NOTE

MANIPULATING *MIRANDA*: *UNITED STATES V. FRAZIER* AND THE CASE-IN-CHIEF USE OF POST-ARREST, PRE-*MIRANDA* SILENCE

Marc Scott Hennes†

† B.A., University of North Carolina at Chapel Hill, 2004; candidate for J.D., Cornell Law School, 2007; Senior Note Editor, Volume 92, *Cornell Law Review*. Many thanks to Professors John Blume, Steven Clymer, and Trevor Morrison for their insightful comments. Thanks also to the members of the *Cornell Law Review* who edited this Note, particularly Ben Carlisle, Fang Chen, and Alison Fraser. Most of all, I am grateful to my family and friends for their unwavering encouragement and support.

INTRODUCTION

On November 6, 2002, Trooper Stephen Rasgorshek of the Nebraska State Patrol stopped Dante Frazier's rented U-Haul truck along Interstate 80 for failing to maintain a lane of travel.[1] This minor traffic violation, however, was not the true basis of Trooper Rasgorshek's stop. Frazier had drawn the attention of two investigators from the Nebraska State Patrol Drug Commercial Interdiction Unit while refueling at a service station, and the investigators radioed ahead to Trooper Rasgorshek to stop the U-Haul.[2] After Frazier and his passenger gave conflicting accounts regarding the purpose of their trip, Trooper Rasgorshek obtained permission to search the cargo area of the truck.[3] Behind a "cover load" of furniture and appliances, Trooper Rasgorshek discovered boxes containing plastic bags filled with a total of over four million tablets of pseudoephedrine.[4]

During the Government's case-in-chief at trial, Trooper Rasgorshek testified for the prosecution that Frazier demonstrated no discernible reaction to the discovery of the drugs in the U-Haul.[5] The prosecutor argued that Frazier's silence after his arrest but before the police read him the *Miranda*[6] warnings was indicative of Frazier's guilt.[7] The jury convicted Frazier of possession of a list I chemical under the Controlled Substances Act, and the trial court judge sentenced him to 188 months' imprisonment.[8] Frazier appealed to the Eighth Circuit, claiming that the Government's use of his post-arrest,

---

1 *See* United States v. Frazier, 408 F.3d 1102, 1106 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

2 *See id.* at 1106. Frazier's truck drew the officers' attention for several reasons: there was no U-Haul rental facility nearby, suggesting a long-distance trip, but the size of the U-Haul and the lack of an accompanying car were inconsistent with this; the truck was from Arizona (a "source area" for drugs); there was a brand new padlock on the hatch; and there was a Bible on the dash—a common technique drug couriers use to avoid suspicion. *Id.*

3 *See id.* at 1107.

4 *Id.* Pseudoephedrine is a common decongestant that illegal drug manufacturers use to synthesize methamphetamine. *See* United States v. Martin, 438 F.3d 621, 626 (6th Cir. 2006) (describing pseudoephedrine as "an over-the-counter decongestant that is also a raw material used to manufacture methamphetamine").

5 *See Frazier*, 408 F.3d at 1109.

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

7 *See Frazier*, 408 F.3d at 1109.

8 *Id.* at 1107.

pre-*Miranda* silence to support their case-in-chief violated the Fifth Amendment.[9] The Eighth Circuit found no Fifth Amendment violation, upheld Frazier's conviction, and in so doing widened the circuit split on the issue of using post-arrest, pre-*Miranda* silence during the case-in-chief.[10]

The use of silence as part of the Government's case-in-chief poses unique problems, as it is unlike any other testimonial or physical evidence that a fact-finder might confront. Particularly problematic is the ambiguous nature of the defendant's silence.[11] On one hand, many might agree with the jury's conclusion that Frazier's silence contradicted his claim of innocence and signified that he was aware of the contraband in the truck. Others might argue that individuals react differently to identical situations and that Frazier's silence was a reaction to the shock of betrayal and the intimidation of police presence that was wholly consistent with his claim of innocence. Still others might suggest that a truly guilty defendant would embellish his reaction to the discovery of the drugs in an attempt to bolster his credibility. Each of these interpretations of Frazier's silence is sensible, and this ambiguity is precisely the problem with allowing the Government to use this type of silence as incriminating evidence during its case-in-chief.

The Supreme Court allows the incriminating use of silence in several different circumstances.[12] Yet, there are significant problems with the current system of silence jurisprudence as a whole, in particular the Government's use of post-arrest, pre-*Miranda* silence in its case-in-chief. One issue of note is that the current silence jurisprudence creates a perverse incentive for law enforcement officers to delay Mirandizing suspects. In doing so, they delay the point at which statements and silence are no longer admissible, which effectively defeats *Miranda*'s purpose of advising suspects of their rights in a timely manner.[13] There is also a strong argument that the current silence jurisprudence impermissibly interferes with criminal defendants' decisions to take the stand by making it much more costly for them to testify.[14]

---

9 *See id.* at 1105–06.

10 *See id.* at 1111; *see also infra* Part III (discussing in detail the circuit split on post-arrest, pre-*Miranda* silence).

11 *See, e.g.*, Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000).

12 *See infra* Parts II.A.1, II.C.

13 *See* United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) (noting that if custody is not the trigger for *Miranda* protection of pretrial silence, there is an incentive for officers to "delay interrogation in order to create an intervening 'silence' that could then be used against the defendant"); Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 503–05 (2002).

14 *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (holding that where criminal defendants take the stand in their own defense, their pre-*Miranda* silence may be used to impeach them).

This Note will explore these particular topics in greater depth, but the overarching point is that the current, highly compartmentalized system of *Miranda* and silence jurisprudence is nonsensical, largely because it attempts to use the Court's *Miranda* holding in a way for which it is not well suited. The Supreme Court intended *Miranda* to protect defendants' *statements*, not their silence.[15] This departure from the original purpose of the *Miranda* warnings coupled with the ubiquity of *Miranda* in today's society[16] makes the *Miranda* framework an exceedingly poor tool for attempting to distinguish between permissible and impermissible uses of silence.

This Note begins by discussing *Miranda* and its effects on Fifth Amendment rights and the right to remain silent. Part II considers the highly compartmentalized silence jurisprudence that has developed in the wake of *Miranda*. Part III scrutinizes the use of post-arrest, pre-*Miranda* silence in the Government's case-in-chief and the present circuit split in this area. Focusing on *Frazier*, this Note argues that allowing the use of post-arrest, pre-*Miranda* silence in the Government's case-in-chief, as the Eighth Circuit and other like-minded circuits do, is troublesome for a variety of reasons and that such use is an affront to the Fifth Amendment.[17] Finally, the Note concludes by outlining a solution that would abolish the use of *Miranda*-based distinctions as a standard for determining the admissibility of silence and focuses instead on the proposed use of the silence. This proposal would essentially bar the use of silence by the Government during its case-in-chief, while allowing the impeachment use of silence in all but the most problematic circumstances.

I
THE BACKGROUND AND AFTERMATH OF *MIRANDA V. ARIZONA*: A WATERSHED FOR PROTECTION AGAINST SELF-INCRIMINATION

The idea of a right or privilege against self-incrimination dates back at least to the early seventeenth century's *ius commune* maxim of *nemo tenetur prodere seipsum* (no man is bound to accuse himself).[18]

---

15 *See Moore*, 104 F.3d at 386 (citing Miranda v. Arizona, 384 U.S. 436, 467–79 (1966)).

16 *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

17 Because the circumstances surrounding the offense and arrest are highly relevant in determining the admissibility of silence, this Note includes a fair amount of factual narrative for many of the cases that it discusses. This level of background and detail will be helpful in sketching the overall landscape of this issue.

18 *See* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 185 (1997). The *ius commune* was "the law applied throughout the European continent and in the English prerogative and ecclesiastical courts." *Id.*

The traditional common-law right was limited, however, in that it "was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony."[19] The more familiar source of the right is the Constitution's guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[20] The Supreme Court's interpretations of the Fifth Amendment vacillate between two readings: One view affords defendants and suspects the right to remain silent, while the other protects only against improper methods of interrogation.[21] Conflict between these two readings has centered primarily on whether a fact-finder may "appropriately treat the refusal of a suspect or defendant to speak as one indication of his guilt."[22] Despite continuing ambivalence on the issue, the dominant conception of the privilege, both in popular understanding and in Supreme Court jurisprudence, is presently the "right to silence" interpretation.[23]

Although *Miranda* is the landmark decision on the right against self-incrimination, the Court's jurisprudence in this area began to develop well before the *Miranda* decision. In *Raffel v. United States*,[24] the defendant, Ed Raffel, chose not to testify during his trial, and the jury subsequently failed to reach a verdict.[25] During a second trial, Raffel took the stand in his own defense.[26] The judge at that trial asked Raffel questions that required him to disclose and explain his failure to take the stand in the first trial.[27] On appeal from his conviction at the second trial, Raffel argued that the judge in the second trial violated his Fifth Amendment rights by compelling him to disclose his choice not to testify in his first trial.[28] The Supreme Court disagreed and held that there can be no partial waiver of the right to silence and that Raffel opened the door to questions about his previous refusal to testify by taking the stand in the second trial.[29] Thus, the Fifth Amendment did not protect Raffel's silence at a *previous trial*.[30] This

---

19 Mitchell v. United States, 526 U.S. 314, 332–33 (1999) (Scalia, J., dissenting).

20 U.S. CONST. amend. V.

21 *See* HELMHOLZ ET AL., *supra* note 18, at 181; *see also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 141–43 (1993) (identifying the right to silence arising not out of the specific text of the Constitution but rather as a result of the right not to be compelled to answer questions).

22 HELMHOLZ ET AL., *supra* note 18, at 182.

23 *Id.*

24 271 U.S. 494 (1926).

25 *See id.* at 495.

26 *See id.*

27 *Id.*

28 *See id.* at 495–96.

29 *See id.* at 499 ("The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do.").

30 *See id.*

type of narrow reading of the right to silence was typical of cases around this time.[31]

The Court's silence jurisprudence remained relatively stagnant until 1966 when it decided *Miranda*, which proved to be a significant milestone for protection against self-incrimination.[32] Prior to *Miranda*, the Court had struggled to find the best way to protect suspects whom police questioned,[33] and the Court for many years used a voluntariness test to determine a statement's admissibility.[34] Confusion regarding the application and effectiveness of the voluntariness test was substantial, and the Court's stance on protection from self-incrimination proved problematic for both courts and law enforcement officials.[35]

Alternatively, in the early 1960s, the Court looked to the Sixth Amendment's guarantee of the right to counsel[36] to regulate police interrogations.[37] However, because the Sixth Amendment provides a right to counsel only in "criminal prosecutions," the Court in this early period found itself in the awkward and contrived position of having to extend the definition of criminal prosecution to the pretrial stage.[38] For this reason, the Sixth Amendment test, like the voluntariness test, was unsatisfactory.

The unexceptional facts of *Miranda* belie the impact that the case would have on criminal and constitutional law for years to come. On March 13, 1963, the police arrested an indigent Mexican immigrant named Ernesto Miranda at his home and brought him to an interrogation room at the police station in Phoenix, Arizona.[39] Officers then

---

31 *See, e.g.*, Johnson v. United States, 318 U.S. 189, 195 (1943) (finding that a defendant's "'voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all'" (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2276(2) (3d ed. 1940))).

32 *See* PETER MIRFIELD, SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE 324–27 (1997).

33 *See* Richard A. Leo & George C. Thomas III, Miranda v. Arizona, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 35, 35 (Richard A. Leo & George C. Thomas III eds., 1998).

34 *See id.* Briefly, the voluntariness test asked courts to determine based on the totality of the circumstances whether the suspect's will was overborne during the interrogation. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320–23 (1959) (looking to all of the circumstances in deciding whether the suspect's will was overborne and thus the court should exclude his confession as involuntary); White v. Texas, 310 U.S. 530, 531–33 (1940); Chambers v. Florida, 309 U.S. 227, 228–35 (1940); Brown v. Mississippi, 297 U.S. 278, 285 (1936).

35 *See* Leo & Thomas, *supra* note 33 ("The difficulties of knowing the precise moment when a suspect's will has been 'overborne' by interrogation are manifest and difficult to exaggerate.").

36 *See* U.S. CONST. amend. VI.

37 *See* Leo & Thomas, *supra* note 33.

38 *See id.*

39 Miranda v. Arizona, 384 U.S. 436, 491 (1966).

questioned Miranda without advising him of his right to have an attorney present.[40] After two hours of interrogation, the officers emerged from the room with Miranda's signed confession.[41] The trial court admitted the confession into evidence, a jury convicted Miranda of kidnapping and rape, and the court sentenced him to forty to sixty years' imprisonment.[42] On appeal, the Supreme Court of Arizona affirmed the conviction, holding that the interrogation had not violated Miranda's constitutional rights.[43]

The Supreme Court, seeking to clarify a decision on the admissibility of confessions that it had made only two years prior to *Miranda*,[44] overturned Miranda's conviction and held that his confession was inadmissible because the officers had not adequately informed Miranda of his rights before the interrogation.[45] The Court's opinion focused on the psychological aspect of custodial interrogations and affirmed its previous stance that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."[46]

With its decision in *Miranda*, the Court attempted to remedy its muddled jurisprudence on the voluntariness test and the Sixth Amendment solution.[47] *Miranda* looked to the self-incrimination clause of the Fifth Amendment as the source of protection for the statements of criminal defendants.[48] This Fifth Amendment approach boasted the advantages of appearing less contrived than the Sixth Amendment approach and providing more of a bright-line rule for police officers to follow than the voluntariness test.[49] The decision rested on the Fifth Amendment's prohibition against compelling individuals to be witnesses against themselves.[50] Interestingly, instead of requiring a finding of compulsion in individual cases, the Court simply assumed that compulsion is "inherent in custodial surround-

---

40 *See id.* at 491–92.

41 *See id.* at 492.

42 *See id.* at 492.

43 *See id.*

44 *See* Escobedo v. Illinois, 378 U.S. 478, 490–92 (1964) (holding a suspect's confession inadmissible because police interrogated him for four hours without advising him of his rights or giving him access to legal counsel). The Court granted certiorari in *Miranda* and its companion cases "in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 441–42.

45 *See Miranda*, 384 U.S. at 492.

46 *See id.* at 448 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

47 *See* Leo & Thomas, *supra* note 33.

48 *See id.*

49 *See id.*

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

ings."[51] This holding thus provided the "custody plus interrogation" bright-line rule for when police must advise suspects of their rights.[52]

Miranda, inspired by the inadequacy of the common law exclusionary rule regarding evidence elicited from suspects under police scrutiny or interrogation, represented a new level of protection for criminal defendants under the Fifth Amendment.[53] The *Miranda* decision required that police officers inform suspects of their rights to silence and counsel prior to custodial interrogations.[54] In addition to providing fodder for the debate over the use of silence, this seemingly simple requirement that the State warn suspects of their rights before interrogation and honor those rights if invoked[55] contains nuances that have proved challenging for lower courts seeking to interpret *Miranda*'s actual requirements.[56]

II
CATEGORIZATION: *MIRANDA* COMPLICATES THE FIFTH AMENDMENT ISSUE

After *Miranda*, courts began determining the admissibility of silence by establishing different categories of silence at trial.[57] Categorizing a defendant's silence involves a two-step process that considers when the silence occurred and how the Government seeks to use the silence at trial.[58] Thus, the first step is to determine when in the arrest-interrogation process the silence in question occurred, using the moment when the suspect was given *Miranda* warnings as the dividing

---

51 *Miranda*, 384 U.S. at 458.

52 Leo & Thomas, *supra* note 33, at 36.

53 *See* MIRFIELD, *supra* note 32, at 325–26. The exclusionary rule deems inadmissible at trial any evidence that police obtained in violation of the Fourteenth Amendment, particularly statements or confessions that police obtained by threats or promises that violate suspects' Fourteenth Amendment rights. *See id.* Although the rule was later expanded to include an inquiry into whether a statement or confession was voluntary under the totality of the circumstances, the Supreme Court was unhappy with the way lower courts determined voluntariness. *See id.* Applying this test and determining voluntariness was no easy task because the "difficulties of knowing the precise moment when a suspect's will is 'overborne' by interrogation are manifest and difficult to exaggerate." *See* Leo & Thomas, *supra* note 33; *see also id.* at 17–18 (noting that the Court reversed eight of the ten cases it reviewed between 1957 and 1963 in which lower courts had upheld convictions based on voluntary confessions).

54 *See* MIRFIELD, *supra* note 32, at 324–26. More specifically, the *Miranda* Court captured the essence of the rights in the now-famous *Miranda* warnings. *Miranda*, 384 U.S. at 479 (holding that a suspect "must be warned prior to any questioning 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").

55 *See Miranda*, 384 U.S. at 478–79.

56 *See* MIRFIELD, *supra* note 32, at 327–39; *infra* Parts II–III.

57 *See infra* Parts II–III.

58 *See id.*

line.[59] The next consideration is whether the defendant's silence was offered at trial to impeach a witness (often the defendant himself) or as evidence against the defendant during the Government's case-in-chief.[60] As the Supreme Court granted certiorari and issued opinions, six distinct categories emerged, and the law is now relatively settled with respect to all but two, on which the circuit courts are split.[61] This Part provides context for the later examination of post-arrest, pre-*Miranda* silence by exploring the Court's jurisprudence with respect to other areas of silence.

A. Pre-arrest Silence

1. *Impeachment Use*

The Supreme Court first considered the use of pre-arrest silence for impeachment purposes in *Jenkins v. Anderson*.[62] The police had arrested Dennis Seay Jenkins after he turned himself in to them two weeks after the stabbing death of Doyle Redding.[63] At his trial, Jenkins testified that Redding and another man had robbed Jenkins's sister and her boyfriend the night before the stabbing.[64] Jenkins claimed that he followed Redding and reported his whereabouts to the police.[65] He testified further that on the day of the stabbing, Redding confronted him about informing the police of the robbery and attacked him with a knife.[66] Jenkins claimed that, during the ensuing struggle, he stabbed Redding in self-defense.[67] On cross-examination, the prosecutor asked Jenkins how long Jenkins waited to report the altercation to the police, and Jenkins admitted that he waited until two weeks after the stabbing.[68] In his closing argument, the prosecutor again mentioned Jenkins's pre-arrest silence, contending that a man who acted in self-defense would not have waited two weeks before reporting the stabbing.[69] Instead, the prosecutor argued, the killing was an intentional retaliation for the robbery the night before.[70] A jury convicted Jenkins of manslaughter, and the judge

---

59 Namely, these categories are (i) pre-arrest and pre-*Miranda*; (ii) post-arrest, pre-*Miranda*; and (iii) post-arrest, post-*Miranda*.

60 *See infra* Parts II–III.

61 These six classifications and the court rulings on them are discussed in detail below. *See id.*

62 447 U.S. 231 (1980).

63 *See id.* at 232.

64 *See id.*

65 *See id.*

66 *See id.* at 232–33.

67 *See id.* at 233.

68 *See id.*

69 *See id.* at 234–35.

70 *See id.* at 234.

sentenced him to ten to fifteen years' imprisonment.[71] After his conviction, Jenkins sought a writ of habeas corpus, claiming that the prosecutor improperly elicited testimony regarding his pre-arrest silence.[72]

The Supreme Court granted certiorari and found that the use of pre-arrest silence for impeachment purposes is constitutionally permissible.[73] The Court, relying on the "waiver theory" enunciated in *Raffel v. United States*,[74] maintained that invoking the Fifth Amendment is essentially an all-or-nothing proposition: Once the defendant chooses to testify, he must testify fully.[75] The Court used *Miranda* to distinguish *Jenkins* from its 1976 *Doyle v. Ohio*[76] decision in which it barred the use of post-arrest, post-*Miranda* silence for impeachment purposes.[77] In contrast to *Doyle*, the State in *Jenkins* broke no *Miranda*-based promise and did not induce Jenkins' pre-arrest silence.[78] For this reason, *Jenkins* did not manifest the same "fundamental unfairness" that was present in *Doyle*, and the Court thus found that no due process violation occurred.[79]

Even though the Court could have disposed of *Jenkins* with the all-or-nothing waiver theory alone, it used the case to continue to champion the idea that Fifth Amendment rights attach when the suspect receives *Miranda* warnings.[80] Alternatively, the Court could have resolved *Jenkins* by focusing on the impeachment use of the testimony, a use that poses fewer constitutional concerns than does case-in-chief use.[81] Instead, the Court increasingly entrenched itself in the position that *Miranda* is determinative of the Fifth Amendment issue. The powerful influence of *Miranda* seemed to make the Court lose sight of that case's underlying rationale of safeguarding the constitutional rights of criminal defendants, rights that extend beyond the Fifth Amendment and custodial interrogation alone.[82] By relying on *Miranda* to resolve issues that its rule was not meant to address, the Court

---

71 *See id.*

72 *See id.*

73 *See id.* at 238.

74 *See* 271 U.S. 494 (1926); *see also* text accompanying *supra* notes 24–30 (providing background on *Raffel* and restating the Court's holding).

75 *See Jenkins*, 447 U.S. at 236 n.3.

76 *See infra* Section II.B.1.

77 *See Jenkins*, 447 U.S. at 239–40.

78 *See id.* at 240.

79 *Id.* The court noted that its decision in *Jenkins* does not force any state court to admit pre-arrest silence for impeachment purposes. Rather, "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative then [sic] prejudicial." *Id.*

80 *See id.*

81 *See* Harris v. New York, 401 U.S. 222, 224–26 (1971).

82 *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) ("'[T]he warnings mandated by [*Miranda* are] a prophylactic means of safeguarding Fifth Amendment rights,'—they are not the genesis of those rights." (citation omitted) (first alteration added)).

set in motion a troubling series of decisions that eroded the constitutional rights of defendants.

2. *Case-in-Chief Use*

Much like the use of post-arrest, pre-*Miranda* silence on which this Note focuses, circuits are also split over whether the Government can use a defendant's pre-arrest silence during its case-in-chief. While the First, Sixth, Seventh, and Tenth Circuits find the Government's use of pre-arrest silence in its case-in-chief impermissible,[83] the Fifth, Ninth, and Eleventh Circuits find no constitutional problems with admitting pre-arrest silence for case-in-chief use.[84]

Courts that find the case-in-chief use of such silence unconstitutional rely primarily on *Griffin v. California*[85] and reject *Doyle*'s premise that Mirandizing a suspect triggers constitutional protection.[86] Although the challenge in *Griffin* involved the prosecutor's comment on the defendant's silence at trial,[87] these circuits read *Griffin*, often in tandem with *Raffel*, to stand for the proposition that "'the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.'"[88]

Circuits taking the opposite stance hold positions similar to that of the Fifth Circuit, which has decided that the Fifth Amendment does not cover defendants' pre-arrest silence, because such silence is not in response to any action by a government agent.[89] Other circuits, citing *Jenkins*, have employed similar reasoning; the Ninth Circuit, for example, has noted that "the privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is

---

83 *See, e.g.*, Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (holding that the Fifth Amendment protected the defendant's silence before arrest); United States v. Burson, 952 F.2d 1196, 1200–02 (10th Cir. 1991) (same); Coppola v. Powell, 878 F.2d 1562, 1567–68 (1st Cir. 1989) (same); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1016–18 (7th Cir. 1987) (same).

84 *See, e.g.*, United States v. Oplinger, 150 F.3d 1061, 1065–67 (9th Cir. 1998) (finding that the defendant's pre-arrest silence was not protected by the Fifth Amendment); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (same); United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991) (same).

85 380 U.S. 609, 614 (1965) ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." (citation omitted)).

86 *See* Doyle v. Ohio, 426 U.S. 610, 618–19 (1976) (holding that *Miranda* warnings implicitly assure an arrestee that the Government will not use prior silence to impeach him at trial).

87 *See Griffin*, 380 U.S. at 610–11.

88 *Coppola*, 878 F.2d at 1568 (quoting *Griffin*, 380 U.S. at 615). The Tenth Circuit reached the same conclusion, noting that the Government, under limited circumstances, may use a defendant's silence for impeachment. *See Burson*, 952 F.2d at 1201.

89 *See Zanabria*, 74 F.3d at 593.

under no official compulsion to speak."[90] The view that official compulsion to speak triggers Fifth Amendment protection is analogous to saying that *Miranda* triggers Fifth Amendment protection, because the police need only give *Miranda* warnings when there is official compulsion to speak.[91]

B. Post-arrest, Post-*Miranda* Silence

1. *Impeachment Use*

The Supreme Court addressed the constitutionality of using post-arrest, post-*Miranda* silence for impeachment purposes in *Doyle v. Ohio*.[92] Police arrested Jefferson Doyle and his co-defendant for selling ten pounds of marijuana to a police informant.[93] Neither defendant attempted to explain the events or their actions to the arresting officer.[94] However, at trial, the defendants explained that the informant had set them up, and they were actually attempting to buy marijuana rather than sell it.[95] Doyle claimed that the deal soured after he and his co-defendant changed their minds about the amount of marijuana they wanted to purchase, at which point the informant threw the money—which the police had been tracing—into the defendants' vehicle and drove off with the marijuana.[96] This testimony "presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it."[97] Thus, in an effort to discredit the defendants, the prosecutor asked them during cross-examination to explain why they did not tell the officers this exculpatory story upon their arrest.[98] The court admitted the evidence of the defendants' silence despite the defense counsel's objections and convicted both defendants; the Ohio state appellate courts affirmed the convictions.[99]

The Supreme Court reversed, holding that the use of post-arrest, post-*Miranda* silence for impeachment purposes violates due pro-

---

90 United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (citing Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)).

91 *See* Miranda v. Arizona, 384 U.S. 436, 444, 457–58 (1966) (emphasizing that custodial interrogation is inherently compulsory).

92 426 U.S. 610 (1976).

93 *See id.* at 611.

94 *See id.* at 613–14.

95 *See id.* at 613.

96 *See id.*

97 *Id.* The police had set up surveillance but did not see the actual transaction because they had a limited view of the parking lot. *See id.* at 612.

98 *See id.* at 613–14.

99 *See id.* at 614–16.

cess.[100] The Court began by noting that *Miranda* warnings are a prophylactic means of safeguarding Fifth Amendment rights.[101] Because the police must Mirandize all suspects and make them aware of the right to remain silent upon arrest, the Court continued, their subsequent silence could be nothing more than an exercise of this right.[102] In addition to the inherent ambiguity of this type of silence,[103] the Government's use of such silence for the purpose of impeachment would violate the *Miranda* warnings' implicit promise that silence will carry no penalty.[104] The Court in *Doyle* once again wedded itself to the idea that *Miranda* is the source of the right against self-incrimination. In contrast to *Jenkins*, however, the silence at issue in *Doyle* was post-*Miranda*, such that looking to *Miranda* as the point of Fifth Amendment protection favored the defendants, and not the State.

Although the Court's silence jurisprudence clearly was not merely antidefendant up to this point, its *Miranda*-based approach to determining the admissibility of silence is misguided and impinges on defendants' constitutional rights.[105] Although the silence in *Doyle* occurred after the suspect received *Miranda* warnings, the State attempted to admit the silence only to impeach testimony that the defendants had freely given regarding a seemingly contrived story that they did not reveal until trial.[106] There is an unsavory inconsistency to barring the use of this type of silence even as impeachment evidence but allowing the State to use Frazier's silence just before the police advised him of his rights in its case-in-chief.[107]

2. *Case-in-Chief Use*

More than ten years after *Doyle*, the Court confronted the constitutionality of using a defendant's post-arrest, post-*Miranda* silence in the Government's case-in-chief in *Wainwright v. Greenfield*.[108] The police arrested David Wayne Greenfield, charged him with sexual battery, and read him his *Miranda* rights three times between his arrest

---

100 *See id.* at 618. Notably, the Court based its decision on the Due Process Clause of the Fourteenth Amendment and not on the Fifth Amendment right against self-incrimination.

101 *See id.* at 617 (citing Michigan v. Tucker, 417 U.S. 433, 443–44 (1974)).

102 *See id.*

103 *See id.* at 617–18; United States v. Hale, 422 U.S. 171, 177 (1975) (observing that more than one explanation may exist for a suspect's post-arrest silence).

104 *See Doyle*, 426 U.S. at 617–18. The Court has also explained its *Doyle* holding by characterizing *Miranda* warnings as a governmental action that induces silence. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 240 (1980).

105 *See infra* Part IV.A.

106 *See Doyle*, 426 U.S. at 613–14.

107 *See* United States v. Frazier, 408 F.3d 1102 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

108 474 U.S. 284 (1986).

and his arrival at the police station.[109] Each time the police Mirandized him, Greenfield said that he understood his rights and asked to consult with a lawyer before making any statements to the police.[110] At trial, Greenfield pled not guilty by reason of insanity.[111] To rebut Greenfield's claim of insanity,[112] the prosecutor questioned the arresting officers about Greenfield's decision to remain silent after his arrest.[113] During closing arguments, the prosecutor used Greenfield's silence after his arrest to invite the jury to infer Greenfield's sanity and thus his guilt.[114] Accepting this invitation, the jury convicted Greenfield, and the judge sentenced him to life imprisonment.[115]

Greenfield subsequently filed a writ of habeas corpus, which the Eleventh Circuit granted.[116] On appeal to the Supreme Court, despite the Florida Attorney General's attempt to distinguish *Greenfield* from *Doyle*, the Court found that *Doyle*'s reasoning still applied.[117] The Court reiterated its view that the *Miranda* warnings include an implicit promise to the suspect that his silence will not be used against him.[118] According to the Court, it is equally unfair to breach this promise by allowing the prosecution to use post-*Miranda* silence to defeat an insanity plea as it is to breach it by allowing the use of this silence to impeach the defendant's trial testimony.[119] Thus, under the Court's "breach of promise" rationale, the government violates the defendant's due process rights if the prosecutor uses the defendant's post-arrest, post-*Miranda* silence for either impeachment purposes or in its case-in-chief.[120]

---

109 *See id.* at 286.

110 *See id.*

111 *See id.* at 287.

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

113 *See id.* at 286–87.

114 The prosecutor's closing argument proceeded as follows:

> He goes to the car and the officer reads him his *Miranda* rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. . . . And here we are to believe that this person didn't know what he was doing at the time of the act . . . . So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

Id. at 287 n.2.

115 *See id.* at 287.

116 *Id.* at 288–89.

117 *See id.* at 292.

118 *See id.*

119 *Id.*

120 *Id.*

C. Post-arrest, Pre-*Miranda* Silence for Impeachment Use

In *Fletcher v. Weir*, the Supreme Court held that impeachment use of a defendant's post-arrest, pre-*Miranda* silence does not violate due process.[121] The facts in *Weir* closely parallel those in *Jenkins*, and the Court again had to distinguish the *Doyle* decision from the case at bar.[122] The *Weir* case arose out of a fight in a nightclub parking lot between Ronnie Buchanan and the defendant, Eric Weir.[123] During the course of the fight, Buchanan pinned Weir to the ground.[124] Buchanan then jumped to his feet yelling that he had been stabbed; he later died from his stab wounds.[125] Weir fled the scene and did not report the stabbing to the police.[126] At his murder trial, Weir took the stand in his own defense and for the first time claimed that the stabbing was accidental and in self-defense.[127] On cross-examination, the prosecutor asked Weir why he did not offer this explanation to the arresting officers or disclose the location of the murder weapon.[128] The jury apparently did not find Weir's answers to these questions reasonable because it subsequently convicted him of first-degree manslaughter.[129]

The Sixth Circuit, reading *Doyle* and *Jenkins* broadly, found that the prosecutor's impeachment use of Weir's post-arrest, pre-*Miranda* silence violated Weir's due process rights.[130] The court noted that such silence lacks probative value because suspects may remain silent following arrest for a number of reasons unrelated to their guilt or innocence, including exercising their right to silence before being Mirandized.[131] The possibility that a suspect might remain silent for such reasons is highly important, as will be discussed in further detail later in this Note.[132] The Supreme Court, however, reversed what it saw as the Sixth Circuit's overly broad reading of *Doyle* and held that the impeachment use of the defendant's post-arrest, pre-*Miranda* si-

---

121 *See* 455 U.S. 603, 607 (1982) (per curiam).

122 *See id.* at 605–06. For a discussion of the facts of the *Jenkins* case, see text accompanying *supra* notes 62–72. For a discussion of the *Doyle* decision, see text accompanying *supra* notes 92–106.

123 *See Weir*, 455 U.S. at 603.

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*

128 *See id.* at 603–04.

129 *See id.* at 604.

130 *See* Weir v. Fletcher, 658 F.2d 1126, 1130 (6th Cir. 1981) ("[W]e conclude that impeachment of a defendant with post-arrest silence is forbidden by the Constitution, regardless of whether *Miranda* warnings are given. *Doyle* and *Jenkins* were decided on a rationale of basic fairness. We think that it is inherently unfair to allow cross-examination concerning post-arrest silence.").

131 *Id.* at 1130–31.

132 *See infra* Part IV.A.

lence posed no constitutional problem.[133] Again relying on the "breach of promise" theory, the Court reinforced the notion that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," there is no due process violation.[134]

III
CASE-IN-CHIEF USE OF POST-ARREST, PRE-*MIRANDA* SILENCE: THE COURTS OF APPEALS ARE DIVIDED

This Note now turns to the remaining piece missing from the silence jurisprudence puzzle: the use of post-arrest, pre-*Miranda* silence during the Government's case-in-chief.[135] Six circuit courts have weighed in on this issue to date with three circuits finding such use unconstitutional and the other three circuits permitting the practice.[136] This Part explores the holding and rationale of one representative case on each side of this issue. Although this Note characterizes certain circuits as permitting or not permitting the use of post-arrest, pre-*Miranda* silence during the Government's case-in-chief, it is important to recognize that the legal waters are still murky because some circuits have been reluctant to lay down a bright-line rule on the topic. They instead opt to either limit their holdings to the facts at bar or to hold that any error that might have occurred was harmless.[137]

A. Circuits Prohibiting Case-in-Chief Use

The District of Columbia Circuit's holding in *United States v. Moore*[138] is representative of the reasoning that similarly aligned sister circuits employ. In *Moore*, Officer Christopher Sanders stopped Opio Moore's vehicle after it ran several red lights at a high rate of speed.[139]

---

133 *See Weir*, 455 U.S. at 604, 607.

134 *Id.* at 607. Despite its reference to "affirmative assurances" in *Weir*, the Court has elsewhere stated that no such "affirmative" assurance exists in the *Miranda* warnings. Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.").

135 Other commentators have previously considered this type of silence and arrived at the conclusion that it should be inadmissible. *See, e.g.*, Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357 (2006). Although Skrapka's note comes to similar conclusions regarding the impermissibility of certain uses of silence, it is the author's hope that the reasoning used and the solution proposed in this Note are sufficiently different to add to the scholarly discourse on this issue. In particular, this Note explicitly proposes abandoning the *Miranda*-based system and substituting a more workable and fair system outlined in greater detail *infra*.

136 The Seventh, Ninth, and District of Columbia Circuits hold that the case-in-chief use of post-arrest, pre-*Miranda* silence is unconstitutional. *See infra* Part III.A. The Fourth, Eleventh and Eighth Circuits have held the opposite. *See infra* Part III.B.

137 *See infra* Part III.A–B.

138 104 F.3d 377 (D.C. Cir. 1997).

139 *See id.* at 380.

Moore was wearing a bulletproof vest and a shoulder holster, and a search of the vehicle uncovered several firearms and a large quantity of cocaine.[140] At trial, Officer Sanders testified that Moore did not say anything at the time the police discovered the narcotics and contraband in the vehicle.[141] During closing arguments, the prosecutor used the officer's testimony to insinuate that Moore was aware the car contained contraband.[142] The judge overruled the defense counsel's objection to this line of argument,[143] and the jury found Moore guilty on all counts.[144]

On appeal, the D.C. Circuit synthesized the Supreme Court's existing silence jurisprudence to conclude that the use of post-arrest, pre-*Miranda* silence during the case-in-chief is impermissible.[145] The court began by noting that numerous Supreme Court decisions establish that *Miranda*'s protection of silence extends backwards in time at least to the point of custodial interrogation.[146] They then suggested that the protection extends beyond the beginning of custodial interrogation, however, by explaining that "neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody."[147] The court went on to correct what it saw as the Government's mistaken interpretation of the Supreme Court's holding in *Doyle*.[148] The Government had argued that *Doyle* stands for the proposition that while the use of post-arrest, post-*Miranda* silence in the Government's case-in-chief violates due process, the use of a defendant's post-arrest but pre-*Miranda* silence was permissible.[149] The D.C. Circuit took strong exception to this interpretation[150] and concluded as a matter of logic that the giving of *Miranda* warnings is relevant only to establish the prosecution's ability to use silence for impeachment purposes and is irrelevant to the use of the defendant's

---

140 *See id.*

141 *See id.* at 384. Notably, the defense counsel did not object to this line of questioning. This oversight was a significant factor in the court's finding that the prosecution's use of the defendant's silence in closing argument was harmless error. *See id.* at 389–90.

142 *See id.* at 384 ("[T]he prosecutor argued to the jury that if Moore 'didn't know the stuff was underneath the hood, [he] would at least look surprised. [He] would at least [have] said, "Well, I didn't know it was there."'" (first alteration added)).

143 *See id.*

144 *See id.* at 380.

145 *See id.* at 389 ("[T]he law is plain that the prosecution cannot, consistent with the Constitution, use a defendant's silence against him as evidence of his guilt.").

146 *See id.* at 385.

147 *Id.* at 385.

148 *See id.* at 386.

149 *See id.*

150 *See id.* ("[T]he Government's construction of *Doyle* relies on quoted language from that decision taken not just out of the context of the decision as a whole but even out of context of the sentence in which the language appears.").

silence in the Government's case-in-chief.[151] Both the Seventh and Ninth Circuits have followed similar, albeit less thorough and passionate, reasoning in finding that the use of post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief is unconstitutional.[152]

B. Allowing Case-in-Chief Use: The Eighth Circuit's Decision in *Frazier*

In *United States v. Frazier*, the latest addition to the developing body of silence jurisprudence,[153] the Eighth Circuit found the use of post-arrest, pre-*Miranda* silence in the Government's case-in-chief to be constitutional.[154] Frazier's defense was that someone named "Jay" hired him to drive the U-Haul from Illinois to California for $1,500 and that he did not know that the truck contained illegal drugs.[155] Frazier further claimed that he had recently completed another such trip, for which Jay paid him $1,000.[156] A Southwest Airlines ticket stub that investigators discovered during their search corroborated Frazier's story about the first trip.[157] Frazier did not take the stand at his trial, but the prosecutor questioned one of the arresting officers about Frazier's reaction at the time of his arrest.[158] During closing argu-

---

151 *See id.* ("Neither *Doyle* nor any other case stands for the proposition advanced by the prosecution that the defendant's silence can be used against him so long as he has not received his *Miranda* warnings. Logically, none could. It simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights. The Supreme Court's purpose in requiring the arresting authorities to advise a defendant of his right to silence and counsel in *Miranda* was to assure that those rights were properly safeguarded before any *statements* he made could be used against him, not his silence.").

152 *See, e.g.*, United States v. Hernandez, 948 F.2d 316, 322–25 (7th Cir. 1991) (noting that, under previous holdings, the introduction of the defendant's post-arrest, pre-*Miranda* silence was a violation of the Fifth Amendment but that the error was, in this case, harmless); Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978) (holding that the prosecution's introduction of the defendant's post-arrest, pre-*Miranda* silence during its case-in-chief "acted as an impermissible penalty on the exercise of the petitioner's right to remain silent").

153 408 F.3d 1102 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

154 *See* text accompanying *supra* notes 1–10.

155 *See Frazier*, 408 F.3d at 1107, 1112. Frazier told this story to investigators shortly after his arrest and after being Mirandized, *see id.* at 1107, unlike the defendants in cases such as *Doyle* who did not reveal their exculpatory stories until trial, *see, e.g.*, Doyle v. Ohio, 426 U.S. 610, 613–14 (1976).

156 *See Frazier*, 408 F.3d at 1107.

157 *See id.*

158 *See id.* at 1109. The following is an excerpt of the trial testimony at issue:

> Q [Prosecutor]: Did you talk with Mr. Frazier . . . or tell [him] why [he was] being arrested?
>
> A [Officer]: I just told [him] that [he was] under arrest for suspicion of narcotics.
>
> Q: What was Mr. Frazier's reaction when you . . . placed him into custody?
>
> A: There really wasn't a reaction.
>
> Q: Was he angry?
>
> A: No, sir.
>
> Q: Was he surprised?

ments, the prosecutor argued that Frazier's silence in response to the discovery of the drugs was a significant factor that should lead the jury to conclude that Frazier lied about not knowing that drugs were hidden in the truck.[159] The jury found Frazier guilty, and the district court sentenced him to 188 months' imprisonment.[160]

On appeal, Frazier claimed that the prosecutor's use of his post-arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination.[161] The court framed the issue in a surprisingly narrow manner by asking whether Frazier was under "government-imposed compulsion to speak" at the time of the silence in question.[162] Limiting the decision to the facts before the court,[163] the Eighth Circuit found no constitutional violation.[164] The court reasoned that although Frazier was under arrest, there was no governmental action inducing his silence. Thus, there was no official compulsion to speak and no constitutional protection of Frazier's silence.[165] Both the Fourth and Eleventh Circuits join the Eighth Circuit in concluding that, in at least some situations, the use of such silence is not an affront to the Constitution, often using the same type of frustratingly limited reasoning.[166]

A: No, sir.
Q: Did he become combative?
A: No, sir.
Q: Did he say anything to you?
A: No, sir.
Q: Did he do anything when you put the handcuffs on him?
A: No, sir.

Id. (alterations in original).

159 *See id.* ("'If a person has a friend who betrays them, what's the innocent person going to do when they discover they're going to jail. Everybody else is back in Chicago. Are they going to become combative, angry, emotional, demanding? There was none of them from . . . Mr. Frazier.'" (alterations in original)).

160 *See id.* at 1107.

161 *See id.* at 1105–06.

162 *Id.* at 1111.

163 *See id.* ("We do not decide today whether compulsion may exist under any other post[-]arrest, pre-*Miranda* circumstances.").

164 *See id.*

165 *See id.*

166 *See, e.g.*, United States v. Rivera, 944 F.2d 1563, 1568–69 (11th Cir. 1991) (distinguishing between testimony commenting on the defendant's silence and testimony regarding the defendant's demeanor, which may include lack of reaction, and implying without deciding that the court would permit the Government to comment on some types of post-arrest, pre-*Miranda* silence); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (citing Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam), for the proposition that the Supreme Court has authorized case-in-chief use of post-arrest, pre-*Miranda* silence).

IV
Making the Case for a More Coherent Model of Silence Jurisprudence

The foregoing analysis indicates that the current state of silence jurisprudence is needlessly complex and compartmentalized. A simple yet effective approach exists to regulate the prosecution's use of silence that stays true to the Constitution, does not stray far from current jurisprudence, protects the rights of the accused, and allows for the use of silence when appropriate. Simply put, the approach establishes a rule that silence is inadmissible for case-in-chief use but tempers this by creating a presumption that silence is admissible for impeachment purposes unless the evidentiary value of the particular use is significantly more prejudicial than it is probative. This Part will begin by outlining in more detail the shortfalls of the current silence jurisprudence and will then lay out the particulars of this Note's proposed approach, which departs from the use of *Miranda* warnings as a dividing line for admissibility.

A. The Shortfalls of *Miranda* as a Trigger for Protection

As noted earlier, the Supreme Court bases its silence jurisprudence on two determinations: first, whether the silence occurred before or after the giving of *Miranda* warnings, and second, in what way the Government seeks to use the silence.[167] The first determination turns on whether the silence occurred before or after the police gave the suspect *Miranda* warnings.[168] However, using *Miranda* warnings as a litmus test for admissibility poses several challenges for how the law adequately protects a defendant's silence. The initial challenge lies in the reality that *Miranda* warnings are meant to safeguard *statements*, not silence.[169] *Miranda* is thus stretched beyond its limits as a boundary for silence jurisprudence.

Another challenge resulting from *Miranda*'s role in silence jurisprudence is the quandary it poses for criminal suspects. Such individuals face three choices, all of which threaten both their constitutional rights as well as a fundamental sense of fairness. A suspect can choose to speak, to remain silent and not testify at trial, or to remain silent and attempt to mitigate the damage by testifying at trial. As discussed below, none of these alternatives sufficiently protects the suspect's rights, and the choice itself unnecessarily forces the defendant to se-

---

167 *See* text accompanying *supra* notes 100–05, 120–21.

168 *See id.*

169 *See* United States v. Moore, 104 F.3d 377, 386 (D.C. Cir. 1997) ("The Supreme Court's purpose in requiring the arresting authorities to advise a defendant of his right to silence and counsel in *Miranda* was to assure that those rights were properly safeguarded before any *statements* he made could be used against him, not his silence.").

lect the least of three evils. A third shortcoming of the current system ironically results from the success of *Miranda* in invading the public consciousness and public culture, such that the actual giving of the warnings has become a mere formality. Finally, the current system undermines the foundation of *Miranda* by creating incentives for the police to delay giving suspects their *Miranda* warnings.

1. *Statements Versus Silence*

Simply put, *Miranda* warnings are a tool for protecting defendants from making statements or admissions in response to intimidating or coercive police tactics that are constitutionally impermissible. Given the inherent ambiguity of silence, however, using *Miranda* to protect defendants' silence creates a set of complications not present when *Miranda* is used to protect statements. If a defendant yells, "I killed him!" when taken into custody for murder, little ambiguity exists regarding the meaning or content of this admission. In contrast, if a defendant such as Frazier remains silent upon his arrest, the subsequent admissibility of his silence as evidence in the case-in-chief rests not only upon whether the evidence was properly obtained but also upon the content and meaning of such an inherently ambiguous act.

A defendant's verbal unresponsiveness upon arrest may stem from a number of causes.[170] In the case of Dante Frazier, he may have been in shock when Trooper Rasgorshek pulled open the back of the U-Haul to reveal an enormous quantity of pseudoephedrine; he may have been preoccupied with retracing his dealings with "Jay" and wondering how he could have been so badly deceived rather than communicating with the officer. Of course, Frazier could very well have had no reaction simply because he knew what the search of the U-Haul would reveal. In any event, where the threatened punishment is more than nine years of imprisonment,[171] it seems unfair for any court to allow such an ambiguous yet prejudicial piece of evidence to factor into determining guilt. Effective as juries may be as fact-finders, attempting to read the mind of the defendant and interpret a complete lack of reaction as relayed secondhand by a Government witness certainly does not befit their role. Frazier's silence was no more or less probative of his guilt simply because it took place a few seconds before the police read him his *Miranda* rights. In most cases, the probative

---

170 For cases discussing the numerous reasons a defendant might remain silent for reasons that are not incriminating, see, *e.g.*, United States v. Hale, 422 U.S. 171, 177 (1975); Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000); *see also* Marcy Strauss, *Silence*, 35 LOY L.A. L. REV. 101, 146–47 (2001) (examining when a suspect's silence may be used for impeachment or in establishing the elements of a crime and looking at the Federal Rules of Evidence as they apply to silence).

171 *See supra* text accompanying note 8.

value of silence is simply too minimal to allow the silence to be admissible.

Miranda's basis in the Fifth Amendment prohibition against compelled statements[172] also makes it a poor dividing line for determining the admissibility of silence. The issue before the Court in *Miranda* was how best to protect against compelled statements, and the Court answered by holding that compulsion is "inherent in custodial surroundings."[173] It is arguably an easier task for a court to determine that a suspect's statement was compelled than to determine (if such a determination is indeed possible) that a suspect's silence was compelled. If, as intuition suggests, truly compelled silence[174] does not exist in criminal arrest scenarios, *Miranda*'s emphasis on compulsion makes it a poor beacon for silence jurisprudence.

Moreover, it is virtually impossible to know whether a suspect's silence is in response to direct questioning.[175] In a situation where courts agree that silence in response to direct questioning is inadmissible but disagree on whether silence not in response to direct questioning is admissible, confusion and abuse of defendants' rights are bound to occur. A suspect remaining silent under precompulsion circumstances is simply not analogous to the suspect immediately admitting guilt or otherwise giving a statement under the same circumstances. Silence and statements are two significantly different types of evidence, and contorting a system designed to protect the latter in an attempt to regulate the former has proved to be an onerous task with highly questionable results.

2. *The* Miranda *"Catch-22"*

Using *Miranda* as a dividing line also poses a troublesome no-win situation for defendants. For example, Frazier's options at the time that the police opened the U-Haul hatch were rather bleak. If he chose to make a statement, this statement would be universally admissible as it was voluntary and was not in response to official compulsion

---

172 *See supra* notes 47–48 and accompanying text.

173 *Id.*; *see also* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

174 In contrast to silence that the government merely induces by giving the suspect *Miranda* warnings, see *supra* note 104, the phrase "truly compelled silence" is intended to connote a degree of governmental compulsion over and above simply providing these warnings and letting the suspect choose to remain silent.

175 *See Hale*, 422 U.S. at 177 (noting numerous reasons a suspect might fail to respond to a question during interrogation).

to speak in the form of custodial interrogation.[176] As it turns out, Frazier's decision to remain silent was also admissible, at least under the approach taken by the Eighth and other similarly minded circuits.[177] Either way, the current silence jurisprudence forces defendants to have their post-arrest behavior on display as the court determines the verdict. Critics of this view might argue that Frazier could have simply chosen to remain silent upon arrest and then taken the stand in his own defense to dispel any adverse inferences that the fact-finder might draw from the officer's testimony about his silence. This position, however, thwarts the defendant's right not to take the stand at all. In effect, the defendant's silence may prove incriminating unless and until the defendant can convince the jury otherwise. Such a presumption surely cannot be compatible with the foundational principle that criminal defendants are innocent until proven guilty.

Furthermore, defendants who attempt to mitigate the impact of the adverse inferences resulting from their prior silence by taking the stand open themselves up to cross-examination by the prosecution. Although the defendant may refuse to answer questions by invoking the protections of the Fifth Amendment, in doing so the defendant is once again subjected to adverse inferences that the jury may draw from his refusal to testify after having been all but compelled to take the stand. Thus, the seemingly simple attempt to use *Miranda* to shield defendants from abuse of their post-arrest, pre-*Miranda* silence has ripple effects that implicate numerous rights of criminal defendants.

3. *The Ubiquity of* Miranda

In a society where the law has permeated television and popular culture, few aspects of the law are as well known as *Miranda* warnings.[178] Some courts have noted that the actual giving of *Miranda* warnings has become a mere formality, because many Americans are aware of their right to remain silent well before the time of custodial interrogation.[179] While this scenario does not remove the need for police to administer *Miranda* warnings, it seems erroneous to believe

---

176 *See* Oregon v. Elstad, 470 U.S. 298, 306–07 (1985).

177 *See supra* notes 170–75 and accompanying text.

178 *See* Clymer, *supra* note 13, at 449 n.3.

179 *See, e.g.*, Weir v. Fletcher, 658 F.2d 1126, 1131 (6th Cir. 1981) ("There is widespread knowledge in society that one who is arrested has no obligation to speak to the police and that he is entitled to consult with an attorney. The news media has widely publicized the *Miranda* case and its formal warnings requirement. Simply stated, many if not most persons under arrest know of their right to remain silent and exercise that right. In fact, many lawyers give out the routine advice to their clients that if the client should be arrested for any reason, the client should say nothing and call the attorney. We do not think that persons who are exercising their right to remain silent should be penalized for it.").

that suspects are aware of or may exercise their right to remain silent only at the point the police actually advise them of that right. In a sense, popular culture has given most Americans their *Miranda* warnings well in advance of their actual arrest.

Empirical research supports the notion that a large percentage of American adults are well aware of the rights embodied in the *Miranda* warnings.[180] A study by Dr. Thomas Grisso measured subjects' comprehension of the words and phrases used in *Miranda* warning statements.[181] The study first asked participants to paraphrase each of the four standard *Miranda* statements, with eight points being a perfect score.[182] The tests showed that 80.9% of adults scored a six or higher, with 42.3% attaining a perfect score.[183] The next part of the test measured understanding of six key words used in standard *Miranda* warnings.[184] Here, a score of twelve represented a perfect score, with 74.7% of adults scoring a nine or above.[185] Grisso's empirical data is powerful evidence that a large majority of the American population has an advanced understanding of the rights embodied in the *Miranda* warnings. Significantly, the study also showed that juveniles have a much more limited understanding of *Miranda* rights, which suggests that this understanding, while not intuitive, is acquired before adulthood.[186] Against this backdrop, it would be unfair and illogical to penalize defendants for knowing and exercising their rights before the police's rote recitation of these rights.

4. *Incentives and the Timing of* Miranda *Warnings*

Any well-trained police officer in the Eighth, Fourth, and Eleventh Circuits should know that pre-*Miranda* silence is presently admissible in their jurisdiction and that *Miranda* warnings need only be given before custodial interrogation. Under the current system, an enterprising arresting officer may expand the time window during which silence is admissible by delaying custodial interrogation and thus delaying the need to administer *Miranda* warnings.[187] Such a tac-

---

180 *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) (focusing on juveniles' capacity to understand and waive *Miranda* rights and examining the capacity of adults to do the same).

181 *See id.* at 1143.

182 *See id.* 1145–46.

183 *See id. at* 1152–53.

184 *See id.* at 1146. The words used were: *consult*, *attorney*, *entitled*, *appoint*, *interrogation*, and *right*. *See id.*

185 *See id.* at 1146–47, 1153.

186 *See id.* at 1157.

187 *See* United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) ("We therefore think it evident that custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*. Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be

tic undercuts the fundamental goals of *Miranda*—those of preventing coercion and ensuring that suspects are advised of their rights in a timely fashion.[188] The current system provides an incentive for officers to postpone Mirandizing a suspect until long after his or her arrest, thus increasing the chance that the defendant would have some sort of admissible incriminating silent reaction.

B. Proposing a Different Way of Thinking About the Admissibility of Silence

Considering all of the problems outlined above, it is indeed surprising that the Court has allowed this problematic jurisprudence to fester for so long. This Note offers a solution that does not radically change the substantive effect or message of existing case law but instead simplifies the current confusing and convoluted system. The proposed regime is simple yet practical: a general rule banning the use of incriminating silence during the Government's case-in-chief but allowing the use of silence for impeachment purposes unless the undue prejudicial effect of the evidence outweighs its probative value. This rule discontinues the use of *Miranda* as a tool for determining the admissibility of evidence. Instead, the rule draws the line at the type of use while balancing the rights of the criminal defendant with the need of the Government to try cases effectively.

1. *Abolishing Categories*

The proposal's first step is to eliminate the pre- or post-arrest and pre- or post-*Miranda* categories that make this area of law needlessly complex. Because the Court never intended *Miranda* to be applied to silence, the administering of *Miranda* warnings should be irrelevant to deciding whether silence is admissible in court. Instead, the pertinent threshold question should be whether the Government seeks to use the silence in its case-in-chief or for impeachment purposes. Thus, in deciding whether the Government may comment on or elicit testimony regarding the defendant's silence, one should ask two questions: first, whether the silence is being used for impeachment purposes, and second, whether the evidentiary value of the silence is significantly more probative than prejudicial. If the answer to both questions is "yes," then the use of the silence is permissible. If the answer to either question is "no," then the court should find the evidence of the silence inadmissible.

---

used against the defendant."); *see also* Clymer, *supra* note 13 (discussing the incentives police have to disobey *Miranda*).

188 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

2. *Impeachment Versus Case-in-Chief Use*

The proposed regime permits the use of post-arrest, pre-*Miranda* silence for impeachment purposes unless the evidentiary value of the particular use is significantly more prejudicial than probative. This aspect of the new system essentially makes the trial judge the gatekeeper for regulating the use of silence. The trial judge should begin with the presumption that silence is admissible for impeachment purposes, preventing the use of such silence only when it would truly create undue prejudice to the defendant to a significant extent. An example of such an impermissibly prejudicial use is *Raffel v. United States*,[189] where the defendant was asked on retrial to explain his failure to take the stand at the original trial. This relatively high bar makes sense because the defendant has implicitly agreed to the use of his silence by testifying and because the strict standard acts to compensate for the corresponding bar of the use of silence in the case-in-chief.

Why retain the impeachment and case-in-chief distinction? One reason is that doing so provides for some consistency with the Supreme Court's silence jurisprudence, which thus far has only allowed silence to be used for impeachment purposes. Thus, courts may continue to rely on much of the existing precedent, including the *Doyle* line of cases.[190]

Additionally, there are several reasons why such impeachment use of silence is typically much less problematic than case-in-chief use. In using silence for impeachment purposes, the Government is not building its main case against the defendant but only challenging previous testimony. Furthermore, the most common scenario is one where the Government is using a defendant's silence to impeach that defendant's own testimony.[191] In this situation, by taking the stand to give initial testimony, the defendant has effectively waived the protections of the Fifth Amendment.[192] If the defendant chooses to lie on the stand, the Government should then be allowed to use the defendant's prior silence to impeach that testimony. This is the crucial dis-

---

189 271 U.S. 494 (1926).

190 *See supra* Part II.A.1; *see also* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987) ("[T]he *Doyle* rule is predicated on the implied promise of the *Miranda* warnings. The cases which have allowed impeachment by silence rely on the fact that the defendant opens himself to impeachment by taking the stand. There is, on the other hand, a constitutional right to say nothing at all about the allegations. While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition." (citations omitted)).

191 *See, e.g.*, Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam); United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984); Woods v. Kuhlmann, 677 F. Supp. 1302 (S.D.N.Y. 1988).

192 *See, e.g.*, *Raffel*, 271 U.S. at 499.

tinction between impeachment and case-in-chief use: Much as a defendant should not be forced to take the stand to explain the Government's case-in-chief use of incriminating silence, the Government's hands should not be bound in terms of being able to use the defendant's silence to rebut the defendant's own testimony.

The proposed plan also eliminates the catch-22 situation that defendants presently face as the decision to take the stand initially would rest entirely in their hands. Thus, the jury is better suited to evaluate and interpret the evidence in an even-handed manner. The troublesome incentive for police to delay giving *Miranda* warnings likewise disappears because, although some silence might still be admissible at trial, *Miranda* becomes irrelevant to the admissibility question. Without knowing whether the defendant will take the stand or whether the case will ever get to trial, the police have little incentive to prolong the post-arrest, pre-*Miranda* window.

3. *Mere Semantics or Substantive Change?*

Critics might argue that this proposal will have little substantive effect on present silence jurisprudence and that adopting a rule such as the one proposed in this Note represents only a matter of semantics. While it is true that this new approach only departs slightly from prior case law, it does settle the current circuit split in the most fair and constitutional manner. That the new approach is not a huge departure from current jurisprudence is also one of its strengths. Silence jurisprudence is clearly still evolving, and a slight readjustment that reaches more desirable results is preferable to a vast disruption of the status quo.

More than just a desire to stabilize the current jurisprudence, the proposed approach reflects concerns regarding the evidentiary reliability of silence and the inadequacy of the *Miranda* decision as a dividing line for admissibility. Simply put, courts that adopt this approach position themselves to favor suspects' substantive rights over the truly semantic and convoluted nature of the present law in this area. At the same time, allowing silence to be used for impeachment purposes in most cases strikes an appropriate balance between the rights of the accused and the right of the Government to put on its case without undue burden.

This approach is not entirely novel. The D.C. Circuit has already adopted a more restrictive version of this Note's proposal, in which *Miranda* still plays a role by canceling out the waiver that is imputed to the defendant who chooses to testify.[193] This version of the proposal

---

193 *See* United States v. Moore, 104 F.3d 377, 387 (D.C. Cir. 1997) ("*Doyle* is an exception to an exception to the general rule. The general rule regarding a defendant's silence is that it cannot be used. The defendant's testifying creates an exception allowing the

unduly burdens the Government's ability to put on its case and retains the illogical and contrived *Miranda* dividing line. Thus, the modified approach outlined above strikes an optimal level of protection for the rights of both sides while also attempting to break silence jurisprudence free from the shackles of *Miranda*. Although *Miranda* was a milestone for criminal defendants and has influenced a generation of convicts and nonconvicts alike, it has no place in the regulation of silence.

Conclusion

The highly compartmentalized nature of silence jurisprudence in the federal courts and the long-standing circuit split over the case-in-chief use of post-arrest, pre-*Miranda* silence foreshadow the lingering difficulties the Supreme Court must face in addressing the admissibility of silence. In resolving the issue, the Court must maintain the delicate balance between protecting the constitutional rights of criminal defendants and not unduly burdening the Government's ability to try its case. This balance would be ill served by allowing the case-in-chief use of post-arrest, pre-*Miranda* silence. The probative value of this type of silence is too low, and the constitutional concerns it generates are too significant to allow the balance to favor the use of such silence.

A better approach, and the one for which this Note has advocated, is to ban the use of all silence in the Government's case-in-chief while generally allowing for the impeachment use of silence so long as the use is not overly and unduly prejudicial to the defendant. Although seemingly drastic, this approach stays true to most of the current precedent while allowing for the admissibility of silence for impeachment purposes in most cases. Moreover, the rule would eliminate outdated and illogical *Miranda* warning-based determinations of admissibility and replace them with a more workable regime. This rule would protect defendants by banning the use of ambiguous silence in the case-in-chief while preserving the impeachment use of silence when a defendant chooses to waive his or her Fifth Amendment right to remain silent, knowing and consenting to the fact that this will allow prior incriminating silence to become admissible.

The admissibility of post-arrest, pre-*Miranda* silence is crucial to the constitutional rights of criminal defendants, and the Supreme Court should act to rectify the uncertainty that currently exists in this area of law. An ideal resolution would include not only a decision on the admissibility of post-arrest, pre-*Miranda* silence but also a reexamination of the suitability of the current regime and the jurisprudence

---

testimony to be used for the purpose of impeachment. The presence of the *Miranda* warning before the silence causes an estoppel that restores to the defendant the protection against the use of the silence. Both the majority and the dissent in *Doyle* make that plain.").

in this area as a whole. Perhaps by doing so, the Supreme Court will finally clarify this complicated yet vital chapter of constitutional law.