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ARTICLES

"You Have the Right to Remain Silent": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt

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The cruellest lies are often told in silence.[1]

Introduction

A fundamental canon of criminal justice demands that the government produce evidence against the accused "by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[2] To effectuate this promise, the Fifth Amendment's Self-Incrimination Clause provides that, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[3] The core protection guaranteed by this clause prohibits the government from compelling a defendant to bear witness against himself at his own criminal trial.[4] The criminal trial, and not the government's investigation of crime, is the bailiwick of the clause's proscriptions. To perfect the protection afforded by the Fifth Amendment, however, the Court has allowed a person to invoke the privilege against self-incrimination *before* his criminal trial, but only when his answers in response to official questions might

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1. Robert Louis Stevenson, Virginibus Puerisque 31 (J.M. Dent & Sons, Ltd. 1963) (1881).

2. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).

3. U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment protects defendants in state proceedings against compulsory self-incrimination to the same extent as it protects defendants in federal proceedings. *See* Malloy v. Hogan, 378 U.S. 1, 11 (1964) (holding that, under the Fourteenth Amendment Due Process Clause, the admissibility of inculpatory statements in a state criminal prosecution is tested by the same standard applied in federal criminal prosecutions).

4. *See* Griffin v. California, 380 U.S. 609, 614-15 (1965) (holding the Fifth Amendment prohibits the government from commenting on the defendant's decision not to testify); *see also infra* note 115 and accompanying text (discussing Griffin v. California).

incriminate him in future criminal proceedings.[5] This rule stems from the observation that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."[6]

The Supreme Court's seminal opinion in *Miranda v. Arizona* again extended the Fifth Amendment's privilege against self-incrimination to include incriminating statements made in the course of a custodial interrogation during the investigation of crime.[7] Generally, *Miranda* announced that when a defendant is subjected to custodial interrogation, his statements are inadmissible as substantive proof of his guilt unless he voluntarily and knowingly waives his rights *after* the police (or other government official) first apprise him of the now-famous *Miranda* warnings.[8] These warnings remind a defendant

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[9]

A defendant who remains silent after receiving the warnings is presumed to have invoked his right to remain silent.

Since *Miranda*, the Court has tempered its prophylactic rule and allowed the government to use a defendant's pre-*Miranda* silence to impeach his credibility, largely relying on the idea that a defendant's pre-*Miranda* silence is not linked to the warning's implicit assurance that silence would carry no penalty, and the idea that silence, absent official compulsion, simply does not raise a constitutional concern.[10] These ideas have allowed some federal courts to permit the government to use a defendant's pre-arrest and pre-*Miranda* silence against him not only to impeach his credibility, but also to prove his guilt.[11] Other federal circuits, however, have read broadly *Miranda* and its progeny to prohibit the use of a defendant's pre-*Miranda* silence in the government's case-in-chief.[12]

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5. *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (stating that the Fifth Amendment protects a person before his criminal trial); *see also* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The *Lefkowitz* Court would allow a person to invoke his privilege against self-incrimination in any "proceeding, civil or criminal, formal or informal." *Lefkowitz*, 414 U.S. at 77. To prevent the government from compromising his rights, the Self-Incrimination Clause also bars the government from commenting on the defendant's exercise of his right not to testify. *See* Chapman v. California, 386 U.S. 18, 25-26 (1967) (holding the government may not comment on defendant's failure to testify).

6. Michigan v. Tucker, 417 U.S. 433, 440-441 (1974).

7. *See infra* Part II (discussing Miranda v. Arizona).

8. *See infra* Part II (discussing Miranda v. Arizona).

9. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

10. *See infra* notes 122-26 and accompanying text (discussing the use of pre-*Miranda* silence to impeach a defendant).

11. *See generally infra* Part IV (discussing the split in federal circuits over the use of a defendant's pre-*Miranda* silence in the government's case-in-chief).

12. *See generally infra* Part IV.A (discussing federal circuits that bar, on constitutional

Still other circuits bar the use of a defendant's pre-*Miranda* silence in the government's case-in-chief, but on evidentiary grounds, not on constitutional grounds.[13] Thus, despite the Court's steady effort since *Miranda* to plug the doctrinal holes in its original opinion, the question remains whether the Fifth Amendment's Self-Incrimination Clause reaches a defendant's pre-*Miranda* or pre-arrest silence thereby barring its use in the government's case-in-chief, or whether the warnings themselves trigger the defendant's constitutional right to remain silent thereby allowing the government to use his pre-*Miranda* silence as substantive proof of his guilt.[14]

This Article will examine the use of a defendant's pre-*Miranda* silence in the government's case-in-chief. First, the Article will explore briefly the history and the use of a defendant's silence before the Court decided *Miranda v. Arizona*. Second, the Article will discuss the *Miranda* opinion—the rules it announced and the rules it did not announce. Third, this Article will examine *Miranda*'s progeny, focusing on the Court's treatment of silence in its impeachment cases. Fourth, the Article will examine the split in the federal circuit courts of appeal on the issue of whether the government's use of a defendant's pre-*Miranda* silence to prove his guilt violates the Constitution. Finally, this Article posits that neither *Miranda* nor the Constitution bar the use of a defendant's pre-arrest or pre-*Miranda* silence in the government's case-in-chief.

I. THE USE OF SILENCE BEFORE *MIRANDA*

In 1926, the United States Supreme Court determined that a criminal defendant who elects to testify on his own behalf may be impeached by his own prior silence.[15] In *Raffel v. United States*, the petitioner was indicted and twice tried for conspiring to sell alcoholic beverages in violation of the National Prohibition Act.[16] At his first trial, the petitioner did not offer himself as a

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grounds, the use of a defendant's silence in the government's case-in-chief).

13. *See generally infra* Part IV.B (discussing federal circuits that do not bar on constitutional grounds the use of a defendant's silence in the government's case-in-chief).

14. In fact, the United States Supreme Court recently considered no less than four cases construing *Miranda v. Arizona* in its 2003-2004 term alone. *See* United States v. Patane, 124 S. Ct. 2620, 2630 (2004) (holding that police officer's failure to recite the *Miranda* warning does not require suppression of physical evidence discovered through defendant's unwarned but voluntary statements); Missouri v. Siebert, 124 S. Ct. 2601, 2604-05 (2004) (holding that a defendant's post-*Miranda*-warning confession made after an unwarned confession was inadmissible at trial); Hiibel v. District Court, 124 S. Ct. 2451, 2460-61 (2004) (holding that a defendant's refusal to identify himself to police did not violate his Fifth Amendment right against self-incrimination); Yarborough v. Alvarado, 124 S. Ct. 2140, 2151-52 (2004) (holding that state court properly applied federal law when it determined that juvenile defendant was not in custody for *Miranda* purposes).

15. Raffel v. United States, 271 U.S. 494, 498-99 (1926). The *Raffel* Court did not address whether evidence of a defendant's prior silence could be used in the prosecution's case-in chief; the Court only ruled on the use of silence to impeach a defendant who testifies on his own behalf.

16. *Id.* at 495.

witness, but the jury heard incriminating testimony from a prohibition agent that Raffel had admitted he owned an illegal drinking establishment.[17] The jury deadlocked.[18] At the second trial, the petitioner, now aware of the prosecutor's case against him, took the stand in his own defense and denied making any statements of ownership to the prohibition officer.[19] This admission prompted the court to question the petitioner about his prior silence and to ask him why he chose to remain silent at the first trial.[20] Raffel objected to this line of questioning, arguing that his prior invocation of his right to remain silent survived to the second trial, despite the fact that he chose to testify on his own behalf. The petitioner contended that the Constitution allowed him to waive partially his right to remain silent, while allowing him to preserve the right to answer some questions, but not others.[21]

The United States Supreme Court disagreed with the petitioner.[22] It held that a defendant who offers himself as a witness in his own defense completely waives his Fifth Amendment immunity.[23] Justice Stone, writing for a unanimous Court, determined that "having once cast aside the cloak of immunity, [a defendant] may not resume it at will."[24] The Court continued that when a defendant takes the stand in his own defense, he does so as any other witness; and he may be cross-examined about his prior silence if that inquiry is relevant and probative to his credibility.[25] Clearly hostile to Raffel's notion that the Constitution allows a defendant to pick-and-choose when to remain silent after he decides to testify in his own behalf, the Court ruled that the Fifth Amendment is reserved for "those who do not wish to become witnesses in their own behalf,

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The trial transcript reported the following exchange between the court and Raffel:

"Q: Did you go on the stand and contradict anything [the prosecution] said?

A: I did not.

Q: Why didn't you?

A: I did not see enough evidence to convict me."

Id. at 495 n.1.

21. *Id.* at 497.

22. *Id.* at 499.

23. *Id.* at 497. The Court noted a split among the states on the question of whether a court errs when it requires a defendant to disclose that he had not testified at an earlier proceeding. *Id.* at 496. The Court noted that the issue has arisen not only when a defendant is questioned about silence in a prior trial, but also when a defendant is questioned about prior silence in a previous preliminary examination, habeas corpus hearing, or bail application. *Id.* By implication, the Court's holding is applicable to any proceeding or hearing and is not limited to prior trials.

24. *Id.* at 497.

25. *Id.* The Court determined that the admissibility of statements regarding a defendant-witness's prior silence rests on evidentiary rules, not the Constitution. *Id.* If the prosecution's inquiry is logical, relevant, and competent within the scope of evidentiary rules, then the inquiry (and its response) is admissible. *Id.*

and not for those who do."[26] The Court explained that when a defendant chooses to take the stand in his own defense, he waives completely his constitutional privileges against self-incrimination; he testifies as any other witness, and thus he is subject to cross-examination as to any fact in issue so long as the examination complies with relevant evidentiary rules.[27] The Court implicitly recognized that the privilege to remain silent survives only so long as a defendant continues to cloak himself in its protection.

Seventeen years later, in *Johnson v. United States*, the United States Supreme Court again considered the admissibility of a defendant's silence.[28] In *Johnson*, the defendant waived his right against self-incrimination and testified on his own behalf.[29] On cross-examination, the government asked the defendant about an offense that was not raised in the defendant's testimony and was different from the one charged in the indictment.[30] The defendant objected and the court overruled the objection, determining that the question and answer bore on the defendant's credibility and was thus admissible.[31] When the government asked again about the offense, the defendant claimed his right against self-incrimination.[32] The trial court granted the defendant's claim.[33] The government, in its closing speech to the jury, commented at length about the defendant's assertion of his right to remain silent.[34]

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26. *Id.* at 499. While the Court conceded that allowing the government to comment on a defendant's prior invocation of his right to remain silent in a second trial may pressure a defendant to take the stand in his first trial (lest his silence be used against him at a second trial), or pressure him to remain silent at his second trial to preserve his silence at the first trial, it determined that these concerns "are without real substance." *Id.* at 498-99. The Court opined that a defendant is always under some pressure to testify, whether or not he is afforded some partial immunity for his prior silence. *Id.* at 499.

27. The *Raffel* Court's rule that the prosecution may impeach a defendant with his own prior silence, was reaffirmed in 1980. *See* Jenkins v. Anderson, 447 U.S. 231 (1980). Justice Stevens, however, in his concurring opinion questioned the continued validity of *Raffel*. *Id.* at 241 n.2 (Stevens, J., concurring) (citing Grunewald v. United States, 353 U.S. 391 (1957); Johnson v. United States, 318 U.S. 189 (1943)).

28. *Johnson*, 318 U.S. at 189.

29. *Id.* at 191. Johnson was charged with income tax evasion. *Id.* at 190.

30. *Id.* at 191.

31. *Id.* at 192.

32. *Id.*

33. *Id.* When the defendant was asked the incriminating question in cross-examination, the defendant claimed his privilege. The trial court, in response, mistakenly ruled that the defendant may decline to answer. *Id.* *See* Jenkins v. Anderson, 447 U.S. 231, 240 n.6 (1980) (noting that *Johnson* trial court mistakenly ruled that defendant could claim the privilege). The trial court should have applied *Raffel* and ruled that once a defendant takes the stand in his own defense, he completely waives his Fifth Amendment privileges.

34. *Johnson*, 318 U.S. at 193-94. The trial court offered the jury a curative instruction which asked the jury to consider the defendant's invocation of his constitutional right only to assess his credibility. *Id.* at 194-95.

Justice Douglas, writing for a majority of the United States Supreme Court, held that the trial court erred when it allowed the government to comment on the defendant's claim of silence.[35] The Court noted that "where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment [by the government]."[36] The Court opined that once a trial court grants a defendant the protections of the Fifth Amendment, it could not allow any inference to be drawn from that claim without offending the Constitution.[37] While the Court was concerned with the substance and meaning of the privilege against self-incrimination, it was more troubled by the abuse of a trial court assuring a defendant that his silence would not be used against him and then using his silence against him.[38]

While *Johnson* seemingly limited or even overruled *Raffel*'s holding that the accused completely waives his privilege if he takes the stand in his own defense, the Court merely suggested that when a trial court expressly grants a defendant's request to remain silent, even if that defendant makes the request during his own cross-examination, it must honor its own grant.[39] *Raffel* stood for the proposition that a defendant completely waives his Fifth Amendment rights once he chooses to testify in his own defense; *Johnson* carved out a narrow exception only when the trial court expressly grants a defendant's request for protection under the

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35. *Id.* at 196. The Court noted that if the trial court had refused the defendant's assertion of his Fifth Amendment privilege on the ground that the value of his answer bore on his credibility, then no error could be assigned. *Id.*

36. *Id.* The Court analogized the case where a defendant takes the stand, waiving his Fifth Amendment privilege, but later invokes his right with the trial court's approval, to the case where the defendant never took the stand in his own defense. *Id.* at 197. In both cases, the defendant was given assurances that his silence would not be used against him.

37. *Id.* at 196-97 (citing Phelan v. Kinderdine, 20 Pa. 354, 363 (1853)).

38. *Id.* at 199. The Court stated that

> the responsibility for misuse of the grant of the claim of privilege is the court's. . . . When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use.

Id.

39. *Id.* The Court noted with approval the notion "that when the accused took the stand 'without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience.'" *Id.* (citing State v. Ober, 52 N.H. 459, 465 (1873)). By implication, had the trial court not expressly granted Johnson's request for the privilege, or ruled that his answer was admissible as to his credibility, then the *Raffel* rule would have likely applied.

Justice Stevens, in his concurring opinion in *Jenkins v. Anderson*, questioned the vitality of *Raffel* in light of *Johnson* suggesting that *Johnson* prohibited federal courts from granting a claim of privilege only to allow later its use against the defendant. *See* Jenkins v. Anderson, 447 U.S. 231, 241 n.2 (1980) (Stevens, J., concurring) (questioning the validity of *Raffel*). *Johnson*, however, neither overruled nor mentioned *Raffel*; and, *Johnson* is better read as a narrow exception to the *Raffel* rule rather than the wholesale abandonment of it. *See Jenkins*, 447 U.S. at 237 n.4 (noting that no court has challenged the rule in *Raffel*).

Fifth Amendment after he waives his right and testifies in his own defense. Notably, the notion that the Fifth Amendment's right to remain silent in the face of official compulsion is firmer when that privilege is guaranteed by a government official found resonance some twenty-three years later in *Miranda v. Arizona*.[40]

The idea that the government may comment on a defendant's assertion of his right to remain silent was raised again in the 1957 case of *Grunewald v. United States*.[41] In that case, the petitioner contended that the trial court improperly allowed the government to impeach him through his prior assertion of his Fifth Amendment right to remain silent at a grand jury investigation.[42] The trial court, relying on *Raffel v. United States*,[43] determined that when a defendant waives his Fifth Amendment privilege at trial, the government may comment on a defendant's prior invocation of his right to remain silent at an earlier proceeding to impugn the credibility of his exculpatory admissions at trial.[44] The petitioner argued on appeal that the trial court erred when it allowed the government to comment on his prior claim of privilege, suggesting that *Johnson* overruled *Raffel*.[45]

The *Grunewald* Court concluded that the trial court erred, but not because it violated the petitioner's constitutional rights.[46] Instead, the Court relied on *Raffel* and held that the probative value of the government's cross examination of the petitioner "was so negligible as to be far outweighed by its possible impermissible impact on the jury."[47] The Court determined that while *Raffel*

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40. *See infra* Part II (discussing Miranda v. Arizona, 384 U.S. 436 (1966)).

41. Grunewald v. United States, 353 U.S. 391, 394 (1957).

42. *Id.* at 415. The defendants were indicted for conspiring to defraud the United States by 'fixing' tax fraud cases through bribes and the use of improper influence. *Id.* at 394-95. Max Halperin, one of three *Grunewald* petitioners, was subpoenaed to appear before a grand jury charged with investigating corruption in the Bureau of Internal Revenue. *Id.* at 416. At the grand jury investigation, Halperin pleaded the Fifth Amendment in response to incriminating questions from the government. *Id.* at 417. At trial, Halperin took the stand in his own defense and answered the same questions he refused to answer before the grand jury. *Id.* Halperin's responses on direct examination corroborated his claims of innocence. *Id.* at 416-17. During its cross examination, the government asked Halperin why he refused to answer the same questions that he answered on the witness stand; inquiring as to defendant's prior invocation of his right to remain silent. *Id.* When the defense rested, the trial court warned the jury that it could only consider Halperin's prior invocation of his right to silence to assess his credibility. *Id.*

43. 271 U.S. 494 (1926).

44. *Grunewald*, 353 U.S. at 418.

45. *Id.* Although the *Grunewald* opinion fails to flesh out the petitioner's argument, it can be inferred that Halperin relied on *Johnson* for the proposition that a trial court cannot allow comment on a defendant's prior claim of privilege under the Fifth Amendment even after a defendant later waives it, overruling *Raffel*'s holding that once a defendant invokes his right to silence, it survives despite the fact that the defendant later waives it.

46. *Id* at 421.

47. *Id* at 420.

allows the government to comment on a defendant's prior invocation of his right to silence if that defendant later waives the right, *Raffel* did not abandon the imperative of the trial court to examine first whether the contested cross examination was admissible.[48] Once a defendant waives his right to silence, *Grunewald* ruled, the trial court must treat him like any other witness, and the government may inquire about a defendant's prior claim of silence to impeach his credibility only when the court determines that the answer is more probative than prejudicial.[49]

Raffel and *Grunewald* concluded that once a defendant surrenders the protection of the Fifth Amendment by testifying on his own behalf, he can be treated as any other witness and can be impeached by his own prior silence.[50] Both Courts implied that had the defendant not waived his right, the government could not have commented on his prior silence without undermining his Fifth Amendment rights. *Johnson* allowed the defendant to retain his privilege, even after he waived it, only when the trial court granted anew his right to not incriminate himself.[51] And while *Grunewald* allowed the government to comment on a defendant's prior invocation of his right to silence to impeach his credibility after he surrenders the right, the Court affirmed that the government could never use a defendant's invocation of the Fifth Amendment right to infer guilt even after he waived it.[52]

Raffel, *Johnson*, and *Grunewald* involved a defendant's express invocation of his right to remain silent—a defendant must invoke the right to enjoy its protections, and a defendant may surrender its privileges. Once invoked, the government may not comment on a defendant's silence in its case-in-chief even

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48. *Id.* at 419-21.

49. *See also Grunewald*, 353 U.S. at 420; Raffel v. United States, 271 U.S. 494, 497 (1926). The *Grunewald* Court decided not to reach the issue of whether Johnson impliedly overruled *Raffel*; instead it treated *Raffel* as controlling precedent and framed the question in *Grunewald* as an evidentiary error, not a constitutional error. *Grunewald*, 353 U.S. at 421. Four justices concurred with the result of the *Grunewald* majority, but disagreed with its reasoning. *See id.* at 425 (Black, J., concurring). Justice Black, writing for the concurrence, failed to see how the trial court could allow the use of a constitutional privilege to discredit or convict a person and predicted that "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* Justice Black found it incongruous that a privilege enumerated in the Constitution could be used against the party asserting it. *Id.* at 425-26. Justice Black, however, assumed that the privilege survives its own waiver and that it is broad enough to protect statements not used to incriminate, but to test the credibility of its holder.

50. *See supra* note 49 and accompanying text (discussing Grunewald v. United States).

51. *See supra* note 36 and accompanying text (discussing Johnson v. United States).

52. *Grunewald*, 353 U.S. at 422 (reiterating that the Constitution prohibits the government from using defendant's claim of silence under the Fifth Amendment to infer guilt of the crimes charged). The Court recognized that a basic function of the right to silence is "'to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'" *Id.* at 421 (quoting Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557-58 (1956)).

if the defendant later waives his immunity.[53] The government, however, may use a defendant's prior silence to impeach his credibility as long as the probative value of the prior silence outweighs its prejudicial impact on a jury.

Historically, federal courts have judged the admissibility of a defendant's confessions and other exculpatory expressions under a voluntariness test.[54] This test was grounded in the Due Process Clause of the Fourteenth Amendment and required courts to consider the totality of all the circumstances surrounding the confession to determine whether a confession was voluntarily made.[55] Two decades later and by a slim majority, the Court decided *Miranda v. Arizona*.[56] *Miranda* determined that the admissibility of a suspect's statements made during a custodial interrogation is determined under the Fifth Amendment's privilege against self-incrimination and not under the Due Process Clause's voluntary-involuntary test.[57] It further held that the Fifth Amendment's privilege against self-incrimination exists regardless of whether it is expressly invoked, and it is only surrendered after the government warns us of the dangers of its waiver.[58] In practical terms, *Miranda* extended the Fifth Amendment's bar to the admissibility of involuntary statements made at trial or other adversary proceedings to include statements made in the course of a custodial interrogation, whether or not they were voluntarily made. But while *Miranda* sought to curtail abuses surrounding the interrogation of suspects to crime, its broad sweep and prophylactic application has allowed some opportunistic courts to extend further the once-qualified privilege against self-incrimination.[59]

II. *MIRANDA V. ARIZONA*

Miranda was concerned with abuses attendant to custodial police interrogation.[60] Chief Justice Warren, writing for the majority, announced that

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53. *See supra* note 52 and accompanying text (discussing *Grunewald* and the idea that the government may not use a defendant's silence to infer his guilt).

54. *See* Dickerson v. United States, 530 U.S. 428, 432-33 (2000) (discussing the history of law governing admissibility of confessions); *see also* Oregon v. Elstad, 470 U.S. 298, 307-08 (1985) (commenting on the "old" due process voluntariness test).

55. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding Due Process Clause prohibited the admissibility of a confession obtained through physical coercion); *see also* Haynes v. Washington, 373 U.S. 503, 514 (1963) (applying totality test to evaluate admissibility of confession).

56. Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* opinion was a consolidation of four state cases, each involving the admissibility of a defendant's confession made while in custody and while subjected to police interrogation. *Id.* at 440. Chief Justice Earl Warren, joined by four justices, wrote for the majority.

57. *Id.* at 478-79.

58. *See infra* Part II (discussing Miranda v. Arizona).

59. *See infra* Part IV.A (noting federal courts prohibiting the use of pre-*Miranda* silence).

60. *Miranda*, 384 U.S. at 444. The Court first recognized that its 1964 *Escobedo* opinion failed to resolve fully the admissibility of confessions won through custodial police interrogations.

in-custody police interrogation is so inherently coercive that any statement made by a suspect is protected by the Fifth Amendment and is thus inadmissible at trial unless the police first apprise the suspect of his constitutional right to remain silent and his right to counsel—the so-called *Miranda* warnings.[61] In *Miranda*, the Court purported to clarify its ruling in *Escobedo v. Illinois*.[62] In *Escobedo*, the Court explained that incriminating statements made by a suspect who is subject to custodial interrogation are inadmissible under the Sixth Amendment unless the police first apprise the suspect of his right to counsel and his right to remain silent.[63] Justice Goldberg, writing for the majority in *Escobedo*, determined that the admission of statements into evidence made in the course of a custodial interrogation and made after a suspect had requested but was denied counsel was a violation of his right to counsel under the Sixth Amendment, even if the suspect voluntarily made the statements.[64] The Court, in *Miranda v. Arizona*, sought both to clarify and to extend *Escobedo* by deciding whether the Fifth Amendment's right to remain silent protects a suspect's in-custody statements to the same extent as the Sixth Amendment. *Escobedo*, however, left open two other important questions: first, whether a suspect in police custody who is subject to police interrogation can still voluntarily waive his right to silence absent the warnings; and second, when and to what extent do the 'new' constitutional safeguards under the Fifth and Sixth Amendments trump the traditional voluntary-involuntary test when determining the admissibility of a suspect's incriminating statements.[65]

Id. at 440-41 (citing Escobedo v. Illinois, 378 U.S. 478, 484 (1964)) (noting that the application of *Escobedo* had been confused and varied). In *Escobedo*, the Court decided whether statements made by a suspect in police custody were admissible when the suspect repeatedly requested but was denied access to his lawyer. *Escobedo*, 378 U.S. at 484. The Court held that when a police investigation focuses on a particular suspect and that suspect is subjected to custodial interrogation by the police, then any incriminating statements made by the suspect are inadmissible against him if the police did not first apprise him of his constitutional right to counsel. *Id.* at 490-91. Of note, the *Escobedo* Court did not care whether the petitioner voluntary waived his right to counsel (or his right to remain silent), but rather whether the police advised the suspect of his right to counsel (or his right to remain silent) during a custodial interrogation.

61. *Miranda*, 384 U.S. at 467-69. The Court ruled that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent," *id.* at 467-68, and a person in custody "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471.

62. *Miranda*, 384 U.S. at 440-41; *see also supra* note 60 (discussing Escobedo v. Illinois).

63. *Escobedo*, 378 U.S. at 490-91.

64. *Id.* In finding a constitutional bar to the admission of a suspect's incriminating statements when the suspect made those statements before police first warned him of the dangers of waiver, the Court implicitly rejected the traditional voluntary-involuntary test found in the Fourteenth Amendment's due process clause. *See id.* at 496 (White, J., dissenting) (noting that the majority abandoned the voluntary-involuntary test). Testing admissibility under the Due Process Clause's voluntary test first began in 1936 with *Brown v. Mississippi*, 297 U.S. 278 (1936).

65. *Miranda*, 384 U.S. at 441-42. The Court determined to clarify its ruling in *Escobedo* and

Miranda determined that any statement made by a suspect who is subject to custodial interrogation is inadmissible under the Fifth Amendment unless the police forewarn him of his right to remain silent.[66] "[T]his warning," the Court concluded, "is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead."[67] The warning, then, is also an absolute prerequisite for the admissibility of in-custody statements. A suspect in custody, the Court opined, can surrender his constitutional rights only if he voluntarily, knowingly, and intelligently waives them after first hearing them.[68] A suspect in custody and subject to interrogation cannot surrender his constitutional right—even if that waiver was voluntary, knowing, and intelligent—unless he is first apprised of those rights.[69] The need for some objective safeguard, the Court noted, is "not lessened in the slightest" by the fact that a confession is voluntarily made.[70]

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stated its purpose was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* Prior to *Miranda,* courts tested the admissibility of a suspect's confessions and other inculpatory statements under a voluntariness test. *See* Dickerson v. United States, 530 U.S. 428, 432-33 (2000) (discussing the history of the law governing the admissibility of confessions). This test was largely grounded in the Due Process Clause of the Fourteenth Amendment and considered the totality of all the circumstances surrounding the confession. *See Brown*, 297 U.S. at 286 (holding that the Due Process Clause prohibited the admissibility of a confession obtained through physical coercion); *see also* Haynes v. Washington, 373 U.S. 503, 514 (1963) (applying the totality test to evaluate the admissibility of confession). Then, in 1964, the United States Supreme Court decided *Malloy v. Hogan*, which held that the Fifth Amendment's self-incrimination clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the states. 378 U.S. 1, 6-11 (1964). Two years later, the Court decided *Miranda* and ruled that the Fifth Amendment's self-incrimination clause determines the admissibility of a suspect's confession obtained during custodial interrogation. *See supra* note 64 (discussing the Court's rejection of the voluntariness test).

66. *Miranda*, 384 U.S. at 467-68. In recognizing an absolute constitutional ban on a suspect's voluntary but unwarned custodial statements, the Court rejected the Fourteenth Amendment's voluntary-involuntary test that courts traditionally used to determine the admissibility of a suspect's incriminating statements. *Id.* at 471-72; *see also id.* at 502-03 (Clark, J., dissenting) (noting that the majority announced a new rule for admissibility).

67. *Id.* at 471-72. Under *Miranda*, whether a person in police custody voluntarily waives his right to silence under the Fifth Amendment is irrelevant when the police fail to first warn of the right and fail to warn of the consequence of waiving it. Implicitly rejecting the voluntary-involuntary test for the admissibility of custodial statements, the Court noted that "[o]nly through such a warning is there ascertainable assurance that the accused was aware of this right." *Id.* at 472.

68. *Id.* at 444.

69. *Id.* at 457-58.

70. *Id.* at 457. Despite this, the Court stated that "no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458. Thus, the Court implicitly and broadly determined that no incriminating statement by a suspect in custody can be voluntary. Using rather circular reasoning, it made no difference to the Court that a custodial confession may have been voluntary, because no custodial confession could be voluntary if it is the product of official

The *Miranda* holding is limited to the *custodial interrogation* of a suspect.[71] In his opinion, Chief Justice Warren specifically and exclusively targets over-zealous police practices with certain "salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."[72] Relying largely on anecdotal evidence of abusive and malicious police tactics, Chief Justice Warren endeavored to prove that custodial interrogation inherently jeopardizes a suspect's constitutional rights, and that suspects must be protected from this evil.[73] Notably, after demonstrating the grave dangers of custodial

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interrogation. Later, the Court offers that "[v]olunteered statements of any kind are not barred by the Fifth Amendment," except when they are secured through interrogation. *Id.* at 478. The Court exempted from its ruling on-the-scene questioning, general investigative fact-finding, and any other statements made absent custodial interrogation. *Id.* at 477-78.

71. *Id.* at 471.

72. *Id.* at 445. The Court stated that the "nature and setting of . . . in-custody interrogation is essential to our decisions today." *Id.* The *Miranda* opinion resolved the admissibility of in-custody confessions in four separate cases: *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. United States*, and *Stewart v. California*. Each case demonstrated the "evils" and abuse attendant to custodial interrogations. *Id.* at 456-57. In *Miranda*, the defendant confessed to kidnapping and rape after a two-hour custodial interrogation. Despite the fact that the defendant's written confession indicated that the confession was made "'with full knowledge of [his] legal rights,'" the Court held that the confession was inadmissible because the defendant was not apprised of his rights before he confessed. *Id.* at 491-92. In *Vignera*, the defendant made oral inculpatory statements to a police detective and an assistant district attorney. *Id.* at 493. The Court held that the defendant's statements were inadmissible because neither the detective nor the assistant district attorney apprised him of his constitutional rights before they interrogated him. *Id.* at 493-94. The defendant in *Westover* signed a confession after a two-hour interrogation by the F.B.I. which preceded lengthy interrogations by local authorities. While the statement indicated that the defendant was apprised of his rights, the Court found that the warnings came after a lengthy interrogation process, and thus the confession was inadmissible. *Id.* at 495-97. Lastly, in the *Stewart* case, police secured a confession after nine separate interrogations spanning five days. The record was silent on whether the defendant was ever apprised of his constitutional rights. The Court determined that the right to remain silent and the right to counsel cannot be assumed and held that the trial court's admission of the defendant's statements was constitutional error. *Id.* at 497-99.

73. *See id.* at 458 (noting that safeguards must be employed "to dispel the compulsion inherent in custodial surroundings"). Chief Justice Warren, in an effort to persuade the Court of the evil that lurks within custodial interrogations, devoted roughly ten full pages of the opinion to assure his brothers on the bench that custodial interrogation is constitutionally dangerous. *Id.* at 446-56. The Court pointed to "extensive factual studies" from the 1930s, opinions of the Court that evidence police brutality, and a report from the Commission on Civil Rights written in 1961. *Id.* at 445-46. The Court also cited various police practice and training manuals which describe the use of physical and mental coercion to obtain confessions through custodial interrogation. *Id.* at 448-55. After the Court carefully described the prevalence of abusive police practices, it later concluded that, under the facts before it, police did not engage in the sort of abusive practices it sought to eradicate. *Id.* at 457.

interrogation, the Court notes that the facts of *Miranda* and its companion cases "do not evince overt physical coercion or patent psychological ploys"—the very dangers the Court sought to remedy.[74] Despite this, the Court believed that abusive police practices were popular enough and that custodial interrogations were invidious enough to require authorities to first warn suspects of the consequences of waiving constitutional rights—the Court determined that these warnings serve as an absolute prerequisite to admissibility.[75] In narrowing its ruling to statements made in the context of custodial interrogation, the Court recognized the "intimate connection between the privilege against self-incrimination and police custodial questioning."[76]

The Court also purported to clarify the circumstances that trigger the requisite warnings.[77] In *Escobedo v. Illinois*, the precursor to *Miranda*, the Court explained that police must immediately warn suspects of their constitutional right to remain silent when a general police investigation begins to focus on a specific individual.[78] Recognizing the latent ambiguity of this test, the *Miranda* Court specifically defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[79] Applying this standard to the facts before it, the Court further refined its definition of custodial interrogation as "incommunicado interrogation of individuals in a police-dominated atmosphere."[80] Later in its opinion, the Court again narrowed its

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74. *Id.*

75. The Court warned that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Id.* at 461. Later, the Court stated that "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations." *Id.* From these lines, and others, one readily can surmise that the Court was only concerned with the application of the privilege against self-incrimination to custodial interrogations. *See id.* at 460 (limiting the question before the Court to custodial interrogations).

76. *Id.* at 458. The Court also noted that the privilege against self-incrimination protects both inculpatory admissions and exculpatory statements when they are the product of custodial interrogation. *Id.* at 476-77.

77. *See id.* at 444 n.4 (noting the Court's effort to clarify *Escobedo*). In *Escobedo*, the Court held that when an "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," the police must warn the suspect of his right to remain silent. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

78. *Escobedo*, 378 U.S. at 490-91. In his dissenting opinion in *Escobedo*, Justice Stewart criticized the majority for broadening constitutional protections to include voluntary statements made by suspects in the course of legitimate police investigations. *Id.* at 494 (Stewart, J., dissenting). Justice Stewart did not attack the applicability of the Fifth Amendment to a suspect's inculpatory statements, but rather he argued that the right to remain silent under the Constitution is triggered "only after the onset of formal prosecutorial proceedings." *Id.*

79. *Miranda*, 384 U.S. at 444.

80. *Id.* at 445.

definition by examining the investigative intent of the questioning officers and the susceptibility of the suspect to the police-dominated atmosphere.[81] Suspects must be warned of the consequences of waiving their constitutional rights when the "thrust of police interrogation . . . was to put the defendant in such an emotional state as to impair his capacity for rational judgment," and when "the compelling atmosphere of the in-custody interrogation, and not an independent decision on [the defendant's] part, caused the defendant to speak."[82]

Alternatively, non-custodial police interrogations fall outside the *sine qua non* of the *Miranda* opinion. According to Chief Justice Warren, police officers need not warn suspects of the consequences of waiving their constitutional rights when they question suspects on-the-scene or question suspects who are not deprived of their freedom of action in any significant way.[83] Further, the admissibility of a person's non-custodial and voluntary statements is not affected by the mandates of *Miranda*.[84] A custodial interrogation—and only a custodial interrogation—triggers the warnings. By default, then, the traditional voluntary-involuntary test for the admissibility of confessions and incriminating statements survives intact for statements made outside of a custodial interrogation.[85] As

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81. *Id.* at 465.

82. *Id.*

83. *Id.* at 477-78; *see also* Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (restating that *Miranda* applies only to custodial interrogation). In *Oregon v. Mathiason*, a per curiam opinion, the Court determined whether a person's exculpatory statements were admissible under *Miranda* when that person voluntarily went to a police station, and when police had not yet *Mirandized* him and had told him that he was not under arrest. *Mathiason*, 429 U.S. at 493-94. The Court held that the statements were admissible even though the defendant made them before police warned him of his constitutional rights, because while police did question the defendant in a police station, his freedom of movement was not curtailed in any significant way—he voluntarily went to the police. *Id.* at 495. The *Mathiason* Court noted that while the police interview with the defendant might have been coercive, "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Id.*

84. *Miranda*, 384 U.S. at 478.

85. *Id.* Three separate dissenting opinions criticized the majority's ruling, each noting that the majority seriously erred when it found a constitutional bar to in-custody interrogations under the Fifth Amendment. First, Justice Clark sharply disagreed with the majority and objected to the majority's 'either-or' constitutional ruling that absent warnings, a confession is never admissible and that once a suspect invokes his rights, all questioning must cease. Justice Clark noted that "[s]uch a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient." *Id.* at 500 (Clark, J., dissenting). Justice Clark would continue to follow the traditional voluntary-involuntary test found in the Due Process Clause and still allow the government an opportunity to show, despite the absence of warnings, that the suspect voluntarily waived his rights. *Id.* at 503 (Clark, J., dissenting). The remaining dissenters, Justices Harlan, Stewart, and White, filed two separate dissents. First, Justice Harlan, with whom Justices Stewart and White joined, contended that the thrust of the majority's ruling is designed "to discourage any

Justice White predicted in his prophetic dissent in *Miranda v. Arizona*, the "decision leaves open such questions as whether the accused was in custody, [and] whether his statements were . . . the product of interrogation."[86]

While the *Miranda* Court concerned itself with conventional interrogation—express questioning by police—the Court would later expand the definition of interrogation to include express questioning or its "functional equivalent."[87]

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confession at all," calling the new ruling "voluntariness with a vengeance." *Id.* at 505 (Harlan, J., dissenting). Harlan objected to the majority's constitutional bar to in-custody confessions found in the Fifth Amendment, when the Court's precedent consistently and successfully evaluated the admissibility of confessions under the Due Process Clause's voluntary-involuntary test. *Id.* at 507 (Harlan, J., dissenting). Harlan favored the "elaborate, sophisticated, and sensitive approach to admissibility of confessions" under the traditional voluntary-involuntary test, noting the test's "ability to respond to the endless mutations of fact." *Id.* at 508 (Harlan, J., dissenting). Harlan noted that the Fifth Amendment only proscribes compelling a defendant in a criminal case to serve as a witness against himself and had never before been applied to protect suspects at the police station. *Id.* at 510 (Harlan, J., dissenting). Second, Justice White filed a dissenting opinion with whom Justices Harlan and Stewart joined. *Id.* at 526 (White, J., dissenting). The gist of White's dissent is that the plain language of the Fifth Amendment limits its application to only coerced statements made during criminal proceedings. *Id.* at 526-27 (White, J., dissenting). The majority opinion, according to Justice White, fabricated a constitutional rule when it concluded that all responses to custodial interrogations are coerced, thus prohibited by the Fifth Amendment. *Id.* at 535-36 (White, J., dissenting). White concluded by noting that

> [t]oday's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation . . . [f]]or all these reasons . . . a more flexible approach makes . . . more sense than the Court's constitutional straightjacket.

Id. at 545 (White, J., dissenting).

86. *Id.* (White, J., dissenting).

87. *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (determining that *Miranda* prohibits express questioning by police or its functional equivalent once a person invokes his right to remain silent or his right to counsel). Fourteen years after *Miranda*, the United States Supreme Court decided *Rhode Island v. Innis* and expanded the meaning of interrogation first applied in *Miranda*. *Id.* In *Innis*, police arrested Thomas Innis for murder and read him his *Miranda* rights. *Id.* at 294. Innis invoked his rights, and the police stopped interrogating him. *Id.* En route to the police station, the officers who accompanied Innis spoke to each other about the danger of leaving a weapon in a neighborhood where children might find it and use it. *Id.* at 294-95. Innis interrupted this conversation and told police where the weapon could be found. *Id.* at 295. Justice Stewart, writing for the majority, ruled that *Miranda* bars the admissibility of statements made during a custodial interrogation or "its functional equivalent." *Id.* at 300-01. The functional equivalent of interrogation refers to "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. As such, *Miranda* protects not only responses to express interrogation, but also any responses that the police should have known would call for a response.

According to *Rhode Island v. Innis*, *Miranda* protects not only a person's answers to express interrogation, but also protects his answers to questions, other than those inherent to arrest and custody, that the police should have reasonably known would call for an incriminating response.[88] In later cases, the Supreme Court would try twice to clarify its meaning of custody in *Miranda*.[89]

First, in *California v. Beheler*, the Court explained per curiam that a person is entitled to the full panoply of rights associated with *Miranda* only when a suspect's freedom of action is curtailed to "[a] degree associated with a formal arrest"—and not before.[90] The following year, the Court decided *Berkemer v. McCarty*, and ruled that *Miranda* rights are owed at least at the moment a person is formally placed under arrest—and not before.[91] Both *Beheler* and *Berkemer* stand for the idea that while the coercive atmosphere of custodial interrogation is one reason for the constitutional safeguards first articulated in *Miranda*, a coercive environment by itself does not activate the need for a *Miranda* warning.[92] Only an arrest—or something very similar to an arrest—marks the beginning of custody for the purposes of determining the applicability of

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88. *Id.* at 300-01.

89. *See* Berkemer v. McCarty, 468 U.S. 420, 438 (1984) (holding that a person questioned during a routine traffic stop was not in custody sufficient to warrant a *Miranda*-type warning); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (holding that a suspect was not in custody during his pre-arrest interview with police).

90. *Beheler*, 463 U.S. at 1125 (citations omitted). The question before the Court was whether police must recite the *Miranda* warning to a suspect who was not under arrest and who voluntarily accompanied police to the station house where he made incriminating statements. *Id.* at 1121-22. Holding that the suspect was not owed a warning, the Court explained that *Miranda* only requires police to warn suspects who are in custody and that custody is either a formal arrest or the restraint of a suspect's freedom of movement to the degree associated with a formal arrest. *Id.* at 1125.

91. *Berkemer*, 468 U.S. at 434-35. In *Berkemer*, the Court considered whether questioning of a motorist pursuant to a routine traffic stop is a custodial interrogation for the purposes of determining the admissibility of his statements under *Miranda*. *Id.* at 425. The motorist moved to exclude various incriminating statements he had made to police at the traffic stop. He argued that because the police had failed to inform him of his constitutional rights, the admission of those statements would violate the Fifth Amendment. *Id.* at 424. The Court sought to clarify that portion of *Miranda* which requires police to apprise a person of his constitutional rights when that person "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 435 (quoting *Miranda*, 384 U.S. at 444). While conceding that a traffic stop does significantly curtail a person's freedom of action, the Court refused to broaden the application of *Miranda* to include a routine traffic stop, explaining that a traffic stop does not sufficiently impair a detainee's free exercise of his privilege against self-incrimination. *Id.* at 438-40. First, the Court noted that, unlike a stationhouse custodial interrogation, a traffic stop is temporary and brief. *Id.* at 437. Second, the Court noted that the public nature of traffic stops mitigates the need to protect persons not subjected to *Miranda*-like back-door interrogations. *Id.* at 438-39. The Court explained that the brief and public nature of a traffic stop reduces the danger that a motorist will be made to incriminate himself. *Id.* at 438 n.27.

92. *Id.* at 438-40; *Berkemer*, 463 U.S. at 1124-25.

Miranda and the admissibility of incriminating statements made in the course of an official interview.[93]

Miranda also gave attention, although cursory, to the admissibility of silence as evidence of a waiver when a person is subjected to in-custody interrogation. The Court stated that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given."[94] The record must show some evidence that the accused affirmatively waived his rights after police apprised him of them. The Court implicitly suggested that a suspect's silence during custodial interrogation is inadmissible unless he validly waives his right to silence. In fact, this very silence could be used to show that the accused intends to exercise his right to remain silent.[95]

When the dust settled after the *Escobedo* and *Miranda* decisions, the voluntary-involuntary test for the admissibility of statements under the Due Process Clause of the Fourteenth Amendment was largely superceded by fixed constitutional prophylactics found in the Fifth and Sixth Amendments. Even a hasty legislative attempt in 1968 to trump *Miranda* and reassert the voluntary-involuntary test failed.[96] In the wake of *Miranda*, a suspect now had an absolute

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93. *Berkemer*, 468 U.S. at 434-35; *Beheler*, 463 U.S. at 1125. The *Beheler* Court noted "that '[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system.'" *Beheler*, 463 U.S. at 1124 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). The Court also noted that "a noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a 'coercive environment.'" *Id.* (quoting *Mathiason*, 429 U.S. at 495).

94. *Miranda*, 384 U.S. at 475. The Court, quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), wrote that "'[p]resuming waiver from a silent record is impermissible.'" *Miranda*, 384 U.S. at 475.

95. *Id.* at 473-74. After a suspect is warned of his rights, the Court stated, the suspect may invoke those rights "in any manner," *id.* at 474, which presumably includes his continued silence.

96. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that *Miranda* may not be overruled by an Act of Congress). Two years after the Court decided *Miranda*, Congress enacted 18 U.S.C. § 3501 (1968). Section 3501(a) of the Omnibus Crime Control and Safe Street Act stated in pertinent part that "[i]n any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntary given." *Id.* § 3501(a). Section 3501(b) of the enactment required the trial judge to consider the totality of circumstances when he or she considers whether a defendant voluntarily confessed to crime. *Id.* § 3501(b). In short, Congress attempted to overrule *Miranda* and to resurrect the traditional voluntary-involuntary test for the admissibility of confessions. In *Dickerson v. United States*, the Court considered whether an Act of Congress could overrule its *Miranda* opinion. *Dickerson*, 530 U.S. at 432. The Court held that it could not. *Id.* First, Chief Justice Rehnquist, writing for the majority, determined that *Miranda* was a constitutional ruling and not merely a prophylactic guideline. *Id.* at 438. *But see id.* at 450-57 (Scalia, J., dissenting) (arguing *Miranda* opinion was prophylactic and not a constitutional decision). As such, Congress could not legislatively supercede a constitutional decision. *Id.* at 444. Second, the majority stated that *stare decisis* directed that the Court affirm its prior decision. *Id.* at 443. Not only did *Miranda* survive a legislative attack, but it was also ratified by the United States Supreme Court over three

right under the Fifth Amendment to remain silent and to have an attorney present prior to a custodial interrogation. Moreover, law enforcement officials are now charged with triggering these constitutional rights through their invocation of the *Miranda* warnings—the rights attach when police offer them. Important questions remained to be resolved, including whether or when *Miranda* protects a defendant's inculpatory silence.

III. THE USE OF SILENCE AFTER *MIRANDA*

Well before it decided *Miranda v. Arizona*, the United States Supreme Court concluded that once a defendant surrenders the protection of the Fifth Amendment by testifying on his own behalf, he can be treated as any other witness and can be impeached by his own prior silence.[97] After *Miranda*, the question became whether the government could fairly impeach a defendant with his own silence if that silence was induced by a *Miranda*-type warning. The problem was determining when the assurances embodied in *Miranda* fully manifested and whether the Fifth Amendment protects pre-trial silence at all.

Struggling to resolve the issue, the Court drew judicially-created lines between silence that occurred pre-arrest and pre-*Miranda*, silence that occurred post-arrest and pre-*Miranda*, and silence that occurred post-arrest and post-*Miranda*.[98] The Court has grappled with this issue seven times since 1966, ultimately determining that the Fourteenth Amendment—and not the Fifth Amendment—permits the government to impeach a defendant with his pre-arrest, pre-*Miranda* silence and his post-arrest and pre-*Miranda* silence, but it does not permit the government to impeach him with his post-arrest, post-*Miranda* silence.[99] This fractured jurisprudence not only begs for the simplicity, flexibility, and efficiency of the pre-*Miranda* due process test for admissibility, but has also allowed some opportunistic courts to find a foothold for the idea that the government cannot use a defendant's pre-*Miranda* silence, or even his pre-

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decades after it was originally decided.

97. *See supra* note 49 and accompanying text (discussing *Raffel* and *Grunewald*).

98. *Compare* Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that the government can use a defendant's pre-arrest and pre-*Miranda* silence to impeach him), *with* Fletcher v. Weir, 455 U.S. 603, 606 (1982) (per curiam) (holding that the government can use a defendant's post-arrest but pre-*Miranda* silence to impeach him), *and* Doyle v. Ohio, 426 U.S. 610, 611 (1976) (holding that the government cannot use a defendant's post-arrest and post-*Miranda* silence to impeach him).

99. *See* Brecht v. Abrahamson, 507 U.S. 619 (1993) (reaffirming *Doyle*); Greer v. Miller, 483 U.S. 756, 764-65 (1987) (holding that the government's single mention of a defendant's post-*Miranda* silence, followed by a curative instruction, did not offend due process); Wainwright v. Greenfield, 474 U.S. 284 (1986) (reaffirming *Doyle*); *Fletcher*, 455 U.S. at 606 (holding that the government can use post-arrest but pre-*Miranda* silence to impeach a defendant); *Jenkins*, 447 U.S. at 238 (holding that the government can use pre-arrest silence to impeach a defendant); and *Doyle*, 426 U.S. at 611 (holding that the government cannot use post-*Miranda* silence to impeach a defendant).

arrest silence, in its case-in-chief.[100]

The first case after *Miranda* to consider whether the government could use a defendant's silence against him was *United States v. Hale*.[101] In *Hale*, the Court considered whether the prosecution could impeach a defendant through questions that required him to testify to his prior silence during police interrogation.[102] The government argued that under *Raffel v. United States*, a defendant who offers himself as a witness in his own defense completely waives his Fifth Amendment immunity.[103] The United States Supreme Court disagreed, but resolved the issue exercising its rules of evidence rather than the Constitution.[104] It reasoned that the defendant's silence in the face of police interrogation lacked significant probative value and that any reference to his silence was intolerably prejudicial to the defendant.[105]

Although the Court left open the constitutional question in *Hale*, it resolved the question in *Doyle v. Ohio* the following year. In *Doyle*, the Court again considered whether the Constitution bars the use at trial of a defendant's prior silence.[106] The *Doyle* Court held that it was fundamentally unfair for the government to use a defendant's silence to impeach his testimony at trial when that silence was induced by the *Miranda* warnings.[107]

Relying on its prior decision in *Miranda*, the *Doyle* Court explained that a defendant's silence after his arrest and in the wake of *Miranda* warnings "may be nothing more than the arrestee's exercise of . . . *Miranda* rights."[108] "Thus,"

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100. *See infra* note 147 and accompanying text (discussing circuit courts of appeal that prohibit the use of a defendant's pre-arrest or pre-*Miranda* silence in the government's case-in-chief).

101. United States v. Hale, 422 U.S. 171 (1975).

102. *Id.* at 173. In *United States v. Hale*, the defendant was arrested for a robbery, taken into custody, and read his *Miranda* rights. The defendant remained silent as police interrogated him about the crime. At his trial, the defendant testified in his own defense and offered an alibi and other exculpatory testimony. *Id.* at 174. To impeach the defendant's testimony, the prosecution asked him why he had not offered the information to the police at his arrest instead of remaining silent. *Id.*

103. *Id.* at 175. *See supra* notes 15-17 and accompanying text (discussing Raffel v. United States, 271 U.S. 494 (1926)).

104. *See id.* at 175 n.4 (noting that the opinion did not reach the constitutional claim); *see also id.* at 176-81 (analyzing the case under rules of evidence).

105. *Id.* at 180.

106. Doyle v. Ohio, 426 U.S. 610 (1976).

107. *Id.* at 619. In *Doyle*, a consolidated case, police arrested two defendants on drug charges and read them the *Miranda* warnings. At trial, each defendant offered an exculpatory frame-up story for the first time at trial. *Id.* at 613. To impeach the defendants' testimony, the prosecution asked each defendant why he remained silent instead of telling the frame-up story to the arresting police officers. *Id.* at 612-14.

108. *Id.* at 617. The prosecution argued that its use of the defendant's post-*Miranda* silence was limited to impeach the defendant's exculpatory story first raised at trial. *Id.* at 616. It relied on Supreme Court precedent that allowed the use of post-arrest statements, inadmissible as evidence

the Court continued, "every post-arrest silence is insolubly ambiguous" because the trial court would be unable to discern whether a defendant's post-arrest silence was induced by *Miranda* warnings (and thus inadmissible) or induced by a defendant's intent to fabricate later an exculpatory story to use at trial (and thus arguably admissible).[109] *Doyle* held that the use of a defendant's post-arrest silence would be fundamentally unfair, and thus deprive him of due process.[110] The *Miranda* warnings, the Court concluded, implicitly assure a defendant that his silence, including his own prior inconsistent silence, cannot be used against him.[111]

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of guilt under *Miranda*, to cross-examine a defendant who offered a contradictory explanation of events at trial. *See id.* at 617 (citing *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), *and Walder v. United States*, 347 U.S. 62 (1954) for the proposition that a defendant's post-arrest statements may be used to impeach his trial testimony).

109. *Id.* at 617-19 n.8 (citing *Hale*, 422 U.S. at 177).

110. *Id.* at 619. Notably, *Doyle* did not hold that Ohio had violated the defendants' Fifth Amendment privilege against self-incrimination when it asked the jury to draw an inference of guilt from the defendants' exercise of their right to remain silent. Thus, while the Fifth Amendment bars the government from commenting on a defendant's refusal to testify, the due process clause of the Fourteenth Amendment bars the government from commenting on a defendant's post-*Miranda* silence. *Contra* Griffin v. California, 380 U.S. 609, 613 (1965) (holding Fifth Amendment bars use of a defendant's refusal to testify at trial).

Justice Stevens, writing for the dissent in *Doyle*, failed to see how the use of the defendant's silence following a *Miranda* warning violated due process. *Id.* at 625-26 (Stevens, J., dissenting). In his view, a trial court ought to allow a defendant to testify to the reasons inducing his silence; if he remained silent in the wake of a *Miranda* warning because of the implicit assurances of the warning, then due process demands that the court protect his silence. *Id.* at 623-26. If, however, the prosecution develops on cross-examination that the defendant did not remain silent because of the implicit assurances behind the warnings, but instead he remained silent to preserve his later manufactured exculpatory story, then his due process rights are not implicated because the defendant's silence was not induced by the warnings. *Id.* Silence, Justice Stevens concluded, is not insolubly ambiguous—the *Miranda* warnings were intended to assure a knowing and voluntary waiver of constitutional rights, and were not intended to provide a shield for perjury. *Id.* at 636. Relying on *Raffel v. United States*, 271 U.S. 494 (1926), Justice Stevens noted that the Fifth Amendment only prohibits the use of silence to infer guilt in the prosecutor's case-in-chief and does not prohibit the prosecution from using silence to impeach a defendant's testimony after he waives his privilege by testifying in his own behalf. *Doyle*, 426 U.S. at 628, 632-33 n.11 (Stevens, J. dissenting). *See also supra* notes 15-26 (discussing Raffel v. United States).

111. *Doyle*, 426 U.S. at 618, 620. *Doyle*, however, did not ban completely the government's use of a defendant's post-*Miranda* silence. *Id.* at 620 n.11. The Court explained that "[i]t goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Id.*

Prophetically, four years after *Doyle*, the Court considered this very issue. Anderson v. Charles, 447 U.S. 404 (1980) (per curiam). In *Anderson v. Charles*, the Court allowed the prosecution to comment on a defendant's failure after his arrest to assert the same version of events

to which he testified at his trial. *Id.* at 408-09. In *Anderson*, the defendant told one version of his story after his arrest and after police read him the *Miranda* warning, then told an inconsistent version at trial. *Id.* at 405-06. The prosecution inquired about this inconsistency and about the defendant's failure to tell the arresting officers the same story he told at trial. *Id.* at 408. The defendant argued that *Doyle* barred the use of his failure to tell the arresting officers the same exculpatory story he told at trial. *See* Charles v. Anderson, 610 F.2d 417, 418 (6th Cir. 1979), *rev'd*, 447 U.S. 404 (1980). The Sixth Circuit, hearing the state case on a writ of habeas corpus, determined that portion of the prosecutor's cross examination that inquired about the defendant's inconsistent version of events was permissible because it bore on his credibility and not the truth of the exculpatory story. *Id.* at 421. The Sixth Circuit, however, ruled that the prosecutor's inquiry into why the defendant had not offered the same exculpatory story to the arresting officers amounted to a *Doyle* violation because the reasons behind the defendant's failure to tell the arresting officers the same story he told at trial were insolubly ambiguous, and thus violated his right to due process. *Id.* The United States Supreme Court, however, disagreed. *See Anderson*, 447 U.S. at 409 (holding *Doyle* inapplicable to the case at bar). The Court determined that the prosecutor in this case did not comment on the defendant's post-*Miranda* silence, but rather on the defendant's inconsistent statements. *Id.* The prosecutor's questions, the Court concluded, did not burden impermissibly the defendant's right to remain silent, but rather sought to impeach the defendant's prior inconsistent version of events. *Id.* The *Anderson* Court opined that it refused to take such a formalistic understanding of silence, instead allowing the government to impeach a defendant with his post-*Miranda* silence when that silence was intertwined with an exculpatory, yet inconsistent, version of events. *Id.* at 408-09.

Eleven years later, the Court again limited *Doyle* when it ruled that due process is not violated when the government's comment on a defendant's post-*Miranda* silence is quickly cured by the trial court so that the defendant's silence was never "used" to impeach him. Greer v. Miller, 483 U.S. 756, 766 (1987). The defendant, Charles Miller, was tried for murder. Miller took the stand in his own defense and offered an exculpatory version of events. The government, in its cross-examination of the defendant, asked Miller why he had not told his version of events to the police at his arrest. *Id.* at 758-59. Miller's attorney objected immediately, the trial court sustained the objection and instructed the jury to disregard the question. A jury found Miller guilty. *Id.* Miller appealed contending that the government's comment on his post-*Miranda* silence was a *Doyle* violation and that the trial court committed reversible error when it refused Miller a mistrial. *Id.* at 759-60. Justice Powell, writing for the majority in *Greer*, first decided that the issue on appeal is determined under *Doyle v. Ohio* because the government commented on the defendant's post-*Miranda* silence. *Id.* at 763. Injecting a formalistic approach into the *Doyle* analysis, the Court concluded that *Doyle* only prohibits the use of a defendant's post-*Miranda* silence, not its mention. *Id.* at 764. Because the trial court, by sustaining the defense's objection and offering an immediate curative instruction to the jury, did not allow the government to use Miller's silence, the government did not violate *Doyle*. *Id.* at 764-65. It seems, then, that the government may violate *Doyle* and comment on a defendant's post-*Miranda* silence so long as that error is harmless.

In an interesting application of *Doyle*, the Supreme Court determined that the government's use of a defendant's post-arrest and post-*Miranda* silence to contradict his insanity plea violated due process. *See* Wainwright v. Greenfield, 474 U.S. 284, 295-96 (1986). In *Wainright*, the police arrested and *Mirandized* the defendant. In response, the defendant stated that he understood the warnings and requested an attorney. He was read the *Miranda* warnings twice again. *Id.* at 286.

Notably, the *Doyle* Court explained that the prosecutor's use of a defendant's post-*Miranda* silence was prohibited by the Fourteenth Amendment's Due Process Clause and not by the Fifth Amendment's privilege against self-incrimination, even though *Miranda* appears to be sympathetic to an outright constitutional ban on the use of silence.[112] In a footnote to its opinion, the *Miranda* Court wrote that the "prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."[113] Although this absolute ban on the use of silence suggests that *Miranda* contemplated prohibiting the use of a defendant's post-*Miranda* silence under the Fifth Amendment, the footnote relies chiefly on *Griffin v. California*, a United States Supreme Court opinion decided one year before *Miranda*.[114] In *Griffin*, the Court determined that the Fifth Amendment prohibits comment on a defendant's decision not to testify at his own trial.[115] *Griffin* did not contemplate the government's use of a defendant's silence at his arrest to impeach him. It merely explained that the Fifth Amendment bans comment on the defendant's failure to testify.[116] The *Doyle* Court, it seems, understood this distinction. *Doyle* determined that the prosecutor's use of a defendant's post-*Miranda* silence implicated the more flexible due process requirements under the Fourteenth Amendment,[117] perhaps because the defendants in *Doyle* neither stood mute nor

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Each time, the defendant requested to speak with an attorney. *Id.* In its closing argument, the prosecution commented on the defendant's silence on the theory that his post-*Miranda* silence and request for counsel demonstrated a degree of comprehension that was inconsistent with insanity. *Id.* at 287. Relying on *Doyle* and its progeny, the Court reaffirmed that the government is barred from using a defendant's post-*Miranda* silence when it induces that silence through the warnings. *Id.* at 290-91. Use of such silence as evidence of the defendant's sanity, the Court concluded, is fundamentally unfair and thus violates the defendant's right to due process. *Id.* at 295.

112. *See Doyle*, 426 U.S. at 619 (holding that use of post-*Miranda* silence to impeach violated due process); *see also Miranda*, 384 U.S. at 468 n.37 (contemplating absolute ban to the use of silence).

113. *Miranda*, 384 U.S. at 468 n.37.

114. *See id.* (citing Griffin v. California, 380 U.S. 609 (1965)).

115. *Griffin*, 380 U.S. at 615. In *Griffin*, both the trial court in its charge to the jury and the prosecution commented on the defendant's failure to testify. *Id.* at 610-11. Justice Douglas, writing for the majority, explained that comment on the accused's refusal to testify is outlawed by the Fifth Amendment because allowing such comment would force a defendant to either invoke his right only to suffer from that choice, or waive it. *Id.* at 614. This choice constitutionally burdens the privilege "by making its assertion costly." *Id.*

116. *Id.* at 615.

117. *Doyle*, 426 U.S. at 619. Justice Stevens, in his *Doyle* dissent, considered whether the defendants' Fifth Amendment privilege against self-incrimination was violated when the prosecutor commented on their post-*Miranda* silence. *Id.* at 626-27 (Stevens, J., dissenting). First, Justice Stevens noted that the defendants failed to invoke their right to remain silent, and one failed to remain silent, at their arrest. *Id.* at 627-28. Since the defendants failed to stand mute or claim the privilege, they cannot rely on footnote 37 in the *Miranda* opinion, which suggests a constitutional

claimed their Fifth Amendment privilege at their arrest, and because the government's use of the defendants' pre-trial silence to impeach them avoided a direct *Griffin*-like Fifth Amendment question.

Reading *Griffin*, *Miranda*, and *Doyle* together, the Court constitutionally distinguishes pre-trial silence used to impeach a defendant, from trial silence used to infer his guilt. Under *Griffin*, any comment on the defendant's failure to testify at his own trial implicates directly the Fifth Amendment prohibition against compelled self-incrimination.[118] In *Miranda*, the Court perfected the defendant's Fifth Amendment right to silence by requiring police to first apprise him of his rights before they interrogate him—explaining that the coercive atmosphere of custodial interrogation burdens the defendant's Fifth Amendment right to silence.[119] And in *Doyle*, the Court determined that comment on the defendant's post-*Miranda* silence to impeach him at trial sounds in due process because of the implicit assurances embodied in the *Miranda* warning.[120] Choosing to base its holding on the flexible requirements of due process and not the absolute proscription of the Fifth Amendment, the *Doyle* Court seemed purposefully to leave the door open for some use of silence not contemplated by its opinion.

Four years after *Doyle*, the United States Supreme Court again considered whether the government could use a defendant's inconsistent silence to impeach him at trial.[121] In *Jenkins v. Anderson*, the Court held that the defendant's constitutional rights were not violated when the prosecution, in its cross-examination of the defendant, referred to his pre-arrest silence in an attempt to impeach his credibility.[122] Indeed, the Court determined that the defendant failed to raise a constitutional claim.[123] Relying on *Raffel v. United States*, the Court

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ban on the use of silence when a defendant stands mute or claims his privilege in the face of accusation. *Id.* at 627-28. More importantly, Justice Stevens noted that the *Miranda* footnote relied primarily on *Griffin v. California*, 380 U.S. 609 (1965), which determined that a prosecutor's comment on a defendant's failure to testify violates his Fifth Amendment rights. *Id.*; *see also Griffin*, 380 U.S. at 615 (holding that Fifth Amendment forbids comment on the accused's silence when it is used to evidence guilt). Unlike *Griffin*, the prosecutor in *Doyle* did not comment on the defendants' failure to testify, but commented on their failure to tell the arresting officers their exculpatory story first heard at trial. *Doyle*, 426 U.S. at 613. As such, *Dolye* is best understood as a *Raffel*-type impeachment case, rather than a *Griffin*-type self-incrimination case.

118. *See supra* note 115 and accompanying text (discussing Griffin v. California).

119. *See supra* notes 56-59 and accompanying text (discussing Miranda v. Arizona).

120. *See supra* note 107 and accompanying text (discussing Doyle v. Ohio).

121. Jenkins v. Anderson, 447 U.S. 231 (1980).

122. *Id.* at 240. The petitioner, Dennis Jenkins, confessed to murder two weeks after the crime, alleging that he killed in self defense. *Id.* at 232-33. At his trial, Jenkins testified in his own defense. The prosecution, in its cross-examination of Jenkins, asked him why he remained silent for two weeks after the crime, intending to raise an inference that Jenkins' silence was inconsistent with his later confession. *Id.* at 233-35. Jenkins argued that the prosecution violated his Fifth Amendment right to remain silent. *Id.* at 235.

123. *Id.* at 238-39.

confirmed that a defendant waives his Fifth Amendment right to remain silent when he testifies in his own defense and the government attempts to use his prior silence to impeach his credibility.[124] Although the *Jenkins* Court submitted, *in arguendo*, that its ruling may force a person to choose between invoking his right to remain silent thereby risking the use of his pre-arrest silence to impeach him and waiving his right to silence to prevent the government from using his pre-arrest silence to impeach him later, it opined that the "Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'"[125] The Court differentiated *Jenkins* from *Doyle*, where the government induced the defendant to remain silent because his silence followed the government's assurance that his silence would not be used against him.[126] In *Jenkins*, the defendant never received a *Miranda* warning—nor was he entitled to one—and thus never received the government's assurance that his silence would not be used against him.[127] Pre-arrest (and pre-*Miranda*) silence, then, can be used to impeach a

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124. *Id.* at 235.

125. *Id.* at 236 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)). Determining whether a constitutional right has been impermissibly burdened, the Court stated that "[t]he 'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'" *Id.* (quoting *Chaffin*, 412 U.S. at 32). The Court also considered whether the challenged governmental practice (using a person's pre-arrest silence to impeach his credibility at trial) furthers other important purposes. *Id.* at 238. Weighing these policies, the Court concluded that the government's use of a person's pre-arrest silence does not appreciably impair the policies behind the Fifth Amendment and does further the important goal of enhancing the reliability of the criminal process. *Id.* at 236-38.

126. *Id.* at 239-40.

127. *Id.* at 240. In his concurrence, Justice Stevens argued that the Fifth Amendment privilege against self-incrimination is irrelevant to a person's decision to remain silent when she is under no official compulsion to speak. *Id.* at 241 (Stevens, J., concurring). The admissibility of pre-arrest silence, then, turns on the rules of evidence and not the Constitution. *Id.* at 244.

Justice Marshall, however, in his dissent, wrote that the majority's ruling has three defects. *Id.* at 246 (Marshall, J., dissenting). First, Justice Marshall would extend *Doyle* to prohibit the use of pre-arrest silence to impeach a defendant, because like post-arrest silence, pre-arrest silence "is so unlikely to be probabative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment." *Id.* (Marshall, J., dissenting); *see also supra* notes 106-08 (discussing use of post-arrest silence in *Doyle*). A defendant, Justice Marshall noted, may have decided to exercise his constitutional right to remain silent before his arrest—his silence is indeterminately ambiguous because it cannot be assumed that he is not aware of his constitutional rights, even prior to an official warning. *Id.* at 247. Second, Justice Marshall argued that allowing the prosecution to draw a negative inference from a defendant's silence impermissibly penalizes the defendant's decision to exercise his privilege against self-incrimination under the Fifth Amendment. *Id.* at 246. To prevent the prosecution from drawing a negative inference from his pre-arrest silence, a defendant would be required to offer his potentially incriminating version of events to the police—replacing "the privilege against self-incrimination with a duty to incriminate oneself." *Id.* at 250 (Marshall, J.

defendant's credibility when he waives his Fifth Amendment privilege by agreeing to testify at his own trial and in his own defense. The use of post-arrest (and post-*Miranda*) silence, however, is fundamentally unfair and violates the due process guarantee of the Fourteenth Amendment because the government assured the defendant that his silence would not be used against him.[128]

The *Miranda* decision, however, addressed the constitutionality of the government's use of a defendant's confession obtained through a custodial interrogation.[129] That opinion did not consider the use of a defendant's statements (or silence) absent the coercive environment surrounding a police interrogation or its functional equivalent. *Miranda*'s progeny, including both *Doyle* and *Jenkins*, ostensibly moved *Miranda*'s constitutional trigger away from police interrogation, and the question became not whether the suspect was interrogated, but whether the government induced his silence. The problem was fixing when, and not whether, the government induced a defendant's silence.

In the wake of *Jenkins*, some federal appellate courts determined that the arrest itself triggered a suspect's right to remain silent (and prohibited the government's use of his silence to impeach him), regardless of whether he was even read the *Miranda* warnings.[130] For example, in *Weir v. Fletcher*, the United States Court of Appeals for the Sixth Circuit determined that the government could not impeach a defendant with his post-arrest silence even if the police

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dissenting). To support this view, Justice Marshall concluded that the majority's reliance on *Raffel* was misguided because *Raffel*, although not expressly overruled, was no longer viable in the wake of *Griffin*. *Id.* at 252. Third, Justice Marshall further opined that allowing the prosecution to draw a negative inference from a defendant's pre-arrest silence would impermissibly burden the defendant's choice to testify in his own defense. *Id.* at 246 (Marshall, J. dissenting). In the paradigmatic case, a defendant would need to report his exculpatory story "at the first possible moment" to prevent the prosecution from later commenting on his pre-arrest silence to discredit his trial testimony should he choose to exercise his constitutional right to testify on his own behalf. *Id.* at 253.

128. Notably, the *Jenkins* Court appears to reinforce an idea first articulated in *Johnson v. United States*, 318 U.S. 189 (1943). In that case, the Court determined that when a trial court expressly grants a defendant's request to remain silent, even if that defendant makes the request after he waives his right and during his own cross-examination, it must honor its own grant. *See supra* notes 28-39 and accompanying text (discussing Johnson v. United States). In *Jenkins*, the Court again suggested that a defendant who waives his privilege against self-incrimination and testifies in his own defense may still invoke his right to protect his post-*Miranda* silence because the government assured him that his silence will carry no penalty. *See* Jenkins v. Anderson, 447 U.S. 231, 240 n.6 (1980).

129. *See supra* notes 79-86 (discussing *Miranda*).

130. Weir v. Fletcher, 658 F.2d 1126, 1131 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982) (concluding that impeachment of defendant with post-arrest silence is unconstitutional); *see also* United States v. Curtis, 644 F.2d 263, 271 (3d Cir. 1981) (holding use of post-arrest silence constituted *Doyle* error without regard to *Miranda* warnings); United States v. Harrington, 636 F.2d 1182, 1187 (9th Cir. 1980) (holding that the use of post-arrest silence to impeach unconstitutional without regard to *Miranda* warnings).

never read him the *Miranda* warnings.[131] Relying on both *Doyle* and *Jenkins*, the Sixth Circuit ruled that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent."[132] Perhaps recognizing that its *Miranda* opinion was growing increasingly slippery, the United States Supreme Court accepted certiorari in *Fletcher v. Weir* and decided, per curiam, that the *Miranda* warnings, and not the arrest, determine whether the government can permissibly impeach a defendant with his own silence.[133]

In *Fletcher*, the defendant testified for the first time at his murder trial that he acted in self defense.[134] The government, in its cross examination of the defendant, asked him why he failed to offer his exculpatory story to the arresting officers both prior to and immediately after his arrest.[135] The court noted that it could not determine whether the defendant had been read the *Miranda* warnings before his post-arrest silence.[136] Reversing the Sixth Circuit, the Court first concluded that a defendant's pre-arrest silence is admissible to impeach him because no government action (a *Miranda* warning) induced the defendant to remain silent before his arrest.[137] Secondly, the Court determined that the government could use a defendant's post-arrest yet pre-*Miranda* silence, because, absent the affirmative assurances embodied in a *Miranda* warning, the government's use of that silence to impeach him does not offend due process.[138]

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131. *Weir*, 658 F.2d at 1130. In *Weir v. Fletcher*, the defendant testified at his murder trial that he acted in self-defense. *Id.* at 1127. The prosecutor, in his cross-examination of the defendant, asked the defendant why he had not disclosed his exculpatory story to the police at the time of his arrest. *Id.* at 1128-29. The court held that the prosecutor's questions about the defendant's silence before his arrest were permissible. *See id.* at 1129 (relying on *Jenkins v. Anderson*, 447 U.S. 231 (1980)). The court also held that the prosecutor's questions about the defendant's post-arrest, yet pre-*Miranda* silence were impermissible. *See id.* (limiting *Jenkins* to pre-arrest silence).

132. *Id.* at 1131.

133. Fletcher v. Weir, 455 U.S. 603, 606 (1982) (per curiam).

134. *Id.* at 603.

135. *Id.* at 604 n.1.

136. *Id* at 605.

137. *Id.* at 606. The Court relied first on *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), which held that the government could not use a defendant's post-arrest and post-*Miranda* silence to impeach him because the defendant's silence may have been induced by the government's assurances that his silence would not be used against him. *See Fletcher*, 455 U.S. at 605 (discussing Doyle v. Ohio). The Court then discussed its ruling in *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), where it held that the government could impeach a defendant with his pre-arrest silence because the defendant had not yet received assurances that his silence would not be used against him. *Fletcher*, 455 U.S. at 606 (discussing Jenkins v. Anderson). Finally, the Court relied on *Anderson v. Charles*, 447 U.S. 404, 408 (1980), where it reasserted the idea that silence following a *Miranda* warning cannot be used to impeach a defendant because the warning assured the defendant that his silence would not be used later against him. *See Fletcher*, 455 U.S. at 606 (discussing Anderson v. Charles).

138. *Id.* at 606-07. Instead, the Court concluded that the admissibility of a defendant's post-arrest, pre-*Miranda* silence is controlled by the rules of evidence, not the Constitution. *Id.* at 606.

A defendant's right to remain silent, then, is triggered not by his arrest, but by the arresting officer's decision to *Mirandize* him. The constitutional trigger for the admissibility of exculpatory statements (or silence), once keyed to the dangers inherent to back-door interrogations, now rests in part on the speed at which an arresting officer can apprise a suspect of his rights.[139] And while the defendant's due process right is perfected when he relies on the assurances implicit in the warnings, the government has no obligation to *Mirandize* anyone absent custody.[140] Even when a suspect is in custody, the government can still use his silence to impeach him if the police fail to *Mirandize* him immediately upon his arrest.[141]

In the end, *Miranda* and its progeny both deepened and broadened a suspect's rights under the Constitution. The Fifth Amendment requires the government to first warn a suspect in custody of the dangers of waiving his constitutional rights. Although the government's use of a defendant's post-*Miranda* silence to impeach him may not infringe directly on his Fifth Amendment rights, it will violate his right to due process under the Fourteenth Amendment. In the paradigmatic case, the Fifth Amendment requires the government to warn a person in custody (or its functional equivalent) to the dangers of waiving Fifth Amendment rights. But, while the warnings are derived

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139. *See supra* note 73 (discussing custodial interrogation as the reason for the *Miranda* warnings).

140. *See supra* notes 77-80 (discussing the requirement of custody). In 1983, the Supreme Court reasserted, in a per curiam opinion, that a suspect is entitled to a *Miranda* warning only when he is in custody and that custody begins with an arrest or something similar to an arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam). In *Beheler*, the defendant called the police shortly after his brother-in-law committed a murder. *Id.* at 1122. Later, Beheler voluntarily accompanied police to the station house where he agreed to talk about the murder. The police interviewed Beheler without first apprising him of his rights. At trial, the trial court admitted Beheler's statements into evidence. *Id.* Weighing the totality of the circumstances surrounding the interview, the court of appeals determined that the government failed to meet its burden by showing that Beheler was not in custody during the interview. *Id.* at 1123. Ultimately, the Supreme Court disagreed with the court of appeals' determination, stating that the government is required to give a *Miranda* warning only when it formally arrests a suspect or restricts his freedom of movement to a degree associated with formal arrest. *Id.* at 1125. Because police in this case neither arrested Beheler nor restricted his movement in a significant way, he was not in custody during the interview—and thus was not entitled to a *Miranda* warning. *Id.* An arrest, or something analogous to an arrest, then, entitles a person to the warnings which, once given, assure a person that his silence cannot be used against him.

141. The Supreme Court has stated that a custodial interrogation activates the need for *Miranda* warnings. *See id.* at 1122-23. The *Miranda* warning, however, determines the admissibility of a defendant's silence at trial. In a more recent test, the United States Supreme Court restated in *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993), that the government could comment on a defendant's pre-*Miranda* silence to impeach him, but that the government could not comment on a defendant's post-*Miranda* silence to impeach him without violating the defendant's due process rights.

from the Fifth Amendment, the Constitution is only breached when the government compels a defendant to bear witness against himself. Once warned, a defendant may waive his right by either subjecting himself to police interrogation or by testifying on his own behalf at trial. Should the defendant choose to remain silent after he is warned, however, the government's use of that silence, even to impeach, is barred not by the Fifth Amendment (because it only protects compelled statements), but rather by the Fourteenth Amendment (because due process demands that the government honor its promises to the suspect).

The case law teaches that the government's use of a suspect's silence to impeach him may sound in the Fifth Amendment, but its admissibility at trial is determined under the Fourteenth Amendment.[142] And while the United States Supreme Court attended to the government's use of a defendant's silence to impeach his credibility after he waives his right to not incriminate himself, the lower courts struggled with the more precarious question of whether the government can use a defendant's pre-trial silence in its case-in-chief. The debate turns on the reach of the Fifth Amendment's prohibitions and whether the Fifth Amendment applies at all to pre-trial, yet arguably incriminating silence.

IV. The Circuits Respond: The Use of Silence in the Government's Case-in-Chief

Since *Raffel v. United States*, the Supreme Court's jurisprudence has evolved to permit the government's use of a suspect's pre-trial silence to impeach him only if that silence preceded the implied assurance embodied in *Miranda* that silence would carry no penalty.[143] But for *Miranda* warnings, no government action induces a suspect to remain silent, so the use of that silence to impeach a defendant violates neither the Fifth Amendment's prohibition against self-incrimination nor the Fourteenth Amendment's fundamental fairness test under a due process analysis.[144] Some circuits have found that, because the *Doyle/Jenkins* analysis allows the government to use a defendant's prior silence against him at trial, no doctrinal basis exists to distinguish between the government's use of a defendant's silence to impeach him and the government's use of a defendant's silence to evidence his guilt.[145] Other circuits, however,

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142. *See supra* notes 112-15 and accompanying text (discussing the application of the Fifth Amendment to the admissibility of a defendant's silence).

143. *See supra* notes 106-11 and accompanying text (discussing *Doyle v. Ohio* and its progeny). Any comment on the defendant's silence at trial (when the government comments on his refusal to testify), however, is barred by the Fifth Amendment. *See supra* notes 115-16 and accompanying text (discussing Griffin v. California).

144. *See supra* notes 127-28 and accompanying text (discussing the use of a defendant's pre-*Miranda* silence to impeach him).

145. The Fifth, Ninth, and Eleventh Circuits have all held that the government may use pre-arrest silence in its case-in-chief. United States v. Oplinger; 150 F.3d 1061, 1067 (9th Cir. 1998) (holding government may use pre-arrest silence in its case-in-chief); United States v. Zanabria, 74

disagree.[146]

A. Federal Circuit Courts of Appeal Concluding That the Government May Not Use a Defendant's Silence in Its Case-in-Chief

Seven circuits have considered whether the government could use a suspect's pre-arrest or pre-*Miranda* silence to establish (or at least infer) the defendant's guilt and have determined that such use is prohibited by the Constitution.[147] For example, in *Coppola v. Powell*, the United States Court of Appeals for the First Circuit concluded that the government's use of a defendant's pre-arrest silence in its case-in-chief unconstitutionally burdened his Fifth Amendment privilege against self-incrimination.[148] In *Coppola*, the police, during a criminal investigation, questioned a suspect but had not yet arrested nor *Mirandized* him.[149] The suspect, when asked about the crime, replied "if you think I'm going to confess to you, you're crazy."[150] At trial in New Hampshire, the government successfully sought to admit the fact that the defendant refused to speak.[151] On appeal, the New Hampshire Supreme Court affirmed, agreeing with the trial court that the defendant had not invoked his Fifth Amendment right to silence.[152] On appeal from a federal district court's denial of the defendant's writ of habeas corpus, the First Circuit disagreed with both the New Hampshire Supreme Court and the federal district court when it determined first that the suspect did invoke his Fifth Amendment privilege against self-incrimination when he refused to confess to police.[153] Then, relying on *Griffin v. California*, the court explained

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F.3d 590 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).

146. *See* Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding pre-arrest silence cannot be used in the government's case-in-chief); United States *ex. rel.* Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987) (holding government cannot use pre-arrest silence in its case-in-chief); United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (suggesting government cannot comment on a defendant's silence in its case-in-chief).

147. *See* Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000); United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); *Coppola*, 878 F.2d at 1562; *Savory*, 832 F.2d at 1011; *Caro*, 637 F.2d at 869; Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978).

148. *Coppola*, 878 F.2d at 1567-68.

149. *Id.* at 1563.

150. *Id.*

151. *Id.* at 1564.

152. *See id.* (citing State v. Coppola, 130 N.H. 148, 152-53 (1987)). The New Hampshire Supreme Court explained that the defendant failed to invoke any Fifth Amendment privilege against self-incrimination because he did not refuse to speak or remain silent (and therefore invoke his constitutional right), but rather refused to confess. *Id.*

153. *Id.* at 1567. The court cited three reasons to support the idea that a defendant invokes his right to remain silent when he refuses to confess, rather than when he refuses to speak. *Id.* at 1564-1566. First, the court explained that the United States Supreme Court construes broadly a defendant's invocation of his right to remain silent. *Id.* at 1565. Second, the court determined that

that the Fifth Amendment bars comment on a person's exercise of his Fifth Amendment privilege against self-incrimination when he elects not to testify in his own defense.[154] *Jenkins v. Anderson*, the court continued, was inapplicable because that case considered whether the Fourteenth Amendment allows the government to impeach a defendant with his pre-*Miranda* silence and did not consider whether the Fifth Amendment prohibits comment on a defendant's claim of his Fifth Amendment right to remain silent (and his subsequent silence) before his arrest.[155] Notably, the *Coppola* court did not consider whether the flexible requirements of the Fourteenth Amendment allow the government to comment on a defendant's pre-arrest or pre-*Miranda* silence, but rather focused on whether the defendant invoked his Fifth Amendment privilege during an investigatory proceeding, thereby barring the government from using his silence against him. In evaluating such claims, courts have first uncovered some indication that a defendant had invoked his rights under the Fifth Amendment and then simply barred that invocation together with any attendant silence as an unconstitutional burden on the Fifth Amendment.

The Sixth Circuit unwittingly agreed with the First Circuit's rule in *Coppola* when it decided *Combs v. Coyle*.[156] In *Combs*, an Ohio trial court convicted the defendant, Ronald Combs, of murdering his former girlfriend and her mother.[157] At trial, the prosecution used Combs' pre-arrest silence to establish that he intended to commit the crime charged.[158] Of note, Combs told the investigating officer to "talk to [my] lawyer."[159] Combs was neither under arrest, nor read the *Miranda* warnings at the time.[160] The defendant appealed his conviction, arguing that the prosecution violated his right to due process under *Doyle v. Ohio* when it allowed the government to comment on his pre-arrest silence in its case-in-

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"a claim of the [Fifth Amendment privilege against self-incrimination] does not require any special combination of words." *See id.* (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)). Finally, the court noted that the privilege is not limited to persons in custody or charged with a crime and applies to suspects under investigation of a crime. *Id.* at 1565-66.

154. *Id.* at 1568. The court noted that had the defendant surrendered his privilege against self-incrimination and testified in his own defense, then the rule of *Raffel v. United States* would have allowed the prosecution to comment on his Fifth Amendment privilege. *Id.* at 1567-68.

155. *Id.* at 1568.

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

157. *Id.* at 273.

158. *Id.* at 278-79. At the defendant's trial, an officer who witnessed the murders testified that he asked the defendant what had happened, and the defendant replied "talk to my lawyer." *Id.* at 279. The trial court immediately followed with an instruction to the jury reminding it that the defendant had a right to remain silent, but still allowed the jury to consider the testimony for the purpose of determining the defendant's intent. In its closing speech, the prosecutor again noted to the jury that the defendant chose not to answer the officer's question, instead asking for a lawyer. The Sixth Circuit determined that the defendant's request for his lawyer "is best understood as communicating a desire to remain silent outside the presence of an attorney." *Id.*

159. *Id.*

160. *Id.* at 280.

chief.[161]

Although the Sixth Circuit disagreed with Combs' reliance on *Doyle* because he was never read the *Miranda* warnings and thus could not have relied on a government assurance that his silence would not be used against him, it did conclude that the Fifth Amendment bars the government from using a defendant's pre-arrest silence as substantive proof of guilt.[162] Notably, the court determined that "Combs clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer."[163] The court also suggested that a person questioned in the course of a criminal investigation may assert his Fifth Amendment privilege against self-incrimination to the same extent as a person charged with a crime or in custody.[164] Then, to hedge its bet, the court determined that even if the privilege does not apply in the pre-custody context, Combs was under arrest and in custody when he told the investigating officers to talk to his lawyer.[165] The court reasoned that because Combs invoked his privilege at the outset of the police investigation, never waived his privilege during the criminal proceeding, and did not testify at his trial, the government could not comment on his silence without offending his Fifth Amendment privilege against self-incrimination.[166] Like the First Circuit, the Sixth Circuit did not object explicitly to the government's use of a defendant's pre-arrest silence in its case-in-chief, but rather to the government's use of his silence after he invoked his right to remain silent and continued to benefit from its protection by choosing not to testify in his own defense.

The Seventh Circuit appears to agree with this analysis.[167] In *Savory v. Lane*, the United States Court of Appeals for the Seventh Circuit concluded that the government may not use a defendant's pre-arrest silence in its case-in-chief.[168] In *Savory*, the prosecution introduced evidence that the defendant refused to make a statement when police initially interviewed him in connection with a

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161. *Id.* at 279.

162. *See id.* at 280, 286 (noting that *Doyle* rests on the theory that the *Miranda* warnings implicitly assure a defendant that his silence will not be penalized).

163. *Id.* at 286.

164. *See id.* at 283 (citing Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989)).

165. *Id.* at 284-85. The court observed Justice Stevens's concurrence in *Jenkins* when he explained that the Fifth Amendment does not apply in the pre-custody context because without arrest or custody a person is under no official compulsion to speak or remain silent—so the Fifth Amendment's prohibition against compelled self-incrimination is inapplicable. *Id.* at 283 (citing Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). The court, anxious that Justice Stevens may be right, wrote that "[e]ven assuming that the Fifth Amendment is inapplicable to precustody contexts, the privilege would still be applicable to Combs, for we agree . . . that Combs was in custody at the time he made the 'talk to my lawyer' statement." *Id.* at 284.

166. *Id.* at 285.

167. *See* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (holding use of defendant's pre-arrest silence violated the Fifth Amendment).

168. *See id.* at 1018-19 (holding that although the Fifth Amendment bars the use of a defendant's pre-arrest silence in the government's case-in-chief, the error was harmless).

murder investigation.[169] The defendant did not take the stand at his trial.[170] The Seventh Circuit concluded that the government's use of the defendant's pre-arrest silence in its case-in-chief did not violate *Doyle v. Ohio* (because the prosecution was not attempting to impeach the defendant), but rather violated *Griffin v. California* (because the prosecution used the defendant's silence to suggest that he was guilty).[171] Explaining that the right to remain silent attaches before the institution of formal adversary proceedings, the court wrote "we believe *Griffin* remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest."[172] Although the court neglected to note in its

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169. *Id.* at 1015.

170. *Id.* at 1017.

171. *See id.* (citing Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965)).

172. *Id.* at 1017. While *Griffin* involved the use of a defendant's refusal to testify in his own defense and not the use of a defendant's pre-arrest silence, the Seventh Circuit did not believe that such a distinction made a difference since the right to remain silent attaches before the institution of formal adversary proceedings. *Id.*

Four years after *Savory v. Lane*, the Seventh Circuit in *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), appeared more sympathetic to the idea that a defendant's pre-arrest silence could be used in the government's case-in-chief. In *Davenport*, IRS agents interviewed two defendants in relation to a bank deposit structuring scheme that violated federal law. *Id.* at 1171. Although the defendants were *Mirandized*, they were neither under arrest nor in custody. *Id.* at 1174. At the pre-arrest interview, one defendant answered some questions and refused to answer others. *Id.* at 1173-74. Later, at trial, the government used the defendant's refusal to answer some of the I.R.S. agent's questions against her. *Id.* at 1175. The Seventh Circuit wrote that despite the ruling in *Savory*, the use of the defendant's pre-arrest silence may not have violated the Constitution in this case. *Id.* It distinguished *Savory*, noting in that case the defendant remained silent throughout the investigatory interview, while the defendants in *Davenport* did answer some questions. *Id.* at 1174. To that end, the court suffered to explain that had the defendants remained silent for the entire interview, the government could not have commented on that silence. *Id.* at 1175. But, because the defendants answered *some* questions, they waived their privilege, and "all bets were off." *Id.* The court noted that absent custody, the prohibitions outlined in *Miranda v. Arizona* are not in play. *Id.* The fact that a defendant answers "some questions can properly be given greater weight in deciding whether that willingness [to answer some questions] should forfeit the right to object to comment on a refusal to answer a particular question." *Id.* Yet, despite the fact that the *Davenport* defendants were read the *Miranda* warnings (and thus implicitly assured that their silence would not be used against them) and despite the Seventh Circuit's holding in *Savory v. Lane* (prohibiting the use of silence in the government's case-in-chief), the court was willing to allow the government to use the defendants' pre-arrest silence against them. Not entirely confidant in its own ruling, however, the court finally determined that "if this is all wrong and there was error here, it was harmless." *Id.* *Davenport* can only then be read as an anomaly and a case of result-oriented jurisprudence.

One year later, the Seventh Circuit resolved any ambiguity about the circuit's position on the use of pre-*Miranda* silence when it decided *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991). In *Hernandez*, the defendant objected to the prosecution's use of his post-arrest yet pre-

reasoning that the defendant had in fact asserted his right to remain silent when he refused to give investigating officers a statement (arguably triggering his Fifth Amendment privilege against self-incrimination under *Griffin*), that fact was key to both the First and Sixth Circuits.[173] Another federal circuit, then, appears to prohibit the use of pre-arrest silence in the government's case-in-chief when the defendant asserts his right to remain silent before he is owed the *Miranda* warnings and even before his arrest.

The Tenth Circuit Court of Appeals also considered whether the government could use a defendant's pre-arrest silence in its case-in-chief and agreed with the First, Sixth, and Seventh Circuits when it concluded that the government may not comment on a defendant's pre-arrest silence without offending the Fifth Amendment.[174] In *United States v. Burson*, the petitioner, Cecil Burson, was convicted for tax evasion.[175] At trial, the prosecuting attorney produced two IRS criminal investigators who testified that Burson had not responded to their investigatory questions at his home and that "it was apparent that he would not cooperate or answer any . . . questions."[176] The court concluded first that Burson had invoked his privilege against self-incrimination when he remained silent in the face of investigatory questioning by the IRS agents.[177] Then, relying on a broad construction of *Griffin v. California*, it determined that once a defendant invokes his privilege against self-incrimination, the Fifth Amendment prohibits the prosecution from commenting on his protected silence.[178] Under the Tenth Circuit's analysis, silence alone may invoke a person's right to silence even in the absence of any official compulsion to speak. Once again, a federal circuit court of appeals was able to prevent the government from using a person's pre-arrest and pre-*Miranda* silence in its case-in-chief if that person first asserted (or even implied) his right to remain silent during an investigation of a crime.[179]

Miranda silence in its case against him. *Id.* at 322. The trial court admitted the silence. *Id.* Relying on *Savory v. Lane*, the Seventh Circuit determined that the government cannot use a defendant's pre-*Miranda* silence as evidence of guilt in its case-in-chief. *See id.* at 322-23.

173. *Savory*, 832 F.2d at 1015 (noting that defendant asserted his right to remain silent, but outside its analysis of the case); *see also supra* notes 148-66 and accompanying text (discussing the First and Sixth Circuits' focus on the defendant's assertion of the right to remain silent).

174. United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991).

175. *Id.* at 1198.

176. *Id.* at 1200.

177. *Id.* at 1200-01. The court noted that Burson's silence in the face of investigatory questions was sufficient to invoke his Fifth Amendment privilege against self-incrimination. *Id.* at 1200.

178. *Id.* at 1201; *see also supra* notes 115-16 and accompanying text (discussing *Griffin*'s prohibition against the use of a defendant's failure to testify at his trial, not before).

179. *Id.* Ten years after its opinion in *United States v. Burson*, the Tenth Circuit again considered the admissibility of a defendant's pre-trial silence and concluded that, in some scenarios, the prosecution may comment on defendant's silence without offending the Constitution. United States v. Oliver, 278 F.3d 1035, 1039 (10th Cir. 2001). In *Oliver*, the prosecution, in its case-in-chief, asked its witness, the arresting officer, whether the defendant was read his *Miranda* rights.

Other federal circuits have barred the government's use of a suspect's pre-*Miranda* or pre-arrest silence in its case-in-chief even when a suspect fails to assert, or even imply, his right to remain silent.[180] For example, the Second

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The prosecuting attorney then inquired whether the defendant exercised his right to remain silent. The defendant objected to the question before the officer could answer it. *Id.* Relying on *Greer v. Miller*, 483 U.S. 756 (1987), the Tenth Circuit determined that the government did not "use" the defendant's assertion of his *Miranda* rights because the officer was not allowed to answer the prosecutor's question. *Oliver*, 278 F.3d at 1039-40. Further, the court concluded that the government commits a *Doyle* violation when it uses the defendant's right to remain silent against him. *Id.* at 1039. So, while *Burson* teaches that any silence after a defendant asserts his right to remain silent is barred by the Fifth Amendment, *Oliver* suggests that the Fourteenth Amendment, as applied in *Doyle*, does not prohibit comment on silence if that comment did not constitute a "use" of a defendant's right to remain silent.

180. *See infra* notes 181-86 and accompanying text (discussing United States v. Caro, 637 F.2d 869 (2d Cir. 1981)); *see also* United States v. Moore, 104 F.3d 377, 389-90 (D.C. Cir. 1997) (holding government may not use post-arrest silence in its case-in-chief, but concluding that error was harmless). In 1997, the United States Court of Appeals for the District of Columbia, in a plurality opinion, relied on *Griffin v. California*, 380 U.S. 609, 615 (1965), to conclude that the government may not comment on a defendant's post-arrest silence in its case-in-chief even when a defendant fails to invoke his right to remain silent. *Moore*, 104 F.3d at 385-86 (noting that police testified that defendant stood mute when contraband was found in his car). Judge Sentelle, writing for the majority, found first that the government commented on the defendant's silence when he was in custody, and not before. *Id* at 387. As such, the government was barred from using that silence in its case-in-chief. Judge Sentelle explained that the Supreme Court's decisions in *Doyle*, *Jenkins*, and *Fletcher* serve as an exception to an exception to the general rule—the government may only use a defendant's post-custody (yet pre-*Miranda*) silence if the defendant waives his privilege against self-incrimination and testifies in his own defense, and the government uses the defendant's prior silence only to *impeach* his testimony. *Id.* Since the case fell outside the exception to the general rule barring the use of silence, Judge Sentelle wrote that the government may not constitutionally comment on the defendant's silence. *Id.* at 389. The court expressly refused to consider whether pre-arrest silence could be used in the government's case-in-chief, deciding that the facts before it precluded such a consideration. *Id.* at 388.

Judge Silberman, in his concurring opinion, disagreed with Judge Sentelle's Fifth Amendment analysis and accused the majority of "impermissible appellate factual finding." *Id.* at 391 (Silberman, J., concurring). Judge Silberman took sharp exception to Judge Sentelle's finding that the defendant was in custody during his contested silence, writing that the circumstances surrounding the defendant's silence were not the product of compulsion required by the Fifth Amendment. *Id.* at 392-93 (noting that *Miranda v. Arizona* stated that the Fifth Amendment is triggered by the compulsion inherent in a custodial interrogation). Judge Silberman also suggested that the majority's reliance on *Griffin v. California* is misguided since that case barred the government from commenting on a defendant's refusal to testify *at trial*—it did not broaden the Fifth Amendment to protect a defendant's pre-trial silence. *Id.* at 394. Finally, Judge Silberman noted that *Doyle* did not announce a Fifth Amendment prohibition to the use of a defendant's post-*Miranda* silence to impeach him, but rather a due process prohibition under the Fourteenth Amendment. *Id.* at 394-95. The logic of *Doyle,* which prohibited the use of silence only when the

Circuit, in *United States v. Caro*, held that the government may not comment on a defendant's pre-arrest silence in its case-in-chief.[181] In *Caro*, the prosecuting attorney, in its direct case, elicited testimony from a customs inspector that the defendant stood mute while the inspector searched his suitcase and found counterfeit Federal Reserve notes in the course of a routine customs inspection.[182] The defendant later waived his Fifth Amendment privilege, denied on direct examination any knowledge of the counterfeit notes, and testified that he was shocked when he saw the inspector remove them from the suitcase.[183] Concluding that the Fifth Amendment barred the use of the defendant's pre-arrest and pre-*Miranda* silence, the Second Circuit chose not to analyze the case before it and instead relied on the want of federal precedent allowing the use of silence in the government's case-in-chief.[184] It noted that "we are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."[185] A criminal suspect in the Second Circuit who stands mute in the face of a routine investigation, who fails to assert (or imply) his right to remain silent, who waives his right to silence by testifying in his own defense, and who offers an exculpatory version of events surrounding the initial investigation may still rely on the Constitution to protect his pre-arrest silence.[186]

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police first assure the defendant that his silence would not be used against him, ought to apply equally to the use of silence to impeach as to the use of silence to demonstrate guilt. *Id.* at 395. As such, Judge Silberman would have allowed the prosecution to comment on the defendant's pre-*Miranda* silence in its case-in-chief since that silence was not compelled by the police, was not induced by a *Miranda* warning, and was not barred by the Fifth or Fourteenth Amendments. *Id.*

181. *Caro*, 637 F.2d at 876.

182. *Id.* at 871. The court noted that the only substantial issue for trial was whether the defendant knew the suitcase contained counterfeit notes. In its direct case, the prosecution attempted to infer guilty knowledge from the defendant's reaction to the inspector's search of the suitcase. *Id.*

183. *Id.* at 872.

184. *Id.* at 876. The court stated it "found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case." *Id.*

185. *Id.*

186. *Id.* The court did state that had the government commented on the defendant's pre-arrest silence after the defendant offered an exculpatory version of events, then the government would be allowed to rebut the defendant's version of facts with his prior silence. *Id.* at 875.

Interestingly, a few months after the Second Circuit decided *Caro*, a United States District Court in the Second Circuit concluded in *United States v. Robinson*, 523 F. Supp. 1006, 1012 (1981), that the prosecution may comment on a defendant's pre-arrest silence in its case-in-chief. In *Robinson*, a district court considered an appeal from a federal magistrate's finding, alleging that the defendant's Fifth Amendment right to remain silent was violated when the magistrate considered his pre-arrest silence to determine his guilt. *Id.* at 1009. In *Robinson*, the prosecutor introduced testimony that the defendant was silent when asked by a court cashier to give her some "real money" after he tried to pass counterfeit notes to pay a court fine. *Id.* at 1007. In its

Generally, the circuits that bar the government from using a defendant's silence in its case-in-chief advance three reasons to support their conclusions. First, these circuits have determined that a suspect may assert his Fifth Amendment right to remain silent well before trial and perhaps even before his arrest. This idea is based on a broad construction of the United States Supreme Court's opinion in *Griffin v. California*, which concluded that the Fifth Amendment only prohibits the government from commenting on a defendant's decision not to testify at his trial.[187] Second, at least one circuit read the Supreme Court's opinions in *Doyle v. Ohio* and *Jenkins v. Anderson* to limit their application only to the government's use of a defendant's silence to impeach his credibility.[188] Third, these circuits drew distinctions between pre-custody and post-custody silence and pre-arrest and post-arrest silence when they determined whether or when the Fifth Amendment bars the government's use of silence in its case-in-chief.[189] Other circuits, however, have looked at the same issue under the same or similar facts and have reached dramatically different conclusions.

B. Federal Circuit Courts of Appeal Concluding That the Government May Use a Defendant's Silence in Its Case-in-Chief

In 1991, the United States Court of Appeals for the Eleventh Circuit opined, in a case remarkably similar to *United States v. Caro*, that the government may comment on a defendant's pre-*Miranda* silence in its case-in-chief without

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summation before the magistrate, the government argued that the defendant's silence proved that he knowingly possessed counterfeit notes. *Id.* at 1008. The district court determined first that the defendant was not in custody during the transaction and therefore was not entitled to a *Miranda* warning. *Id.* at 1009. Next, the court discussed the United States Supreme Court case of *Jenkins v. Anderson*, 447 U.S. 231 (1980), focusing on Justice Stevens's concurring opinion which noted that "the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official obligation to speak." *See id.* at 1010 (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring)). The court then concluded that absent any official compulsion to speak, the use of a defendant's pre-arrest and pre-*Miranda* silence in the government's case-in-chief turns on the rules of evidence and not the Constitution. *See id.* at 1011 (noting that the court cashier was not a law enforcement officer and thus defendant was not compelled to respond). And despite its *Caro* opinion a few months earlier, the Second Circuit affirmed the district court's opinion in an unreported summary order. *See* United States v. Robinson, 685 F.2d 427 (1982) (granting summary order). In a footnote to its order, however, the Second Circuit notes that "a summary order is not citable as precedent." *Id.*

187. *See supra* note 154 and accompanying text (discussing the use of *Griffin v. California* to bar the admission of a defendant's pre-trial silence).

188. *See supra* notes 106-12, 117, 121-26 and accompanying text (discussing the idea that *Doyle v. Ohio* and *Jenkins v. Anderson* limited their holdings to the use of silence to impeach a defendant's credibility).

189. *See supra* notes 145-84 and accompanying text (discussing courts that distinguish between pre- and post-custodial silence and pre- and post-arrest silence when deciding whether the government can use silence to prove guilt).

offending the Constitution.[190] In *United States v. Rivera*, the Eleventh Circuit considered whether the prosecution violated the petitioner's constitutional rights when it commented in its case-in-chief on her silence at three different points during the initial investigation and her subsequent arrest.[191] First, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony that she was "without any visible signs of agitation or nervousness about being singled out for questioning" by a customs inspector at an airport luggage carousel.[192] Second, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony that the petitioner failed to protest or react after a customs inspector discovered cocaine in her suitcase but before her arrest.[193] And third, the court considered whether the government violated the petitioner's constitutional rights when it introduced testimony in its case-in-chief that the petitioner was not "physically upset" after the customs inspector placed her under arrest and read her the *Miranda* warning.[194]

Citing *Jenkins v. Anderson*, the *Rivera* court concluded that the government may comment on a defendant's silence in its case-in-chief when it occurs before her arrest and before she is read the *Miranda* warnings.[195] Then, citing *Fletcher v. Weir*, the court determined that the government may comment on a defendant's post-arrest but pre-*Miranda* silence, even if a defendant is in custody.[196] To support these conclusions, the court reasoned that because the petitioner had not yet received the *Miranda* warning, then "she had not yet received such affirmative assurances . . . [that] the government could unquestionably comment on her silence[]."[197] The *Miranda* warning, and not the petitioner's arrest or

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190. United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); *see also* United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (holding that the government cannot constitutionally use a defendant's silence in its case-in-chief).

191. *Rivera*, 944 F.2d at 1567, 1569 n.20.

192. *Id.* at 1567. The petitioner and two others arrived at Miami International Airport from Barranquilla, Colombia. *Id.* at 1565. A customs inspector approached the group at a luggage carousel and asked them questions related to the purpose and itinerary of their trip. *Id.*

193. *Id.* at 1567. After approaching the petitioner and her companions at the luggage carousel, the customs inspector decided to examine their luggage and escorted them to an inspection area. *Id.* at 1565. Finding a false bottom in petitioner's suitcase, the inspector discovered cocaine. *Id.*

194. *Id.* at 1567. After the customs inspector discovered cocaine in the petitioner's luggage, she was taken to a separate room, read the *Miranda* warning, and placed under arrest. *Id.* The court also noted that the government, in its closing statement to the jury, asked the jury to infer that the petitioner was guilty because of her consistent indifference to the custom inspector. *Id.* at 1567.

195. *Id.* at 1568 n.10. The court assumed that even though the petitioner objected to the inspector's testimony about the petitioner's silent demeanor, and not specifically about her silence, the inspector's testimony could be construed as comments on the petitioner's silence. *Id.* at 1567-68.

196. *Id.* at 1568 n.11.

197. *Id.* at 1568 n.12. The *Rivera* court pointed to that part of *Fletcher v. Weir* where the court explicitly rejected the idea that an arrest, by itself, induces a defendant to remain silent. *See id.*

custody, is the triggering mechanism that assures a defendant that his silence will not be used against him.[198] *Rivera* stated that the government was "clearly entitled" to comment on the petitioner's pre-*Miranda* silence and that the government could argue that the petitioner's silence or silent demeanor was inconsistent with her claim of innocence.[199] Notably, the *Rivera* court decided the case under the Fourteenth Amendment's due process restrictions first articulated in *Doyle v. Ohio* and despite the availability of *Griffin v. California*, it did not assert, or even imply, that the Fifth Amendment's privilege against self-incrimination bore at all on the issue.

The Fifth Amendment does, however, prohibit the prosecution from commenting on a defendant's post-*Miranda* silence.[200] In *United States v. Tenorio*, the Eleventh Circuit considered whether the government may comment on a defendant's post-*Miranda* silence to establish proof of his guilt.[201] Citing

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(citing Fletcher v. Wier, 455 U.S. 603, 606-07 (1982)).

198. *Id.* at 1568. The *Rivera* court suggested that the government's use of the petitioner's silence after she was read the *Miranda* warnings may have been in error, but that the error was harmless. *Id.* at 1569.

199. *Id.* The Eleventh Circuit first intimated that the prosecution could use a defendant's pre-trial silence in its case-in-chief in *United States v. Nabors*, 707 F.2d 1294, 1299 (11th Cir. 1983). In *Nabors*, the prosecution presented evidence in its case-in-chief that the defendant failed to respond to an insurer's request for information about damage to an aircraft that was destroyed to cover up a drug smuggling operation. *Id.* at 1295-96, 1297. The appellant objected to this evidence, arguing that its admission violated his right to remain silent under the Fifth Amendment. *Id.* at 1298. Admitting that the issue before it was "difficult to decide" the court noted nonetheless that the case was unlike *Doyle v. Ohio* and *Jenkins v. Anderson* because the government here attempted to use silence to infer guilt, and not to impeach the defendant, and because the silence here was not in response to police interrogation, but to a private insurance company. *Id.* Undeterred by a lack of authority espousing the government's use of silence in its case-in-chief, the court determined that since the appellant never asserted his right to remain silent when he refused to respond to the insurer's request for information, he could not claim it at trial. *Id.* at 1299. The court noted that had the appellant said something to his insurer, the government could use that statement against him and it saw no reason why the same should not be true for the use of his silence. *Id.*

The Eleventh Circuit reaffirmed its ruling in *Rivera* in *United States v. Simon*, 964 F.2d 1082 (11th Cir. 1992). In *Simon*, the appellant objected to the government's use of his pre-arrest silence in its case-in-chief. *Id.* at 1086 n.*. The court rejected appellant's contention, citing to *Rivera* for the proposition that "silence is admissible in the absence of *Miranda* warnings." *See id.* (citing *Rivera*, 944 F.2d at 1568). More recently, the Eleventh Circuit had an opportunity to reconsider its *Rivera* decision when it decided *United States v. Campbell*, 223 F.3d 1286 (11th Cir. 2000) (per curiam). In *Campbell*, the appellant contended that the government impermissibly commented on his pre-*Miranda* silence in its case-in-chief and that *Rivera* was decided wrongly. *Id.* at 1290. The court, however, chose not to address the merit of appellant's objection, instead finding that even if the court erred, the error was not plain (and thus not reversible). *Id.*

200. *See* United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995).

201. *Id.* at 1105-06. In *Tenorio*, a customs inspector at Miami International Airport searched

Griffin v. California and *Doyle v. Ohio*, the court ruled that the trial court violated the Fifth and Fourteenth Amendments when it allowed the government to comment on the defendant's post-*Miranda* silence.[202] First, the court determined that the government failed to draw time distinctions that would have allowed the jury to understand whether the prosecutor commented on the defendant's pre- or post-*Miranda* silence.[203] Second, the court concluded that the jury could have convicted the defendant solely on the defendant's post-*Miranda* silence.[204] As such, the trial court violated the defendant's Fourteenth Amendment right to due process when it allowed the government to impeach him with his post-*Miranda* silence, and it violated the defendant's Fifth Amendment privilege against self-incrimination when it allowed the government to use his post-*Miranda* silence to prove his guilt.[205] Notably, in a concurring opinion, Judge Edmondson endorsed the *Rivera* opinion when he wrote, "[t]he law of this circuit is settled that evidence of pre-*Miranda* silence is admissible in the government's case-in-chief as substantive proof of guilt."[206] So while the government may not constitutionally comment on a defendant's silence after he has been assured that his silence will carry no penalty, the government may comment on his pre-*Miranda* silence, even in its case-in-chief, because the defendant was never promised that his silence would not be used against him.

Both the Fourth and Fifth Circuits agree with the Eleventh Circuit that the prosecution may use a defendant's pre-*Miranda* silence if that silence is inconsistent with the defendant's innocence.[207] For example, in *United States v.*

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the defendant's suitcase, discovered heroin, and apprised the defendant of his rights. *Id.* at 1104-05. At trial, the inspector testified that the defendant was not surprised when heroin was found in his bag. *Id.* at 1105. The defendant, after having waived his privilege against self-incrimination, testified that the suitcase was loaned to him, and that he did not tell the customs inspector this exculpatory story because he decided to exercise his right to remain silent. *Id.* The prosecution argued in its summation that the defendant's silence immediately after the inspector discovered heroin in his suitcase evidenced his guilt. *Id.* at 1105. The trial court overruled the defendant's objection to the use of his silence, finding that the government was allowed to comment on the defendant's pre-*Miranda* silence. *Id.* at 1106.

202. *See id.* (citing Griffin v. California, 380 U.S. 609 (1965); Doyle v. Ohio, 426 U.S. 610 (1976)).

203. *Id.*

204. *Id.*

205. *Id.* The court concluded that the government violated the defendant's right to due process because the *Miranda* warnings carry an implicit assurance "that silence will carry no penalty" and because silence has "low probative value." *See id.* (citing *Doyle*, 426 U.S. at 617-19). The court also concluded that the trial court violated the defendant's Fifth Amendment right presumably because the defendant's "silence was the touchstone of the government's case-in-chief." *Id.* at 1107.

206. *See id.* at 1108 (Edmondson, J., concurring).

207. *See* United States v. Cain, No. 97-4059, 1998 WL 141205 (4th Cir. Mar. 27, 1998) (per curiam) (holding government may comment on defendant's pre-*Miranda* silence in its case-in-chief); United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995) (holding government may use

Cain, an unpublished opinion from the Fourth Circuit, the court considered per curiam whether a trial court erred when it allowed a witness for the prosecution to testify that the defendant "really didn't want to answer any . . . questions" during a police search of his trailer.[208] While the court was unable to determine whether or when the defendant was *Mirandized*, it did rule that the government could have commented on a defendant's silence so long as it occurred before *Miranda* warnings were given.[209] Prior to *Cain*, the Fourth Circuit twice concluded that the government may comment on a defendant's pre-*Miranda* silence without offending the Constitution.[210] First, in *Folston v. Allsbrook*, the Fourth Circuit ruled that the government may use a defendant's silence in its case-in-chief when that silence was not a result of police interrogation but instead was observed by an accomplice while both were held in the same jail cell.[211] Noting that the government had not yet induced the defendant's silence with a *Miranda* warning, the court concluded that "his silence was [not] so ambiguous and so without probative value as to be inadmissible."[212] Later, in *United States v. Love*, the Fourth Circuit considered more directly whether the government may comment on a defendant's pre-*Miranda* silence at his arrest in its case-in-chief.[213] In *Love*, a witness for the prosecution, a police officer, testified that the defendants failed to explain their presence at the scene of a crime.[214] The defendants objected, presumably contending that the Constitution prohibits the government from using their silence to infer guilt. The court disagreed, explaining that the defendants had not received any *Miranda* warnings at the time the witness had observed their silence.[215] Relying on *Fletcher v. Weir*, the court concluded that the Constitution does not bar the government from using a

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pre-*Miranda* silence in its case-in-chief if its probative value is high).

208. *Cain*, 1998 WL 141205 at *6.

209. *See id.* (citing United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991)).

210. United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985); Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982).

211. *Folston*, 691 F.2d at 187. In *Folston*, an accomplice testified against the appellant to conversations he had with the appellant and a third accomplice while all three were held in a jail cell. *Id.* at 185. Over the appellant's objections, the accomplice testified that the appellant remained silent when he asked the appellant why he shot the victim. *Id.* at 187.

212. *Id.* The *Folston* court relied on *Fletcher v. Weir* for the idea that "*Doyle* is inapplicable when the record does not indicate that the defendant 'received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.'" *Id.* (quoting Fletcher v. Weir, 455 U.S. 603, 605 (1982)). Despite the fact that *Doyle* and *Fletcher* talked about the use of silence to impeach a defendant, the court made no analytical distinction between the use of silence to impeach a defendant's credibility and the use of silence to prove the defendant's guilt—both uses could survive a constitutional attack if the silence either preceded a *Miranda* warning or occurred outside a police interrogation and without a *Miranda* warning. *Id.*

213. *Love*, 767 F.2d at 1063.

214. *Id.*

215. *Id.* The opinion does not indicate whether or when the defendants received a *Miranda* warning.

defendant's pre-*Miranda* silence against him.[216] Both *Folston v. Allsbrook* and *United States v. Love* read *Doyle* and *Fletcher* to allow the government to comment on a defendant's pre-*Miranda* silence, despite the fact that the government was using the defendant's silence to prove his guilt and not just to impeach his credibility. Only when a defendant relies on the implicit promises of a *Miranda* warning will the Fourth Circuit prohibit the government from using his silence against him.[217]

While the Fifth Circuit initially prohibited the use of silence to evidence guilt, it has grown increasingly sympathetic to the idea that the use of silence, when that silence is not induced by any governmental action, is not constitutionally defective.[218] In 1976, one month before the United States Supreme Court explained in *Doyle v. Ohio* that due process prohibits the government from using a defendant's post-*Miranda* silence to impeach him, the Fifth Circuit determined that the government may not comment on a defendant's silence—either pre- or post-*Miranda*—because such a use, when analyzed under evidentiary rules, is intolerably prejudicial.[219] Relying largely on the Supreme Court's decision in *United States v. Hale*, the Fifth Circuit, in *United States v. Impson*, did not decide on constitutional grounds whether the trial court erred when it allowed the government to comment on the defendant's pre-*Miranda* silence in its case-in-chief, but rather relied on the rules of evidence.[220] Since the court analyzed the case under evidentiary rules, and not the Constitution, it made little difference to the court whether the government used silence to impeach or to evidence guilt, or whether the silence was observed before or after a *Miranda* warning—the admissibility of silence turned on whether its probative value exceeded its prejudicial impact.[221] *Impson* reflects the Fifth Circuit's hostility toward the use of silence in any guise, implicitly broadening the reach of *Miranda* by refusing to distinguish between silence either before or after the

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216. *Id.* (citing *Fletcher*, 658 F.2d at 1129).

217. *See supra* notes 207-08 and accompanying text (discussing United States v. Cain, No. 97-4059, 1998 WL 141205 (4th Cir. Mar. 27, 1998)).

218. *Compare* United States v. Impson, 531 F.2d 274, 279 (5th Cir. 1976) (holding use of pre- or post-*Miranda* silence is intolerably prejudicial), *with* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (holding Fifth Amendment does not bar the use of silence that was not induced by the government).

219. *Impson*, 531 F.2d at 279. In *Impson*, a police officer testified that the defendant remained silent following his arrest. *Id.* at 275. The defendant objected, arguing that he was not apprised of his right to remain silent and that the officer's testimony infringed on his right to remain silent. *Id.* at 276.

220. *Id.* at 275-76.

221. *Id.* at 276-78; *see also* United States v. Henderson, 565 F.2d 900, 905 (5th Cir. 1978) (holding that admissibility of silence turns on its probative value). The *Impson* court chose not to distinguish between pre- and post-*Miranda* silence in part because such a distinction might reward police for failing to inform a suspect immediately upon his arrest of his right to remain silent. *Impson*, 531 F.2d at 277. This argument assumes, of course, that police officers will willingly manipulate constitutional requisites to their advantage.

Miranda warning.

In the wake of *Fletcher v. California*, the Fifth Circuit conceded in *United States v. Musquiz* that the government can comment on a defendant's post-arrest yet pre-*Miranda* silence.[222] After explaining that the Supreme Court had since narrowed the breadth of its *Miranda* decision, the court explained that the Constitution does not bar the government's use of a defendant's pre-*Miranda* silence to impeach his credibility.[223] Furthermore, the court expressly recognized that silence not induced by a *Miranda* warning can have probative value and, citing to the Eleventh Circuit's *Rivera* opinion, it appeared sympathetic to the use of pre-*Miranda* silence in the government's case-in-chief.[224] Notably, the court acknowledged the circuit's recent hostility to the use of silence, writing that this "hostility seems to have flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment" that can no longer be justified under the Constitution.[225]

Finally, in *United States v. Zanabria*, the Fifth Circuit expressly ruled that the Fifth Amendment does not protect a defendant's silence if that silence was not induced by government action.[226] In *Zanabria*, the defendant argued that the government's use of his pre-arrest silence in its case-in-chief violated his right to remain silent under the Fifth Amendment.[227] The court noted that "the silence at issue was neither induced by nor a response to any action by a government agent" and explained that the Fifth Amendment only protects against compelled self-incrimination and not every incriminating silence.[228] While *Zanabria* did not explicitly rule that the *Miranda* warning itself serves as the triggering mechanism to determine whether police induced a defendant's silence, it recognized that the Fifth Amendment only protects an incriminating silence observed after the government either compelled it or assured the defendant that his silence would not be used against him.

The Ninth Circuit, however, has determined that custody, and not the *Miranda* warnings, triggers the protections afforded by the Fifth Amendment—a

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222. United States v. Musquiz, 45 F.3d 927, 930-31 (5th Cir. 1995). In *United States v. Musquiz*, the defendant offered an exculpatory story for the first time at his trial. *Id.* at 930. The prosecution, in its cross-examination of the defendant, inquired why the defendant had not offered this explanation at the time of his arrest, but before he was read the *Miranda* warning. *Id.*

223. *Id.*

224. *Id.* at 930-31.

225. *Id.* at 930.

226. United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).

227. *Id.* In *United States v. Zanabria*, the defendant was tried for the unlawful possession, distribution, and importation of controlled substances. *Id.* at 591. While the defendant chose not to testify in his own defense, he argued that his actions were the product of duress. *Id.* at 592. In an attempt to rebut the defendant's defense, the arresting customs officer testified that the defendant failed to make mention of any evidence pointing to duress before his arrest. *Id.* at 593. The government used this testimony in its closing remarks to rebut the defendant's duress defense. *Id.*

228. *Id.*

suspect's silence is fair game if it occurs before his arrest but not after.[229] In 1998, the Ninth Circuit concluded, in *United States v. Oplinger*, that the government may comment on a defendant's pre-arrest silence without offending either due process or the Fifth Amendment.[230] In *Oplinger*, the appellant appealed his conviction for bank fraud on the ground that the prosecution, in its direct case against him, violated his privilege against self-incrimination when it elicited testimony from his employer that he remained silent when questioned about a number of suspicious transactions.[231] The court disagreed.[232] According to the unambiguous language of the Fifth Amendment, the court opined, the privilege against self-incrimination only comes into play when government compels silence.[233] Here, the appellant's silence was observed by his employer, not the police—as such, the appellant failed to raise a valid constitutional claim.[234] The *Oplinger* court explained that the "self-incrimination clause was intended as a 'limitation on the investigative techniques of government, not as an individual right against the world.'"[235] The difficulty for the circuit, however, rested in determining when governmental techniques were compelling enough to trigger a suspect's Fifth Amendment right to remain silent.

The Ninth Circuit resolved partially that question in 2000 when it decided *United States v. Whitehead*.[236] In *Whitehead*, the prosecution commented on the appellant's post-arrest but pre-*Miranda* silence in its case-in-chief.[237] The court held that the comment violated the appellant's right to remain silent under the Fifth Amendment, presumably because the appellant was in custody when police observed his silence.[238] Notably, the *Whitehead* court suggests that because the

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229. *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (holding government may not use defendant's post-arrest and pre-*Miranda* silence in its case-in-chief); United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding government may use defendant's pre-arrest and pre-*Miranda* silence without offending the Constitution).

230. *Oplinger*, 150 F.3d at 1067.

231. *Id.* at 1065-66.

232. *Id.* at 1066.

233. *Id.* at 1066-67. The court was highly persuaded by Justice Stevens's concurrence in *Jenkins v. Anderson*. *Id.* at 1066. The court cited with approval Justice Stevens's opinion that the privilege against self-incrimination is simply irrelevant to a person's decision to remain silent before he has any contact with the police. *See id.* (citing United States v. Jenkins, 447 U.S. 231, 243-44 (1980) (Stevens, J. concurring)).

234. *Id.* at 1067.

235. *Id.* (quoting United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997)). While the court notes that the First, Seventh, and Tenth Circuits disagree with its holding, it wrote that "the position those courts have endorsed is simply contrary to the unambiguous text of the Fifth Amendment, which plainly states that '[n]o person . . . shall be *compelled* in any criminal case to be a witness against himself.'" *See id.* at 1067 (citing U.S. CONST. amend. V (alteration in original)).

236. United States v. Whitehead, 200 F.3d 634 (9th Cir. 2000).

237. *Id.* at 637.

238. *Id.* at 639. The court explicitly stated that its holding does not conflict with *United States*

right to remain silent derives from the Constitution and not from the *Miranda* warnings, comment on a suspect's silence after his arrest violates the Fifth Amendment regardless of whether a suspect is *Mirandized*.[239] This approach extended the reach of *Doyle v. Ohio* to prohibit the government's use of silence even without a *Miranda* warning.[240] Under *Whitehead*, a suspect's Fifth Amendment right to remain silent attaches at his arrest or custody, before the government implicitly assures him that his silence will not be used against him and even before the police begin to interrogate him. And while pre-arrest silence is still fair game, an arrest or custody in the Ninth Circuit must be the type of "investigative technique" that triggers the Fifth Amendment, even though the court failed to explain how an arrest on its own compels suspects to remain silent.

In more recent cases, the Ninth Circuit has reaffirmed its rule that the right to remain silent attaches at the arrest, not when a suspect is read the *Miranda* warnings. Although the government may comment on a suspect's pre-arrest silence in its case-in-chief, it may not comment on a suspect's post-arrest silence, regardless of when or whether the suspect was *Mirandized*.[241] For example, in *United States v. Velarde-Gomez*, the court considered whether evidence of a

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v. Oplinger because in that case the appellant was not in custody. *Id.*

The *Whitehead* court relied on two Ninth Circuit decisions to support its holding. *Id.* at 638-39. First, it cited *Douglas v. Cupp,* 578 F.2d 266, 267 (9th Cir. 1978), which held that the prosecution may not comment on a defendant's post-arrest silence in its case-in-chief regardless of whether the *Miranda* warnings were given. *Whitehead*, 200 F.3d at 638-39; *Douglas*, 578 F.2d at 267. Of note, Judge Carter, in his dissenting opinion to *Douglas*, stated that the Supreme Court has not established a "per se rule that under no circumstances can evidence of silence after an arrest be admitted without violating the Constitution." *Id.* at 268 (Carter, J. dissenting). In fact, the Supreme Court would soon rule that pre-*Miranda* silence could be used to impeach a defendant. *See supra* notes 131-38 and accompanying text (discussing *Fletcher v. Weir* and the use of pre-*Miranda* silence). Second, the court cited *United States v. Baker*, 999 F.2d 412 (9th Cir. 1993). *Whitehead,* 200 F.3d at 639. In *Baker*, the Ninth Circuit held that the government's use of a defendant's silence in its closing summary violated the defendant's due process rights, because the jury had no way of distinguishing whether the prosecutor was using the defendant's silence before or after the *Miranda* warnings. *Baker*, 999 F.2d at 415. And while the *Baker* court implicitly suggested that the government can safely comment on pre-*Miranda* silence, the *Whitehead* court discounted this suggestion, explaining first that the statement was rank dicta, and second that it otherwise did not comport with the court's *Douglas* precedent. *Whitehead*, 200 F.3d at 639; *Baker*, 999 F.2d at 415.

239. *Whitehead*, 200 F.3d at 638; *see also* United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (noting *Whitehead* recognized that silence is protected regardless of a *Miranda* warnings because the right is derived from the Constitution and not from the warning itself).

240. *See* United States v. Bushyhead, 270 F.3d 905, 912 (9th Cir. 2001) (noting that *Whitehead* broadened the reach of *Doyle*).

241. *See* United States v. Beckman, 298 F.3d 788, 795 (9th Cir. 2002) (holding government may use defendant's pre-arrest silence in its case-in-chief); *see also* United States v. Velarde-Gomez, 269 F.3d 1023, 1033 (9th Cir. 2001) (holding government cannot use defendant's post-arrest yet pre-Miranda silence in its case-in-chief).

defendant's silent demeanor after his arrest but before he was *Mirandized* violated his Fifth Amendment privilege against self-incrimination.[242] First, the court concluded that evidence of a suspect's silent demeanor is equivalent to evidence of silence.[243] The court then concluded that the government violated the appellant's right to remain silent under the Fifth Amendment when it commented on his pre-*Miranda* silence in its case-in-chief, explaining that *Doyle v. Ohio* announced that the Fifth Amendment (and not the *Miranda* warnings) implicitly assures a person that his silence will carry no penalty.[244] Since the Fifth Amendment's right to remain silent attached when the appellant was in custody, the "individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given."[245]

Unfortunately, the *Velarde-Gomez* court both misconstrued *Doyle* and the facts of its case when it concluded that the government violated the appellant's Fifth Amendment rights when it commented on the defendant's pre-*Miranda* but post-arrest silence. First, *Doyle* held that the *Miranda* warning itself implicitly promises a suspect that his silence will carry no penalty and that the use of post-*Miranda* silence violates the Fourteenth Amendment, not the Fifth Amendment.[246] Second, the defendant's silent demeanor was observed when the customs inspector informed the appellant why he was being detained—it was not observed in response to a custodial interrogation.[247] Nonetheless, *Velarde-Gomez* reaffirmed that use of post-arrest but pre-*Miranda* silence violates the Fifth Amendment.

One week after the court filed its *Velarde-Gomez* opinion, the Ninth Circuit decided *United States v. Bushyhead* and this time ruled that the government may not constitutionally comment on a suspect's silence when that silence evidences

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242. *Velarde-Gomez*, 269 F.3d at 1025-26. In this case, the appellant-defendant moved the trial court to exclude evidence of his silence and silent demeanor both before and after he was *Mirandized* by customs inspectors. *Id.* at 1026. The trial court granted the motion, but later reconsidered its ruling and permitted the government to introduce evidence of the appellant's demeanor both before and after he was read the *Miranda* warnings. *Id.* at 1026-27. At trial, the government then elicited testimony from the customs inspector that the appellant was non-responsive before he was read the *Miranda* warnings. *Id.* at 1027. And again in its closing summary to the jury, the government commented on the appellant's calm, relaxed, and emotionless demeanor when customs inspectors discovered marijuana in his car. *Id.* at 1028.

243. *Id.*

244. *Id.*

245. *Id.* at 1029. To support this analysis, the court cited *United States v. Whitehead*, which recognized "that because the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given ... comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *Id.* (citing United States v. Whitehead, 200 F.3d 634, 638 (9th Cir. 2000)). Again, the court failed to explain how an arrest without interrogation compels a suspect to incriminate himself.

246. *See supra* notes 106-17 and accompanying text (discussing Doyle v. Ohio).

247. *Velarde-Gomez*, 269 F.3d at 1027-28.

the suspect's invocation of his right to remain silent.[248] In *Bushyhead*, the trial court admitted testimony during the government's case-in-chief that the appellant, after his arrest but before he was read the *Miranda* warning, stated to police "'I have nothing to say, I'm going to get the death penalty anyway.'"[249] Summarily ruling that the statement was not an unsolicited confession but rather an invocation of silence itself, the court first concluded that the testimony violated the appellant's Fifth Amendment right to remain silent.[250] Like *Velarde-Gomez*, the court explained that its decision in *United States v. Whitehead* extended *Doyle v. Ohio* to protect pre-*Miranda* silence and statements that invoke silence.[251] The Ninth Circuit, then, prohibits comment on a defendant's post-arrest but pre-*Miranda* silence and statements that invoke his right to remain silent and supports this view with a liberal reading of *Doyle v. Ohio*. The government may, however, still comment in its case-in-chief on a defendant's silence so long as the silence was observed before his arrest.[252]

Generally, the circuits that permit the government to use a defendant's silence in its case-in-chief advance two reasons to support their conclusions. First, these circuits suggest that without the affirmative assurances embodied in the *Miranda* warnings that a suspect's silence will carry no penalty, the government may comment on a suspect's pre-*Miranda* silence without violating the Fourteenth Amendment's Due Process Clause.[253] For support, these circuits rely on the doctrinal underpinnings of *Doyle v. Ohio* to allow the government to use a defendant's silence not only to impeach his credibility but to infer guilt. Second, these circuits opine that without some element of official coercion—required by the plain language of the Fifth Amendment—that induces a suspect to remain silent, the Fifth Amendment is simply irrelevant.[254] Under the Ninth Circuit's analysis, only when the court treats an arrest itself as sufficiently coercive will the Fifth Amendment bar the use of a suspect's post-arrest silence.[255] So while the circuits that prohibit the use of a suspect's silence

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248. United States v. Bushyhead, 270 F.3d 905, 913 (9th Cir. 2001).

249. *Id.* at 911.

250. *Id.* at 912-13. Without analysis, the court determined that the appellant invoked his right to remain silent when he told police, "I have nothing to say, I'm going to get the death penalty anyway." *Id.* at 912. Presumably, the trial court allowed the statement as a voluntary confession to the crime. The court, however, fails to explain how the trial court abused its discretion.

251. *Id.*

252. *See* United States v. Beckman, 298 F.3d 788, 795 (9th Cir. 2002) (holding that the use of pre-arrest and pre-*Miranda* silence to prove guilt is permissible); Johnson v. LaMarque, No. C-02-00394 CRB (PR), 2003 WL 1798117, at *4 (N.D. Cal. Apr. 2, 2003) (holding government may use pre-arrest silence in its case-in-chief).

253. *See generally supra* Part IV.B (discussing use of pre-*Miranda* silence under Fourteenth Amendment).

254. *See generally supra* Part IV.B (discussing use of pre-*Miranda* silence under Fifth Amendment).

255. *See supra* note 238 and accompanying text (discussing the Ninth Circuit's opinion that arrest is coercive enough to implicate a suspect's Fifth Amendment rights).

in the government's case-in-chief advance a broad view of the Fifth Amendment's reach and a textual (and narrow) view of the Court's post-*Miranda* decisions, those circuits that allow silence advance a textual (and narrow) construction of the Fifth Amendment together with a broad view of the post-*Miranda* decisions.

V. A CASE FOR THE USE OF SILENCE IN THE GOVERNMENT'S CASE-IN-CHIEF

To resolve whether a trial court may constitutionally permit the government to comment on a defendant's silence to demonstrate proof of his guilt requires a two-step inquiry: first, whether the *Miranda* warnings (and not the arrest) serve as the triggering mechanism for the Fifth Amendment's privilege against compelled self-incrimination, thus protecting only post-*Miranda* silences; and second, whether the Fourteenth Amendment's Due Process Clause prohibits the use of pre-*Miranda* silence when that silence was neither induced nor compelled by the government. Despite the inconsistent results in the federal circuits, the United States Supreme Court's jurisprudence has resolved partially each of these issues, although without explicitly determining the constitutionality of the use of silence in the government's case-in-chief. When read together, these cases beg the conclusion that the Constitution simply does not bar the use of a defendant's pre-*Miranda* silence in the government's case-in-chief.

A. The Fifth Amendment Does Not Bar the Use of a Defendant's Silence in the Government's Case-in-Chief

The Supreme Court teaches that the *Miranda* warnings themselves serve as the triggering mechanism for the Fifth Amendment's privilege against compelled self-incrimination. The Fifth Amendment is simply not implicated before the government is required to recite the warnings because the Fifth Amendment does not reach beyond the custodial interrogation that first prompted the *Miranda* Court to expand the Fifth Amendment's protection. The Court, in *Miranda v. Arizona*, perfected a defendant's rights under the Fifth Amendment by requiring the government to first warn a suspect of his right to remain silent and his right to counsel before it begins a custodial interrogation.[256] The coercive atmosphere of the station-house interview prompted the Court to move beyond the traditional due process test which required proof that, in the totality of the circumstances, a confession had to be voluntary to be admissible against the defendant.[257] In linking its ruling to the dangers inherent to a custodial interrogation, the Court recognized the "intimate connection between the privilege against self-incrimination and police custodial questioning."[258] The opinion, designed to protect the core rights found under the Fifth Amendment, announced a Constitution-based exclusionary rule that added to, but never supplanted,

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256. *See supra* Part II (discussing Miranda v. Arizona, 384 U.S. 436 (1966)).

257. *See supra* Part II (discussing *Miranda*).

258. *See Miranda*, 384 U.S. at 458 (narrowing its ruling to custodial interrogation); *see also supra* notes 65-77 and accompanying text (discussing *Miranda*).

traditional Fifth Amendment jurisprudence.[259]

Since *Miranda,* the Court has affirmed that the Constitution does not demand the exclusion of a defendant's incriminating yet unwarned statements or silences. In *Rhode Island v. Innis*, the Court expanded the definition of "custodial interrogation" (and thus the reach of the Fifth Amendment's exclusionary rule) to include express questioning or its "functional equivalent."[260] The *Innis* Court defined "functional equivalent" as "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."[261] Thus, while the Court expanded the reach of *Miranda*, it affirmed that only responses to an interrogation or its equivalent are inadmissible under the Fifth Amendment's exclusionary rule since only then could a statement (or silence) be compelled. Furthermore, the Court in both *California v. Beheler* and *Berkemer v. McCarty* suggested that while custody (or an arrest) determines when a suspect is owed a *Miranda* warning, the warning itself determines the admissibility of incriminating responses in the course of an official interview.[262] Justice Marshall, writing for the majority in *Berkemer,* succinctly noted that "we have frequently reaffirmed the central principle established by [*Miranda*]: if the police take a suspect into custody and then ask him questions without informing him of [his rights], his responses cannot be introduced into evidence to establish his guilt."[263] The arrest or custody of a suspect only requires the police to warn him of his rights. Only when the government attempts to admit his incriminating statements or silences made in the course of a custodial interrogation (or its equivalent) will the Fifth Amendment's exclusionary rule prevent their admission. The Fifth Amendment is not triggered until a suspect is compelled to incriminate himself and a suspect is only compelled to incriminate himself when he is asked to respond to an official question after his arrest or custody. The failure to *Mirandize* a suspect in the course of a custodial interrogation creates a presumption of compulsion and demands the exclusion of incriminating responses even if those incriminating responses were voluntary.[264]

This idea was reaffirmed in *Oregon v. Elstad.*[265] In *Elstad*, the Court considered whether an unwarned yet voluntary statement made in the course of a custodial interrogation rendered a later warned and voluntary confession inadmissible.[266] While the Court was concerned with the admissibility of a

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259. *See supra* note 96 (discussing *Dickerson v. United States*, 530 U.S. 428, 432 (2000), which held that *Miranda* announced a constitutional ruling and not merely a constitutional safeguard).

260. *See supra* note 87 (discussing Rhode Island v. Innis, 446 U.S. 291 (1980)).

261. *Innis*, 446 U.S. at 301; *see supra* notes 87-88 (discussing *Innis*, 446 U.S. at 291).

262. *See supra* notes 89-95 and accompanying text (discussing *Berkemer* and *Beheler*).

263. Berkemer v. McCarty, 468 U.S. 420, 429 (1984).

264. *See* Oregon v. Elstad, 470 U.S. 298, 307 (1985) (discussing *Miranda*).

265. *Id.* at 318 (holding that an unwarned response to police questioning does not prevent defendant from later waiving his rights and confessing).

266. *Id.* at 300. In *Elstad*, the defendant made voluntary yet incriminating statements to police

subsequent and fully-warned statement, its opinion reaffirmed the core principle of *Miranda* that "[t]he Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony."[267] Thus, the defendant's answers to police questioning while he was in custody and subjected to custodial interrogation were inadmissible under *Miranda* despite the fact that his responses were wholly voluntary and uncoerced.[268] The Court concluded that "[w]hen police *ask questions* of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief."[269] Because *Miranda*'s presumption of compulsion is intrinsically tied to interrogation, logic dictates that without interrogation there can be no compulsion—and without compulsion, the constitutional prohibition against compelled self-incrimination does not apply. Silence, then, observed after an arrest but before the *Miranda* warning is not compelled unless it is in response to a question, and therefore its use is determined, not under the Fifth Amendment's privilege against self incrimination, but under the routine rules of evidence that ask whether the probative significance of that silence is greater than its prejudice to the defendant.

Justice Stevens, in his concurrence in *Jenkins v. Anderson*, agrees with this analysis.[270] In *Jenkins*, the Court held that the government can use a defendant's pre-arrest silence to impeach his credibility at trial without violating due process since no governmental action induced the defendant to remain silent.[271] Justice Stevens, while concurring with the majority's result, wrote, "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."[272] The Justice continued, "[t]he fact that a citizen has a constitutional right to remain silent *when he is questioned* has no bearing on the probative significance of his silence before he has any contact with the police."[273] Justice Stevens warned, "[a] different view ignores the clear words of the Fifth Amendment."[274] So, while the Fifth Amendment may protect a defendant who submits to interrogation, it

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at his home without the benefit of a *Miranda* warning. *Id.* at 301. Later, at the police station, the defendant was first *Mirandized*, waived his rights, and offered a full statement to the police. *Id.* The defendant argued that his first unwarned, and thus inadmissible, statements tainted his later warned statement as to render it too inadmissible. *Id.* at 302.

267. *Id.* at 306-07.

268. *Id.* at 307-08.

269. *Id.* at 317 (emphasis added).

270. *See supra* note 127 (discussing Justice Stevens's concurrence).

271. *See supra* notes 122-26 and accompanying text (discussing *Jenkins*).

272. *Jenkins*, 447 U.S. at 241, 243 (Stevens, J. concurring) (arguing that the Fifth Amendment does not apply in the pre-arrest context).

273. *Id.* at 243 (emphasis added).

274. *Id.* at 244. In the first footnote to his concurrence, Justice Stevens redacted the language of the Fifth Amendment, which reads "[n]o person ... shall be compelled in any criminal case to be a witness against himself." *Id.* at 241 n.1.

simply has no play before he is owed a *Miranda* warning—and a suspect only is owed a warning incident to custodial interrogation.[275]

Those federal circuits which bar the government from using a defendant's pre-*Miranda* silence in its case-in-chief rely primarily on a broad reading of *Griffin v. California*.[276] *Griffin* concluded that the Fifth Amendment prohibits the prosecution from commenting on a defendant's decision not to testify at his trial.[277] Some federal circuits, however, suggest that *Griffin* permits the conclusion that the Fifth Amendment protects a defendant's utterances (and silences) well before his trial and even before his arrest.[278] This view, however, is an unjustified extension of both *Griffin* and constitutional law.

To illustrate, the Seventh Circuit, in *Savory v. Lane*, concluded that the government's use of the defendant's pre-arrest silence in its case-in-chief violated his rights under the Fifth Amendment because "*Griffin* remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest."[279] Unfortunately, the court neglects to establish just how *Griffin* allows for the sweeping prohibition against the use of a defendant's silence before that silence is even compelled. Instead, it argued "that the right to remain silent . . . attaches before the institution of formal adversary proceedings" by noting that the language of the Fifth Amendment's privilege against self-incrimination speaks to all "persons" and not just "defendants."[280] However, while the Court in *Miranda v. Arizona* did extend the Fifth Amendment to mitigate the coercion inherent to custodial interrogations, it limited its application to only compelled utterances (or silences).[281] And while the Court in *Griffin v. California* did hold that the Fifth Amendment forbids comment on the defendant's silence, the issue before the Court was limited to whether comment on the defendant's failure to testify violated the Fifth Amendment's privilege against self-incrimination.[282] *Griffin* simply did not

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275. *See supra* Part II (discussing when a suspect is owed a *Miranda* warning).

276. *See supra* Part IV.A (discussing the federal circuits that ban the use of pre-*Miranda* silence to prove the defendant's guilt).

277. *See supra* note 115 and accompanying text (discussing Griffin v. California).

278. *See supra* note 115 and accompanying text (discussing Griffin v. California).

279. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (finding *Griffin* protects pre-arrest silence); *see also supra* notes 167-73 and accompanying text (discussing the Seventh Circuit's view on the use of silence to prove guilt).

280. *Savory*, 832 F.2d at 1017. The court contrasted the right to counsel under the Sixth Amendment that attaches when the defendant becomes an "accused" with the language of the Fifth Amendment that reads, "[no] *person* shall." *Id.* (emphasis added). The Fifth Amendment, however, limits the application of the self-incrimination privilege only to persons "in any criminal case." U.S. CONST. AMEND. V. Presumably, the Seventh Circuit read "person" to mean any person who at any time can invoke the privilege.

281. *See supra* notes 69-74 and accompanying text (discussing Miranda v. Arizona).

282. *See* Griffin v. California, 380 U.S. 609, 611 (1965) (narrowing issue before the Court); *see also supra* note 115 and accompanying text (discussing Griffin v. California). Notably, Justice Stewart, in his dissenting opinion, did affirm that before determining whether the government is

speak to the admissibility of silence before the start of adversarial proceedings; but even if it did, without the requisite compulsion, the case does not support the idea that a defendant's pre-*Miranda* silence is barred by the Constitution.

B. The Due Process Clause of the Fourteenth Amendment Does Not Bar the Use of a Defendant's Pre-Miranda Silence in the Government's Case-in-Chief

In *Doyle v. Ohio*, the Court considered whether comment on a defendant's post-*Miranda* silence violated his right to due process under the Fourteenth Amendment.[283] In that case, the government used the defendants' silence, observed after they were read the *Miranda* warnings, to impeach exculpatory stories first offered at trial.[284] The Court held that the Due Process Clause of the Fourteenth Amendment forbade the use of the defendants' post-*Miranda* silence to impeach their credibility.[285] The Court explained that silence in the wake of a *Miranda* warning is "insolubly ambiguous" since it could be viewed as a defendant's exercise of his right to remain silent.[286] Because the warning implicitly assures the defendant that his silence will carry no penalty, the use of his silence against him breaches the government's promise to the defendant.[287] That breach constitutes the foundation of a due process violation.

A few years after *Doyle*, the Supreme Court decided in turn *Jenkins v. Anderson* and *Fletcher v. Weir*.[288] *Jenkins* considered whether comment on a defendant's pre-arrest (and pre-*Miranda*) silence violated his right to due process under the Fourteenth Amendment.[289] Relying on *Doyle*, the Court concluded that the use of a defendant's pre-arrest silence to impeach him did not violate due process, because the defendant had not yet been promised that his silence would not be used against him.[290] Instead, the Court directed each jurisdiction to

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precluded from commenting on a defendant's silence, the Court must first determine whether the defendant's silence was compelled. *Griffin*, 380 U.S. at 620 (Stewart, J, dissenting) (noting that since the defendant was not compelled to remain silent, his constitutional right to remain silent was not violated).

283. *See supra* notes 106-11 and accompanying text (discussing Doyle v. Ohio).

284. *See supra* notes 106-11 and accompanying text (discussing *Doyle*).

285. Doyle v. Ohio, 426 U.S. 610, 619 (1976); *see supra* notes 106-11 (discussing *Doyle*).

286. *Doyle*, 426 U.S. at 619; *see supra* note 110 and accompanying text (discussing reasons why the prosecution cannot use a defendant's post-*Miranda* silence to impeach him).

287. *See supra* note 110 and accompanying text (discussing reasons why the prosecution cannot use a defendant's post-*Miranda* silence to impeach him).

288. *See supra* notes 122-27, 130-38 and accompanying text (discussing Jenkins v. Anderson and Fletcher v. Weir).

289. *See supra* notes 122-27 and accompanying text (discussing Jenkins v. Anderson).

290. Jenkins v. Anderson, 447 U.S. 231, 238 (1980). The Court also concluded that the use of a defendant's pre-arrest silence to impeach him did not violate his rights under the Fifth Amendment. *Id.* At issue was whether the use of the defendant's pre-arrest silence impermissibly burdened his Fifth Amendment right to remain silent. *Id.* While the Court elected not to consider whether or under what circumstances pre-arrest silence is protected by the Fifth Amendment, it did

resolve the issue under its own rules of evidence that weigh the probative value of the defendant's silence against any prejudice against the defendant which might result.[291] The Court also noted that allowing the government to impeach a defendant's credibility with his prior silence "may enhance the reliability of the criminal process" and "advances the truthfinding function of the criminal trial."[292]

Again, in *Fletcher v. Weir*, the Court held that use of a defendant's pre-*Miranda* silence to impeach him does not violate his due process rights under the Fourteenth Amendment because, in the absence of the affirmative assurances embodied in the *Miranda* warning, the defendant was never promised that his silence would not be used against him.[293] While silence following a warning is normally so ambiguous as to have too little probative value to warrant its admission into evidence, silence preceding a warning carries no such impediment.[294] As such, *Fletcher* observed that "[a] State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post arrest silence may be deemed to impeach a criminal defendant's own testimony."[295] *Fletcher* confirmed that the use of a defendant's pre-*Miranda* silence against him is determined under routine rules of evidence and such use does not involve the Due Process Clause of the Fourteenth Amendment.

At least one federal court of appeals case that forbade the government to use a defendant's pre-*Miranda* silence in its case-in-chief argues that *Jenkins* (and presumably *Doyle* and *Fletcher*) only permits the use of silence to impeach a defendant who already waived his right to remain silent by choosing to testify in his own defense.[296] In *United States v. Caro*, the Second Circuit concluded that "we are not confident that Jenkins permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."[297] *Caro* seemed to consider dispositive how the

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conclude, relying on *Raffel v. United States*, that the Fifth Amendment is not violated when the government uses a defendant's pre-arrest silence to impeach his credibility. *Id.*

291. *Id.* at 239.

292. *Id.* at 238. The Court noted that, under the Fifth Amendment, the use of a defendant's pre-arrest silence to impeach him is tied to his decision to testify at his trial and thus "cast aside his cloak of silence." *Id.* Quoting *Harris v. New York*, the Court wrote, "[h]aving voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately." *Id.* (quoting Harris v. New York, 401 U.S. 222, 225 (1971)). But, as Justice Stewart correctly notes in his concurrence, absent some element of compulsion, a defendant cannot hide under the Fifth Amendment for protection. *Id.* at 244 (Stewart, J., concurring).

293. *See supra* notes 130-38 and accompanying text (discussing Fletcher v. Weir).

294. *See* Fletcher v. Weir, 455 U.S. 603, 604-05 (1982) (per curiam) (contrasting the facts in *Doyle* with the case at bar).

295. *Id.* at 607.

296. *See supra* Part IV.A (discussing federal courts of appeal that forbid the use of silence in the government's case-in-chief)

297. *See* United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (noting that *Jenkins* was

government used a defendant's pre-arrest silence.

Whether the government uses a defendant's prior silence to impeach his credibility or to prove his guilt is a distinction without a difference, at least when analyzing the issue under the Due Process Clause. In fact, both the Sixth and Seventh Circuits (which concluded that the government may *not* comment on a defendant's pre-arrest silence in its case-in-chief under the Fifth Amendment) agree that the use of a defendant's pre-arrest silence in the government's direct case cannot violate the defendant's due process rights because, in the pre-arrest (and pre-*Miranda*) context, the government has not yet assured a defendant that his silence would not be used against him.[298] The same logic that drove the *Jenkins* Court to dismiss a due process attack on the use of a defendant's pre-arrest silence to impeach him applies with the same force to the use of silence to prove his guilt.

The fundamental core of a *Doyle* violation lies in the government's assurances (or lack thereof) that silence will carry no penalty.[299] To remain faithful to the constitutional principles articulated in *Doyle* and its progeny, no distinction logically can be drawn between how the government uses a defendant's pre-*Miranda* silence without extending the doctrinal foundations of the Due Process Clause well beyond its current applications. How the government uses a defendant's silence is simply unrelated to the threshold question that asks whether the government first assured the defendant that his silence would not be used against him. While silence may be "insolubly ambiguous," that determination is best left to the sound discretion of the trial court. The question is not whether the Due Process Clause prohibits the government's use of a criminal defendant's pre-*Miranda* silence, but whether the probative weight of that silence is greater than its prejudice to the defendant.

CONCLUSION

Miranda v. Arizona extended the core Fifth Amendment privilege against self-incrimination beyond the trial to protect criminal defendants subjected to custodial interrogations. Since the Fifth Amendment bars trial courts from exercising their contempt power to compel defendants to testify against themselves, the Court believed that police pressure exacted during the course of an interrogation could exert the same sort of coercion that the Constitution sought to prevent. As such, the Court required the government to first apprise a suspect of his right to remain silent and his right to counsel before a trial court

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limited to the use of silence to impeach a defendant). Unfortunately, the Second Circuit fails to discuss why *Jenkins* appears to forbid the use of pre-arrest silence in the government's case-in-chief.

298. *See supra* Part IV.A (discussing Sixth Circuit and Seventh Circuit). The Fourth, Fifth, and Eleventh circuits agree that without the assurances embodied in the *Miranda* warning, the Due Process Clause does not forbid the government's use of a defendant's pre-*Miranda* silence in its case-in-chief. *See supra* Part IV.B (discussing the Fourth, Fifth, and Eleventh Circuits).

299. *See supra* Part III (discussing *Doyle*, *Jenkins*, and *Fletcher*).

could conclude that his statements were made voluntarily and, thus, admissible against him. *Miranda* and its progeny, however, linked the admissibility of a defendant's inculpatory statements to the coercion inherent to an interrogation. A suspect's responses made outside the context of an official interview, even if they are made after his arrest, are immune from a Fifth Amendment challenge since they fall outside the coercive atmosphere inherent to a custodial interrogation. While *Miranda* shields a defendant's unwarned statements made in the course of a custodial interrogation, it simply does not limit the admissibility of his statements or silence before he is compelled to speak. The Fifth Amendment, then, does not bar the government's use of a defendant's pre-*Miranda* silence in its case-in-chief so long as the government did *Mirandize* him before it interrogated him.

Doyle v. Ohio held that the government's use of a defendant's post-*Miranda* silence to impeach him violated his rights under the Due Process Clause of the Fourteenth Amendment.[300] *Doyle* explained first that a defendant's post-*Miranda* silence is insolubly ambiguous, and thus its use is intolerably prejudicial.[301] Second, *Doyle* opined that a defendant is deprived due process when the government uses his silence against him after it assures him that his silence would carry no penalty.[302] Logically, the government's use of a defendant's pre-*Miranda* silence cannot violate due process because his silence was not induced by the government. Moreover, pre-*Miranda* silence, while ambiguous, is not intolerably ambiguous, because a defendant's pre-*Miranda* silence cannot be viewed necessarily as the defendant's assertion of his *Miranda* rights. The Fourteenth Amendment, then, does not bar the government's use of a defendant's pre-*Miranda* silence in its case-in-chief.

In conclusion, neither the Fifth nor the Fourteenth Amendments prohibit the government from using a defendant's pre-*Miranda* silence in its direct case against him. Despite this, silence is ambiguous, perhaps intolerably so. But the admissibility of a defendant's silence ought to be left to the sound discretion of the trial court in its application of the routine rules of evidence—and, however rare, the probative value of a defendant's pre-*Miranda* silence may sometimes outweigh its prejudicial impact. The Constitution, however, simply does not afford the defendant redress.

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300. Doyle v. Ohio, 426 U.S. 610, 619 (1976).

301. *Id.*

302. *Id.*