DO YOU HAVE THE RIGHT TO REMAIN SILENT?: THE SUBSTANTIVE USE OF PRE-*MIRANDA* SILENCE

INTRODUCTION

The Fifth Amendment provides, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] One of the rights encompassed by the privilege against self-incrimination is the right to remain silent.[2] Due in large part to the popularity of police and law dramas on television and in movies, the right to remain silent is perhaps one of the most widely known constitutional rights.[3] Most Americans, however, would likely never consider that their exercise of this right could be used against them to prove their guilt in a criminal trial.[4]

The Supreme Court has never addressed whether a defendant's silence prior to his receipt of *Miranda* warnings can be used against him as substantive evidence of his guilt.[5] However, some federal circuit courts have held that the prosecution may introduce a defendant's pre-*Miranda* silence as evidence of guilt in its case-in-chief.[6] For example, in *United States v. Frazier*, the defendant was pulled over while driving a U-Haul.[7] A search of the truck turned up more than four million tablets of pseudoephedrine.[8] Frazier later claimed that he was innocent and had merely accepted a friend's offer to drive the truck from one city to another.[9] At trial, the arresting officer testified that Frazier was not angry or surprised when he was arrested but that he remained silent upon being told why he was being arrested.[10] At closing, the prosecutor noted that this silence was indicative of Frazier's guilt: "If a person has a friend who betrays them, what's the innocent person going to do when they discover they're going to jail. . . . Are they going to become combative, angry, emotional, demanding? There was none of them from . . . Mr. Frazier."[11] The Eighth Circuit ultimately decided that this use of the defendant's silence did not violate the Constitution, holding that "an

1. U.S. CONST. amend. V.
2. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
3. Aaron R. Pettit, Comment, *Should the Prosecution be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-In-Chief?*, 29 LOY. U. CHI. L.J. 181, 181 (1997).
4. *Id.*
5. *Id.* at 182.
6. *See infra* Part II.A.2.
7. United States v. Frazier, 394 F.3d 612, 615 (8th Cir. 2005).
8. *Id.* at 616.
9. *Id.*
10. *Id.* at 618.
11. *Id.* (quoting the prosecutor's closing argument) (internal quotation marks omitted).

arrest by itself is not governmental action that implicitly induces a defendant to remain silent."[12]

This use of an arrestee's silence as substantive proof of his guilt is problematic. Post-arrest silence is inherently ambiguous, as such silence potentially has a variety of meanings. A defendant may have numerous reasons for remaining silent in the face of arrest, many of which have nothing to do with guilt or innocence. He may be shocked or intimidated. He may (and likely does) know that he is under no duty to speak to the police or to declare his innocence and that any statement he does make could later be used against him at his trial. Given the abundance of police-related television shows and movies, it seems logical that a large percentage of the general population is aware of the rights embodied in the *Miranda* warnings and knows that an arrestee has "the right to remain silent." The Supreme Court has noted that an arrestee's silence after receiving *Miranda* warnings is "insolubly ambiguous" because "[s]ilence in the wake of [*Miranda* warnings] may be nothing more than the arrestee's exercise of these *Miranda* rights."[13] Thus, even when an arrestee is not immediately read his rights by the arresting officer, he may well be exercising his right to remain silent. Additionally, the possible prejudicial impact of calling attention to an arrestee's silence is significant; the Supreme Court has noted that a jury is likely to attach far more weight to such evidence than is warranted.[14]

This Comment will begin by discussing the Supreme Court's prior case law concerning the use of a defendant's silence in criminal trials. Part II examines the circuit split over the admissibility of silence in the prosecution's case-in-chief and then discusses how state courts have addressed the admissibility of silence as substantive evidence of guilt. In Part III, this Comment suggests that the right to remain silent is triggered at least at the point of a defendant's arrest, if not before, and that silence in the face of arrest is ambiguous at best.

I. BACKGROUND

A. Evidentiary Use of Silence

A defendant's silence can be introduced as evidence for either impeachment purposes or as substantive evidence. In cases where silence is used to impeach a defendant's story, the defendant has chosen to testify at trial and is usually giving an exculpatory version of the events for the first time.[15] On cross-examination, the prosecutor attempts to undermine the defendant's credibility by asking him why he failed to inform the authorities

12. *Id.* at 620.
13. Doyle v. Ohio, 426 U.S. 610, 617 (1976).
14. United States v. Hale, 422 U.S. 171, 180 (1975).
15. *See, e.g.*, Fletcher v. Weir, 455 U.S. 603 (1982); Jenkins v. Anderson, 447 U.S. 231 (1980); *Doyle*, 426 U.S. 610.

of this version of the events earlier. During closing arguments, the prosecutor suggests that, if the defendant's version of the events were true, he would have naturally informed the authorities prior to trial.

In cases where silence is introduced as substantive evidence, the defendant has usually exercised his Fifth Amendment right not to testify at trial. The prosecution introduces the defendant's pre-arrest or pre-*Miranda* silence to suggest knowledge of guilt[16] or to attack some other element of the crime. The prosecution suggests that, more often than not, defendants who are wrongfully accused verbally protest or declare their innocence. The critical distinction is the defendant's choice to refrain from testifying in his own defense.[17] "[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."[18] Once a defendant has chosen to take the stand in his own defense, he is "under an obligation to speak truthfully and accurately,"[19] and his silence can be used against him.[20] The right to remain silent cannot be construed to include the right to commit perjury—i.e., a defendant cannot testify that he spoke with the arresting officers when he in fact did not.[21]

*B. The Admissibility of Post-*Miranda *Silence*

The Supreme Court has examined the evidentiary use of post-arrest, post-*Miranda* silence and has found that such use by the prosecution violates a defendant's constitutional rights.[22] Rather than holding that such use violates the Fifth Amendment privilege against self-incrimination, the Court has held that such use violates the Due Process Clause.[23] Once an arrestee has received *Miranda* warnings, the Court has held that evidentiary use of post-*Miranda* silence violates the implicit assurances embodied in the *Miranda* warnings.

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16. *See Frazier*, 394 F.3d at 618-20.
17. *See, e.g.*, United States v. Moore, 104 F.3d 377, 388 (D.C. Cir. 1997).
18. *Id.* (quoting *Jenkins*, 447 U.S. at 238) (internal quotation marks omitted).
19. *Jenkins*, 447 U.S. at 238 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)) (internal quotation marks omitted).
20. *See Moore*, 104 F.3d at 388.
21. *Id.*
22. *See* Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (holding that substantive use of post-*Miranda* silence violates due process); Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that the use of post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment).
23. *See Wainwright*, 474 U.S. at 295; *Doyle*, 426 U.S. at 619. Given that I cite cases based in federal and state criminal jurisdictions, I refer generally to the Due Process Clause throughout this Comment. The Fifth Amendment Due Process Clause applies to prosecutions by the federal government, while the Fourteenth Amendment Due Process Clause applies to state prosecutions.

*1. Introduction of Post-*Miranda *Silence to Impeach the Defendant's Testimony*

The Supreme Court has held that introducing evidence of a defendant's post-arrest, post-*Miranda* silence to impeach the defendant's testimony violates the Due Process Clause.[24] In *Doyle v. Ohio*,[25] the Court addressed the admissibility of a defendant's silence for impeachment purposes after receiving *Miranda* warnings. The defendant testified at trial, claiming for the first time that he had been framed. On cross-examination, the prosecutor attempted to impeach the defendant, asking why he had failed to tell his story to the police. The Court observed that post-arrest, post-*Miranda* silence is "insolubly ambiguous" because "[s]ilence in the wake of [*Miranda* warnings] may be nothing more than the arrestee's exercise of these *Miranda* rights."[26] The Court further found that while the *Miranda* warnings carry no "express assurance that silence . . . carr[ies] no penalty, such assurance is implicit [and]. . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[27]

*2. Introduction of Post-*Miranda *Silence for Substantive Use*

In *Wainwright v. Greenfield*,[28] the Court held that a prosecutor's use of a defendant's post-*Miranda* silence as evidence of his sanity violates the Due Process Clause.[29] In *Wainwright*, the prosecution argued that the defendant's affirmative invocation of his *Miranda* rights after receipt of *Miranda* warnings was inconsistent with his plea of insanity. The Court found this use of silence impermissible[30] and that the rationale underlying *Doyle* applied equally in this case:

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

24. *Doyle*, 426 U.S. at 619.
25. 426 U.S. 610.
26. *Id.* at 617.
27. *Id.* at 618.
28. 474 U.S. 284 (1986).
29. *Id.* at 295.
30. *Id.*

> viction. The implicit promise, the breach, and the consequent penalty are identical in both situations.[31]

The Court held that "the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized" violated the defendant's due process rights.[32]

*C. The Admissibility of Pre-*Miranda *Silence*

The Supreme Court has only addressed the impeachment use of pre-*Miranda* silence and has not yet addressed the substantive use of such evidence. The Court has held that impeachment use of pre-*Miranda* silence does not violate the Due Process Clause. When a defendant has not been read the *Miranda* warnings, there is no governmental action inducing the defendant's silence, and therefore, there is no constitutional violation when the prosecution uses such silence to impeach the defendant's testimony.

Unlike post-*Miranda* silence, the Court has held that the prosecution may use pre-arrest, pre-*Miranda* silence to impeach a testifying defendant.[33] In *Jenkins v. Anderson*,[34] the defendant testified at his trial, claiming that he had acted in self-defense. On cross-examination, the prosecutor questioned the defendant as to why he had failed to report this to the authorities prior to his arrest. The prosecutor again referenced the defendant's silence in his closing argument, suggesting that if the defendant had truly acted in self-defense, he would have reported this to the authorities. The defendant claimed that this use of his pre-arrest silence violated the Fifth Amendment. The Court disagreed, holding that the Fifth Amendment is not violated when the prosecution impeaches a defendant with his pre-arrest silence.[35] The Court noted that impeachment with pre-arrest silence "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."[36] The Court further held that the use of pre-arrest silence does not violate the Due Process Clause.[37] The Court observed that in cases of impeachment by pre-arrest silence, there is no governmental action inducing the defendant's silence, and because the silence occurs prior to the receipt of *Miranda* warnings, the fundamental unfairness that was held to have violated due process rights in *Doyle* is absent.[38]

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31. *Id.* at 292.
32. *Id.* at 295.
33. *See* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980).
34. *Id.*
35. *Id.* at 238.
36. *Id.*
37. *Id.* at 240.
38. *Id.*

The Court has also held that the impeachment use of post-arrest, pre-*Miranda* silence does not violate due process.[39] In *Fletcher v. Weir*,[40] the defendant testified at trial, claiming self-defense. This was the first occasion on which the defendant offered an exculpatory version of the crime. On cross-examination, the prosecutor asked the defendant why, when arrested, he had failed to give this story to the arresting officers. The Court observed that the record indicated that the defendant did not receive *Miranda* warnings immediately following his arrest.[41] The Court held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," the use of post-arrest silence for impeachment purposes does not violate due process, and a state is entitled to resolve such situations under its own rules of evidence.[42]

While the Supreme Court has resolved the use of silence in most situations, it has not yet addressed the permissibility of the prosecution's use of a defendant's pre-*Miranda* silence as substantive proof of his guilt.[43]

II. THE ADMISSIBILITY OF SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT—CURRENT LAW

A. The Circuit Split

The admissibility of pre-*Miranda* silence as substantive evidence is still in dispute in the federal courts. Courts that have found such evidence admissible reason that the receipt of *Miranda* warnings is the determining factor; in the absence of the warnings, and thus the affirmative assurances that such silence will not be used against the defendant, the evidentiary use of pre-*Miranda* silence does not violate due process.[44]

*1. Pre-*Miranda *Silence Held Inadmissible*

In *United States v. Whitehead*,[45] the Ninth Circuit held that because the right to remain silent is derived from the Constitution and not from the *Miranda* warnings, comment by the prosecution on the defendant's silence violates the Fifth Amendment, regardless of whether the warnings were given.[46] In *Whitehead*, the defendant was arrested after attempting to smuggle more than fifty pounds of marijuana from Mexico into the United States underneath the rear bumper of a car.[47] After being placed in custody for

39. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982).
40. *Id.*
41. *Id.* at 605.
42. *Id.* at 607.
43. *See* United States v. Frazier, 394 F.3d 612, 618 (8th Cir. 2005).
44. *See, e.g.*, *id.* at 620. These courts find that substantive use of silence does not violate the Self-Incrimination Clause because there is no government-imposed compulsion. *Id.*
45. 200 F.3d 634 (9th Cir. 2000).
46. *Id.* at 639.
47. *Id.* at 636.

Miranda purposes, Whitehead remained silent while officers searched his car, despite not having been read his *Miranda* rights.[48] During its case-in-chief, the prosecution solicited testimony from one of the officers affirming that Whitehead remained silent after his arrest.[49] During its closing argument, the prosecution argued that Whitehead remained silent because he knew he was guilty.[50] The court held that the government's comment on a defendant's post-arrest, pre-*Miranda* silence in its case-in-chief was unconstitutional,[51] as it would "act [] as an impermissible penalty on the exercise of the . . . right to remain silent."[52]

In *United States v. Moore*, the D.C. Circuit held that custody, rather than interrogation, is the triggering mechanism for the right to pretrial silence under *Miranda*.[53] During the case-in-chief, the prosecutor asked the arresting officer to confirm that Moore had remained silent when guns and drugs were discovered underneath the hood of the car.[54] At closing, the prosecutor argued to the jury that if Moore "didn't know the stuff was underneath the hood, [he] would at least look surprised. [He] would at least [say], 'Well, I didn't know it was there.'"[55] The court held that this use of Moore's silence to suggest guilt violated his right to silence:[56]

> While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion would unduly burden the Fifth Amendment privilege.[57]

The court further noted that a prosecutor's comment on a defendant's post-custodial silence is an undue burden on the defendant's right to remain silent at trial, reasoning that "it calls a jury's further attention to the fact that he has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread."[58] The court finally observed that allowing comment on post-custodial, pre-*Miranda* silence would create an incentive for the arresting officers to delay interrogation, thereby creating an intervening period of silence that could then be used against the defendant.[59]

48. *Id.*
49. *Id.* at 637-38.
50. *Id.* at 638.
51. *Id.*
52. *Id.* (quoting Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978)) (internal quotation marks omitted).
53. 104 F.3d 377, 385 (D.C. Cir. 1997).
54. *Id.* at 384.
55. *Id.*
56. *Id.* at 385.
57. *Id.*
58. *Id.*
59. *Id.*

The Seventh Circuit also held that prosecutorial comment on a defendant's refusal to talk to the police violates the Fifth Amendment privilege against self-incrimination.[60] In *United States ex rel. Savory v. Lane*, the defendant refused to talk to police during his initial, noncustodial questioning.[61] At trial, this silence was introduced in the prosecution's case-in-chief.[62] Noting that "[t]here is . . . a constitutional right to say nothing at all about the allegations," the court found the use of the defendant's silence to imply guilt "nothing short of incredible, given the language of our constitution and the interpretation it has been consistently given."[63]

*2. Pre-*Miranda *Silence Held Admissible*

In *United States v. Frazier*, the Eighth Circuit held that post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt.[64] At trial, the arresting police officer testified that the defendant remained silent during and immediately after his arrest, but before the defendant was given his *Miranda* warnings.[65] In closing arguments, the prosecution argued that this silence was a factor that could indicate guilt.[66] The court analyzed the admissibility of silence in light of the Court's decision in *Fletcher v. Weir*,[67] noting that "the more precise issue is whether Frazier was under any compulsion to speak at the time of his silence."[68] The court found that "an arrest by itself is not governmental action that implicitly induces a defendant to remain silent,"[69] and thus, the admission of the defendant's silence as substantive proof of guilt did not violate the Fifth Amendment privilege against self-incrimination.[70]

The Fourth Circuit has held that the government may comment on a defendant's silence in its case-in-chief if the silence occurs prior to the receipt of *Miranda* warnings.[71] In *United States v. Love*, the arresting officer was permitted to testify that the defendants remained silent when arrested.[72] The court read *Fletcher* to hold that testimony concerning a defendant's silence is permissible so long as the defendant had not yet received the *Miranda* warnings.[73] The court held that, since neither defendant had received *Miranda* warnings at the time their silence was observed, there was no con-

60. United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987).
61. *See id.* at 1015.
62. *Id.*
63. *Id.* at 1018.
64. 394 F.3d 612, 620 (8th Cir. 2005).
65. *Id.* at 616.
66. *Id.* at 618.
67. 455 U.S. 603, 607 (1982) (holding that the use of post-arrest silence for impeachment purposes does not violate due process).
68. *Frazier*, 394 F.3d at 620.
69. *Id.*
70. *Id.*
71. United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).
72. *Id.*
73. *Id.*

stitutional problem with the use of the post-arrest silence as substantive evidence of guilt.[74] The Eleventh Circuit has also held that comment on pre-*Miranda* silence does not "raise constitutional difficulties" regardless of whether that silence occurred before or after custody.[75]

B. The State Response—Silence is Ambiguous

State courts have generally dealt with the admissibility of pre-*Miranda* silence through an evidentiary analysis rather than through a constitutional analysis.[76] Courts finding this evidence inadmissible generally hold that silence is too ambiguous to be a reliable indicator of guilt and that any probative value would be far outweighed by the prejudice to the defendant at trial.[77]

Silence can be admitted into evidence through the theory of tacit admissions. A tacit admission occurs when a statement is made in the presence of the defendant that, if untrue, the defendant would naturally be expected to deny.[78] Under such circumstances, the silence or the failure to deny the statement has traditionally been received as an admission and, thus, admissible as an exception to the hearsay rules.[79] Therefore, prosecutors can attempt to introduce the fact that the defendant stayed silent in the face of arrest to suggest guilt, claiming that defendants who are innocent naturally protest or object at the time of arrest.

The Alabama Supreme Court abolished the tacit admission rule in criminal trials in *Ex parte Marek.*[80] In *Marek*, the defendant claimed that the prosecution failed to lay the proper predicate for the introduction of a tacit admission.[81] The court agreed with the defendant but decided to reconsider the tacit admission rule.[82] The court noted that underlying the presumption that a defendant's silence is prompted by his guilt is the premise that an innocent individual will deny such accusations.[83] The court found that the "underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent."[84] The court

74. *Id.*
75. United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).
76. *See generally* State v. Moore, 965 P.2d 174 (Idaho 1998) (using evidentiary analysis in deciding that admission of testimonial evidence that defendant failed to attend a police interview did not violate the defendant's right to remain silent).
77. *See, e.g.*, Weitzel v. State, 863 A.2d 999, 1003 (Md. 2004).
78. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 262, at 405 (5th ed. 1999).
79. *Id.*
80. 556 So. 2d 375, 382 (Ala. 1989).
81. *Id.* at 379-80. In Alabama, and in many jurisdictions, the prosecution is required to show (1) that the defendant heard and understood the accusatory statement, (2) that the defendant had an opportunity to deny the accusatory statement, and (3) that the defendant remained silent. *Id.*
82. *Id.* at 380-81.
83. *Id.*
84. *Id.* at 381.

observed that an individual might choose to remain silent because he is angry, frightened, or believes that he has the right to remain silent that has been so well publicized by the mass media.[85] Without the underlying premise, "the tacit admission rule merely describes two concurrent events, accusation and silence, without giving the reason for the concurrence of the two events. Accordingly, neither logic nor common experience any longer supports the tacit admission rule, if, indeed, either ever supported it."[86]

The court further held that receipt of *Miranda* warnings had no bearing on the evidentiary use of tacit admissions and that the abolition of the rule expressly applied to both pre-arrest and post-arrest situations.[87] Noting that "[a]n individual with the right to remain silent has the right to remain silent *without regard to whether an officer has told him of that right*,"[88] the court found that "the use of a tacit admission is as much a violation of an unwarned person's right to remain silent as it would be a violation of a warned person's right."[89]

In *People v. De George*,[90] the New York Court of Appeals held that pre-arrest silence in the presence of police officers is inadmissible as evidence.[91] The court observed that silence in such situations may be the natural reaction of many people:

> Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's "awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial," a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because "they are simply fearful of coming into contact with those whom they regard as antagonists." In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence.[92]

The court further stated that jurors may not be sensitive to the wide range of alternative explanations for the defendant's silence and may give the evi-

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85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* The court noted that "[a]lthough the constitutional impediments of the Fifth Amendment may not apply to a tacit admission occurring before an accused is arrested, the fundamental logical problems with the rule remain. Accordingly, this decision expressly applies to pre-arrest situations, as well as post-arrest situations." *Id.* (citation omitted).
90. 541 N.E.2d 11 (N.Y. 1989).
91. *Id.* at 13.
92. *Id.* (citations omitted).

dence more weight than is warranted, creating a substantial risk of prejudice.[93]

In *Weitzel v. State*,[94] the Court of Appeals of Maryland also held that pre-arrest silence in the presence of a law enforcement officer is inadmissible as substantive evidence of guilt under Maryland evidence law.[95] The court recognized that the public understands "that any statement made in the presence of police 'can and will be used against you in a court of law'"[96] as a result of increasingly popular depictions of police procedures and *Miranda* warnings:

> Although the Supreme Court has required only that such warnings be given when police are engaging in custodial interrogation, the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril. While silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best.[97]

III. ANALYSIS

A. The Triggering Point of the Right to Remain Silent

The Court's decisions in *Fletcher* and *Doyle* recognize that the *Miranda* warnings contain an implicit assurance that a defendant's exercise of his rights will not be later used against him at trial.[98] Thus, the Court reasons that, where the warnings themselves may have induced the silence, it is a violation of due process for the warning-induced silence to be introduced either as substantive evidence of guilt or used to impeach a defendant's credibility.[99] The Court's recognition of post-*Miranda* silence as "insolubly ambiguous"[100] surely applies with equal weight given the extensive presence of the *Miranda* warnings in American culture.[101] Most Americans can probably recite the *Miranda* warnings by heart due to their use on various television shows: "[The] warnings are well-established and mechanical in nature. Most ten year old children who are permitted to stay up late enough

93. *Id.*
94. 863 A.2d 999 (Md. 2004).
95. *Id.* at 1005. The court in this case dealt specifically with "the admissibility of pre-arrest silence in the presence of a law enforcement officer as substantive evidence of guilt." *Id.* at 999.
96. *Id.* at 1004.
97. *Id.* at 1004-05.
98. *See* Fletcher v. Weir, 455 U.S. 603, 606 (1982); Doyle v. Ohio, 426 U.S. 610, 617-18 (1976).
99. *See Fletcher*, 455 U.S. at 606-07; *Doyle*, 426 U.S. at 617-18.
100. *Doyle*, 426 U.S. at 617.
101. *See Weitzel*, 863 A.2d at 1004.

to watch police shows on television can probably recite them as well as any police officer."[102]

The *Fletcher* and *Doyle* decisions, however, rely on the actual delivery of the *Miranda* warnings. Those decisions hold that, because the warnings themselves may actually induce the defendant's silence, use of that silence to suggest guilt or impeach violates due process.[103] Additionally, the Court has noted that, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," using post-arrest silence to impeach a defendant is not a violation of due process.[104]

However, as the D.C. Circuit Court of Appeals has noted, it cannot be the case that a defendant's right to remain silent is itself only triggered once the defendant has been informed by the police that he has such a right.[105] The court held that custody, rather than interrogation, is "the triggering mechanism for the right of pretrial silence under *Miranda*."[106] The court held that a defendant who remains silent at arrest must be treated as having asserted the right to stay silent and that prosecutorial comment on that silence at trial is an undue burden on the defendant's Fifth Amendment privilege.[107]

The D.C. Circuit Court of Appeals did not read *Doyle* as standing for the proposition that a defendant's silence can be used against him so long as he has not been read his *Miranda* warnings and instead treated *Doyle* as "an exception to an exception to the general rule" that a defendant's silence cannot be used against him.[108] The court reasoned that *Miranda* stands for the proposition that a defendant has a right to remain silent, and the right to remain silent means that the exercise of that right will not be used against him.[109] *Fletcher* holds that a defendant's silence can be used for impeachment purposes if the defendant chooses to take the stand in his own defense at trial.[110] *Doyle* restores the protection of the defendant's silence if the defendant has been given the *Miranda* warnings.[111] To hold that *Doyle* stands for the proposition that the failure to give the warnings somehow allows the state to use the defendant's exercise of his right to remain silent against him would "turn[] a whole realm of constitutional protection on its head."[112]

102. United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981) (discussing sufficiency of warnings).
103. *See Fletcher*, 455 U.S. at 606-07; *Doyle*, 426 U.S. at 617-18.
104. *Fletcher*, 455 U.S. at 607.
105. United States v. Moore, 104 F.3d 377, 386 (D.C. Cir. 1997).
106. *Id.* at 385. *Moore* dealt with silence occurring both before and after the defendant's arrest; however, as the defendant had been stopped by the police and contraband had been discovered in his car, "no one could suppose that he was still free to leave." *Id.* at 389. The court further held that "the critical event is not necessarily the formal arrest of the defendant, but rather the time at which he came into custody." *Id.* at 388-89.
107. *Id.*
108. *Id.* at 387.
109. *Id.* at 387 n.4.
110. Fletcher v. Weir, 455 U.S. 603, 604-06 (1982).
111. *Moore*, 104 F.3d at 387.
112. *Id.* at 386.

The use of the actual giving of *Miranda* warnings to determine the admissibility of silence is problematic. *Doyle* holds that it is fundamentally unfair to use an accused's silence against him when the government has assured him that his silence will not be used against him.[113] An arrestee, however, may be relying on those exact assurances even though he has not been read his rights.[114] The *Miranda* warnings have become a fixture of popular culture, weakening the reliance on the difference between the "warned" and "unwarned" defendant.[115] An "unwarned" defendant may well rely on the exact same implicit promise that his silence will not be used against him.[116] Moreover, there seems to be no difference in the probative value of the evidence between the warned and unwarned defendant.[117]

A defendant has the right to remain silent regardless of whether he has been informed of that right.[118] If an arrestee knows his *Miranda* rights prior to arrest and remains silent in reliance on that right, there seems to be "no legitimate distinction between that accused's silence and the silence of an accused who *has* been given his *Miranda* warnings."[119] The right to remain silent exists regardless of whether the arrestee has been informed of that right.[120] "While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition."[121]

As the Court stated in *Miranda*, "[t]he prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."[122] The *Miranda* decision, by requiring warnings prior to custodial interrogation, only defines the point at which the interrogation becomes so coercive that the defendant must be informed of his Fifth Amendment rights and the consequences of waiving them:[123]

> [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the ac-

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113. Doyle v. Ohio, 426 U.S. 610, 618 (1976).
114. Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 142 (2001).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Ex parte* Marek, 556 So. 2d 375, 382 (Ala. 1989).
119. *Id.*
120. *Id.*
121. United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1018 (1987).
122. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).
123. State v. Moore, 965 P.2d 174, 181 (Idaho 1998).

> cused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.[124]

The purpose of this rule is plain: the prosecution can circumvent an accused's Fifth Amendment right to silence "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning [the] defendant himself."[125] The purpose of the *Miranda* warnings is not to trigger the right itself but only to inform the defendant that he has such a right.[126]

B. Probative Value vs. Prejudicial Impact

When used to suggest the defendant's guilt, the probative value of the defendant's silence is far outweighed by its prejudicial impact. Mere silence in the face of arrest is "ambiguous and does not necessarily make it more probable than not that the defendant is attempting to hide something, or is guilty."[127] A multitude of innocent or alternative explanations exist for a defendant's choice to remain silent once he has been arrested. Underlying the legal presumption that an arrestee's silence is prompted by the knowledge of his guilt is the premise that an arrestee who believes himself to be innocent will naturally deny the reasons for arrest or will voice his innocence.[128] That premise is "inappropriately simple, because it does not account for the manifold motivations that an accused may have when . . . he chooses to remain silent."[129]

A defendant likely believes that he has the right to remain silent before he is informed of his right and undoubtedly believes that his silence cannot be used against him even if he is not read his rights.[130] Some courts have recognized that the extensive presence of *Miranda* warnings on television have come with the public's "consequent understanding that any statement made in the presence of police 'can and will be used against you in a court of law.'"[131] In abolishing the use of pre-arrest silence in police presence as substantive evidence of guilt under state law, the Court of Appeals of Maryland reasoned that presence of police officers itself renders any silence by a defendant ambiguous.[132] Noting that the *Miranda* warnings are only required during custodial interrogation, the court observed that, given the "ubiquity" with which the *Miranda* warnings appear on television and popular entertainment, "the average citizen is almost certainly aware that

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124. *Miranda*, 384 U.S. at 467.
125. State v. Fricks, 588 P.2d 1328, 1332 (Wash. 1979).
126. *See Miranda*, 384 U.S. at 467.
127. Pettit, *supra* note 3, at 219.
128. *See Ex parte* Marek, 556 So. 2d 375, 381 (Ala. 1989).
129. *Id*.
130. Pettit, *supra* note 3, at 218.
131. Weitzel v. State, 863 A.2d 999, 1004 (Md. 2004).
132. *Id.* at 1004-05.

any words spoken in police presence are uttered at one's peril."[133] Thus, the court found that silence in police presence is "ambiguous at best."[134]

Whether or not an arrestee has a right to remain silent before having been read the *Miranda* warnings, silence in the face of arrest is simply unreliable as an indication of guilt. Silence in police presence could mean anything. The defendant may reasonably believe that, once he has been arrested, he has a constitutional right to remain silent or he may believe that any statement made to the police, whether or not he intends it to be exculpatory, could later be used against him at trial. An innocent defendant may believe that remaining silent is the wiser course of action given the well-known warning that anything said can and will be used against him. The defendant may have been advised by his attorney to refrain from making a statement to the police without the attorney present.[135] The defendant, whether or not guilty, may choose to remain silent because he finds the situation intimidating: "At the time of arrest . . . innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute."[136] Or the defendant may distrust law enforcement and regard such officers as antagonists. When examined, silence in the face of arrest simply does not necessarily lead to the inference that the accused knows that he is guilty.[137] It is, in most cases, "impossible to conclude that a failure to speak [in the face of arrest] is more consistent with [knowledge of] guilt than with innocence."[138]

In *United States v. Hale*,[139] Justice Marshall noted that the probative value of silence, when used to imply the defendant's guilt, is extremely low: "[S]ilence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others."[140] The premise that silence in the face of arrest means that an arrestee knows that he is guilty does not withstand scrutiny. The observation that an arrestee remains silent does not necessarily lead to an inference that the arrestee knows that he is guilty, and with that premise undercut, "the tacit admission rule merely describes two concurrent events," arrest and silence, without explaining the concurrence of the two events.[141] Neither logic nor common experience supports such an inference.[142]

Admission of post-arrest silence as substantive evidence of guilt also thwarts the truth-seeking function of a trial because such evidence is "un-

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133. *Id.* at 1005.
134. *Id.*
135. Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 210 (1984).
136. United States v. Hale, 422 U.S. 171, 177 (1975).
137. *Ex parte* Marek, 556 So. 2d 375, 381 (Ala. 1989).
138. People v. DeGeorge, 541 N.E.2d 11, 13 (N.Y. 1989).
139. 422 U.S. 171.
140. *Id.* at 176.
141. *Marek*, 556 So. 2d at 381.
142. *Id.*

duly prejudicial."[143] The *Hale* Court recognized "a significant potential for prejudice" that exists when a defendant's silence is used against him.[144] The jury is likely to attach much more weight to the defendant's silence than is warranted given the low probative value of the silence, and allowing the defendant to explain his choice is unlikely to defeat the strong negative inference that the jury will draw.[145] While the issue of whether evidence is so inconsistent as to necessarily be excluded is normally at the discretion of the trial court, the Supreme Court felt justified in exercising supervisory control over the trial courts because the evidentiary issue had "grave constitutional overtones."[146] The introduction of post-arrest silence "does not enhance, but may even frustrate the truth-seeking function of the trial. Evidence of silence obfuscates the truth."[147]

CONCLUSION

Silence in the face of arrest only suggests guilt if it is expected that an arrestee will speak out. The reasoning that the only explanation consistent with silence is guilt is undercut by the fact that there are so many possible explanations for silence following an arrest, rendering such an assumption highly suspect. Yet jurors tend to assign such great weight to silence that even a defendant's explanation for his silence would be insufficient to overcome the prejudice. While, the use of silence as substantive evidence of guilt adds virtually nothing to the truth-seeking function of a criminal trial, it has the enormous potential to detract from that function. Post-arrest silence should be deemed inherently ambiguous and thus not probative of guilt or innocence.

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143. *See* Strauss, *supra* note 114, at 151.
144. *Hale*, 422 U.S. at 180.
145. *See id.*
146. *Id.* at 180 n.7 (quoting Grunewald v. United States, 353 U.S. 391, 423 (1957) (describing the prosecution's use of the defendant's silence for impeachment purposes)) (internal quotation marks omitted).
147. Strauss, *supra* note 114, at 151.