The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda

The policies underlying the Fifth Amendment’s self-incrimination clause “have no application in a prearrest context.”1 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.”2

Imagine that someone murders your friend, and the police are investigating the circumstances surrounding the crime. During a preliminary investigation, police ask the victim’s boyfriend where he was on the night of the murder. The boyfriend informs police that he does not wish to speak with them at this time. Subsequently, the police uncover evidence that the boyfriend is the murderer.

At trial, the defense’s opening statement is that the defendant was home all night watching a football game. During the prosecution’s case-in-chief, the police officer takes the stand to testify that the defendant did not provide any information to them during a routine inquiry. The defendant, however, had stated that he did not wish to speak with the police about the matter. Counsel for the defendant objects to the officer’s testimony and moves for a mistrial, claiming a violation of his client’s Fifth Amendment privilege against self-incrimination.3 The trial judge notes that the United States Supreme Court has never ruled on the issue of whether the prosecution may use pre-arrest silence to show substantive evidence of guilt of the accused, and the Federal circuit courts are split on the issue.4

I. INTRODUCTION

The Fifth Amendment secures a defendant’s right against compelled self-incrimination at trial.5 The United States Supreme Court expanded that protection to include custodial interrogations, which are presumed to be inherently coercive in nature.6 When faced with the pre-arrest, pre-Miranda

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2. Id. at 241 (concluding privilege not applicable without compulsion).
3. U.S. CONST. amend. V. The Fifth Amendment states in relevant part that no person “shall be compelled in any criminal case to be a witness against himself.” Id.
4. See Jenkins, 447 U.S. at 240 (allowing pre-arrest silence for impeachment; reserving ultimate judgment on use for substantive guilt); see also infra note 8 and accompanying text (discussing current circuit split regarding pre-arrest silence).
5. See supra note 3 (setting forth Fifth Amendment language securing right against compelled self-incrimination).
context, however, the Court has limited its rulings to certain contexts, allowing comment on a defendant’s silence for impeachment purposes. The Court’s reservation on the issue has led to a split among the circuit courts as to whether the prosecution may use pre-arrest silence to show substantive evidence of a defendant’s guilt. The split among the circuits has provided little guidance to lower courts, resulting in scattered state law decisions regarding the use of pre-arrest silence in the prosecution’s case-in-chief.

This Note takes the position that the current Court should rule that the use of pre-arrest, pre-Miranda silence in the prosecution’s case-in-chief as substantive evidence of a defendant’s guilt is not a violation of the Fifth Amendment and should be admissible. Part II.A. of this Note outlines the evolution of the privilege including a discussion of the drafters’ intentions behind the Fifth Amendment’s self-incrimination clause. This discussion briefly outlines the history behind the colonists’ adoption of the self-incrimination privilege. Additionally, the Note will focus upon the Supreme Court’s treatment of Fifth Amendment case law surrounding the self-incrimination clause. Part II.A. also addresses the policy concerns underlying the privilege.

Part II.B. details the current state of the circuit court split regarding pre-arrest, pre-Miranda silence. Furthermore, this section highlights the Miranda progeny that have created numerous exceptions to the landmark decision. This entails a discussion on the lack of clarity that leaves this area of

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7. Jenkins, 447 U.S. at 240 (limiting holding to impeachment context). But see id. at 243-44 (Stevens, J., concurring) (discussing use of pre-arrest silence beyond impeachment context as substantive evidence of guilt). Justice Stevens stated that a person who is not under compulsion to speak has no right to invoke the protections of the Fifth Amendment. Id. at 244.

8. Compare United States v. Beckman, 298 F.3d 788, 795 (9th Cir. 2002) (allowing silence for impeachment and substantive evidence of guilt), and United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (holding use of pre-arrest silence proper for showing substantive evidence of guilt), with Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (holding use of silence impairs policies underlying self-incrimination privilege), Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (limiting use of pre-arrest silence to impeachment), and Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (extending Court’s rationale in Griffin v. California, 380 U.S. 609 (1965), to pre-arrest context).

9. See infra notes 82-84 and accompanying text (discussing various inconsistent decisions in state courts).

10. See infra notes 98-111 and accompanying text (discussing Supreme Court decisions regarding silence and Fifth Amendment).

11. See infra notes 24-37 and accompanying text (announcing drafters’ intentions underlying Fifth Amendment privilege against self-incrimination); see also infra notes 105-10 and accompanying text (detailing two components required to exercise privilege).

12. See infra note 28 and accompanying text (noting procedures of 1700’s gave rise to adoption of privilege).

13. Infra notes 24-28 and accompanying text.


15. Infra Parts II.B.2.a.-b. (discussing competing views regarding use of pre-arrest silence); see also infra note 82 (addressing split among state courts on issue); infra notes 86-89, 95 (noting scholars’ discussion on use of pre-arrest silence for substantive evidence of guilt).

jurisprudence open for manipulation by state and appellate courts.17

Part III analyzes the Supreme Court’s treatment of Fifth Amendment jurisprudence following Miranda, specifically regarding the self-incrimination clause and its effect on the ongoing pre-arrest silence debate.18 This analysis highlights the Court’s willingness to allow the use of silence in various contexts.19 The analysis observes the Court’s tendency to allow the use of pre-arrest silence as substantive evidence of guilt.20 This discussion concludes with a proposal regarding the potential effect a decision on pre-arrest silence would have on challenges toward Miranda.21

Finally, Part IV will conclude that the Supreme Court will rule that the use of pre-arrest, pre-Miranda silence as substantive evidence of a defendant’s guilt is admissible in the prosecution’s case-in-chief.22 This Note further concludes that doing so will indirectly open a new round of challenges to Miranda case law.23

II. HISTORY

A. Privilege Against Self-Incrimination

The Fifth Amendment’s self-incrimination clause evolved from numerous drafts and debates between the framers.24 James Madison initially proposed the clause and embedded it in a provision concerning a defendant’s procedural rights at trial.25 The framers positioned the final draft of the clause within the Fifth Amendment and unanimously adopted it as it is worded today.26 The eventual placement of the privilege in the Fifth Amendment led to debates over the interpretation and intended scope of the clause.27

The privilege against self-incrimination developed in response to

17. See infra notes 41-47 (discussing origin and concerns underlying Miranda); infra notes 57-62 and accompanying text (discussing cases providing Miranda exceptions); see also infra notes 64-67 (addressing recent decision in Dickerson v. United States).
18. infra notes 86-128 and accompanying text (discussing tug-of-war between Griffin and Jenkins rationales).
19. See infra Parts III & IV (articulating Court’s allowance of silence in different contexts).
20. infra Parts III & IV (discussing Court’s trend toward permitting use of silence in case-in-chief).
21. infra notes 58-62 (addressing expansion of exceptions in Miranda context); see also infra notes 101-07 and accompanying text (highlighting Justices Scalia and Stevens’ analysis of current Fifth Amendment and Miranda jurisprudence).
22. See infra Part IV (theorizing Supreme Court’s stance on pre-arrest silence).
23. infra notes 98-107 and accompanying text (discussing Court’s rejection of Fifth Amendment and Due Process challenges to use of silence).
25. See id. at 422-23 (noting proposed style and placement of initial draft).
26. See id. at 426-27 (stating framers unanimously agreed to placement of clause in Fifth Amendment, instead of Sixth Amendment). After some discussion and debate, the framers placed the self-incrimination clause in the Fifth Amendment as opposed to the Sixth Amendment. Id.
27. Id. at 427 (arguing placement of clause indicated intent to extend beyond trial context).
governmental abuse of individuals’ rights. England’s inquisitional-style courts utilized torturous tactics that concerned the framers. In most cases, tortured individuals conceded guilt regardless of the truth underlying such confessions. Many scholars have debated the extent to which the drafters intended the self-incrimination clause to protect individuals. One theory is that the framers designed the privilege to include an individual’s right to remain silent. This theory relies upon the belief that a defendant should have unfettered discretion whether or not to speak. This rationale, however, springs from a case involving the protections afforded in a custodial context. The opposing theory rejects the right to remain silent hypothesis and states that the protection extends only to situations when compulsion exists. In fact, the Fifth Amendment states that no person “shall be compelled in any criminal case to be a witness against himself.” These two conflicting interpretations provide the foundation for the debate arising under the invocation of the privilege against self-incrimination.

28. See LEVY, supra note 24, at 430-31 (discussing history of state oppression); see also Mary A. Shein, The Privilege Against Self-Incrimination Under Siege: Asherman v. Meachum, 59 BROOK. L. REV. 503, 503 (1993) (noting history of state abuse behind drafting of privilege). The creation of the privilege arose from the concern of establishing an accusatorial system of justice rather than the inquisitorial system utilized by earlier English courts. Shein, supra, at 506-08 (explaining concern behind framers’ adoption of privilege). The English Courts’ use of the inquisitorial system led to abuses and torture that the framers wanted to protect against. Id.; LEVY, supra note 24, at 419-22 (observing history of English inquisitorial Star Chamber led to proposal of self-incrimination privilege); see JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 5-10 (Univ. of Mich. Press, 1993) (setting forth benefits and protections of adversary procedural system).

29. See Carol A. Chase, Hearing the “Sounds of Silence” in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System, 44 KAN. L. REV. 929, 933-35 (1996) (detailing history of Star Chamber through common law courts); see also LEVY, supra note 24, at 419 (pointing to framers’ debates whether certain provisions provided protection from torture).

30. LEVY, supra note 24, at 418 (touching upon torturous practices of European countries to “extort a confession of crime”).

31. See infra notes 32-37 and accompanying text (discussing conflicting opinions surrounding interpretation of privilege against self-incrimination).


33. See Miranda, 384 U.S. at 469-70 (noting importance of defendant’s free will in custodial context).

34. Id. (highlighting need for protection in custodial environment).

35. Alschuler, supra note 32, at 2626-27 (explaining second theory behind privilege focuses upon compulsion aspect). This rationale relies upon the Fifth Amendment’s inclusion of “nor shall be compelled” language. Id. at 2626. The inclusion of the term “compelled” leads some scholars to infer the framers’ usage was intentional. Id.; see Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting) (declaring compulsion as focus of privilege); see also LEVY, supra note 24, at 430 (admitting privilege intended to protect against torture). But see LEVY, supra note 24, at 423-24 (suggesting Madison’s proposal of privilege meant to extend beyond mere compulsion).


37. See Alschuler, supra note 32, at 2625-26 (noting Supreme Court’s oscillation between two
The Court’s interpretation of the privilege against self-incrimination has ranged in scope from very broad to extremely narrow.\(^{38}\) In *Murphy v. Waterfront Commission*,\(^{39}\) the Court established a number of policy considerations underlying the Fifth Amendment’s privilege against self-incrimination.\(^{40}\) The Court noted that preventing police abuse and cruel punishment of criminal suspects, leading to self-accusations, were among the policies courts should consider.\(^{41}\) The application of these policies has varied on occasion, depending upon the factual situations in which questioning takes place.\(^{42}\)

The Court, though, has on at least one occasion expressed a desire to limit the scope of the Fifth Amendment, prohibiting its invocation for preliminary or general communications.\(^{43}\) In *Miranda v. Arizona*, the Court noted that its decision did not affect “on-the-scene questioning” and other preliminary inquiries intended to initiate police investigations.\(^{44}\) The Court focused upon a citizen’s duty to provide “whatever information they may have to aid in law enforcement.”\(^{45}\)

interpretations of privilege); see also LEVY, supra note 24, at 429-30 (commenting neither interpretation can truly be proved or disproved). The framers left little evidence to truly support one interpretation over the other. LEVY, supra note 24, at 430.

\(^{38}\) See infra notes 80-86, 98-110 and accompanying text (outlining Court’s use of both interpretations in decisions).

\(^{39}\) *Id.* at 52 (1978).

\(^{40}\) *Id.* at 55 (setting forth policies underlying privilege). The Court stated the privilege is fueled by the following policy considerations: (1) an unwillingness to subject criminal suspects to cruel punishment and self-accusation; (2) an accusatorial rather than an inquisitorial system of justice; (3) to prevent possible police abuses to obtain confessions; (4) ideas of fundamental fairness in the truth-seeking process; (5) privacy rights; (6) distrust of statements against one’s own interests; and (7) preference to protect the innocent rather than punishing a guilty party. \emph{Id.}; see Jane Elinor Notz, Comment, \textit{Prearrest Silence as Evidence of Guilt: What You Don’t Say Shouldn’t Be Used Against}, 64 \textit{U. CHI. L. REV.} 1009, 1019-22 (1997) (discussing policy arguments established by *Murphy* court); Barbara Rook Snyder, \textit{A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials}, 29 \textit{WM. & MARY L. REV.} 285, 308-10 (1988) (contending scholars disagree more about policies rather than development).

\(^{41}\) *Murphy*, 378 U.S. at 55 (concluding prevention of abuses and torture among considerations during drafting of Fifth Amendment privilege).

\(^{42}\) See infra notes 50-62, 75-78 and accompanying text (describing application of policies within different questioning contexts).

\(^{43}\) See Fisher v. United States, 425 U.S. 391, 401 (1976) (rejecting expansion of Fifth Amendment to privacy of general communications); Miranda v. Arizona, 384 U.S. 436, 477-78 (1966) (refraining from extending Fifth Amendment to general questioning); see also Griffin v. California, 380 U.S. 609, 617-23 (1965) (Stewart, J., dissenting) (concluding Fifth Amendment should be limited to compulsion only).

\(^{44}\) *Miranda*, 384 U.S. at 477-78 (distinguishing preliminary questioning from custodial interrogations).

\(^{45}\) *Id.* (highlighting importance of preliminary questioning to police investigations); see also Michigan v. Tucker, 417 U.S. 433, 450-51 (1974) (balancing society and criminal defendants’ rights). The *Tucker* Court held that under our system of justice, providing all relevant information is a critical facet of the adversarial system. *Tucker*, 417 U.S. at 450. The Court emphasized that society’s strong interest in prosecutions usually outweigh a criminal defendant’s rights within the pre-Miranda context. *Id.*
B. Modern Evolution of Miranda and Pre-Arrest Silence

1. Evolution of Miranda and Its Progeny

In *Miranda*, the Supreme Court ruled that a criminal defendant had a right to remain silent when confronted with police questioning in a custodial context.46 The Court held that statements made in a custodial situation, without the police having informed a defendant of his “rights,” are inadmissible at trial.47 The Court has only extended protection of a defendant’s choice to remain silent to the *post-arrest* context.48 In *Griffin v. California*,49 the Supreme Court recognized that a defendant has an absolute constitutional right to be free from having any comment made concerning his failure to testify at trial.50 The Court ruled that such a comment would force a defendant to testify, and therefore violate his right against self-incrimination afforded by the Fifth Amendment.51

As part of its decision in *Miranda*, the Court extended the reach of the privilege against self-incrimination to contexts outside the courtroom.52 The Court, however, has noted distinctions between a post-arrest or custodial situation and a pre-arrest context.53 In *Miranda*, the Court specifically distinguished preliminary, pre-arrest questioning from the coercive, custodial

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46. *Miranda*, 384 U.S. at 479 (ruling police must warn suspect of right to remain silent). Based on the inherently coercive nature of the environment, the Court limited its decision to custodial interrogations. *Id.* at 456-63 (outlining inherently compulsive setting of police interrogations). The focus of the Court’s analysis relied upon the government’s compulsion of suspects to speak as its basis for a Fifth Amendment violation. *Id.*; see also Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 742-45 (1999) (summarizing inherent coercion analysis from *Miranda*); George M. Dery III, *The “Illegitimate Exercise of Raw Judicial Power”: The Supreme Court’s Turf Battle in Dickerson v. United States*, 40 BRANDeS L.J. 47, 54 (stating *Miranda* recognizing inherently coercive nature of custodial interrogation).

47. *Miranda*, 384 U.S. at 478-79 (ruling as admissible statements made while in custody without *Miranda* warnings).


50. *Id.* at 614-15 (setting forth defendant’s right not to testify and prohibit comment upon decision). It is a violation of the Constitution for a prosecutor to comment upon a defendant’s failure to take the stand and give his side of the story. *Id.* The Court relied upon the self-incrimination clause to provide criminal defendants this right. *Id.*

51. *Id.* (holding prosecutor’s comment on defendant’s silence at trial unconstitutional).

52. *Miranda*, 384 U.S. at 467 (extending Fifth Amendment protection to other coercive settings).

53. *See* Stefanie Petrucci, *Comment, The Sound of Silence: The Constitutionality of the Prosecution’s Use of Prearrest Silence in its Case-in-Chief*, 33 U.C. DAVIS L. REV. 449, 460 (2000) (pointing to Court’s decision in Jenkins for distinction). Police are required to provide assurances under *Miranda*, but those assurances are afforded to protect an individual in a coercive, custodial environment. *Id.* Moreover, the author highlights the limits of the Fifth Amendment to custodial interrogations and subsequent formal proceedings. *Id.* at 465; see also United States v. Oplinger, 150 F.3d 1061, 1066-68 (9th Cir. 1998) (concluding pre-arrest context provides no compulsion or inducement).
interrogations upon which the Court made its decision.54 The critical role of investigation in law enforcement was a consideration in noting this distinction.55 The Court also held that the inherently coercive environment of custodial interrogations is not usually present in the early investigation stages.56 Following its landmark decision, the Court’s subsequent cases began to chip away at the rights that the Miranda decision had established.57

The Supreme Court began curtailing Miranda’s application by unhooking the decision from its constitutional moorings.58 The Court articulated an exception for admitting statements for impeachment purposes even if the statement was in violation of Miranda.59 Although the law affords a defendant certain rights, the Court concluded that the law does not allow a defendant to bend the law to serve his needs.60 The Court has authorized the admissibility of statements uttered after a Miranda violation and when public safety is a concern.61 At times, the Court has distinguished between violations of Miranda’s requirements and police action in violation of the Fifth Amendment.62 In fact, the mounting number of exceptions gave rise to

54. See Miranda, 384 U.S. at 477-78 (highlighting distinction between custodial and preliminary contexts). The Court noted that a custodial interrogation or a deprivation of freedom is the “point that our adversary system of criminal proceedings commences[,]” id. at 477.

55. Id. at 477-78 (observing function of investigation in criminal justice).

56. Id. at 478 (acknowledging coercive interrogation environment generally not present in preliminary investigations).


60. Harris, 401 U.S. at 225-26 (refusing to allow defendant to circumvent impeachment process).


62. Kamisar, Confession Law, supra note 58, at 893 (pointing to Court’s distinction between compulsion under Miranda and protections directly implicating Fifth Amendment).
speculation that Miranda’s days are numbered.63

In Dickerson v. United States,64 the Court upheld Miranda and feebly asserted that the rights under Miranda were constitutional in nature.65 Leading up to the decision, many scholars expressed their opinions on the viability of Miranda.66 Although the Court upheld Miranda, many critics believe that the Dickerson Court reached its decision for non-legal reasons and Miranda remains on the verge of extinction.67 The criticism of Dickerson received support in Chavez v. Martinez.68 In Chavez, the Supreme Court outlined narrower parameters for the Fifth Amendment’s self-incrimination clause.69 The decision in Chavez has revived challenges to Miranda and the scope of the Fifth Amendment.70

63. See Dery, supra note 46, at 54-67 (summarizing growing exceptions’ effect on Miranda); Lunney, supra note 46, at 766-68 (noting lower courts’ acknowledgment of direction of post-Miranda jurisprudence); supra notes 58-62 (detailing court-created exceptions). The lower courts began to follow the Supreme Court’s decisions and recognized the movement towards weakening Miranda. Lunney, supra note 46, at 766-68.

64. 530 U.S. 428 (2000).

65. Id. at 444 (ruling Miranda constitutional in nature and upholding precedent).


67. Dery, supra note 46, at 75-80 (pointing to alternative motives for upholding Miranda); Kamisar, Confession Law, supra note 58, at 889-92 (discussing motives behind Chief Justice Rehnquist’s reasoning). Chief Justice Rehnquist was the initial Justice who began authoring opinions that retracted Miranda, but he authored Dickerson to uphold Miranda. Kamisar, Confession Law, supra note 58, at 889-92. The reasons for the decision could range from pride to retention of power over Congress. Id. at 892; see Dickerson, 530 U.S. at 460-65 (Scalia, J., dissenting) (concluding Miranda progeny requires overruling landmark decision); Kamisar, A Close Look, supra note 57, at 397 (conceding Dickerson decision result of compromise by Chief Justice Rehnquist); see also Dery, supra note 46, at 47-48 (acknowledging doubt over Dickerson holding). Dery highlights portions of the Dickerson decision where the majority acknowledged the decline of Miranda throughout subsequent cases. Dery, supra note 46, at 75-77; see Aaron J. Levangie, Case Comment, You Still Have the Right to Remain Silent, 34 Suffolk U. L. Rev. 679, 683-85 (2001) (criticizing Dickerson as inconsistent with Miranda progeny). But see Donald Dripps, Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis, 17 Const. Commentary 19, 22 (theorizing Dickerson consistent with Miranda).

68. See Chavez v. Martinez, 123 S. Ct. 1994, 2006 (2003) (rejecting claim of constitutional violation under Miranda). The Chavez case dealt with a § 1983 claim against police officers for actively questioning a man while he received medical treatment at the hospital. Id. at 1999-2000. The Court ruled that because the police never used Martinez’s statements against him, Miranda and the Fifth Amendment did not apply. Id. at 2000-01.


2004] 
PRE-ARREST SILENCE AS EVIDENCE OF GUILT 197

2. Pre-arrest, Pre-Miranda Silence as Substantive Evidence of a Defendant’s Guilt

While the Court has expressed jumbled precedent regarding the custodial and post-arrest contexts, the pre-arrest framework remains even cloudier.71 The Court’s interpretation of the term “silence” encompasses a defendant’s decision to remain silent and consult an attorney before speaking.72 Silence, as opposed to a statement, may at times be less demonstrative of a particular thought or belief.73 Moreover, a defendant’s decision to remain silent is arguably only circumstantial evidence of a defendant’s knowledge.74

In Jenkins v. Anderson,75 the Supreme Court considered whether the prosecution can use pre-arrest silence for impeachment purposes.76 The Court held that the defendant’s decision to take the stand “cast[s] aside his cloak of silence” and the protections of the Fifth Amendment’s privilege against self-incrimination.77 Although the Court determined pre-arrest silence is admissible for impeachment purposes, it limited its decision solely to the impeachment context.78 In doing so, the Court refrained from deciding whether pre-arrest silence as substantive evidence of a defendant’s guilt is admissible in the prosecution’s case-in-chief and left it open for lower courts to interpret.79

Currently, the Circuit Courts of Appeals are divided on whether pre-arrest silence is admissible as substantive evidence of a defendant’s guilt.80 The delaying Miranda unconstitutional); see also Klein, supra note 57, at 568 (pointing to numerous questions left unanswered by Dickerson decision); Amanda L. Prebble, Note, Manipulated by Miranda: A Critical Analysis of Bright Lines and Voluntary Confessions Under United States v. Dickerson, 68 U. CIN. L. REV. 555, 582-83 (2000) (questioning viability of Miranda jurisprudence). The cases following Miranda have left the vitality of the landmark case unclear. Prebble, supra.

71. See infra notes 76-84 (detailing current state of pre-arrest silence jurisprudence).
74. See Petrucci, supra note 53, at 486-87 (acknowledging circumstantial nature of silence).
75. 447 U.S. 231 (1980).
76. Id. at 238-39; see Questioning of a Defendant on Early Silence Upheld, N.Y. TIMES, June 11, 1980, at A26 [hereinafter Questioning] (announcing Supreme Court’s decision in Jenkins).
77. Jenkins, 447 U.S. at 238 (recognizing defendant’s choice to take witness stand and waive privilege).
78. Id. at 240 (limiting scope of decision to impeachment context). But see id. at 242-44 (Stevens, J., concurring) (stating silence probative without compulsion).
79. See infra notes 80-86 (discussing various interpretations among federal and state courts); Jenkins, 447 U.S. at 240-41 (leaving each jurisdiction free to decide issue of pre-arrest silence for substantive guilt).
80. Compare United States v. Beckman, 298 F.3d 788, 795 (9th Cir. 2002) (allowing silence for impeachment and substantive evidence of guilt), United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (announcing use of silence to show substantive evidence of guilt does not violate Constitution), United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (allowing State’s use of pre-arrest silence when defendant not under compulsion), United States v. Tenorio, 69 F.3d 1103, 1108 (11th Cir. 1995) (holding use of pre-arrest silence proper for showing guilt), United States v. Calise, 996 F.2d 1019, 1022 (9th Cir. 1993) (ruling prosecutor’s comment regarding silence harmless error), and United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (holding prosecution’s comment on defendant’s demeanor during initial questioning to show
Eleventh, Ninth, and Fifth Circuits have ruled pre-arrest silence is admissible in the prosecution’s case-in-chief, while the Tenth, Seventh, Sixth, and First Circuits have ruled the use of pre-arrest silence is a violation of the Fifth Amendment. Likewise, state courts have been inconsistent in their application because of conflicting precedent on the issue. Some state courts have agreed with the Fifth, Ninth, and Eleventh Circuits in their analysis of the issue. Meanwhile, other state courts have relied upon the analysis proffered by the First, Sixth, Seventh, and Tenth Circuits.

a. Rationale for Prohibiting Pre-arrest Silence

Based upon the Supreme Court’s lack of guidance, some lower courts have ruled pre-arrest silence inadmissible in the prosecution’s case-in-chief. Courts that prohibit the use of pre-arrest silence as substantive evidence of a defendant’s guilt rely upon certain rights afforded by the Fifth Amendment.  


82. See infra notes 83-84 (detailing state courts split on issue of pre-arrest silence); see also Marcy Strauss, supra note 73, at 137-40 (summarizing state court opinions concerning pre-arrest silence as substantive evidence of guilt). Strauss, however, believes that pre-arrest silence should be inadmissible even in an impeachment context, despite the Court’s ruling in Jenkins. Strauss, supra note 73, at 162.

83. See State v. Ramirez, 871 P.2d 237, 246 (Ariz. 1994) (holding comment on pre-arrest silence absent governmental coercion does not violate constitution); Key-El v. State, 709 A.2d 1169, 1174-75 (Md. 1991) (determining privilege does not protect selective invocation in pre-arrest context); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (limiting use of pre-arrest silence to impeachment), and Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (extending Court’s rationale in Griffin to pre-arrest context).


85. See infra notes 86-97 and accompanying text (detailing opinions holding pre-arrest silence inadmissible).

86. See Ouska v. Cahill-Masching, 246 F.3d 1036, 1047-49 (7th Cir. 2001) (applying Fifth Amendment analysis to pre-arrest context); Combs v. Coyle, 205 F.3d 269, 284 (6th Cir. 2000) (contending Fifth Amendment applies to pre-arrest silence); Coppola v. Powell, 878 F.2d 1562, 1568-69 (1st Cir. 1989) (opining Fifth Amendment and Griffin applicable to pre-arrest silence); see also Jackson, supra note 81, at 522-23 (arguing use of pre-arrest silence contrary to Fifth Amendment).
The rationale is that disclosing a defendant’s choice to remain silent during the pre-arrest stage will lead the jury to infer guilt. As a result, these courts conclude that comments upon a defendant’s silence compel an individual to speak or otherwise incriminate herself, which the Supreme Court prohibits.

Additionally, critics argue that the right against self-incrimination under the Fifth Amendment, in conjunction with *Miranda*, implies the government’s promise to respect the defendant’s decision to remain silent. These courts maintain that the Supreme Court’s ruling prohibiting comment on a defendant’s silence at trial extends to the pre-arrest context. The rationale is that by remaining silent a defendant has exercised his constitutional right against self-incrimination, and commenting on his choice to do so violates the Fifth Amendment. Some proponents claim a compulsive environment exists for a defendant to choose whether to remain silent or speak.

Another contention rests upon the notion that use of pre-arrest silence is highly prejudicial and provides little probative value. Despite these contentions, several circuit courts have held that the use of pre-arrest silence in the prosecution’s case-in-chief is harmless error. Alternatively, the “right to silence” theorists have attempted unsuccessfully to challenge pre-arrest silence as a violation of fundamental fairness. These courts have clumped Supreme

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88. See Griffin v. California, 380 U.S. 609, 613-15 (1965) (prohibiting comment on defendant’s choice not to testify); Combs, 205 F.3d at 281-82 (relying on Griffin, holding use of pre-arrest silence similar in effect); Coppola, 878 F.2d at 1568 (contending Griffin rationale applicable to pre-arrest context).

89. See Michael R. Patrick, Note, Toward the Constitutional Protection of a Non-Testifying Defendant’s Prearrest Silence, 63 Brook. L. Rev. 897, 935 (1997) (pointing to involuntary coercion arising from admission of pre-arrest silence in State’s case-in-chief). But see Doyle v. Ohio, 426 U.S. 610, 621 (1976) (Stevens, J., dissenting) (rejecting majority’s estoppel theory). Justice Stevens disagreed with the majority that *Miranda* carries the government’s implied promise not to use an individual’s silence against him. Id.; see Snyder, supra note 40, at 319-20 (discussing Justice Stevens’ rejection of estoppel theory).

90. See United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (concluding silence equals invocation of privilege); see also Ouska, 246 F.3d at 1047-48 (deciding privilege applicable in both post-arrest and pre-arrest context); Jackson, supra note 81, at 523 (arguing invoking privilege during pre-arrest situation same as post-arrest).

91. See Patrick, supra note 89, at 935 (characterizing defendant’s options as choice between two evils); Snyder, supra note 40, at 286-87 (claiming choice of speech or silence unfair). But see Craig W. Strong, Note, A Contextual Framework for the Admissibility of a Criminal Defendant’s Pre-Arrest Silence, 79 Neb. L. Rev. 448, 460-61 (2000) (conceding situations when pre-arrest silence not compulsive).

92. See Combs, 205 F.3d at 285 (noting silence creates inference of guilt and increased likelihood of perjury); Pettit, supra note 87, at 219-20 (arguing pre-arrest silence highly prejudicial with little probative value).

93. See e.g., Ouska, 246 F.3d at 1049 (conceding admission of pre-arrest silence harmless error); Burson, 952 F.2d at 1201 (same); Savory v. Lane, 832 F.2d 1011, 1020 (7th Cir. 1987) (same). These courts noted the overwhelming weight of evidence against the defendant. Ouska, 246 F.3d at 1049.

Court precedent together as an implied justification for denying the use of pre-arrest silence. 96  Combining the rights of both the Fifth Amendment and Miranda afforded in other contexts, these courts have construed Supreme Court precedent to hold that the use of pre-arrest silence as substantive evidence of a defendant’s guilt is unconstitutional. 97

b. Rationale for Allowing Pre-arrest Silence as Substantive Evidence of Guilt

As a stepping-stone for allowing prosecutors to comment on a defendant’s pre-arrest silence, some courts rely on the Supreme Court’s ruling in Jenkins. 98 The majority in Jenkins primarily focused upon a defendant’s choice to cast aside the protection of the privilege and testify in his own defense. 99 While the Court ruled pre-arrest silence admissible for impeachment, the majority stopped short of deciding whether pre-arrest silence would be admissible in the prosecution’s case-in-chief as substantive evidence of a defendant’s guilt. 100 Justice Stevens, in his concurrence, provided the best look at the position other justices might have on the issue. 101 Justice Stevens’ opinion advocated the extension of pre-arrest silence to show a defendant’s substantive guilt. 102 Justice Stevens supported his stance by referring to the history within society and the legal community of condemning an individual’s attempt to conceal a crime. 103 While some critics consider Justice Stevens’ opinion dicta, it provides some indication of the stance the Court would take on the issue. 104

against pre-arrest silence). The Court ruled that at least for impeachment purposes, traditional common law principles do not support the reliance on fundamental fairness. Id. at 239; see Strauss, supra note 73, at 128 (noting unsuccessful reliance upon fundamental fairness).

96. See Doyle v. Ohio, 426 U.S. 610, 618 (1976) (holding right to remain silent carries inherent promise to refrain from use of silence); Griffin v. California, 380 U.S. 609, 613-15 (1965) (prohibiting comment upon defendant’s failure to take stand at trial); Combs, 205 F.3d at 281-85 (concluding Griffin line of cases applicable to context); Petrucci, supra note 53, at 469-70 (pointing to lower courts’ reliance on other related Supreme Court decisions). But see Patrick, supra note 89, at 898-99 (criticizing courts’ reliance on Griffin).

97. See e.g., Ouska, 246 F.3d at 1047-48 (relying on Griffin decision to rule comment on silence unconstitutional); Combs, 205 F.3d at 279-83 (deciding case under Griffin and Doyle v. Ohio rationales); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (same).

98. Jenkins, 447 U.S. at 240 (allowing pre-arrest silence for impeachment).

99. Id. at 238 (concluding defendant may not testify and still prevent government from attacking his credibility).

100. Id. at 240-41 (limiting opinion to impeachment context).

101. Id. at 243-45 (Stevens, J., concurring) (stating pre-arrest silence highly probative of guilt and not in violation of constitution); see Jackson, supra note 81, at 516 (noting Justice Stevens’ extension of majority opinion). But see Jackson, supra note 81, at 527 (characterizing Justice Stevens’ remarks as dicta).

102. Jenkins, 447 U.S. at 244 (Stevens, J., concurring) (holding defendant’s silence quite probative of criminal involvement).

103. Id. at 243 n.5 (Stevens, J., concurring) (observing alternative of encouraging concealment of crimes). Justice Stevens relied upon a “deeply rooted social obligation” of citizens to report known criminal activities and identified the failure to do so as representative of “irresponsible citizenship.” Id. Unless the defendant’s silence falls within the Fifth Amendment’s protection, a duty exists for any citizen to report such activity, regardless of his involvement. Id.

104. See Petrucci, supra note 53, at 478 n.205 (pointing to Justice Stevens’ reasoning in Jenkins). Compare Jackson, supra note 81, at 527-28 (arguing Justice Stevens’ comments merely dicta), with United
Additionally, Justice Scalia has expressed strong disapproval of extending the *Griffin* rationale to areas when silence may function as evidence. Justice Scalia’s interpretation of the Fifth Amendment focuses on the compulsion element that gave rise to the privilege. Justice Scalia concluded that the possibility of an adverse inference from his silence does not compel a defendant to testify.

Reading the Fifth Amendment as protecting against only governmental acts that compel an individual to incriminate himself supports allowing pre-arrest silence in the case-in-chief. Two components are necessary in order to exercise the privilege: testimonial evidence and compulsion. Absent the use of compulsion, a defendant’s decision to remain silent is one that is unfettered, and the Constitution does not prohibit the use of that silence. When circumstances arise where a reasonable person would respond, a defendant’s silence is probative of his knowledge and involvement in the underlying offense.

Although silence may lead to some inference of guilt, courts have ruled that

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States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (relying on Justice Stevens’ concurrence in *Jenkins*).

105. Mitchell v. United States, 526 U.S. 314, 331-37 (1999) (Scalia, J., dissenting) (concluding Fifth Amendment does not ban use of defendant’s silence as “demeanor evidence”). Scalia concluded that a defendant’s choice to remain silent is an expression observable by law enforcement. *Id.* at 335-36. An observer’s testimony about a defendant’s reaction to a question and his subsequent silence is not within the protections of the Fifth Amendment. *Id.;* see Brian H. Kurbjeweit, Note, *The Privilege Against Self-Incrimination: Is the Court Chipping Away at Our Most Precious Right?,* 9 WIDENER J. PUB. L. 479, 497 (2000) (discussing Scalia’s reasons for refusing to extend *Griffin* to sentencing phase).

106. *Mitchell,* 526 U.S. at 331-37 (Scalia, J., dissenting) (pointing to historical concern of coercion and torture giving rise to privilege); see Oregon v. Elstad, 470 U.S. 298, 305-07 (1985) (limiting Fifth Amendment’s application to compulsive context). The Court stressed that the Fifth Amendment’s protections address compulsive contexts. *Elstad,* 470 U.S. at 305-07. Acknowledging this factor, the Court implied that the Fifth Amendment privilege extends to only compulsory self-incrimination. *Id. But see Kamisar, A Close Look,* supra note 57, at 402-12 (attacking Justice Scalia’s stance of limiting Fifth Amendment to compulsive context).


108. See *Oplinger,* 150 F.3d at 1066-67 (ruling use of silence constitutional absent compulsion). The court relied upon Justice Stevens’ concurrence from *Jenkins* and noted the requirement of compulsion to exercise the privilege. *Id.;* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (concluding governmental coercion required to claim privilege); see Petrucci, *supra* note 53, at 471-74 (detailing requirement of compulsion inherent in privilege against self-incrimination).


111. *Jenkins,* 447 U.S. at 243-44 (Stevens, J., concurring) (concluding circumstance reasonable for innocent person to speak); see Strauss, *supra* note 73, at 145 (conceding situations exist where pre-arrest silence probative).
it represents only one piece of evidence in the overall trial. Numerous courts have ruled that a defendant’s choice to remain silent is relevant and probative as evidence. In fact, some courts that oppose its usage have conceded pre-arrest silence is harmless error when taken in connection with all the other evidence. Considering possible reasons an individual would remain silent, comment upon that silence would simply leave the issue open for the fact-finder to decide in conjunction with all the other evidence presented.

An analogy made between the use of pre-arrest silence and consciousness of guilt evidence is instructive. Although inferences deriving from use of pre-arrest silence may be slightly prejudicial, this evidence is only circumstantial and does not rise to the level of prejudice the Fifth Amendment protects against. The production of evidence adverse to the defendant’s case constitutes a natural component of the adversarial system. Under Rule 403 of the Federal Rules of Evidence, courts are concerned primarily with excluding evidence that is “unfairly prejudicial.” When addressing this

112. See infra notes 113-22 and accompanying text (detailing role of silence as evidence at trial).
113. See e.g., United States v. Beckman, 298 F.3d 788, 795 (9th Cir. 2002) (affirming trial court’s admission of pre-arrest silence); Combs v. Coyle, 205 F.3d 269, 282-86 (6th Cir. 2000) (reversing trial court’s use of silence); Zanabria, 74 F.3d at 593 (holding silence admissible); see also Patrick, supra note 89, at 953 (commenting on several trial court’s admission of pre-arrest silence leading to circuit court splits).
114. See Ouska v. Cahill-Masching, 246 F.3d 1036, 1049 (7th Cir. 2001) (conceding admission of pre-arrest silence harmless error); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (noting other evidence overwhelming); Savory v. Lane, 832 F.2d 1011, 1020 (7th Cir. 1987) (concluding silence limited in its overall weight).
115. See United States v. Rivera, 944 F.2d 1563, 1569-70 (11th Cir. 1991) (electing to allow jury to determine defendant’s reason for silence); see also Petrucci, supra note 53, at 487-88 (reasoning jury will consider silence with all other evidence).
116. See Snyder, supra note 40, at 298-99 (relating use of pre-arrest silence to consciousness of guilt).
117. See Snyder, supra note 40, at 299 (noting limiting instructions sufficient to combat prejudice of such evidence); see also United States v. Scheffer, 523 U.S. 303, 336 (1998) (Stevens, J., dissenting) (concluding consciousness of guilt evidence helpful to jury’s determination). Although this evidence may be prejudicial, it is not conclusive and is open to the jury’s interpretation. Scheffer, 523 U.S. at 336; see Ouska, 246 F.3d at 1049 (concluding comment on pre-arrest silence harmless error); Burson, 952 F.2d at 1201 (conceding use of pre-arrest silence does not reach constitutional level of error); Petrucci, supra note 53, at 486-87 (explaining silence suggests defendant’s knowledge about crime).
118. See United States v. Gelzer, 50 F.3d 1133, 1139 (2nd Cir. 1995) (noting all evidence probative of guilt adverse to defendant’s interests); United States v. Jackson, 886 F.2d 838, 847 (2d Cir. 1989) (holding evidence not unfairly prejudicial simply because adverse to defendant); Clark Freshman, Note, Beyond Atomized Discrimination: Use of Acts of Discrimination Against “Other” Minorities to Prove Discriminatory Motivation Under Federal Employment Law, 43 STAN. L. REV. 241, 257 n.68 (1990) (pointing to general prejudice inherent in any evidence adverse to defendant’s interest). Freshman acknowledges the inherent prejudice of adverse evidence but explains that the Federal Rules of Evidence are primarily concerned with evidence that is unfair and substantially outweighs the probative value. Freshman, supra.
119. See Gelzer, 50 F.3d at 1139 (discouraging extension of federal rules’ exclusion beyond unfair prejudice). The court concluded that Rule 403 is only concerned with “some adverse effect . . . beyond tending to prove the fact or issue that justified its admission into evidence.” Id. (quoting United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980); see Joseph A. Aliuie, Note, Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?, 14 J.L. & POL. 153, 193 (1998) (declaring American judicial system only concerned with unfair prejudice).
concern, courts must determine whether the danger of unfair prejudice substantially outweighs the probative value. In addition to some courts interpreting pre-arrest silence as harmless error, other courts have allowed the admission of pre-arrest silence as part of the adversarial process.

The potentially ambiguous nature of a defendant’s pre-arrest silence makes a jury less likely to infer guilt without additional evidence. In Jenkins, Justice Marshall articulated other possible reasons that a defendant may remain silent aside from guilt. Justice Marshall conceded that commenting on a defendant’s pre-arrest silence does not prevent a favorable inference. Courts have in fact held that pre-arrest silence alone does not suffice to convict a defendant. Courts have found that the need for additional evidence to support any inferences from a defendant’s pre-arrest silence would only give it weight similar to other circumstantial evidence. The requirement of additional evidence to support these inferences lowers the prejudicial effects that this material would have once admitted into evidence. Allowing pre-arrest silence continues the Supreme Court’s trend of providing more discretion in the admissibility of evidence at trial.

120. See Fed. R. Evid. 403 (codifying balancing standard for exclusion of unfairly prejudicial evidence); see also Gelzer, 50 F.3d at 1139 (advocating balancing test between probative and prejudicial effects); Aluise, supra note 119, at 193 (discussing Advisory Committee notes to Rule 403).

121. See United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (agreeing with Zanabria court on evidentiary use); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (noting pre-arrest silence admissible as “proper evidentiary use”); see also Strong, supra note 92, at 464 (arguing persuasive nature of silence part of adversarial system). The use of pre-arrest silence does not compel a defendant to testify but is a factor in a defendant’s decision to rebut the inferences that may be made by such circumstantial evidence. Strong, supra note 92, at 464.

122. See id. (setting forth reasons for silence in pre-arrest context). Justice Marshall states that a fear of false accusations may lead to an individual’s decision to remain silent. Id.

123. Id. (admitting other non-adverse reasons exist for silence).

124. Ouska v. Cahill-Masching, 246 F.3d 1036, 1049 (7th Cir. 2001) (conceding admission of pre-arrest silence harmless error); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (holding pre-arrest silence alone not enough to convict); Savory v. Lane, 832 F.2d 1011, 1020 (7th Cir. 1987) (concluding pre-arrest silence rebuttable and its admission harmless error).

125. See supra note 125 and accompanying text (detailing circuit courts’ characterization of pre-arrest silence as small part of overwhelming case).

126. See supra note 125 and accompanying text (pointing to circuit courts’ ruling pre-arrest silence harmless error); see also Petrucci, supra note 53, at 488 (stating pre-arrest silence alone will not satisfy reasonable doubt standard).

III. ANALYSIS

The framers drafted and adopted the Fifth Amendment with the primary purpose of preventing tortured, compelled confessions induced by the government. The arguments suggesting that a prosecutor’s comment on a defendant’s pre-arrest silence leads to an unconstitutional adverse inference are unpersuasive. While some courts have expressed disapproval of a prosecutor’s comment on a defendant’s pre-arrest silence, many courts are receptive to its use for substantive purposes. Commenting on a defendant’s silence when police ask preliminary questions does not compel a defendant to testify in order to dispel any possible adverse inferences. The mere fact that the government has presented evidence that a defendant may be guilty of the crime charged does not rise to the level of compulsion proscribed by the Fifth Amendment. The presentation of adverse evidence is the primary function of the adversarial process.

Arguably, there are alternative reasons why an individual would choose to remain silent when police confront him. Justice Marshall suggested fear of false accusations and general nervousness as other reasons for pre-arrest silence. The existence of various reasons prevents a jury from determining a defendant’s guilt based solely on her pre-arrest silence. As the Court has...
indicated, defendants will remain silent for reasons other than guilt.\textsuperscript{138} If that hypothesis is true, then mention of a defendant’s choice to remain silent should not hinder his rights to a fair trial.\textsuperscript{139} If a defendant is innocent, then the jury should easily infer that a valid reason exists for his choice to remain silent.\textsuperscript{140} The inference that silence equates to a guilty mind is only one of many possible inferences and does not preclude an inference of innocence anymore than an inference of guilt.\textsuperscript{141}

The Court has made a sharp distinction between questioning occurring in a coercive, custodial context and general, investigatory questioning.\textsuperscript{142} During a preliminary inquiry, a reasonable citizen should provide the police with any useful information they have to promote the pursuit of justice.\textsuperscript{143} The framers developed the Fifth Amendment’s privilege against self-incrimination to protect the innocent, not to ensure that guilty individuals could manipulate and mislead the system.\textsuperscript{144} Absent coercive behavior that falls within the protection of the Fifth Amendment, preliminary investigations are a crucial component to law enforcement that the criminal justice system should protect.\textsuperscript{145} Without a compulsion element, an individual’s decision to remain silent is both voluntary and within his exercise of free will.\textsuperscript{146}

\textsuperscript{138} See supra note 124 and accompanying text (explaining various circumstances when defendant may remain silent); see also supra notes 123-24 and accompanying text (articulating Justice Marshall’s explanation for defendants’ silence).

\textsuperscript{139} See supra note 74 and accompanying text (considering silence together with other evidence); supra note 105 and accompanying text (concluding use of pre-arrest silence not constitutionally prohibited); see also supra note 114 and accompanying text (conceding harmless nature of pre-arrest silence); Petrucci, supra note 53, at 487-88 (reasoning jury will consider silence with all other evidence).

\textsuperscript{140} See supra note 111 and accompanying text (recognizing situations when innocent person would not remain silent); see also supra note 103 and accompanying text (discouraging concealment of crime); supra notes 123-25 and accompanying text (discussing circumstances of silence despite innocence); supra note 73 and accompanying text (suggesting silence less indicative of guilt).

\textsuperscript{141} See supra notes 123-25 and accompanying text (articulating situations where silence induced by reasons other than guilt); see also supra note 94 (conceding additional evidence overwhelming and pre-arrest silence harmless error); supra note 115 and accompanying text (reasoning juries will consider all evidence together).

\textsuperscript{142} See supra notes 43-45 and accompanying text (refusing to extend protection to preliminary questioning); see also supra note 53 and accompanying text (exposing lack of compulsion in pre-arrest context).

\textsuperscript{143} See supra note 103 and accompanying text (suggesting duty exists in pre-arrest context to provide information and therefore not protected by privilege).

\textsuperscript{144} See supra note 103 and accompanying text (explaining privilege designed to protect innocent not guilty); see also supra note 103 and accompanying text (commenting on Justice Stevens’ limitation on Fifth Amendment as protection for innocent); supra note 102 and accompanying text (determining silence probative of defendant’s involvement).

\textsuperscript{145} See supra notes 54-56 and accompanying text (distinguishing pre-arrest context from custodial context and role in law enforcement); see also supra note 45 and accompanying text (implying pre-arrest matters vital to criminal justice system).

\textsuperscript{146} See supra note 44, 53 and accompanying text (distinguishing compulsion in custodial situation from pre-arrest context); supra note 56 and accompanying text (admitting coercive environment not inherent in pre-arrest situation); supra note 40 and accompanying text (articulating required components for invocation of privilege against self-incrimination); supra note 110 and accompanying text (concluding comment on pre-arrest
One policy behind the Fifth Amendment is a preference to protect the innocent rather than punish the guilty. With alternative reasons for a defendant’s silence, a jury is not likely to presume a defendant guilty from his decision to remain silent. The prosecution’s use of pre-arrest silence suggests that the evidence taken in its totality would lead a reasonable juror to a guilty verdict. It is not the use of pre-arrest silence alone that determines a defendant’s substantive guilt; it is only a piece of circumstantial evidence that jurors should consider along with the other incriminating evidence. Justice Scalia has equated a defendant’s silence to demeanor evidence, which is constitutionally admissible. Several circuit courts that oppose the prosecution’s use of pre-arrest silence have conceded its use is harmless error when viewed within the totality of the circumstances.

The Supreme Court’s decisions in a similar context provide a clear model for determining whether pre-arrest silence is admissible as substantive evidence of a defendant’s guilt. The Jenkins Court overwhelmingly accepted admissibility of pre-arrest silence in an impeachment context. Although the majority of the Court avoided extending its decision beyond the facts presented, Justice Stevens’ concurrence revealed the Court’s potential reasoning as to the scope of admitting pre-arrest silence. Justice Stevens highlighted the

silence not restrictive of free will). But see supra notes 91-92 and accompanying text (arguing silence in pre-arrest stage invokes Fifth Amendment protections).

147. See supra note 40 and accompanying text (setting forth policy considerations behind Fifth Amendment).

148. See supra note 74 and accompanying text (noting only circumstantial weight of allowing silence); see also supra note 94 and accompanying text (focusing on totality of evidence in allowing pre-arrest silence evidence as harmless error). But see supra note 87 and accompanying text (arguing inference of guilt preclusive).

149. See supra note 111 and accompanying text (highlighting probative value in conjunction with all evidence); supra notes 114-15 and accompanying text (suggesting silence only small portion of all incriminating evidence); see also supra notes 116-21 and accompanying text (stressing role of pre-arrest silence as circumstantial evidence for consideration with all other evidence).

150. See supra notes 116-21 and accompanying text (considering role of silence when combined with other evidence); see also supra note 94 and accompanying text (concluding pre-arrest silence not solely determinative, therefore harmless error).

151. See supra note 105 and accompanying text (equating silence to expressions observable by police and admissible).

152. See supra note 94 and accompanying text (highlighting courts’ concessions of pre-arrest silence as harmless error); see also supra note 117 and accompanying text (determining pre-arrest silence not preclusive, only circumstantial).

153. See supra notes 76-78 and accompanying text (discussing Court’s ruling in Jenkins); supra note 44 and accompanying text (indicating Court’s acknowledgment of differences in pre-arrest context); see also supra note 53 and accompanying text (focusing on differences between pre-arrest context and custodial environment).


155. See supra notes 101-04 and accompanying text (addressing effect of Justice Stevens’ opinion); see also supra note 113 and accompanying text (highlighting lower courts’ reliance on Stevens’ analysis).
probative value of silence to a defendant’s involvement in the crime. Silence by itself is not determinative of guilt, but it serves as additional support to the already incriminating evidence presented. Pre-arrest silence, much like other circumstantial evidence, is admissible for many reasons. When taken into consideration with other evidence at trial, the circumstantial nature of pre-arrest silence may lead the jury to a possible inference of guilt but will not necessarily preclude the jury from inferring otherwise from the facts presented.

Another distinguishing factor is that this silence takes place in a pre-arrest context. The Court acknowledges a distinction between custodial and pre-arrest contexts. The inherent dangers of compulsion that exist in a custodial context are not present when police merely ask an individual some preliminary questions. The drafters of the Fifth Amendment never envisioned such a broad interpretation of the privilege’s language.

The Supreme Court has begun limiting the scope of defendants’ rights by continually weakening the rights extending from its decision in Miranda. Although the Court recently reinforced the Miranda ruling in Dickerson, ulterior motives may have existed for upholding the landmark decision. While the Court recognizes the outdated, over-extended nature of Miranda, several justices appear more comfortable molding exceptions rather than infringing upon the principle of stare decisis. Given the skepticism

156. See supra notes 101-02 and accompanying text (citing Justice Stevens’ discussion of probative nature of pre-arrest silence).
157. See supra notes 117-28 and accompanying text (discussing role of pre-arrest silence as circumstantial evidence).
158. See supra notes 114, 123-25 and accompanying text (analyzing other reasons for silence in pre-arrest context).
159. See supra notes 113-15 and accompanying text (evaluating impact of pre-arrest silence as evidence). But see supra note 87 and accompanying text (arguing comments on pre-arrest silence preclude non-adverse inferences).
160. See supra notes 43-45 and accompanying text (exposing distinguishing characteristics existing in pre-arrest context); supra note 53 and accompanying text (reiterating differences between pre-arrest and custodial context).
161. See supra notes 43-45 and accompanying text (examining Court’s distinction between custodial and pre-arrest circumstances); see also supra notes 53-56 and accompanying text (observing nature and importance of preliminary investigations).
162. See supra notes 53-56 and accompanying text (stressing Court’s acknowledgment of coercion lacking in pre-arrest context); see also supra notes 108-10 and accompanying text (focusing on need for compulsion to invoke protections of Fifth Amendment privilege against self-incrimination).
163. See supra notes 28-30 and accompanying text (discussing development of privilege); supra note 40 and accompanying text (observing torture and abuse drove adoption of privilege); see also supra notes 105-07 and accompanying text (considering Justice Scalia’s historical perspective on adoption of privilege).
164. See supra notes 58-62 and accompanying text (detailing Court’s limitations on, and increase in exceptions to, Miranda decision).
165. See supra notes 64-67 and accompanying text (explaining Court’s decision and potential underlying motives); see also Kamisar, A Close Look, supra note 57, at 396 (observing subsequent weakening of Miranda intended to make standard “more workable”).
166. See Kamisar, supra note 57, at 395-97 (suggesting majority in Dickerson more comfortable with articulating workable exceptions than overruling Miranda); see also Dery, supra note 46, at 75 (noting Justice Rehnquist’s reliance on stare decisis to uphold weakened Miranda).
surrounding *Dickerson* and the recent *Chavez* decision, *Miranda* challenges continue to arise.\(^{167}\)

The Supreme Court’s likely acceptance of pre-arrest silence as substantive evidence of guilt will continue this trend of limiting the over-extension of defendants’ rights.\(^ {168}\) Although the pre-arrest context is distinct from the *Miranda* context, the Court’s refusal to extend a defendant’s Fifth Amendment protections to the pre-arrest context would further confine the exercise of an individual’s properly narrowed *Miranda* rights.\(^ {169}\) Having already condensed the scope of *Miranda*, refusing to extend it into the pre-arrest context would be consistent with the Court’s continual handling of defendants’ rights.\(^ {170}\) By adding yet another context in which *Miranda* rights are irrelevant, a new line of challenges will continue to erode the protections that the Court has made nearly obsolete over the last few decades.\(^ {171}\)

**IV. CONCLUSION**

The United States Supreme Court should rule that pre-arrest silence in the prosecution’s case-in-chief is admissible to show substantive evidence of a defendant’s guilt. The Court’s precedent regarding pre-arrest silence for impeachment is indicative of its tendencies on the issue. The Federal Rules of Evidence provide additional support for admitting this material. Although the use of pre-arrest silence has minimal potential to prejudice a defendant’s case, the adversarial system is only concerned with evidence that is substantially and unfairly prejudicial, thus preventing the fair administration of justice. The admissibility of a defendant’s pre-arrest silence neither reaches this level of unfair prejudice nor undermines any policy considerations necessary for the proper functioning of the adversarial legal system.

Extensive analysis of the Fifth Amendment’s privilege against self-incrimination reveals that the drafters only intended the protection for a much narrower set of circumstances. The admission of a defendant’s pre-arrest silence will properly fit within the scope of Fifth Amendment protections, and the restriction of defendants’ rights within this area reflects this position. The

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\(^{167}\) *See supra* notes 68-70 and accompanying text (pointing to recent challenges to *Miranda*).

\(^{168}\) *See supra* notes 101-03 and accompanying text (stressing Justice Stevens’ position of allowing pre-arrest silence as consistent with precedent); *see also supra* notes 105-10 and accompanying text (demonstrating Justices Scalia and Stevens’ willingness to allow silence in conformity with precedent).

\(^{169}\) *See supra* notes 58-62 and accompanying text (considering exceptions to *Miranda* already provide limited scope for exercise of defendants’ rights).

\(^{170}\) *See supra* notes 58-62 and accompanying text (suggesting previous *Miranda* exceptions create trend of diminishing rights); *see also supra* notes 53-56 and accompanying text (maintaining distinction between pre-arrest and custodial contexts); *supra* text accompanying note 57 (pointing subsequent case law adversely affects *Miranda*).

\(^{171}\) *See supra* notes 68-70 and accompanying text (focusing on recent challenges to *Miranda*); *supra* notes 57-62 and accompanying text (highlighting Court’s acknowledgment of *Miranda* as unnecessary within modern law enforcement practices and regulations).
Supreme Court has continually articulated exceptions to its *Miranda* decision and expressed discontent with the antiquated ruling. A decision denying the extension of Fifth Amendment and *Miranda* protections to situations outside the custodial context will reinforce the Court’s uneasiness with *Miranda*. The Court’s refusal to extend protections to the pre-arrest context will again narrow the scope of the Fifth Amendment and *Miranda*, while leading to a variety of indirect challenges aimed at overruling its result. It may very well be this persistent onslaught of indirect challenges, limiting the scope of the Fifth Amendment and *Miranda*, that lead to *Miranda*’s eventual demise.

*Adam M. Stewart*