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Jeffrey D. Waltuck

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REMAINING SILENT:
A RIGHT WITH CONSEQUENCES

JEFFREY D. WALTUCK*

I. INTRODUCTION

The United States is a country in which individuals are innocent until proven guilty.1 In the immediate wake of the events of September 11, 2001,2 people were eager to cooperate with officials of law enforcement agencies.3 Much has come to light since the earliest days following the aftermath regarding what appears to be the railroading of innocent people.4 With this

* J.D. Candidate, May 2005. The author wishes to thank his wife, without whose love, understanding, and support this endeavor would not have been possible. He further wishes to thank his parents, whose life-long commitment to hard work made possible the enriched lives of their children, and who instilled the value of education. Finally, the author wishes to thank his brother for a life-time of unwavering friendship. The author dedicates this Comment to his son.

1. See generally Neb. Press Ass'n v. Stuart, 427 U.S. 539, 616 (1976) (Brennan, J., concurring) (stating in an appendix to his decision, “an accused is presumed innocent until proven guilty”); Andres v. United States, 333 U.S. 740, 745 n.5 (1948) (stating that a person “is presumed innocent... until he is proven guilty”).

2. See The Day that Changed America, NEWSWEEK, Dec. 31, 2001, at 40 (chronicling the events of September 11th, 2001). On this date, terrorists hijacked four airliners, two Boeing 757s and two Boeing 767s, one of each from United Airlines and American Airlines. Id. Two of the planes were flown into the two towers of the World Trade Center in New York City, New York. Id. Both towers later collapsed causing the second largest loss of American lives in a single day since the Civil War, and the deadliest attack on American soil ever. Id.

3. See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 SUP. CT. REV. 153, 206 (2002) (discussing public acceptance of police intrusion on privacy interests following September 11th). Nadler wrote: It is undoubtedly true that after the terrorist attacks of September 11, 2001, citizens feel a greater need to rely on police for safety and security. As a result, citizens... now may be more willing to give police wider latitude to intrude upon individual privacy interests to further the purposes of rooting out terrorism and enhancing our safety. Id.

4. See Kevin R. Johnson, Symposium: Beyond Belonging: Challenging the Boundaries of Nationality, 52 DEPAUL L. REV. 849, 864 (2003) (asserting that immigrant minority groups may tend, under some circumstances, to be less cooperative with law enforcement due to their questionable immigration
backdrop of fear, and backlash against law enforcement, it would seem logical and prudent not to answer questions of law enforcement authorities and to request the assistance of counsel. The Constitution, after all, grants these rights.\textsuperscript{5} While exercising these rights might well lead police to an assumption of guilt, or at a minimum that something is amiss or being hidden, one can rest easy knowing that this evidence of guilt will not make it in front of a jury.\textsuperscript{7} Right? Wrong! An individual's silence can indeed be used against him as circumstantial evidence of guilt.\textsuperscript{8}

This Comment analyzes the mosaic of law that has spawn from \textit{Miranda v. Arizona}.\textsuperscript{9} This Part illustrates the current conflict among jurisdictions. Part II discusses the narrow holdings of the Supreme Court and limited protections afforded by the Constitution for suspects who remain silent and later become defendants.\textsuperscript{10} It further discusses any assurances that may otherwise be implicitly guaranteed to a suspect.\textsuperscript{11} It distinguishes between the time when such rights and protections become vested in a suspect. Finally it will lay forth the extent to which evidence of silence, if admissible, may be used, and how.\textsuperscript{12} Part III analyzes the current state of the law. It also examines how it is being status).\textsuperscript{5}


6. U.S. CONST. amend. V. “No person shall... be compelled in any criminal case to be a witness against himself.” \textit{Id.} “In all criminal prosecutions, the accused shall enjoy the right to... have the assistance of counsel for his defence.” U.S. CONST. amend. VI.

7. Contrary Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that evidence of silence may be introduced to impeach a criminal defendant if he testifies at trial).

8. See \textit{id.} (concluding that under some circumstances evidence of a defendant’s silence is admissible at trial).


10. We will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given... [nor] can a knowing and intelligent waiver of these rights be assumed on a silent record. \textit{Id.}

11. See Jenkins, 447 U.S. at 238 (concluding that a defendant who chooses to take the stand may be impeached with evidence of silence occurring prior to being given his \textit{Miranda} warnings). See also Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding only that once given a \textit{Miranda} warning, the suspect’s silence cannot be used against him in a subsequent criminal trial).

shaped by rules of evidence, and not by the Federal Constitution, and the reasons the courts have stated for doing so. Part IV suggests that a constitutional standard is unnecessary, its reasons and rationale that the current restrictions adequately protect the defendant and the integrity of the trial process, and why Jenkins v. Anderson\textsuperscript{13} was rightly decided.

II. BACKGROUND

Besides Roe v. Wade,\textsuperscript{14} it is hard to imagine a Supreme Court decision that has touched the popular culture to the extent Miranda v. Arizona\textsuperscript{15} has. Having heard of Miranda, most Americans would probably say that they know that a criminal suspect has to be informed of certain rights when being questioned by police.\textsuperscript{16} Two of which are the right to remain silent, and the right to an attorney.\textsuperscript{17} In fact these rights may be too well known.\textsuperscript{18} For even though the Supreme Court has said that once a suspect has been informed of his Miranda rights his silence cannot be used against him at trial, the decision does not actually mandate that the rights be given to a suspect at all.\textsuperscript{19} In fact, police and prosecutors have incentives not to inform a suspect of these rights.\textsuperscript{20} Miranda only prohibits the use at trial of information obtained without proper warnings.\textsuperscript{21}

\textsuperscript{13} 447 U.S. at 238.
\textsuperscript{14} 410 U.S. 113, 163 (1973). In this famous decision the Court held that the state could not place an absolute bar against a woman who chose to have an abortion. \textit{Id.}
\textsuperscript{16} \textit{See} United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981) (stating that, “[m]ost ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite [the Miranda warnings] as well as any police officer”).
\textsuperscript{17} \textit{Miranda}, 384 U.S. at 444-45.
\textsuperscript{18} \textit{See} Strauss, supra note 12, at 116-17 (critiquing the decision in \textit{Fletcher v. Weir}, 455 U.S. 603 (1982) (per curiam)). The defendant’s post-arrest, but pre-Miranda, silence could not have been educed by police, when in fact the defendant had been twice previously arrested and presumably had been read his rights on at least one of those occasions. \textit{Id.} This raised the specter that his silence was a result of his exercising a known right and not as evidence of a guilty conscience as the Supreme Court apparently concluded. \textit{Id.}
\textsuperscript{19} Susan R. Klein, \textit{No Time for Silence}, 81 \textit{TEX. L. REV.} 1337, 1338 (2003), “Is there actually a right to silence if police officers can use harassing and abusive tactics against suspects so long as the resulting statements are not used in a subsequent criminal trial?” \textit{Id.}
\textsuperscript{20} \textit{Id.} The police don’t fear any monetary sanctions for failing to issue Miranda warnings. \textit{Id.} The fact is that the police, in certain circumstances, stand nothing to lose and everything to gain by intentionally failing to inform a suspect of his Miranda rights. \textit{Id.}
\textsuperscript{21} \textit{Id.} “[A] violation of the privilege against self-incrimination ‘occurs only
Miranda unequivocally requires that for a suspect's statement to be used at trial, he must have been informed of his rights.\textsuperscript{22} Ten years passed before the Supreme Court would further clarify the application of its holding in Miranda. In 1976, the Supreme Court held the use of a suspect's silence at trial was fundamentally unfair.\textsuperscript{23} A clear picture had seemingly emerged regarding a suspect's rights granted under the Constitution in the Fifth and Sixth amendments, and his right to enjoy those privileges under the Fourteenth Amendment.\textsuperscript{24}

The holding of the Supreme Court seemed clear enough in regards to the constitutional right of defendants.\textsuperscript{26} In 1981, in Jenkins, the Sixth Circuit applied Doyle when it reversed the holding of the lower court on the basis that the prosecution introduced evidence of the defendant's pre-trial silence.\textsuperscript{26} The Supreme Court reversed the decision of the Sixth Circuit and clarified its opinion in Doyle.\textsuperscript{27} The Court opined that the fundamental unfairness that existed in Doyle was not present in the case at bar.\textsuperscript{28} The difference being that in Doyle the suspect had been informed of his Miranda rights by authorities, and in Jenkins the suspect had not.\textsuperscript{29} The Court reasoned that what was so unfair in Doyle was that the suspect had been told that he could remain silent, and that the warning came with implicit assurances that his silence would not be used against him either.\textsuperscript{30} The defendant's silence in Jenkins was not, the Court reasoned, induced by any information provided by law enforcement, and therefore not subject to the protections in Doyle.\textsuperscript{31} In short, the

\textsuperscript{22} Id. (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

\textsuperscript{23} 384 U.S. at 498-99. A prerequisite to using any statements made by the defendant at trial is that he must be informed that he does not need to talk to police. \textit{Id.} This is a threshold issue of admissibility. \textit{Id.} at 476.

\textsuperscript{24} Doyle, 426 U.S. at 619. "We hold that the use . . . of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." \textit{Id.}


\textsuperscript{26} 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." \textit{Id.}

\textsuperscript{27} Fletcher v. Weir, 455 U.S. 603, 605-06 (1982) (per curiam).

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} at 605-07.

\textsuperscript{30} \textit{Id.} at 604-05.

\textsuperscript{31} \textit{Id.} at 603. The Court took note of the fact that the decision in Jenkins, 447 U.S. at 231, was based on when the silence occurred. \textit{Fletcher}, 455 U.S. at 606. Fletcher reasoned that since the silence occurred prior to being arrested
Court concluded that silence after a *Miranda* warning may be the result of an invitation to remain silent once the accused is aware the right is available to him. This conclusion presupposes that a suspect has no independent knowledge of his constitutional rights aside from what he is told at that time by law enforcement officials.

**A. When Is a Suspect’s Silence Protected?**

A clear picture had now emerged as to what a criminal suspect’s rights were, and when those rights became vested. A temporal line of demarcation can thus be drawn at the point in which a person has been read his *Miranda* rights. A clear state of the law properly concludes that from that point forward, any silence shall not be used by prosecutors at trial. The Supreme Court further has held that prior to that point in time evidence of silence is not constitutionally protected.

That would seem then, to be the end of the story; evidence of silence is admissible at trial if the silence occurred prior to receiving notice of enumerated rights under *Miranda*. However, two key clarifications that need to be made to that assertion. First, the Supreme Court only said that use of silence is not protected under the Federal Constitution, leaving open the question as to whether it may be protected under any of the constitutions of the fifty states. Secondly, it is the admissibility

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and taken into custody, it must necessarily be based on something other than what amounts to be a governmental invitation to remain silent. *Id.*

32. *Id.* at 607. "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.*


34. See *Doyle*, 426 U.S. at 617-18 (holding a suspect’s silence after having been read his rights may not be used at trial).

35. Strauss, *supra* note 12, at 116. "[T]he Supreme Court [notes that] reading Miranda warnings is the dispositive factor in determining fundamental fairness." *Id.* (analyzing *Fletcher*).

36. See, e.g., *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (providing a succinct explanation that "*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.").

37. Klein, *supra* note 19, at 1337. In emphasizing that Supreme Court decisions have provided for further protections and limits on the use of silence through evidentiary and state constitutional grounds, the author states that "[t]hrough a series of cases in the 1970s and 80s, the Court ‘deconstitutionalized’ Miranda." *Id.*

38. *Fletcher*, 455 U.S. at 607.

39. See *id.* (holding that fundamental fairness is required by the U.S. Constitution through the due process clause of the Fourteenth Amendment).
of the evidence of silence that is in question, and therefore must be examined by each jurisdiction's rules of evidence.\(^{40}\)

Regarding the jurisdictional rules of evidence, at least federally, the question has been answered.\(^{41}\) Not surprisingly, by the same Court that held no constitutional protection, the U.S. Supreme Court has held there to be no protection under the Federal Rules of Evidence.\(^{42}\)

For the states though, the waters are a bit muddier, for another temporal line must be drawn. That line is drawn at the time of arrest.\(^{43}\) Thus, a distinction is made as to silence proffered in a custodial setting versus non-custodial silence.\(^{44}\) The distinction is the increased possibility of duress and coercion that exist to a greater degree for a person in police custody.\(^{45}\)

The Court left open the question of admissibility on state constitutional grounds. \(^{1}\) It was unclear that where a suspect remained silent, in the absence of his \textit{Miranda} warnings, that it would ever be a violation of his rights to use his silence as evidence in a cross-examination to impeach the defendant if he chooses to take the stand. \(^{1}\)

\(^{40}\) \textit{Jenkins}, 447 U.S. at 239. While holding that the prosecution did not violate the Constitution by introducing evidence of the defendant’s silence at trial, the Court explicitly stated that they were not in all cases allowing in such evidence. \(^{1}\) Other situations and jurisdictions may restrict the use of such evidence. \(^{1}\) The Court stated, “[e]ach jurisdiction may formulate its own rules of evidence.” \(^{1}\) \textit{See also} \textit{Fletcher}, 455 U.S. at 607 (stating that “[a] State is entitled, in such situations, to [evaluate the admissibility] under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony”).

\(^{41}\) \textit{Fletcher}, 455 U.S. at 606. It can be inferred that since this is a federal case and since the evidence was ultimately considered admissible, that evidence of silence did not violate any federal rule of evidence. \(^{1}\) This position is consistent with the fact that the court mentioned evidentiary considerations and chose not to find that admission of this evidence violated the Federal Rules of Civil Procedure. \(^{1}\)

\(^{42}\) \textit{Id}.\(^{43}\) \textit{Pettit}, \textit{supra} note 33, at 199. In addition to state jurisdictional decisions regarding the admissibility of pre-arrest silence evidence, the circuits are split as well. \(^{1}\) Prosecutors have tried to put evidence of pre-arrest silence before juries in several circuit courts. \(^{1}\) The Supreme Court has not, as of yet, dealt with the issue, and the treatment in the circuit courts has varied. \(^{1}\) Some courts have allowed in the evidence, while others have not. \(^{1}\)

\(^{44}\) \textit{Compare} \textit{McKune v. Lile}, 536 U.S. 24, 49 (2002) (finding that the “environment of police custodial interrogation” only required the issuance of \textit{Miranda} warnings as a prophylactic measure “after observing” that an inherent coercion actually exerted its toll), \textit{with} \textit{Beckwith v. United States}, 425 U.S. 341, 346 (1976) (asserting that “it was the custodial nature of the interrogation” itself that required the procedures set forth in \textit{Miranda} be followed).

\(^{45}\) \textit{See} \textit{Davis v. United States}, 512 U.S. 452, 471 (1994) (Souter, J., concurring) (referring to “the inherent coercion of the custodial interrogation”); \textit{Arizona v. Roberson}, 486 U.S. 675, 686 (1988) (implying that the level of coercion increases with the time in custody when the Court stated, “the presumption of coercion that is created by prolonged police custody”);
Given that *Miranda* warnings usually take place subsequent to an arrest, an elementary timeline emerges.\(^{46}\) The important factors that determine the admissibility of silence in the defendant's trial include: the time period prior to an arrest, the time between an arrest and the issuance of *Miranda* warnings, and the time subsequent to both the arrest and receipt of the warnings.\(^{47}\)

**B. How Can Unprotected Silence Be Used at Trial?**

After first ascertaining when the suspect, now a defendant, acted silently,\(^{48}\) the relevant jurisdiction need now only apply its constitution\(^{49}\) and evidentiary rules to find the silence admissible.\(^{50}\) Key to that determination is the purpose for which the prosecution seeks to offer evidence of such silence.\(^{51}\)

There are two possible ways in which the state could use such evidence at trial.\(^{52}\) The first consists of its use during the state's case-in-chief.\(^{53}\) The other is by way of introducing it as evidence to impeach the defendant himself.\(^{54}\) The rationale employed by the courts in determining the appropriate use of the defendant's silence seemingly differs as the courts struggle with not only the

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\(^{46}\) See, e.g., United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (detailing a rare example where *Miranda* warnings were issued to a suspect prior to arrest). The vast majority of situations where a suspect is informed of his rights occur after he is arrested. *Id.* *Caro* stands as a rare example of a suspect who was Mirandized prior to arrest. *Id.*

\(^{47}\) See, e.g., Michigan v. Jackson, 475 U.S. 625, 639 (1986) (imposing a "bright-line standard" as to the conduct of police while interrogating a suspect in custody, which directly carries over to the admissibility at trial of evidence elicited on either side of this "bright-line").

\(^{48}\) Strauss, *supra* note 12, at 108. The rules regarding the admissibility of silence as evidence in a defendant's trial hinge upon the key question of when the silence actually occurred. *Id.*

\(^{49}\) *Id.* at 120. While the admissibility of silence as evidence in some circumstances does not violate the U.S. Constitution in terms of its due process requirements, several state courts have held that it does offend the notions of due process of their state constitutions. *Id.* In those states, admissibility of silence is prohibited, not under an evidentiary approach, but as a state constitutional due process question. *Id.*

\(^{50}\) Fletcher, 455 U.S. at 607. "A State is entitled . . . to [evaluate the admissibility] under its own rules of evidence." *Id.*

\(^{51}\) See Strauss, *supra* note 12, at 120 (noting the difference between evidence offered for impeachment purposes and evidence offered in the prosecution's case-in-chief). The allowance of silence evidence in the case-in-chief is more problematic since it cannot be espoused to be in rebuttal to any potentially perjured testimony given by the defendant. *Id.*

\(^{52}\) *Id.* at 108, 112.

\(^{53}\) *Id.* at 112.

\(^{54}\) *Id.* at 108.
purpose of the silence evidence, but also when that silence took place. The previously linear model of temporal delineations must now be expanded to a planar field and include the purpose or function that the silence will serve at trial. This must be done for each of the time frames denoted above.

After making such a functional determination, many jurisdictions allow silence as evidence to be used unfettered against a defendant who becomes a witness. The theory here is that a defendant's silence may directly or indirectly contradict a subsequent statement made under oath at trial. The truth-finding exercise is thus thwarted if a defendant is permitted to offer testimony inconsistent with his prior actions and would thereby not be accountable to a jury for such inconsistencies.

55. Compare State v. Kerchusky, 67 P.3d 1283, 1289 (Idaho Ct. App. 2003) (holding that the U.S. Supreme Court has yet to rule on the admissibility of silence evidence that occurred prior to arrest for use at trial in the prosecution's case-in-chief), and State v. Moore, 965 P.2d 174, 180 (Idaho 1998) (holding that evidence of silence prior to arrest is inadmissible at trial in the state's case-in-chief, citing Fifth Amendment considerations and opining that the constitutional right always exists and does not wait for Miranda), with United States v. Butler, 924 F.2d 1124, 1129-30 (D.C. Cir. 1991) (construing Doyle, 426 U.S. at 619, strictly, the court held that the only impermissible use of silence evidence at trial was use that referenced the defendant's post-Miranda actions). The court held that it was wholly appropriate for the state to impeach the defendant on cross-examination with silence occurring both prior to and subsequent to arrest but occurring before the Miranda warning. Id. at 1129-30.

56. See generally Strauss, supra note 12, at 108-40 (breaking down the analysis of current law by first looking at the time in which the silence seeking to be introduced as evidence took place, and then addressing how the courts found admissibility based on whether the evidence was offered for impeachment or as part of the state's case-in-chief).

57. See supra note 56 and accompanying text.

58. See, e.g., Butler, 924 F.2d at 1129-30 (holding that the decisions of the Supreme Court only act to restrict the use of a defendant's statements or silence as a consequence of being read his Miranda rights). The use of any evidence of silence occurring prior to Miranda warnings is constitutionally admissible for at least impeachment purposes. Id. The Butler court acknowledged that the Supreme Court left the door open as to its use in the prosecution's case-in-chief. Id.

59. See, e.g., id. at 1129 (holding that using silence evidence to impeach was a means to prevent the defendant from offering perjured testimony). In Butler, the defendant took the stand to explain why he had not previously told his exculpatory story. Id. He explained that he did not have an opportunity to inform police. Id. The court held that it was permissible to question the defendant on cross-examination about opportunities that he had to talk with police, but had remained silent. Id. The court said that not allowing such a cross-examination would have the affect of allowing potentially perjured testimony to go unchallenged. Id. The time frame for the silence introduced by prosecutors was during the pre-Miranda period. Id.

60. See Fencl v. Abrahamson, 841 F.2d 760, 766 (7th Cir. 1988) (citing Jenkins, 447 U.S. at 238).

It is firmly established that neither the fifth amendment nor the
This use presupposes, however, that the silence occurred prior, at least, to being warned of the defendant's *Miranda* rights. As previously stated, any mention of a defendant's silence after receiving such a warning has been held unconstitutional in federal courts.

While not universal, courts have dealt with the issue of the use of a defendant's silence in the state's case-in-chief more critically. Using reasoning that is logically consistent, more courts exclude evidence of silence in the state's case-in-chief. Falling somewhere between the truth finding of a trial, the prosecution's attempt to forestall a defendant's proffered perjury, and the fundamental fairness required in *Doyle*, it fits that on a continuum of admissibility, evidence of a suspect's silence offered in the state's case-in-chief should be more restricted than if it were designed to impeach a defendant's testimony, and more admissible than if the possibility existed that such silence was directly elicited by police by way of informing a suspect of his *Miranda* rights.

fourteenth amendment is violated by the government's use of prearrest silence to impeach a defendant's credibility when he testifies at trial. When a defendant testifies at trial, the fifth amendment is not violated because "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."

*Id.*

61. *Doyle*, 426 U.S. at 619. *Doyle* clearly and unambiguously establishes that once a suspect has been issued *Miranda* warnings, any silence after that point is absolutely off-limits for prosecutors to raise at trial, be it for impeachment, or for the state's case-in-chief. *Id.*

62. *Id.*

63. See, e.g., United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (holding that Fifth Amendment must be given a "liberal construction"); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (holding that Due Process prevents the admission of evidence of a defendant's silence where no *Miranda* warnings had been given if for purposes other than the impeachment of the defendant).

64. See *Moore*, 965 P.2d at 180 (comparing the split of authority and citing cases in support of its holding that evidence of silence should be excluded from the state's case-in-chief whether occurring prior to or subsequent to a *Miranda* warning).


66. 426 U.S. at 618.

67. See *Strauss*, supra note 12, at 120 (speculating that, "[a]dmission of evidence of silence in the case-in-chief potentially poses a more difficult question than impeachment"). "[I]mpeachment obviously occurs only after the defendant takes the stand and arguably lies; the interest in preventing the acceptance of perjured testimony may be sufficient to justify the introduction of otherwise inadmissible evidence." *Id.*

68. See *Doyle*, 426 U.S. at 617 (opining that the use of post-*Miranda* silence at trial has limited value and can potentially be overly prejudicial, especially in light of the fact that "every post-arrest silence is insolubly ambiguous
When grappling with the plethora of state and circuit jurisdictions that have, and more importantly have not, addressed this issue, it becomes clear that the planar model ceases to be sufficient. Conceptually speaking, a two-dimensional grid-like analysis must be expanded spatially to accommodate jurisdictional differences. Only then does the mosaic that takes shape accurately reflect the current state of the law.

III. ANALYSIS

In analyzing how silence may be used, it is important to both identify and understand the competing interests. It would be overly simplistic to identify the State and the defendant, for they are merely the parties. The interests are those of truth and facts versus constitutional rights. The Supreme Court has stated that when constitutional rights are not violated the relevant question becomes one of admissibility under the appropriate rules of evidence. In fact, there has never been a question as to whether because of what the State is required to advise the person arrested.

69. See Strauss, supra note 12, at 137-38 (summarizing the lack of uniformity in one area alone, that of pre-arrest and pre-Miranda silence, by stating "courts in New Jersey, Maryland, Vermont, Wisconsin, and Texas" have decided one way, while "[o]n the other hand, numerous state courts have held" the other).

70. See, e.g., United States v. Thompson, 82 F.3d 849, 854-56 (9th Cir. 1996) (declining to decide whether the prosecutor's reference at trial to the defendant's silence, prior to arrest, was permissible). The court noted that the defendant did not raise the issue at trial and it was therefore bound to review under a clear error standard. Id. The court held that it could not make a finding of clear error in the absence of a Supreme Court decision since the circuits that have addressed the issue are currently split on the question. Id.

71. John W. Auchincloss II, Protecting Doyle Rights After Anderson v. Charles: The Problem of Partial Silence, 69 VA. L. REV. 155, 165 (1983). There are two competing interests for the court to weigh in a criminal matter. Id. These are the defendant's due process rights and State's interest in getting truthful testimony before the jury in its consideration of a conviction. Id. Cf. Mark Berger, Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence, 22 AM. J. CRIM. L. 391, 429 (1995) (identifying the competing interests in Great Britain). The criminal justice system needs to be concerned with two primary considerations, which are of equal import. Id. One of these considerations is prevention of abuse by the State. Id. The other is the ability to use all available evidence against a defendant. Id. Cf. Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 314-15 (1998) (identifying competing interests in a civil setting).

72. Auchincloss, supra note 71, at 165. The two interests or values must be taken into consideration, not only by the court, but more generally if a consistent rule of applicability is to be created. Id.

73. See Coleman v. State, 895 P.2d 653, 667-69 (Nev. 1995) (Steffen, C.J., dissenting in part and concurring in part) (analyzing U.S. Supreme Court cases on the admissibility of evidence of silence once a determination has been made that its introduction is not constitutionally prohibited). Even evidence
a person has a right to exercise what he believes, even correctly, to be his constitutional rights.\textsuperscript{74} The question is always one of admissibility of that choice to the finder of fact.\textsuperscript{75}

This section analyzes the admissibility of evidence of such silence, and when and under what circumstances it is admissible. It addresses when constitutional concerns preclude admissibility, when they do not, and the reasoning behind such determinations.

\textbf{A. The Function of a Trial}

A criminal trial is reached for much the same reasons that a civil trial is reached: the parties fail to reach an agreement. The disagreement in the criminal trial is not what one might think however, that the State and the defendant disagree as to whether the defendant committed the crime for which he is accused. The reason is rather that the parties disagree as to whether the State can prove that the defendant committed the crime.

It shall be assumed for the sake of this Comment that there are no disputes of law. This then leaves the trial as a forum to dispute and resolve the disposition of facts.\textsuperscript{76} What results is a forum in which the admissibility of evidence is a key determinant to the outcome.\textsuperscript{77} A criminal trial, of course, has the potential to result in a loss of liberty for the accused.\textsuperscript{78} One might conclude that the primary focus of a trial is to bring out the truth.\textsuperscript{79} Given the truth-finding function of a trial, why then should we exclude any relevant, non-prejudicial evidence?

\footnotesize{that burdens a defendant's Fifth Amendment right, without necessarily violating it, may be admissible after the State's compelling interest is considered. Id.}

\textsuperscript{74} NAACP v. Button, 371 U.S. 415, 447 (1963) (White, J., concurring in part and dissenting in part) (stating "[s]urely it is beyond the power of any State to prevent the exercise of constitutional rights. . . .").

\textsuperscript{75} See Jenkins, 447 U.S. at 238 (demonstrating that there is indeed a choice of litigation tactics, in that choosing to testify may effectually waive Fifth Amendment protections, and illustrating how evidentiary matters become the primary concern).

\textsuperscript{76} Richard D. Friedman, Squeezing Daubert out of the Picture, 33 SETON HALL L. REV. 1047, 1057 (2003).

\textsuperscript{77} Andrew J. Ruzicho & Louis A. Jacobs, Evidentiary Rulings Under Rules 403 and 404 Control Outcome of Discrimination Case, 24 No. 11 EMP. PRACTICES UPDATE 3 (2001). A judge's decision on the admissibility of evidence is the key factor in the outcome of a trial. Id.

\textsuperscript{78} Gerard Quinn, Civil Commitment and the Right to Treatment Under the European Convention on Human Rights, 5 HARV. HUM. RTS. J. 1, 11 (1992). Loss of liberty in a civil proceeding is highly unusual. Id. The risk of loss of liberties is a characteristic difference between a civil and a criminal proceeding. Id.

\textsuperscript{79} Glenn A. Fait, Victims' Rights Reform—Where Do We Go from Here? More than a Modest Proposal, 33 MCGEORGE L. REV. 705, 705-06 (2002). The truth-finding function of a trial is, and should be, the purpose of a criminal trial. Id.
B. Constitutional Protections

Under the Federal Rules of Evidence, relevant, non-prejudicial evidence may be excluded if its admission would violate the Constitution. It is well established in American jurisprudence that a person cannot be compelled to testify against one's self.

1. Historical Analysis

The reasons for this date back to pre-nineteenth century England, where defendants were counseled, not by private advocates, but by the court itself. The Framers, recognizing the inherent coercion that potentially existed, afforded an accused in a criminal matter the right not to testify against himself. Even though the pre-trial phase of defendant's counsel by the courts has changed, the underlying coercion implicit in the system remains a problem.

Coercive interrogation is known for its lack of reliability.

80. FED. R. EVID. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States. . . ." Id.
81. See Lisa Tartallo, The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege, 27 NEW ENG. L. REV. 137, 139-51 (1992) (chronicling the historic rationale behind the privilege against self-incrimination from pre-colonial England, through modern Supreme Court rulings).
82. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 321-23, 492-93 (MacMillian Pub'g Co. 2d ed. 1986) (1968) (giving the rationale behind the state of the law, and giving examples from trials in the late seventeenth century where the court counseled defendants). Defendants were only afforded counsel for murder prosecutions during this period of time, and not for lesser offenses, such as theft, as they are today. Id. at 321-23.
83. See Berger, supra note 71, at 395-96 (contending that defendants under the crown were coerced into confessions). This eventually led to the right not to testify against one's self in England. See Levy, supra note 82, at 368-432 (describing the history of the Fifth Amendment in the United States). The right against self-incrimination was well established in England prior to the Revolutionary War. Id. By default, the colonies adopted English common law, including the right against self-incrimination. Id. Not included in the original drafting of the Constitution, the right against self-incrimination had been adopted as common law in the States. Id. Even before the Bill of Rights was ratified, many state constitutions contained provisions parallel to the right that was forthcoming in the Constitution. Id.
84. Miranda, 384 U.S. at 448-49. Coercion takes many forms. Id. It can consist of both psychological and physical stress. Id. The fact remains that much, if not all, of police questioning and interrogation occurs in privacy. Id.
85. See David Whedbee, The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters, 12 PAC. RIM L. & POL’Y J. 561, 590 (2003) (concluding that the reliability of statements that are coerced are suspect). Taken to its logical extreme, coercion can become torture and is not a reliable means of ascertaining the truth. Sanford
Thus, the protections provided by the Bill of Rights in regards to a criminal defendant’s right not to testify against himself can be attributed to two important ideals. First, that protection of individual liberties was paramount; second, and interlocking with the first, that to make a defendant subject to forfeiture of those liberties, the evidence presented against him must be of the highest quality of reliability. Evidence elicited from the defendant himself, through the counsel of the courts, was inherently subject to coercion, and not reliable. The Fifth Amendment stands as a protection of the individual against the State, and serves as a safeguard of the truth-finding process of a trial. Understanding the history behind the Fifth Amendment and its continued importance, explains why a defendant might choose to remain silent, but why then should that silence be inadmissible?

2. Inadmissibility of Silence

The reason evidence of silence is inadmissible corresponds with the same reason as the historic need for the Fifth Amendment itself, namely reliability. If it could be argued that the counsel of the court (an arm of the State) could affect the representations of the defendant, thus making any resulting admissions unreliable, the same can be argued of any resulting silence. This is especially true when a suspect has been warned

Levinson, “Precommitment” and “Postcommitment”: The Ban on Torture in the Wake of September 11, 81 TEX. L. REV. 2013, 2029 (2003).
86. See infra notes 87-88 and accompanying text.
87. Kyle J. Kaiser, Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment, 88 IOWA L. REV. 1205, 1216-17 (2003). Through Fourteenth Amendment due process, the Fifth Amendment protects a person’s fundamental right to liberty. Id.
88. Joseph L. Schwartz, Evidence—The Admissibility of Statistical Probabilities in DNA Testing for Suspect Identification in Criminal Proceedings—Commonwealth v. Curnin, 409 Mass. 218, 565 N.E.2d 440 (1991), 25 SUFFOLK U. L. REV. 868, 873 (1991). DNA cases are an example, but the underlying principle is the same, that dependability must be at the heart of the determination as to the admissibility of any evidence upon which a defendant may be at risk for losing his liberties. Id.
89. Berger, supra note 71, at 395-96. Ecclesiastical courts in seventeenth century England often coerced confessions out of people. Id.
90. Auchincloss, supra note 71, at 165.
91. Compare Miranda, 384 U.S. at 448-49, (protecting truth in the twentieth century by trying to eliminate coercion), with Levy, supra note 82, at 321-23 (documenting examples of the coercive forces at play in England in the seventeenth century).
92. Levy, supra note 82, at 321-23. When a suspect’s only counsel is that of the court, and the court necessarily is a function of the state, any admission by the suspect becomes less reliable. Id.
93. Doyle, 426 U.S. at 617. Once Miranda rights have been given, it cannot be adequately determined if silence was a result of the warning or for some
of his rights under *Miranda.* The *Doyle* Court said as much when it held that the finder of fact could draw no reliable inferences from a suspect’s silence since it is entirely possible, if not probable, that the silence was induced by the police when informing a suspect of his right to remain silent.

The analysis of why silence may not be admissible is identical to that of the historic need for the Fifth Amendment. The reliability of the defendant’s statements, or lack thereof, is the determinant factor in the admissibility of evidence at trial. The constitutional protections against the admissibility of a defendant’s statements, and the *Doyle* Court’s protections of a defendant’s silence (after the issuance of *Miranda* warnings) serve as the ultimate safeguards where the determination of the veracity of such statements or silence would amount to rank speculation.

C. Evidentiary Safeguards

Following the narrow holding in *Doyle,* *Jenkins* established that for the silence to be excluded at a constitutional level, there must be some inducement by the State to remain silent. Absent an explicit warning of the type required by *Miranda,* the Court refused to find the defendant’s silence had necessarily been induced by the actions of the police. Setting aside the fact that such silence is protected under some state constitutions, the admissibility of silence rests on its analysis under the appropriate rules of evidence. Foregoing an analysis of the common law of evidence and of each of the fifty states, the Federal Rules of Evidence will serve as a modern analytical guide to the

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other reason. *Id.* It would therefore be inherently unreliable to use such silence as evidence at trial. *Id.* Silence evidence becomes unreliable as a result of state action. *Id.

94. *Id.*

95. *Id.* “Silence in the wake of [Miranda] warnings may be nothing more than the arrestee’s exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.” *Id.*

96. *Id.*

97. 447 U.S. at 239-40. When a person, in a pre-arrest situation chooses not to speak of his own volition, and not in response to an invitation to do so proffered by police, evidence of his silence does not violate the Constitution. *Id.*

98. *Id.* at 240-41. Once it had been determined that no constitutional issue barred the admissibility of evidence of silence, it became a consideration of relevancy under an evidentiary standard. *Id.*

99. See supra note 49 and accompanying text (discussing the relevant Federal Rules of Evidence).

100. *Fletcher,* 455 U.S. at 607. States are free to establish and use their own rules of evidence for determining the admissibility of silence evidence when the admissibility does not warrant constitutional protection. *Id.*
admissibility of pre-Miranda silence.\textsuperscript{101}

Any analysis of the constitutional protections afforded citizens must necessarily begin with the Constitution. To end the discussion there, however, would be a mistake, for ample protections lie outside the Constitution within enacted laws.\textsuperscript{102} Evidentiary rules provide one such example.\textsuperscript{103} The right protected is that of a fair trial wherein truth and facts may be asserted.\textsuperscript{104} Great deference is paid to the fact finder as the evaluator of the evidence once admitted.\textsuperscript{105} The Rules provide a framework of admissibility and exclusion.\textsuperscript{106} The established rules are set forth not only to protect the rights of those involved in any individual trial, but to protect the evidentiary process for the reliability of future trials, and to further other public policies.\textsuperscript{107} From an individual rights perspective, however, this Comment is only concerned with the results of the admissibility of evidence in a particular trial against a particular named defendant.

Under this evidentiary analysis, the same principles that applied to a constitutional analysis are in play here as well.\textsuperscript{108} The constitutional approach is black and white, and the rule is easy to apply.\textsuperscript{109} Beyond that, a full pallet of gray exists based upon circumstances unique to each case.\textsuperscript{110} Constitutional principles

\begin{footnotes}
\item[101] See infra note 106 and accompanying text (discussing the impact of the Federal Rules of Evidence).
\item[102] See, e.g., Henry v. Kernan, 197 F.3d 1021, 1029 (9th Cir. 1999) (discussing the protections afforded a defendant’s silence by the Federal Rules of Evidence in both the prosecution’s case-in-chief and as impeachment evidence).
\item[103] See supra note 102 and accompanying text.
\item[104] See id.
\item[106] See, e.g., FED. R. EVID. 402 (creating admissibility for relevant evidence); FED. R. EVID. 403 (creating a rule of evidence for the exclusion of certain relevant evidence).
\item[107] FED. R. EVID. 102. “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Id.
\item[108] Compare FED. R. EVID. 102 (promoting truth via evidentiary standards), with Miranda, 384 U.S. at 448-49 (protecting truth by eliminating coercive influence by restricting admissibility at a constitutional level).
\item[109] Miranda, 384 U.S. at 441-42. “We granted certiorari . . . 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.” Id. But see David A. Strauss, Miranda, the Constitution, and Congress, 99 MICH. L. REV. 958, 962-63 (2001) (explaining that protecting rights is better achieved under a catch-all approach like Miranda than trying to employ a case-by-case scheme).
\item[110] See Strauss, supra note 109, at 963 (discussing the merits of a black letter standard versus a case-by-case basis for evaluating admissibility of
should guide, even if the Constitution is not controlling. 111 This does not necessarily demand the same result, just that the same principles be applied.

Doyle was a state case decided on constitutional grounds. 112 But, had it been in federal court, perhaps the evidence of Doyle's silence would not have been admitted under the Federal Rules of Evidence, 113 and the constitutional issue never would have been reached, 114 the goal and the result being the same either way. The goal of excluding prejudicial evidence, and the result being that it would be excluded. 115

This illustrates that where evidence of silence is not protected constitutionally as in Jenkins, 116 it is still afforded the just consideration of its probative value versus its prejudice. 117 Once evidence is admitted, the jury is free to draw whatever inferences it chooses. 118

D. Relevancy of the Timeline

The timeline discussed in detail in Part II is still highly relevant for two determinations. The first such determination is that of probative versus prejudicial value and ultimate determination of admissibility. 119 The second is that of the weight of the evidence should it be admitted under the first step of the determinative process.

111. But cf. FED. R. EVID. 402 (stating that where there were contradictory constitutional considerations, those considerations would trump the evidentiary rules).

112. 426 U.S. at 618. It would be a violation of due process to admit evidence of silence after a person had been advised of the Miranda rights. Id.

113. See FED. R. EVID. 403 (excluding evidence that is more prejudicial than probative); Doyle, 426 U.S. at 617 (concluding that, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested").

114. Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944). No constitutional jurisprudential doctrine is more established than that constitutional questions should not be decided unless it is unavoidable. Id.


116. 447 U.S. at 238-39. "[U]se of prearrest silence to impeach... credibility" is not a violation of constitutional protections. Id.

117. FED. R. EVID. 403. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id.

118. See Edwin Meese III, Promoting Truth in the Courtroom, 40 VAND. L. REV. 271, 279-80 (1987) (promoting the principle that evidence of a defendant’s silence should be admissible and that the system ought to trust juries to make the appropriate determination as to the weight of the evidence).

119. FED. R. EVID. 403.
Admitting the evidence is not the end of the line. By admitting the evidence, the judge is saying that he believes the jury can properly evaluate the weight of the evidence. In *Fletcher*, the defendant, Weir, argued that his silence, though not explicitly induced by a government warning, was made with knowledge of his rights gained through prior arrests. Weir claimed that his silence should be excluded from admission because it was an exercise of his constitutional rights. It was not excluded, but again, that is not the end of the line. Weir was free to argue the circumstances surrounding his silence and the jury is presumed to be well equipped to evaluate the reasons for such silence and give it due weight. Whether Weir wanted to admit his prior arrests is of course another matter altogether, but courts are suited to advise juries on what they can use to evaluate the defendant's guilt in the matter before them. The court, foreseeing the defense argument that the admission of the prior arrests to rebut the reason for the silence would itself be prejudicial, could have, within its discretion, excluded the evidence.

E. Silence as a Right to Itself

Stated often is the supposition that one has the right to silence, and that seems to be the end of the argument. Silence is not a right unto itself; it is merely the outcropping of the right not to testify as a witness against one's self. The Supreme Court has said that no inference can be drawn from a defendant's failure to testify, for the Constitution prohibits the State from compelling a defendant to testify. Merely exercising a constitutional right does not afford any guarantee that it will not be used against a person. An accused needs to weigh the value of that privilege to him when choosing to exercise it.

IV. PROPOSAL

As described above, there is not currently a national standard for determining the admissibility of silence that falls outside the protection of *Miranda*. Many courts have dealt with the issue,
but a national consensus has thus far eluded the Supreme Court.127 Some have called for a consistent national constitutional standard.128 While a consistent coherent rule based upon a constitutional standard seems like a worthy goal, it is unnecessary and unwise. As four cases involving Miranda rights come before the Supreme Court this fall,129 a call will surely be made to once and for all set a constitutional standard to exclude all evidence of silence by a defendant.130 This section briefly looks at the cases currently before the Supreme Court and the groundswell of support for a single standard of constitutional protection. It also proposes that the Court stand fast and execute the law in this area as decided.

The Court has previously issued its rules piecemeal,131 and now may be the time to set forth a clear picture of the law and answer what remaining questions there are as to constitutional protections. There is no need to make every protection of constitutional proportion, and the Supreme Court needs to say what the protections are, where they stop, and where evidentiary safeguards begin.132

The cases before the Supreme Court deal with additional aspects of a suspect's Miranda rights.133 These include the

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127. See supra note 69 and accompanying text (illustrating a variety of positions employed by several states).
128. See Strauss, supra note 12, at 162 (calling for a uniform national standard of admissibility, presumably based upon a constitutional standard).
130. Since this Comment was first written, the Supreme Court has ruled on these four cases. In both Yarborough, 541 U.S. 652, and Seibert, 124 S. Ct 2601, the Court limited its holding to affirmative statements and therefore did not address the issue of silence. In Patane, 124 S. Ct. 2620, the Court addressed the issue of the admissibility of physical evidence resulting from an unwarned search, and again did not reach the issue of silence. And in Fellers, 540 U.S. 519, the Court remanded on Sixth Amendment grounds and did not rule on any Fifth Amendment issues including silence.
131. See Miranda, 384 U.S. at 498-99 (holding a suspect must be warned of his rights); Doyle, 426 U.S. at 619 (holding use of silence at trial of a suspect who had been warned is unconstitutional); Fletcher, 455 U.S. at 605-06 (ruling admissible evidence of silence not reduced by a Miranda warning).
132. But cf. Jenkins, 447 U.S. at 240 (holding that while silence may be used to impeach, it failed to say whether all evidence of silence is permissible, or only for impeachment purposes).
133. See, e.g., Fellers, 285 F.3d at 723 (considering whether an admission prior to being given Miranda rights is admissible); Patane, 304 F.3d at 1014 (considering whether physical evidence obtained from information gathered from a suspect without the benefit of Miranda rights is admissible).
question of whether police may intentionally delay in advising a suspect of his rights, and whether after such a delay information gained can be used to gather evidence that will be admissible. This is often called the fruit of the poisonous tree doctrine.

The question can present itself like this: A murder suspect is questioned at the scene of a crime. There, police have a feeling that the suspect is a bit reluctant to cooperate, and if they tell him that he can remain silent, he might do just that. But the scene is understandably emotional, and the officer feels that he can elicit valuable information from the suspect. The suspect finally admits to the crime and leads police to the murder weapon. It is clear that the admission will not be admissible, but what about the gun?

This seems a bit far a field from the problem of silence, but the court can and should use the same logic to afford the same protection and set a consistent standard. Here the gun should most assuredly come into evidence. Why? The better question is why not? There is no question that the defendant in this hypothetical is the murderer, and that the weapon recovered is the murder weapon, so why exclude it, merely because the state chose not to avail itself of the opportunity to use the defendant's statement at trial. An analog to this situation appears to be where an unlawful search uncovers evidence that leads to evidence not part of the illegal search. It may appear to be an analog but the two are distinguishable.

In the case of the illegal search, the first act is illegal, and public policy must not encourage actions that violate the Constitution. In the case of the potentially un-warned suspect, the failure to warn is not an illegal act, nor should it be. The

134. *Fellers*, 285 F.3d at 723; *Patane*, 304 F.3d at 1014.
135. See *Patane*, 124 S. Ct. at 2630 (holding that the Fifth Amendment protects one from being a witness against himself). Justice Thomas, writing for the plurality, explains how the constitutional protection afforded a defendant-witness is fully protected by excluding testimonial evidence. *Id.* at 2626. There is no such constitutional requirement that physical evidence be excluded. *Id.*
136. See, e.g., *Segura v. United States*, 468 U.S. 796, 804 (1984) (holding that not only is evidence that is directly obtained illegally without a search warrant subject to exclusion, so too is evidence that is "found to be derivative" of the illegal search).
137. See, e.g., *Nardone v. United States*, 308 U.S. 338, 340 (1939) (reasoning that indirect evidence should be inadmissible). If illegal searches resulted in indirect evidence that was admissible, then police would actually be encouraged to perform illegal searches. *Id.* This would create a promotion of an unconstitutional policy, and is therefore bad public policy. *Id.*
138. *But see Coleman*, 895 P.2d at 663 (holding that by allowing post-arrest, pre-*Miranda* silence the court would encourage game playing). By prohibiting the use of all silence subsequent to an arrest, the risk of police intentionally refusing to issue *Miranda* warnings in the hopes of gaining useful information is eliminated. *Id.*
questioning comes with its own protections and consequences for the state, that the statement cannot be used at trial.\textsuperscript{139} The poison tree analogy only works if the location of the gun was obtained at trial in violation of constitutional protections.

Just as with evidence of silence, evidence of the gun is subject to the limitation of an evidentiary foundation.\textsuperscript{140} And as with silence, these evidentiary safeguards are sufficient.\textsuperscript{141} The trial is after all a search for the truth, and the evidentiary rules and constitutional protections and limitations serve to ensure its fairness.\textsuperscript{142}

Constitutional rights live on a slippery slope. A right contracted may become useless and obsolete. So too, a right expanded can be stretched to bear no resemblance to its origin. The fear is that adhering only to the letter of the Constitution will result in a practical denial of the right.\textsuperscript{143} The fear is a real one and decisions like \textit{Miranda}\textsuperscript{144} and \textit{Doyle}\textsuperscript{145} help to forestall the circumvention of rights. The hope, however, is that the balance of justice can be maintained within these rights and that the search for truth is not derailed by unnecessarily expanding rights beyond the scope of protections afforded by the Constitution.

If a man is standing between a police officer and another and admits to a crime, the police officer may be barred from telling his story,\textsuperscript{146} while the other may be free to tell his story to a jury.\textsuperscript{147}

\textsuperscript{139} Compare \textit{Miranda}, 384 U.S. at 467 (holding a statement made without the benefit of being informed of certain constitutional rights is inadmissible), with \textit{Fellers}, 285 F.3d at 723 (considering the admissibility of a statement made prior to \textit{Miranda} warnings, but repeated after being informed of such warnings).

\textsuperscript{140} FED. R. EVID. 104. In this example, if the gun had been wiped clean and there was no other evidence linking the gun to the crime, it might very well be inadmissible; but if the fingerprints of the suspect were found on the gun, and the rifling on the bullet matched the barrel of the gun, then it probably would be found admissible. \textit{Id.}

\textsuperscript{141} FED. R. EVID. 102. The purpose of the Federal Rules of Evidence is to afford a fair proceeding in which the truth is revealed. \textit{Id.}

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} See generally \textit{Miranda}, 384 U.S. at 444 (expanding the constitutional right against self-incrimination to include a warning by investigators).

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} 426 U.S. at 617-18.

\textsuperscript{146} See generally \textit{Miranda}, 384 U.S. at 467 (holding that suspect must be warned for the state to use his statement).

\textsuperscript{147} See FED. R. EVID. 801 (d)(2)(a) (stating that an admission by a party opponent is not hearsay). This apparently contradictory rule actually comports with \textit{Miranda}, in that one of the principles for holding that non-advised statements are not admissible is the inherent coercive effects of private police interrogation. \textit{Miranda}, 384 U.S. at 457-60. Presumably, the presence of a third party, one without state affiliation, would also serve as an adequate deterrent to coercion and thus support the truth of the statement. \textit{Id.}
So too is there a dilemma in the law regarding silence. If a police officer approaches two suspects at a crime scene and immediately arrests one and begins to question both of them, and they both remain silent, the silence of one may be admissible and the silence of the other may not be. These are questions of degree and not of demarcation.4

The relevancy of such silence may be clear, so too may the prejudice of the evidence. The determination of such prejudice lies with the trial court, and not a hard and fast constitutional rule barring admissibility. Once the threshold question of admissibility has been answered, the appropriate weight given it is a job well suited for a jury with access to as near all the facts as can be constitutionally admitted.

While it may not seem radical to espouse the status quo, in light of the fervent calls to expand a constitutional right, it is necessary to be reminded at this point what the right is, and why it should not be expanded. First, the Constitution provides for a right against self-incrimination. This literal reading has been wisely expanded enough to be practical. Next, it must be remembered that this right under the Constitution is in place to promote the truth. Finally, the truth should come out. Expanding the constitutional right only aids to subvert the truth and provide for mechanisms of suppression of evidence unwarranted by a narrow protection not to give testimony at trial.

V. CONCLUSION

A trial is search for the truth. Only through evidence is the truth determined. The mechanisms of a trial and the rules of evidence, tempered by the Constitution, serve the goal of finding the truth. If a jury is to be the ultimate determiner of facts on its way to the truth, it should have all the facts. Our rules of evidence

148. See supra Part II.A. (discussing the relevance of the specific point in time in which a Miranda right or an arrest takes place). When silence occurs is often the determinative factor in its admissibility. Id.
149. Contra id.
150. See Strauss, supra note 12, at 161 (calling “[s]ilence... inherently, insolubly ambiguous”). Strauss contends that jurors ascribe a disproportionately large amount of weight to such silence. Id.
151. FED. R. EVID. 104.
152. FED. R. EVID. 104(e). The weight of evidence is a consideration of the jury. Id.
153. See supra note 128 and accompanying text.
154. U.S. CONST. amend. V. “No person shall... be compelled in any criminal case to be a witness against himself.”
155. See supra p. 668 (discussing the decisions that have expanded the right).
156. See supra Part III.B.1. (discussing the reason behind the Fifth Amendment is to promote reliability and truthfulness).
are well suited to prevent prejudicial evidence from reaching a jury, and juries are, in turn, well adept at weighing the evidence on a case-by-case basis. To afford evidence of silence a blanket constitutional protection deprives the trier of fact facts, always. Our system is more subtle than that and able to evaluate each instance independently.