth Circuit had to modify the rule applied in the two prior cases.[231] The defendant, Bushyhead, was charged with the first-degree murder of his ex-girlfriend's current boyfriend on the Pyramid Lakes Tribe Reservation.[232] Bushyhead stabbed the boyfriend thirty-nine times while he was sleeping in bed next to the defendant's ex-girlfriend.[233] Evidence suggested that Bushyhead had been on an extended

223. *Id.* at 1027-28.
224. *Id.* at 1025.
225. *Id.* at 1029 (alterations in the original) (citation omitted) (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976)).
226. *Id.*
227. *Id.*
228. *Id.* at 1033.
229. 270 F.3d 905 (9th Cir. 2001).
230. *Id.* at 908.
231. *Id.* at 908-09.
232. *Id.* at 907.
233. *Id.* at 908.

drinking binge prior to the murder, and he was drinking when police arrested him.[234] After the arrest, police took Bushyhead to the hospital as his physical injuries required medical attention.[235] When an FBI agent carrying a printed *Miranda* warning statement approached the defendant at the hospital, Bushyhead said, "I have nothing to say, I'm going to get the death penalty anyway."[236] The district court permitted the prosecution to present in its case-in-chief testimony from the FBI agent regarding Bushyhead's statement for the purpose of showing that the defendant was conscious of committing the murder.[237]

On review before the Ninth Circuit Court of Appeals, Bushyhead challenged the admission of this evidence, presenting the court with the issue of whether the prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* statement expressing intent to exercise the right to remain silent for the purpose of proving guilt violated the defendant's Fifth Amendment privilege against self-incrimination.[238] After determining that a defendant's silence includes his statement invoking the right to remain silent,[239] the court held that the Fifth Amendment privilege against self-incrimination forbids the prosecution's use of a criminal defendant's silence and the circumstances of that silence as evidence of guilt.[240] Thus, the court found that the evidence regarding Bushyhead's statement invoking the right to remain silent should not have been admitted.[241]

A closer examination of the cases emanating from the D.C., Seventh, and Ninth Circuits exposes some common lines of reasoning that those courts used in prohibiting the prosecution's use in its case-in-chief of a criminal defendant's post-arrest, pre-*Miranda* silence for the substantive purpose of proving guilt. First, several of the cases determined that the reasoning in *Doyle* and its progeny, which admitted evidence of a criminal defendant's silence for impeachment purposes if the defendant had not yet received the *Miranda* warnings, did not apply in cases involving the use of a criminal defendant's silence as substantive evidence of guilt.[242] Second, not being bound by the

234. *Id.*
235. *Id.* at 911.
236. *Id.*
237. *Id.* at 908-09.
238. *Id.* at 912-13.
239. *Id.* at 913 (citing Wainwright v. Greenfield, 474 U.S. 284, 294 n.13 (1985)).
240. *Id.*
241. *Id.*
242. *See* United States v. Moore, 104 F.3d 377, 387 (D.C. Cir. 1997); *see also* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987). Although this line of reasoning did not directly appear in *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991), the court seemingly incorporated the reasoning into its decision when it stated that *Hernandez* fell under

reasoning of the impeachment cases, all three circuits concluded that the right to remain silent exists at the moment of arrest, *before* the point in time when the *Miranda* rights are given.[243] Thus, because a defendant possesses a Fifth Amendment privilege against self-incrimination, the courts held that a criminal defendant's silence following the point at which he is taken into custody may not be used by the prosecution during its case-in-chief as substantive proof of guilt.[244] Third, the Seventh Circuit recognized that the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence was not probative of a criminal defendant's guilt because a defendant may remain silent for any number of reasons.[245] Finally, the D.C. Circuit recognized that allowing a prosecutor to comment on a criminal defendant's post-arrest, pre-*Miranda* silence for the purpose of proving guilt further burdened the Fifth Amendment privilege against self-incrimination by emphasizing that the defendant had not taken the stand to rebut the natural inference of guilt.[246]

All of the premises used by the D.C., Seventh, and Ninth Circuits show a more analytical and comprehensive approach to the issue than those found in the reasoning of the Fourth, Fifth, Eighth, and Eleventh Circuits. The former circuits considered and rejected the line of reasoning adopted by the latter circuits, whereas the converse cannot necessarily be said by looking at the filed opinions.[247] As a whole, the former circuits also took more caselaw into consideration than the latter circuits.[248] Thus, the circuits prohibiting the use of

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Savory. *See id.* at 323.

243. *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000); United States v. Whitehead, 200 F.3d 634, 638 (9th Cir. 2000); *Moore*, 104 F.3d at 385; *see also Savory*, 832 F.2d at 1018. Again, although the Seventh Circuit did not explicitly state this assertion in *Hernandez*, it was included as part of that decision when the court stated that *Hernandez* fell under *Savory*. *See Hernandez*, 948 F.2d at 323.

244. *Bushyhead*, 270 F.3d at 913; *Velarde-Gomez*, 269 F.3d at 1033; *Whitehead*, 200 F.3d at 639; *Moore*, 104 F.3d at 389; *Hernandez*, 948 F.2d at 323.

245. *Hernandez*, 948 F.2d at 325.

246. *Moore*, 104 F.3d at 385.

247. In other words, the circuits prohibiting the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt considered and rejected the reasoning of the impeachment cases like *Doyle*, on which the circuits reaching the opposite conclusion relied. See the discussion of reasoning on which the latter circuits relied, *supra* Part IV.A. The closest that any of the latter circuits came to addressing the reasoning of the former circuits was in *United States v. Frazier*, 394 F.3d 612 (8th Cir. 2005). There, the Eighth Circuit used *Wainwright v. Greenfield*, 474 U.S. 284 (1986), to illustrate the importance of the timing of the *Miranda* warnings for cases involving the use of silence as substantive evidence of guilt. *Frazier*, 394 F.3d at 618-19.

Greenfield had held that the use of a criminal defendant's post-*Miranda* silence violated the defendant's right to due process because a defendant has already received the implicit assurance from the government that his silence will not be used against him. *Greenfield*, 474 U.S. at 292.

248. The circuits prohibiting the use of post-arrest, pre-*Miranda* silence were forced to look

post-arrest, pre-*Miranda* silence as substantive evidence of guilt provided better-reasoned opinions than their counterparts that permitted the use of such silence.

*V. A Case Against the Use of a Defendant's Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*

In light of all of the arguments presented by the circuits that have considered the issue of whether the prosecution may use in its case-in-chief a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt, the better position is that the use of such silence as evidence of guilt should be prohibited. In support of such a prohibition are: (1) the Federal Rules of Evidence, (2) the right to due process of law, and (3) the Fifth Amendment privilege against self-incrimination. After a thorough consideration of the use of post-arrest, pre-*Miranda* silence as evidence of guilt under these three precepts of law, it is apparent that both evidentiary law and constitutional law forbid the prosecution from introducing the testimony of an arresting officer or any other witness about the criminal defendant's post-arrest, pre-*Miranda* silence during its case-in-chief.

A. Developing the Argument in Light of Evidentiary Law

A study of the Federal Rules of Evidence reveals that prosecutorial use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt is not permissible. As stated previously, FRE 801(d)(2)(B) makes an accusatory statement admissible as evidence if the party whom it accuses manifests an adoption or belief in its truth.[249] Silence is one means by which the accused party can manifest his assent to the truth of the accusation because an accused party is expected to deny untruthful accusations.[250] Not all circumstances, however, permit this inference — especially in the criminal context.[251]

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more comprehensively at other caselaw because they had rejected the reasoning of the impeachment cases, whereas the circuits permitting the use of such silence were apparently content to stop further research after looking at the impeachment cases.

249. *See supra* notes 20-25 and accompanying text.

250. FED. R. EVID. 801(d)(2)(B) advisory committee's note; United States v. Hale, 422 U.S. 171, 176 (1975) ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.").

251. *See* FED. R. EVID. 801(d)(2)(B) advisory committee's note; *Hale*, 422 U.S. at 176 ("Failure to contest an assertion, however, is considered evidence of acquiescence *only if it would have been natural under the circumstances to object to the assertion in question*." (emphasis added)); 3 GRAHAM, *supra* note 27, § 810.21, at 158; 2 MCCORMICK ET AL., *supra*

FRE 403 acts as a safety valve in situations where the accused party's silence is too ambiguous to serve as an adoptive admission of guilt, requiring the court to determine whether the probative value of evidence is substantially outweighed by its prejudicial effect.[252] If the probative value of the evidence is substantially outweighed by its prejudicial effect, then the court may exclude the evidence.[253] In the context of prosecutorial use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt, the danger of unfair prejudice by misleading the jury substantially outweighs the probative value of the alleged adoptive admission. Once a criminal defendant has been placed under arrest, his silence might be motivated by any number of factors.[254]

As previously noted in the discussion of *United States v. Hernandez*,[255] the Seventh Circuit recognized that a criminal defendant's post-arrest, pre-*Miranda* silence does not necessarily give rise to an inference of guilt: "[S]uch an inference is not inexorable; many persons might be too shocked to speak."[256] Also as previously discussed, Justice Marshall listed several incentives for remaining silent at the time of arrest in the majority opinion for *United States v. Hale*.[257] Justice Marshall stated that silence may be an indication of intimidation, a sign of unwillingness to incriminate another, or a reaction to hostile and unfamiliar surroundings.[258]

Prior to the U.S. Supreme Court's holdings in both *Jenkins v. Anderson* and *Fletcher v. Weir*, which authorized the use of all pre-*Miranda* silence for impeachment purposes, the Second Circuit reviewed a case in which it ascertained one of the incentives for remaining silent at the time of arrest that Justice Marshall had listed in *Hale*.[259] In *United States v. Nunez-Rios*, a sister and brother were arrested for possessing cocaine, with the intent to distribute, that was hidden in the sister's purse.[260] The sister, Nunez-Rios, claimed that she

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note 1, § 262, at 168.

252. FED. R. EVID. 403.

253. *Id.*

254. United States v. Hernandez, 948 F.2d 316, 325 (7th Cir. 1991); *see also* United States v. Nunez-Rios, 622 F.2d 1093, 1100 (2d Cir. 1980) ("[E]ven disregarding the effect of *Miranda* warnings, post-arrest silence is highly ambiguous and therefore lacks significant probative value."). *See generally Hale*, 422 U.S. at 176-77 (providing a litany of circumstances that might induce a criminal defendant's silence).

255. *See supra* text accompanying notes 180.

256. *Hernandez*, 948 F.2d at 325.

257. *See supra* text accompanying note 31.

258. *Hale*, 422 U.S. at 177.

259. United States v. Nunez-Rios, 622 F.2d 1093, 1100 (2d Cir. 1980). *Nunez-Rios* was decided in May of 1980, while *Jenkins* was decided in June of 1980, and *Fletcher* in 1982. *See* Fletcher v. Weir, 455 U.S. 603, 603 (1982); Jenkins v. Anderson, 447 U.S. 231, 231 (1980); *Nunez-Rios*, 622 F.2d at 1093.

260. *Nunez-Rios*, 622 F.2d at 1094-95.

did not know what was in her purse until the police revealed its contents after having arrested her and her brother.[261] When police discovered the contents of her purse, Nunez-Rios remained silent.[262] The prosecution used Nunez-Rios's silence to impeach her on cross-examination, and she was later convicted by the jury.[263] On appeal before the Second Circuit, the court held that Nunez-Rios's silence was not probative of her guilt because she likely remained silent to avoid incriminating her brother.[264] Although Nunez-Rios's silence might lead to an inference of guilt, such silence could also lead one to believe that she "may have maintained silence out of fear or unwillingness to incriminate another," as Justice Marshall recognized in *Hale*.[265] Thus, numerous inferences can be made from a criminal defendant's post-arrest, pre-*Miranda* silence, and "[i]n most circumstances silence is so ambiguous that it is of little probative force."[266]

Furthermore, if the prosecution is permitted to comment on the defendant's silence that resulted from the implicit accusation made through his arrest, the jury will likely infer guilt in a situation where such an inference is not warranted.[267] Thus, the prejudicial effect of the evidence substantially outweighs its probative value, and the evidence should be excluded.

Although the Seventh Circuit is the only court that has considered, even nominally, the impact of the FRE on prosecutorial use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt, their potential impact on the use of such silence is significant. As previously discussed, the FRE govern the admissibility of evidence not only in federal trials but also in many state trials because most states pattern their evidentiary codes on the FRE.[268] Therefore, the FRE provide strong support for the argument for prohibiting the prosecution's use of post-arrest, pre-*Miranda* silence in its case-in-chief. The argument becomes even stronger as the implications of the right to due process of law and the Fifth Amendment privilege against self-incrimination are considered.

261. *Id.* at 1096.
262. *Id.* at 1095.
263. *Id.* at 1097, 1099.
264. *Id.* at 1100.
265. United States v. Hale, 422 U.S. 171, 177 (1975).
266. *Id.* at 176.
267. *Id.* at 180.
268. *See supra* note 19 and accompanying text.

B. Developing the Argument in Light of the Right to Due Process of Law

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty or property without due process of law."[269] In 1868, Congress ratified the Fourteenth Amendment, which provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."[270] In determining whether a person has been deprived of due process of law, one must consider whether the ideals of fundamental fairness and common decency have been offended.[271] Thus, the primary question is whether permitting the prosecution to use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief deprives the defendant of the fundamental fairness guaranteed by the due process of law. In several Supreme Court cases involving the evidentiary use of a criminal defendant's silence, different factors have been used to determine whether a defendant has been accorded due process of law.

One factor that becomes relevant when considering whether the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt denies a criminal defendant the fundamental fairness guaranteed by due process of law is the manner in which the common law addresses the use of such silence.[272] The common law provides a historical reference through which fundamental fairness and common decency can be defined.[273] In *Jenkins v. Anderson*, the U.S. Supreme Court suggested that evidentiary law was the appropriate body of common law for its consideration of whether the use of pre-arrest silence *for impeachment purposes* violated the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment.[274] The *Jenkins* Court was reluctant to analyze the effect of evidentiary law on the due process question, however, because the case arose out of a Michigan state court, requiring the application of that state's evidentiary law.[275] The *Jenkins* Court did recognize, however, that the relevance of pre-arrest silence in a federal criminal proceeding would be a matter of federal evidentiary law, which meant that the Court could consider federal evidentiary law in a similar case arising under the

269. U.S. CONST. amend. V.

270. *Id.* amend. XIV, § 1.

271. Breithaupt v. Abram, 352 U.S. 432, 435-36 (1957); *see also* Wainwright v. Greenfield, 474 U.S. 284, 291 (1986); Jenkins v. Anderson, 447 U.S. 231, 238-40 (1980); Doyle v. Ohio, 426 U.S. 610, 618 (1976).

272. *See Jenkins*, 447 U.S. at 239; Powell v. Alabama, 287 U.S. 45, 65 (1932).

273. *See Powell*, 287 U.S. at 65.

274. *Jenkins*, 447 U.S. at 239.

275. *Id.* This reluctance was grounded in the fact that "[e]ach jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Id.*

Due Process Clause of the Fifth Amendment.[276] Thus, the distinction between whether a case involves the Due Process Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment might be dispositive of whether the principles of the FRE relating to post-arrest, pre-*Miranda* silence may be considered.

If a case involves the Due Process Clause of the Fifth Amendment, then the FRE play a role in determining whether the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt has denied a criminal defendant the fundamental fairness guaranteed by the Fifth Amendment. Because evidence of such silence would be excluded under the FRE for lacking probative value,[277] the FRE suggest that such use of silence does deprive a criminal defendant of due process of law. If a case is analyzed under the Due Process Clause of the Fourteenth Amendment, the probative value of the evidence would be a question of state evidentiary law.[278] If the state's evidentiary code is modeled after the FRE, as is currently the case in thirty-nine states,[279] then that state's evidentiary law would also suggest that using post-arrest, pre-*Miranda* silence as substantive evidence of guilt deprives a criminal defendant of the due process of law. If state evidentiary law is not modeled after the FRE, state courts would be allowed to evaluate the probative value of the silence, and federal courts would be required to consider other factors in relation to the due process claim.

Another factor that is relevant in determining whether a criminal defendant has a due process claim in a case involving the evidentiary use of silence is whether government action induced the defendant's silence.[280] In all of its cases involving a due process claim regarding the evidentiary use of a criminal defendant's silence, the U.S. Supreme Court has stated that it is fundamentally unfair for the government to assure a defendant implicitly that his silence will not be used against him and then to break that implicit promise.[281] In the context of post-arrest, pre-*Miranda* silence, the combination of two governmental actions appears to induce a defendant's silence — the act of arrest combined with the usual delay in advising a defendant of his or her *Miranda* rights. The act of arrest serves as an implicit accusation against the person being arrested because the arresting officers are suggesting that enough

276. *Id.* at 239 n.5.

277. *See* discussion *supra* Part V.A.

278. *See Jenkins*, 447 U.S. at 239 n.5.

279. Broun, *supra* note 19, at 789-90.

280. Wainwright v. Greenfield, 474 U.S. 284, 290-91 (1986); Fletcher v. Weir, 455 U.S. 603, 606 (1982); *Jenkins*, 447 U.S. at 240; *see also* Doyle v. Ohio, 426 U.S. 610, 619 (1976) (quoting United States v. Hale, 422 U.S. 171, 182-83 (1975) (White, J., concurring)).

281. *Greenfield*, 474 U.S. at 292; *Fletcher*, 455 U.S. at 606; *Jenkins*, 447 U.S. at 240; *Doyle*, 426 U.S. at 619 (quoting *Hale*, 422 U.S. at 182-83 (White, J., concurring)).

evidence exists to tie the person to the crime for which he is being arrested. If the person being arrested is already aware of his right to remain silent, then that person will often be inclined to remain silent.[282] Therefore, the defendant's awareness of the right to remain silent and the time at which that right comes into effect becomes relevant in determining whether the act of arrest induces a criminal defendant to remain silent.

A criminal defendant who has been arrested but has not yet received the *Miranda* warnings is most likely aware that he has the right to remain silent, either because of prior dealings with the police or because of a familiarity with those warnings that are a part of our nation's collective conscience.[283] Furthermore, the right to remain silent does not exist only after an arrested person receives the *Miranda* warnings. As the Ninth Circuit stated in *United States v. Velarde-Gomez*: "'[T]he warnings mandated by [*Miranda* are] a prophylactic means of safeguarding Fifth Amendment rights' — they are not the genesis of those rights."[284] Thus, because most criminal defendants know that they have a right to remain silent and because that right exists at the time of arrest, most defendants will be induced to remain silent by the simple act of arrest.

Moreover, the usual delay between the point of arrest and the time at which a criminal defendant receives the *Miranda* warnings provides ample opportunity for the defendant to remain silent, thereby exacerbating the fundamental unfairness that attends the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Even more shocking to the conscience is the fact that many police might consciously delay the defendant's receipt of the *Miranda* warnings in order to obtain incriminating evidence, either in the form of spontaneous inculpatory statements or silence.[285] In sum, prosecutorial use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt is fundamentally unfair because the act of arrest induces the average criminal defendant, who is aware of his rights, to remain silent and because such silence is even further induced by the typically lengthy period between the arrest and the receipt of the *Miranda* warnings.

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282. *See supra* notes 9-10 and accompanying text.

283. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000); Leo, *supra* note 1, at 1000; O'Neill, *supra* note 9, at 185.

284. United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (second alteration in original) (citation omitted), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000).

285. *See* United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2d Cir. 1980) ("In the absence of such a prophylactic rule [that encourages law enforcement officials to give *Miranda* warnings promptly], police might have an incentive to delay Miranda warnings in order to observe the defendant's conduct.").

One may attempt to argue that the U.S. Supreme Court rejected the contention that arrest alone induces silence from the defendant because the Court stated as much in *Fletcher v. Weir*.[286] The context of that case, however, must not be forgotten. In *Fletcher*, the Court considered whether the impeachment use of a criminal defendant's post-arrest, pre-*Miranda* silence violated the principles of fairness guaranteed by the Fourteenth Amendment.[287] The *Fletcher* Court rejected the contention that the act of arrest implicitly induces a defendant to remain silent, explaining that "this broadening of *Doyle* is unsupported by the reasoning of that case and contrary to our post-*Doyle* decisions."[288] While this logic may have carried the day in a 1982 case involving the use of post-arrest, pre-*Miranda* silence for impeachment purposes, it should not be conclusive in a case involving the use of such silence as substantive evidence of guilt for several reasons.

First, the Supreme Court had not yet identified the *Miranda* warnings as a part of America's national culture when *Fletcher* was decided. This realization would not come for another eighteen years.[289] Thus, at the time of *Fletcher*, the Court could not recognize that a defendant would most likely be aware of his right to remain silent and would exercise that right at the time of arrest.

Second, *Fletcher* involved the use of silence for impeachment purposes rather than as substantive evidence of guilt.[290] In every Supreme Court case involving the impeachment use of a defendant's silence, the Court has expressed "[the] view that *Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect [through the *Miranda* warnings] that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'"[291] The significance of the *Miranda* warnings in determining whether the prosecution may use a criminal defendant's post-arrest, pre-*Miranda* silence is limited, however, to cases involving impeachment.[292] In *United States v. Moore*, the D.C. Circuit explained why the reasoning of impeachment cases like *Doyle* and *Fletcher* is confined to cases involving impeachment:

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286. *See Fletcher*, 455 U.S. at 606.

287. *Id.* at 607.

288. *Id.* at 606.

289. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).

290. *Fletcher*, 455 U.S. at 603-04.

291. Wainwright v. Greenfield, 474 U.S. 282, 291 (1986) (quoting South Dakota v. Neville, 459 U.S. 553, 565 (1983)); *see also Fletcher*, 455 U.S. at 606; Jenkins v. Anderson, 447 U.S. 231, 240 (1980); Doyle v. Ohio, 426 U.S. 610, 619 (1976) (quoting United States v. Hale, 422 U.S. 171, 182-83 (1975) (White, J., concurring)).

292. United States v. Moore, 104 F.3d 377, 386 (D.C. Cir. 1997).

> *Doyle* is an exception to an exception to the general rule. The general rule regarding a defendant's silence is that it cannot be used. The defendant's testifying creates an exception allowing the testimony to be used for the purpose of impeachment. The presence of the *Miranda* warning before the silence causes an estoppel that restores to the defendant the protection against the use of the silence.[293]

On closer examination, the explanation given by the D.C. Circuit in *Moore* is correct. As will be discussed later, the Fifth Amendment privilege against self-incrimination prohibits the prosecution's use of a criminal defendant's silence during its case-in-chief.[294] When a defendant testifies at his own trial, the prosecution is permitted to impeach him by commenting on his silence, thereby enhancing the reliability of the criminal process.[295] If the defendant received the *Miranda* warnings before remaining silent, however, the prosecution cannot use the defendant's silence for impeachment purposes because it would be fundamentally unfair to permit such use once the defendant has been implicitly assured that his silence would carry no penalty.[296] Thus, the D.C. Circuit determined that the reasoning of cases that involved the use of silence *for impeachment purposes* is inconsequential for a case involving prosecutorial use of post-arrest, pre-*Miranda* silence *as substantive evidence of guilt*.[297] Therefore, the logic of *Fletcher* rejecting the contention that the act of arrest implicitly induces a defendant to remain silent should be ignored.

One may further attempt to argue, however, that the logic of *Fletcher* should apply in a case involving the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt, in light of the U.S. Supreme Court's application of the inducement reasoning from *Doyle v. Ohio* in *Wainwright v. Greenfield*. Both cases involved the evidentiary use of post-*Miranda* silence. In *Doyle*, the Supreme Court held that the use of a defendant's post-*Miranda* silence *for impeachment purposes* was fundamentally unfair because the *Miranda* warnings implicitly assured Doyle that his silence would carry no penalty.[298] In *Greenfield*, a case involving the use of silence *as substantive evidence of guilt*, the Supreme Court borrowed from the reasoning of *Doyle* and its progeny, stating that "[w]hat is impermissible is the evidentiary use of an

293. *Id.* at 387.
294. *See* discussion *infra* Part V.C.
295. *Jenkins*, 447 U.S. at 238.
296. *Doyle*, 426 U.S. at 618.
297. *Moore*, 104 F.3d at 387.
298. *Doyle*, 426 U.S. at 618.

individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized."[299]

Although the rationale for the reliance upon the reasoning of *Doyle* is not expressly stated, the *Greenfield* Court left one small clue in its opinion that might explain this reliance. After applying the reasoning of *Doyle*, the *Greenfield* Court noted that, "unlike *Doyle* and its progeny, the silence [in this case] was used as affirmative proof in the case in chief, not as impeachment."[300] The Court then inserted a footnote, stating that "[t]he constitutional violation might thus be especially egregious because, unlike *Doyle*, there was no risk 'that the exclusion of the evidence [would] merely provide a shield for perjury.'"[301] In this footnote, the Supreme Court seemingly acknowledged the fact that other constitutional provisions, like the Fifth Amendment privilege against self-incrimination, militated the finding that Greenfield was denied due process of law. The *Greenfield* Court, however, was not presented with the opportunity to assess the case in light of the Fifth Amendment because the defendant only brought a due process challenge under the Fourteenth Amendment. Rather, the Court took the easy way out and borrowed the reasoning from its impeachment cases. Thus, had the Court been given the opportunity to address the issue of using a defendant's post-*Miranda* silence as substantive evidence of guilt from all possible angles, one can assume that it would not have succumbed to relying on the reasoning of its impeachment cases. Therefore, the reasoning of *Doyle* and *Fletcher* still does not apply in a case involving the prosecution's use of post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief,[302] and *Fletcher*'s contention that the act of arrest alone does not induce a criminal defendant to remain silent is also immaterial.

Because the common law of evidence, as stated in the FRE, prohibits the prosecution from using a criminal defendant's post-arrest, pre-*Miranda* silence as evidence of guilt and because a defendant can be induced to remain silent by the act of arrest and the subsequent delay that precedes the receipt of the *Miranda* warnings, permitting the prosecution to use post-arrest, pre-*Miranda* silence as evidence of guilt would deny a defendant the fundamental fairness that he is guaranteed by the Fifth Amendment.[303] If the state in which a criminal defendant's case arises has modeled its evidentiary code after the Federal Rules of evidence, the same can be said with regard to the fundamental fairness guaranteed by the Fourteenth Amendment. Thus, the argument against

299. Wainwright v. Greenfield, 474 U.S. 284, 295 (1986).
300. *Id.* at 292.
301. *Id.* at 292 n.8 (quoting *Doyle*, 426 U.S. at 626 (Stevens, J., dissenting)).
302. *Moore*, 104 F.3d at 387.
303. *See* Jenkins v. Anderson, 447 U.S. 231, 239 n.5 (1980).

the use of post-arrest, pre-*Miranda* silence is buttressed by the Federal Rules of Evidence and the right to the due process of law, and the argument only becomes stronger after being analyzed in light of the Fifth Amendment privilege against self-incrimination.

C. Developing the Argument in Light of the Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[304] This clause of the Fifth Amendment has been incorporated into the Fourteenth Amendment and is accordingly applicable to every state and federal proceeding.[305] As previously stated, the U.S. Supreme Court requires that law enforcement officers employ effective procedural safeguards to secure a criminal defendant's Fifth Amendment privilege against self-incrimination.[306] The procedural safeguards prescribed by the Court, the *Miranda* warnings, include informing the person being arrested "that he has a right to remain silent, [and] that any statement he does make may be used as evidence against him."[307] These warnings have become so familiar in America that the Supreme Court has acknowledged that "the warnings have become part of our national culture."[308] In the context of custodial interrogation, the Fifth Amendment prevents the prosecution from commenting on "the fact that [the criminal defendant] stood mute or claimed his privilege in the face of accusation."[309] In other words, the Fifth Amendment privilege against self-incrimination protects a criminal defendant's post-arrest, post-*Miranda* silence from prosecutorial use.[310] The Fifth Amendment also prevents the prosecution from commenting on a criminal defendant's silence at trial.[311] Thus, the question becomes whether the Fifth Amendment privilege against self-incrimination guarantees a criminal defendant the right to remain

304. U.S. CONST. amend. V.

305. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

306. *See supra* text accompanying notes 49-50.

307. Miranda v. Arizona, 384 U.S. 436, 444 (1966); *see also* Dickerson v. United States, 530 U.S. 428, 442 (2000) (citing *Miranda*, 384 U.S. at 467) ("*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.").

308. *Dickerson*, 530 U.S. at 443.

309. *Miranda*, 384 U.S. at 468 n.37 (citing Griffin v. California, 380 U.S. 609 (1965); *Malloy*, 378 U.S. at 8).

310. *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."); *Miranda*, 384 U.S. at 468 n.37.

311. *Griffin*, 380 U.S. at 615.

silent during his criminal trial by preventing the prosecution from commenting on post-arrest, pre-*Miranda* silence during its case-in-chief.

In resolving that question, it is necessary to determine when the right to remain silent exists.[312] As seen earlier in the discussion relating to the right to the due process of law,[313] the *Miranda* warnings are not the source of the right to remain silent, but merely a means of protecting that right.[314] Thus, a criminal defendant has the right to remain silent when he is arrested, and the prosecution should not burden the exercise of that right by commenting on the defendant's post-arrest silence in its case-in-chief.[315] If the prosecution is allowed to use the defendant's post-arrest, pre-*Miranda* silence against him, the defendant may feel compelled to speak and to become a witness against himself by providing law enforcement officers either with statements that are unwittingly inculpatory or with exculpatory statements that can be contradicted with other evidence.[316] Thus, the criminal defendant is faced with a no-win situation.[317]

As the Supreme Court noted in *Jenkins v. Anderson*, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' The 'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'"[318] In *Jenkins*, it was argued that permitting the prosecution to use a defendant's pre-arrest silence for impeachment purposes unconstitutionally burdened the exercise of the Fifth Amendment privilege against self-incrimination by compelling him to say something.[319] The Supreme Court did not perceive that the possibility of impeachment unduly burdened the defendant's Fifth Amendment rights because it had previously held that a correlative Fifth Amendment privilege to testify at one's own trial was not unconstitutionally burdened by prosecutorial comment on a defendant's failure to testify at a previous trial.[320] Although the *Jenkins* Court did not believe that using a criminal defendant's silence for impeachment purposes unconstitutionally burdened the privilege against self-

312. *See* United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997); United States v. Nunez-Rios, 622 F.2d 1093, 1100 (2d Cir. 1980).

313. *See* discussion *supra* Part V.B.

314. United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000); *Nunez-Rios*, 622 F.2d at 1100 (quoting People v. Conyers, 400 N.E.2d 342, 346 (N.Y. 1980)).

315. *Velarde-Gomez*, 269 F.3d at 1029.

316. *Id.* at 1032.

317. *See id.*

318. Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30, 32 (1973)).

319. *Id.*

320. *Id.* at 236-37 (citing Raffel v. United States, 271 U.S. 494, 499 (1926)).

incrimination, the Court explicitly noted that it was not considering whether the privilege against self-incrimination was unduly burdened by prosecutorial use of a criminal defendant's silence as substantive evidence of guilt.[321]

The prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in-chief, however, unconstitutionally burdens the defendant's Fifth Amendment privilege against self-incrimination for several reasons. First, permitting the prosecution to use post-arrest, pre-*Miranda* silence as substantive evidence of guilt forces the defendant into the no-win situation described above.[322] Second, comments on such silence in the prosecution's case-in-chief draw the jurors' attention to the fact that the defendant has not testified in order to explain his silence.[323] Third, in the post-arrest, pre-*Miranda* context, the right to remain silent is designed to protect a criminal defendant from feeling compelled to make the sort of statements that he indeed feels compelled to make if he knows that his silence can be used against him.[324] Although the Eighth Circuit avoided the Fifth Amendment issue raised in *United States v. Frazier* by stating "that the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak,"[325] its premise that the defendant is under no official compulsion to speak during the point in time between his arrest and his receipt of the *Miranda* warnings is unwarranted. If the prosecution is allowed to comment on a defendant's post-arrest, pre-*Miranda* silence in its case-in-chief, the policies behind the privilege against self-incrimination are significantly impaired because the defendant is compelled to make statements that can be used against him at trial or to remain silent, which can also be used against him at trial.[326] The essence of the privilege is not to compel a criminal defendant to be a witness against himself,[327] and the privilege is significantly impaired when the prosecution is permitted to use post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief.

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321. *Id.* at 236 n.2.

322. *See Velarde-Gomez*, 269 F.3d at 1032.

323. *See* United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997); *see also* Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) ("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.").

324. *See Velarde-Gomez*, 269 F.3d at 1032.

325. *See* United States v. Frazier, 394 F.3d 612, 619 (8th Cir. 2005) (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring))

326. *See Velarde-Gomez*, 269 F.3d at 1032.

327. *See* U.S. CONST. amend. V.

Furthermore, in *Jenkins v. Anderson*, the Supreme Court recognized that "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."[328] The *Jenkins* Court believed that the prosecution's use of a criminal defendant's pre-arrest silence for purposes of impeachment was a commendable practice because it reinforced the reliability of the criminal process.[329] The reliability of the criminal process, however, is not enhanced by the use of silence as substantive evidence of guilt,[330] because there are many reasons why a defendant might remain silent when he is arrested.[331] In fact, the reliability of the criminal process may even be hurt by the policy.[332] If the criminal defendant is compelled to testify in order to explain his silence at the time of his arrest, he may perjure himself on the stand.[333] Although the prosecution is entitled at that point to impeach the defendant with his previous silence,[334] there is no way to predict what effect the defendant's explanation will have on the jury. Thus, because the prosecutorial practice of using post-arrest, pre-*Miranda* silence as substantive evidence of guilt in its case-in chief does not enhance the reliability of the criminal process and may even hurt its reliability, the constitutional right to remain silent and the Fifth Amendment privilege against self-incrimination are impermissibly burdened by such practice. Therefore, the prosecution should be prohibited from commenting on a criminal defendant's post-arrest, pre-*Miranda* silence in its case-in-chief.

Thus, in light of the analysis under the FRE, the right to due process of law, and the privilege against self-incrimination, the prosecution should not be permitted to use in its case-in-chief a criminal defendant's post-arrest, pre-*Miranda* silence as evidence of guilt.

VI. Conclusion

Under the Federal Rules of Evidence, when the truth of an accusatory statement is acknowledged by the accused party through silence, the statement

328. *Jenkins*, 447 U.S. at 238 (citing Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973)).

329. *Id.*; *see also* Wainwright v. Greenfield, 474 U.S. 284, 292 n.8 (1986) (stating that exclusion of the post-arrest, post-*Miranda* silence in *Doyle* would have provided a shield for perjury).

330. Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000); *see also Greenfield*, 474 U.S. at 292 n.8 (stating that the use of post-arrest, post-*Miranda* silence as substantive evidence of guilt did not provide a shield for perjury)

331. United States v. Hale, 422 U.S. 171, 176-77 (1975); United States v. Hernandez, 948 F.2d 316, 325 (7th Cir. 1991); United States v. Nunez-Rios 622 F.2d 1093, 1100 (2d Cir. 1980).

332. *Combs*, 205 F.3d at 285.

333. *Id.*

334. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982).

is admissible as evidence at the accused party's trial.[335] Evidence of such adoptive admissions by the accused party must be excluded, however, when its probative value is substantially outweighed by its prejudicial effects.[336] In the context of using post-arrest, pre-*Miranda* silence as substantive evidence of guilt, the probative value of the alleged admission of guilt is substantially outweighed by its prejudicial effects. Silence in the face of arrest can be legitimately caused by many different factors such that the silence is rarely indicative of the arrested party's guilt.[337] Furthermore, prosecutorial comment on the arrested party's silence at his trial will likely mislead the jury to infer guilt in a situation where such an inference is not warranted.[338] Thus, in a jurisdiction applying the FRE or rules that are substantially similar, the prosecution would be prevented from admitting such evidence in its case-in-chief.

Prosecutorial use of a criminal defendant's post-arrest, pre-*Miranda* silence as evidence of guilt during its case-in-chief also denies the defendant the fundamental fairness that he is guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. One factor that leads to this conclusion is the treatment of such silence under the common law. In relation to the Fifth Amendment, the FRE provide that such silence should be excluded because its probative value is substantially outweighed by its prejudicial effects.[339] In relation to the Fourteenth Amendment, the common evidentiary law produces the same result in a majority of states because at least thirty-nine states have modeled their evidentiary codes after the Federal Rules.[340] Another factor that supports the conclusion that the defendant has been deprived of the due process of law if his post-arrest, pre-*Miranda* silence is used as substantive evidence of guilt is the fact that the government has induced him to remain silent. The act of arrest is an accusation made by law enforcement officers that probable cause exists to believe the defendant committed the crime being investigated. The defendant who has been accused by the act of arrest can be assumed to know of his right to remain silent because that right has become ingrained in his identity as an American to the point that the Supreme Court has acknowledged it as part of America's national culture.[341] Furthermore, because the timing of

335. FED. R. EVID. 801(d)(2)(B).

336. *Id.* 403.

337. *See* United States v. Hale, 422 U.S. 171, 176-77 (1975); United States v. Hernandez, 948 F.2d 316, 325 (7th Cir. 1991); United States v. Nunez-Rios 622 F.2d 1093, 1100 (2d Cir. 1980).

338. *Hale*, 422 U.S. at 180.

339. *See id.* at 176-77; *Hernandez*, 948 F.2d at 325; *Nunez-Rios*, 622 F.2d at 1100.

340. Broun, *supra* note 19, at 789-90.

341. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).

the *Miranda* warnings is determined by law enforcement officers and not by the defendant, the law enforcement officers may strategically delay giving the warnings. This results in a no-win situation that forces the defendant either to make incriminating statements or to be incriminated by his silence. Thus, because a criminal defendant is induced, and even encouraged, to remain silent by government actors, it is fundamentally unfair to permit the prosecution — another government actor — to use the defendant's post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief.

The prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt also violates the defendant's Fifth Amendment privilege against self-incrimination. That privilege is unconstitutionally burdened by a government practice that impairs the major policies underlying the privilege. The burden is primarily evidenced in two scenarios: (1) within the trial context, the prosecution's use of the defendant's post-arrest, pre-*Miranda* silence in its case-in-chief forces him to testify at trial if he wishes to explain his silence;[342] and (2) outside the trial context, permitting the prosecution to use post-arrest, pre-*Miranda* silence as evidence of guilt presents the criminal defendant with a no-win situation between remaining silent or speaking, both of which could be used against him.[343] The prosecutorial practice itself defies the very essence of the privilege against self-incrimination by compelling the defendant to be a witness against himself at the same time that it detracts from the reliability of the criminal process by calling for an inference of guilt where no such inference should be drawn. Therefore, the prosecution's use of a criminal defendant's post-arrest, pre-*Miranda* silence as evidence of guilt is an illegitimate governmental practice that violates the defendant's core Fifth Amendment privilege.

In conclusion, the current four-to-three split among the federal circuit courts of appeals in favor of permitting the prosecution to use post-arrest, pre-*Miranda* silence as substantive evidence of guilt is quite remarkable in light of the conclusions that evidentiary law and current Fifth Amendment and due process jurisprudence prohibit such use. Although the four circuits that have held such use of silence to be permissible have a plausible argument relying on *Doyle* and its progeny, those circuits do not realize that the cases addressing the *impeachment use* of silence are irrelevant when considering a case involving the use of silence as *substantive evidence of guilt*.[344] The criminal defendant's post-

342. *See* Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000); United State v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997).

343. *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1032 (9th Cir. 2001), *rev'g en banc* 224 F.3d 1062 (9th Cir. 2000); *Combs*, 205 F.3d at 285.

344. *See Moore*, 104 F.3d at 386; United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

arrest, pre-*Miranda* silence is not indicative of his or her guilt and is protected by at least two principles enumerated in the Bill of Rights that prevent its use as substantive evidence of guilt. The distinction regarding the use of such silence is crucial, and it remains to be seen whether the U.S. Supreme Court will recognize the distinction.

Marty Skrapka