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Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence

Mikah K. Thompson

METHINKS THE LADY DOTH PROTEST TOO LITTLE: REASSESSING THE PROBATIVE VALUE OF SILENCE

Mikah K. Story Thompson*

I. INTRODUCTION

The syllogism[1] goes as follows: major premise – Innocent people proclaim their innocence in response to an accusation; minor premise – Defendant failed to respond to an officer's accusation that he killed his wife; conclusion – Defendant is guilty of killing his wife. This syllogism is the basis upon which courts and lawmakers allow a defendant's silence to be admitted into evidence as proof of guilt. They reason that it is quite appropriate for jurors to infer that innocent people would proclaim their innocence and, therefore, a defendant's decision not to speak constitutes evidence of his or her guilt.[2]

This Article will challenge the assumptions upon which the syllogism rests. It will ultimately demonstrate that the major premise, which argues that the innocent speak while the guilty remain silent, is often untrue, especially when the person leveling the accusation is a member of law enforcement. Research in the areas of sociology, psychology, and communications reveals that a person's silence in relation to law enforcement officers can reflect many things other than guilt or innocence. Part II of this Article will discuss the traditional evidentiary uses of silence. Part III will discuss the manner in which the Fifth Amendment privilege and the reading of *Miranda* warnings affect the

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[1] *The American Heritage Dictionary* defines a syllogism as "[a] form of deductive reasoning consisting of a major premise, a minor premise, and a conclusion; for example, *All humans are mortal*, the major premise, *I am a human*, the minor premise, *therefore, I am mortal*, the conclusion." THE AMERICAN HERITAGE DICTIONARY (4th ed. 2006), *available at* http://dictionary.reference.com/browse/syllogism.

[2] *See infra* Part III.D.

government's ability to argue that a defendant's silence is evidence of guilt or lack of credibility. Part III will also describe court interpretations regarding the probative value of silence. Part IV will explore what silence means outside the legal context. This section will review the possible meanings of silence as examined by scholars in other disciplines. Part V will propose a new addition to the Federal Rules of Evidence that will provide greater limits on the admissibility of evidence of a defendant's failure to communicate with law enforcement officers. Part VI will conclude that basic evidentiary standards and public policy considerations call for limitations on the use of a criminal defendant's silence.

II. THE TRADITIONAL EVIDENTIARY USE OF SILENCE

At the outset, it is important to describe what constitutes silence. *Merriam-Webster's Dictionary of Law* defines silence as "forbearance from speech or comment."[3] Likewise, the Ninth Circuit defines silence as "the fact of abstaining from speech."[4] For purposes of this Article, "silence" refers to a defendant's failure to speak. The failure to speak can arise in several situations. It could arise in response to an accusation of criminal conduct. Additionally, it could arise where a defendant fails to report a crime or fails to offer an exculpatory statement to law enforcement upon arrest. Typically, the government uses a defendant's silence in one of the following ways: (1) to establish a non-hearsay adoptive admission; (2) to impeach the defendant's credibility as a witness; or (3) as substantive evidence of the defendant's guilt.

A. Silence as Proof of an Adoptive Admission

Federal Rule of Evidence 801(d)(2)(B) allows for the admissibility of "adoptive admissions" against a party-opponent. The rule states: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth."[5]

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[3] MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996), *available at* http://dictionary.reference.com/browse/silence.

[4] United States v. Velarde-Gomez, 269 F.3d 1023, 1031 (9th Cir. 2001) (quoting THE NEW SHORTER OXFORD DICTIONARY 2861 (4th ed. 1993)).

[5] FED. R. EVID. 801(d)(2)(B). An adoptive admission technically meets the definition of hearsay. For example, if *A* accuses *B* of killing *C* and *B* acknowledges the statement by nodding, any later testimony about *A*'s statement and *B*'s adoption of the statement are out-of-court statements. If those statements are offered to prove that *B* killed *C*, then the statements meet the definition of hearsay. *See* FED. R. EVID. 801(a)-(c).

In essence, the adoptive admissions rule allows the statements of others to be admitted against a party-opponent if the party-opponent has in some way adopted the statement as his own. For example, the First Circuit found an adoptive admission where a defense attorney admitted in open court that the defendant knew an accomplice had deposited a gun in the defendant's car.[6] The court found the attorney's admission to be attributable to the defendant because the defendant stated during the same hearing that he agreed with the statements made by his attorney.[7] Although adoptive admissions technically satisfy the definition of hearsay,[8] the drafters of the Federal Rules of Evidence felt that adoptive admissions, like all other admissions, should be excluded from the definition of hearsay "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[9]

While several types of verbal and nonverbal conduct may constitute proof of a party-opponent's acquiescence or manifestation of belief in someone else's statement,[10] a party-opponent's silence or failure to deny a statement may also qualify as proof that the party has adopted the statement.[11] Courts typically apply three factors, or preconditions, that must be satisfied before a party may introduce her opposing party's silence as proof of an adoptive admission. The proponent of the evidence must show that: (1) the party heard and understood the statement; (2) the circumstances naturally called for a response; and (3) the party failed to respond.[12] The failure to satisfy any one of these factors renders

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[6] *See* United States v. Negrón-Narváez, 403 F.3d 33, 39 (1st Cir. 2005).

[7] *Id.*

[8] *See supra* note 5.

[9] FED. R. EVID. 801(d)(2) advisory committee's note.

[10] *See, e.g.*, United States v. Beckham, 968 F.2d 47, 52 (D.C. Cir. 1992) ("When [defendant's accomplice] told [an undercover officer] that he could get another rock of crack from 'my buddy,' [defendant] immediately got up from his chair, walked over to a stash of crack that was packaged for distribution, and began to open it. By that action, [defendant] indicated his endorsement of [the accomplice's] statement."); United States v. Marino, 658 F.2d 1120, 1124-25 (6th Cir. 1981) (finding that defendant's possession of an airline ticket was an admission that defendant had traveled in interstate commerce because "possession of a written statement becomes an adoption of its contents"); Wickliffe v. Duckworth, 574 F. Supp. 979, 984 (N.D. Ind. 1983) ("The record is clear that petitioner adopted the admissions . . . . [H]e demonstrated his agreement by laughing, slapping hands with [the declarant] and nodding.").

[11] *See* FED. R. EVID. 801(d)(2)(B) advisory committee's note ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue.").

[12] *See* United States v. Duval, 496 F.3d 64, 76 (1st Cir. 2007) ("[A] party's agreement with a fact stated by another may be inferred from (or 'adopted' by) silence . . . when (i) a statement

the silence less probative on the issue of whether the party adopted the statement at all.[13] For example, if the evidence demonstrates that the defendant did not hear the statement, then her silence lacks any probative value. Thus, the proponent of the adoptive admission must meet each of the three requirements.

B. Silence as Impeachment Evidence

Federal Rule of Evidence 613 allows for the impeachment of trial witnesses through prior inconsistent statements.[14] Where a witness's trial testimony is inconsistent with a prior statement made by the witness, opposing counsel may cross-examine the witness regarding the inconsistency or introduce actual proof of the prior inconsistency.[15] This line of questioning is not used to demonstrate the truth of the prior statement,[16] but to show the witness's lack of credibility. As the First Circuit Court of Appeals has stated:

> In our view, Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary—not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question).[17]

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is made in a party's presence, (ii) the nature of the statement is such that it normally would induce the party to respond, and (iii) the party nonetheless fails to take exception." (internal quotations omitted)); *see also* United States v. Ward, 377 F.3d 671, 675 (7th Cir. 2004); United States v. Higgs, 353 F.3d 281, 310 (4th Cir. 2003); United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985).

[13] The drafters of the Federal Rules of Evidence define the "probative value" of evidence in the following manner: "The standard of probability under the rule is 'more . . . probable than [the fact in dispute] would be without the evidence.'" FED. R. EVID. 401 advisory committee's note.

[14] FED. R. EVID. 613.

[15] *Id.*

[16] In order to use a prior inconsistent statement for its truthfulness, the proponent of the evidence must satisfy Federal Rule of Evidence 801(d)(1)(A), which excludes from the definition of hearsay prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

[17] United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir. 1999); *see also* 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 34, at 126 (5th ed. 1999) ("The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement is true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements.").

The Supreme Court has held that a defendant's silence can be used as impeachment evidence and may sometimes qualify as a prior inconsistent statement. In *Raffel v. United States*,[18] the Court held that a defendant who invoked his privilege against self-incrimination in his first trial yet chose to take the stand during his second trial could be impeached with his prior failure to testify.[19] During Raffel's first trial for conspiracy to violate the National Prohibition Act, he listened to testimony by a prohibition agent that Raffel admitted owning a bar that served alcohol. Raffel did not testify during that trial, and the jury deadlocked.[20] During Raffel's second trial, the same prohibition agent testified regarding Raffel's admission, and Raffel took the stand and testified that he had never made such a statement.[21] On cross-examination, the court asked Raffel why he failed to take the stand in his own defense during the first trial.[22] Raffel was convicted following the second trial.[23] On appeal, the Court held that the prosecutor's questions were permissible.[24] The Court found that by taking the stand, Raffel opened himself up to cross-examination and impeachment.[25] The Court also noted that Raffel's cross-examination may have been probative of his credibility "if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story."[26] Thus, the Supreme Court found that under certain circumstances, a defendant's silence may be inconsistent with claims of innocence made at trial.

The Court has not always found silence to qualify as a prior inconsistent statement. In *Grunewald v. United States*,[27] the Court held that a defendant's invocation of his Fifth Amendment privilege during grand jury proceedings could not be used to impeach his trial testimony.[28] In *Grunewald*, the Court failed to see how the defendant's silence during the grand jury hearing was contradictory to his trial testimony proclaiming his innocence.[29] Indeed, the

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[18] 271 U.S. 494 (1926).
[19] *Id.* at 497.
[20] *Id.* at 495.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 497.
[26] *Id.* at 498.
[27] 353 U.S. 391 (1957).
[28] *Id.* at 424.
[29] *Id.* at 421-22.

Court found the defendant's silence to be "wholly consistent with innocence."[30] In distinguishing its holding in *Grunewald* from its holding in *Raffel*, the Court found that the *Raffel* decision did not concern itself with the probative value of the impeachment evidence. Rather, *Raffel* focused on the constitutionality of impeaching a defendant regarding his prior silence.[31] The *Grunewald* Court held that although the line of questioning regarding the defendant's grand jury silence was constitutional, it was not probative on the issue of the defendant's credibility and was therefore inadmissible.[32] In accord with the *Grunewald* holding, subsequent decisions regarding the admissibility of silence to impeach a defendant-witness's credibility have turned on whether the courts found the silence to have some probative value as a statement inconsistent with a defendant's trial testimony.[33] As the Supreme Court has noted, "[i]f the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and therefore must be excluded."[34]

C. Silence as Substantive Evidence of Guilt

At times, courts have allowed the use of a defendant's silence against her as proof of her guilt for the crime charged. In the civil context, the Supreme Court has held that a jury may infer culpability from a party's failure to testify at trial, even where the party's silence is due to her invocation of the self-incrimination

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[30] *Id.* at 421.

[31] *Id.* at 420.

[32] *Id.* at 421.

[33] *See* United States v. Hale, 422 U.S. 171, 179-80 (1975) ("Petitioner here had no reason to think that any explanation he might make would hasten his release. . . . In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof."). *But see* Doyle v. Ohio, 426 U.S. 610, 621-22 (1976) (Stevens, J., dissenting) ("If defendants had been framed, their failure to mention that fact at the time of their arrest is almost inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount to a prior inconsistent statement and admissible for purposes of impeachment."); United States v. Strother, 49 F.3d 869, 874 (2d Cir. 1995) ("Under certain circumstances, a witness's prior silence regarding critical facts may constitute a prior inconsistent statement where failure to mention those matters . . . conflict[s] with that which is later recalled." (internal quotations omitted)); Dennis v. United States, 346 F.2d 10, 17-18 (10th Cir. 1965), *rev'd on other grounds*, 384 U.S. 855 (1966) ("In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact . . . may be relevant to the process of testing credibility of a witness'[s] trial testimony.").

[34] *Hale*, 422 U.S. at 176.

privilege.[35] In the criminal context, government attorneys violate the Constitution by commenting on a defendant's failure to testify at trial;[36] however, they can argue that a defendant's failure to ask questions or show emotion upon being arrested[37] tends to demonstrate consciousness of guilt for the crime charged.[38] Wigmore provides an explanation for the value courts traditionally place on evidence of silence:

> A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. . . . There may be explanations indicating that the person had in truth no belief of that tenor, but the conduct is "prima facie" an inconsistency.[39]

Wigmore's rationale is based on the assumption that it is natural for one to protest false accusations or to proclaim innocence in the face of arrest. This Article seeks to highlight circumstances where it is actually more natural to remain silent than to protest. If such circumstances exist, then the major premise of the "silence indicates guilt" syllogism breaks down, courts must call the probative value of silence into question, and, most importantly, jurors' assumptions about the meaning of silence may be completely incorrect.

In the context of criminal cases, the government's use of a defendant's silence triggers concerns regarding the defendant's privilege against self-incrimination under the Fifth Amendment.[40] The next section of this Article will explore jurisprudence assessing what effect, if any, the self-incrimination privilege and the reading of *Miranda* warnings have on the probative value of a defendant's silence.

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[35] *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.'" (quoting 8 WIGMORE, EVIDENCE § 439 (McNaughton rev. 1961))).

[36] *See* Griffin v. California, 380 U.S. 609, 614 (1965) (finding that comment on defendant's refusal to testify "is a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly").

[37] *See* United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005).

[38] *Id.*

[39] 3A WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1970), *quoted in Baxter*, 425 U.S. at 319 n.3.

[40] The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

III. SILENCE IN THE FACE OF *MIRANDA* AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment's grant of a criminal defendant's privilege against self-incrimination greatly complicates the issue of whether a defendant's silence should be used against him. The drafters of the adoptive admissions rule recognized that the potential impact the rule might have on the self-incrimination privilege was "troublesome" because a criminal defendant's silence could be motivated by advice of counsel or exercise of the self-incrimination privilege.[41] However, the drafters felt that the Supreme Court resolved any potential conflicts and decided not to include a limitation on the use of a criminal defendant's silence.[42] Today, the constitutionality of the use of a criminal defendant's silence turns on whether the silence occurs prior or subsequent to arrest and the reading of *Miranda* warnings, which inform a criminal defendant of his right against self-incrimination.[43] This Article does not seek to debate whether the use of a criminal defendant's silence is constitutional based on when the silence occurs during the arrest and interrogation process. Rather, it will address what effect the constitutional guarantees embodied in *Miranda*, and the self-incrimination privilege, have on the probative value of the silence.

A. *Post-Arrest, Post-*Miranda *Silence*

The Supreme Court has weighed in on the constitutionality of governmental use of a criminal defendant's silence when the silence occurs following arrest and the reading of *Miranda* warnings. In *Doyle v. Ohio*,[44] the Court held that courts are barred from admitting evidence of a defendant's silence for impeachment purposes when the silence occurs post-arrest and post-*Miranda*.[45] In *Doyle*, the defendants were accused of selling marijuana.[46] Each defendant took the stand in his own defense and testified that he had been

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[41] FED. R. EVID. 801(d)(2)(B) advisory committee's note.

[42] *Id.*

[43] Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any [custodial interrogation], the [accused] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

[44] 426 U.S. 610 (1976).

[45] *Id.* at 619 ("We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.").

[46] *Id.* at 611.

framed by the true seller of the drugs.[47] On cross-examination, the prosecutor asked each defendant why he had not told law enforcement of the frame-up at the time of arrest.[48] The questions drew objections from defense counsel, but the trial court allowed the line of questioning.[49] The trial court also allowed the prosecution to argue during closing argument that the defendants' silence following arrest was evidence that the frame-up story was untrue.[50] In finding that the questions and comments on the defendants' post-arrest, post-*Miranda* silence were unconstitutional, the Supreme Court reasoned that it would be patently unfair to assure a defendant of his right to remain silent during arrest and subsequently use the defendant's silence against him at trial.[51] For this reason, the Court held that the use of the defendants' silence following the reading of *Miranda* violated their due process rights under the Fourteenth Amendment.[52]

*B. Post-Arrest, Pre-*Miranda *Silence*

Often, the government will seek to use a defendant's silence against her when the silence occurs after arrest but before the reading of *Miranda* warnings.[53] The constitutionality of this practice may turn on the purpose for

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[47] *Id.* at 612-13.

[48] *Id.* at 613.

[49] *Id.* at 613-14.

[50] *Id.* at 614 n.5.

[51] *Id.* at 618. ("[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

[52] *Id.* at 619. Although *Doyle* concerned the use of silence as impeachment evidence, a later Supreme Court decision held that post-*Miranda* silence could not be used to disprove a defendant's insanity defense. *See* Wainwright v. Greenfield, 474 U.S. 284, 292 (1986). Lower courts have interpreted *Greenfield* to hold that post-*Miranda* silence cannot be used to establish a defendant's guilt. *See, e.g.*, United States v. Frazier, 408 F.3d 1102, 1110 (8th Cir. 2005) ("The [*Greenfield*] Court held that [post-*Miranda* silence] evidence, like that at issue in *Doyle*, was inadmissible as substantive evidence of guilt because it is equally unfair to promise an arrested person that his silence will not be used against him and then use that silence to overcome his plea of insanity.").

[53] Contrary to popular belief, law enforcement is not required to advise an arrestee of her *Miranda* rights until custodial interrogation commences. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). Therefore, it is constitutionally permissible for law enforcement officers to make an arrest without reading *Miranda* warnings.

which the government seeks to use the evidence. In *Fletcher v. Weir*,[54] the Supreme Court found no constitutional violation in a prosecutor's decision to cross-examine a defendant about his post-arrest, pre-*Miranda* silence.[55] The defendant in *Fletcher* was charged with intentional murder, but at trial he testified that he killed the victim in self-defense.[56] On cross-examination, the prosecutor questioned the defendant on his failure to offer his self-defense story to the officers who arrested him.[57] Ultimately, the jury found the defendant guilty of murder.[58] He appealed, claiming, based on *Doyle*, that the prosecutor's line of questioning regarding his post-arrest silence violated his due process rights.[59] The Supreme Court disagreed, finding that "[i]n 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 post-arrest silence when a defendant chooses to take the stand."[60] The Court's ruling established a bright line: Where a defendant-witness's silence precedes the reading of *Miranda* warnings, the government may use the silence to impeach the defendant at trial.

The Court has never addressed the issue of whether the government may use a defendant's post-arrest, pre-*Miranda* silence to establish guilt for the crime charged. However, the circuit courts have continuously debated this issue. The Fourth, Eighth, and Eleventh Circuits have held that the use of a defendant's post-arrest, pre-*Miranda* silence triggers no constitutional concerns.[61] In *United States v. Frazier*,[62] the Eighth Circuit addressed whether the government could argue that the defendant's post-arrest, pre-*Miranda* silence implied he was guilty of drug possession.[63] In *Frazier*, the government did not use evidence of the defendant's silence to impeach his testimony.[64] Rather, the prosecutor elicited evidence of the defendant's silence from one of the arresting officers and later argued during closing argument that the

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[54] 455 U.S. 603 (1982).

[55] *Id.* at 607.

[56] *Id.* at 603-04.

[57] *Id.*

[58] *Id.* at 604.

[59] *Id.*

[60] *Id.* at 607.

[61] *See* United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).

[62] 408 F.3d at 1102.

[63] *Id.* at 1109.

[64] The opinion does not indicate whether the defendant testified on his own behalf.

defendant's failure to get upset, angry, combative, or emotional during his arrest reflected his guilt.[65] The defendant argued on appeal that the government's actions violated his privilege against self-incrimination.[66] The Eighth Circuit found no violation of the defendant's self-incrimination privilege. The court found that, unlike the situation in *Doyle*, there was no governmental action that induced the defendant's silence.[67] Because law enforcement did not inform the defendant of his right to remain silent, the *Frazier* court found that the use of his silence during the government's case-in-chief did not violate the defendant's Fifth Amendment rights.[68] The Fourth and Eleventh Circuits agree that the government may comment on defendants' post-arrest silence so long as law enforcement has not read *Miranda* warnings.[69]

The D.C. and Ninth Circuits wholeheartedly disagree with the view that the government may use a defendant's post-arrest, pre-*Miranda* silence against him.[70] These courts reason that although *Miranda* warnings are a procedural safeguard in place to ensure that arrestees are advised of their Fifth Amendment rights, the warnings "are not the genesis of those rights."[71] Rather, an arrestee possesses the right to remain silent upon being taken into custody and questioned by law enforcement, even if he has not been advised of his *Miranda* rights.[72] These circuits hold that the issue of whether an arrestee is advised of his rights is immaterial. Instead, these courts are concerned with whether the arrestee invoked his privilege against self-incrimination.[73] According to the D.C. Circuit, an arrestee who remains silent must be treated as having asserted his privilege, and any prosecutorial comment on that invocation places undue

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[65] *Frazier*, 408 F.3d at 1109.

[66] *Id.*

[67] *Id.* at 1111.

[68] *Id.*

[69] *See* United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) ("Yet, even if [defendant] was in custody at that time, the government could comment on her silence . . . because she had not yet been given her *Miranda* warnings."); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985).

[70] *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1033 (9th Cir. 2001); United States v. Moore, 104 F.3d 377, 387 (D.C. Cir. 1997).

[71] *Velarde-Gomez*, 269 F.3d at 1029; *accord Moore*, 104 F.3d at 385 ("[N]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody.").

[72] *Velarde-Gomez*, 269 F.3d at 1029.

[73] *Id.* at 1028-29; *see also* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (pre-arrest, pre-*Miranda* case) ("Whether Mr. Burson was advised of his privilege against self-incrimination is immaterial. What is important is that Mr. Burson clearly was not going to answer any of the agents' questions.").

burden on the defendant's Fifth Amendment right to remain silent.[74] The D.C. Circuit also noted that any contrary finding "would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant."[75]

The D.C. and Ninth Circuits do not believe that their stance on the substantive use of post-arrest, pre-*Miranda* silence calls into question the holdings of *Doyle* and *Fletcher*.[76] While the Fourth, Eighth, and Eleventh Circuits cite *Doyle* and *Fletcher* as support for the position that post-arrest silence is fair game for prosecutors so long as *Miranda* warnings have not been given,[77] circuits holding the opposite opinion argue that *Fletcher* and *Doyle* are distinguishable because they addressed the use of silence as impeachment evidence rather than as substantive evidence of a defendant's guilt.[78] Thus, it seems that in these jurisdictions, a defendant can prevent use of her post-arrest, pre-*Miranda* silence by electing not to testify at trial and thereby subject herself to impeachment through cross-examination.[79]

C. *Pre-Arrest, Pre-*Miranda *Silence*

The third context in which these issues arise is the pre-arrest, pre-*Miranda* context. In this situation, the criminal defendant is not facing custodial interrogation by law enforcement such that *Miranda* warnings would be required. Indeed, at the moment the criminal defendant is silent, he may not

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[74] *Moore*, 104 F.3d at 385.

[75] *Id.*

[76] For a discussion of *Doyle* and *Fletcher*, *see supra* Parts III.A and III.B.

[77] *See* United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (citing Fletcher v. Weir, 455 U.S. 603 (1982)); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (citing *Fletcher*); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (citing Doyle v. Ohio, 426 U.S. 610 (1976), and *Fletcher*).

[78] *See Velarde-Gomez*, 269 F.3d at 1029 n.1 ("*Doyle* referred to the use of post-arrest, post-*Miranda* silence for impeachment. The government may still use a defendant's post-arrest, pre-*Miranda* silence for impeachment (but not, as this opinion explains, in its case in chief)." (internal citations omitted)); *Moore*, 104 F.3d at 387 ("The present case is not an impeachment case, and neither *Doyle* nor *Fletcher* has anything to do with it.").

[79] As the Supreme Court held, "a defendant who elects to testify in his own behalf waives any Fifth Amendment objection to the use of his prior silence for the purpose of impeachment." Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring); *see also* Harris v. New York, 401 U.S. 222, 225 (1971) (finding that the self-incrimination privilege "cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.").

even be a suspect. The Supreme Court has opined on the use of pre-arrest, pre-*Miranda* silence for impeachment purposes. In *Jenkins v. Anderson*,[80] the defendant was charged with first-degree murder. He was not arrested until he turned himself in to law enforcement some two weeks following the killing.[81] At trial, the defendant testified that he killed the victim in self-defense.[82] During cross-examination, the prosecutor questioned the defendant about his failure to report the killing to the police or to turn himself in immediately after the killing occurred.[83] During closing arguments, the prosecutor referenced the defendant's testimony where he admitted he remained silent for two weeks following the killing to support the government's argument that the defendant killed to retaliate rather than to defend himself.[84]

On appeal, the defendant argued that this use of his pre-arrest silence was unconstitutional.[85] The Court held that the impeachment was proper because it "follows the defendant's own decision to cast aside his cloak of silence."[86] The Court ruled that a defendant may protect his privilege against self-incrimination by not testifying at trial.[87] However, once the defendant decides to take the stand, "[t]he interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."[88] In addition to finding no violation of the defendant's self-incrimination privilege, the *Jenkins* Court also ruled that the use of the defendant's pre-arrest silence did not violate his due process rights because, unlike the situation in *Doyle*, no government action had induced the defendant to remain silent before his arrest.[89] The *Jenkins* Court expressly noted that its holding was limited to the use of pre-arrest silence for impeachment purposes only.[90] It left unanswered the question of whether pre-arrest silence could be used as substantive evidence of a defendant's guilt.

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[80] 447 U.S. 231 (1980).
[81] *Id.* at 232.
[82] *Id.*
[83] *Id.* at 233.
[84] *Id.* at 234.
[85] *Id.* at 235.
[86] *Id.* at 238.
[87] *Id.*
[88] *Id.* (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).
[89] *Id.* at 240.
[90] *Id.* at 236 n.2.

In the absence of a ruling from the Supreme Court on the issue of whether the government may make substantive use of a defendant's pre-arrest silence, the circuit courts have issued divergent rulings. Clearly, circuit courts that apply the bright-line rule that no violation occurs in the post-arrest, pre-*Miranda* context would likely find no violation in the pre-arrest, pre-*Miranda* context, because neither situation involves the use of silence following the reading of the warnings.[91] Some jurisdictions that have found a constitutional violation in the substantive use of a defendant's post-arrest, pre-*Miranda* silence have not found such a violation where the silence occurs prior to arrest. In *United States v. Oplinger*,[92] the Ninth Circuit found that the government's use of pre-arrest, pre-*Miranda* silence as proof of guilt does not trigger constitutional concerns.[93] The court reasoned that, unlike the post-arrest, pre-*Miranda* situation, a defendant who has not yet been arrested is "under no official compulsion whatever, either to speak or to remain silent."[94]

The First, Sixth, Seventh, and Tenth Circuits have found that the substantive use of pre-arrest silence violates a defendant's privilege against self-incrimination.[95] These courts found *Doyle* and *Fletcher* inapplicable[96] and instead have opted to follow the Supreme Court's reasoning in *Griffin v. California*.[97] In *Griffin*, the Court held that neither the prosecutor nor the court may invite the jury to infer guilt from a defendant's failure to testify at trial.[98] The Seventh Circuit held that *Griffin*'s prohibition on comments regarding a defendant's silence at trial also extends to silence occurring before trial and before arrest.[99] The Seventh Circuit found that because the privilege against self-incrimination attaches long before trial, non-testifying defendants should feel assured that evidence of their silence, regardless of when it occurs during the investigatory and adjudicative process, will not be used against them.[100]

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[91] *See supra* notes 63-69 and accompanying text.

[92] 150 F.3d 1061 (9th Cir. 1998).

[93] *Id.* at 1067.

[94] *Id.* at 1066 (internal quotations omitted).

[95] *See* Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987).

[96] This was because *Doyle* and *Fletcher* involved using silence as impeachment evidence rather than as evidence of a defendant's guilt. *See, e.g.*, *Combs*, 205 F.3d at 281.

[97] 380 U.S. 609 (1965).

[98] *Id.* at 613.

[99] *Savory*, 832 F.2d at 1017.

[100] *Id.* at 1017-18; *accord Coppola*, 878 F.2d at 1568 (finding a constitutional violation where prosecution offered defendant's statement to police that he was not going to confess

The Sixth Circuit agrees with this rationale, holding that "[i]n a prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution."[101]

The circuit split on the proper use of pre-arrest, pre-*Miranda* silence can be explained, at least in part, by whether a jurisdiction interprets impeachment evidence and substantive evidence of guilt as similar or dissimilar. Circuits finding that pre-arrest silence is not protected do not draw an actual distinction between impeachment and guilt evidence. Instead, those courts look for the existence of some type of government action, like the arrest of the defendant or the reading of *Miranda* warnings, that might convince the defendant that he should remain silent. [102] On the other hand, circuits that find it constitutionally impermissible to use substantive evidence of a defendant's silence universally find that substantive use requires more protection than impeachment use.[103] Unless the defendant opened himself up to impeachment by testifying at trial, these courts believe that use of the pre-arrest silence actually punishes the defendant for invoking his privilege against self-incrimination.[104] At least one circuit has argued that substantive use of pre-arrest silence places great pressure upon a defendant to waive his privilege against self-incrimination:

> Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon first contact with police or later at trial in order to explain the prior silence. [105]

With this constitutional framework for analyzing silence, it is important to explore the probative value of silence. The next section will explore court decisions addressing the meaning of silence from an evidentiary standpoint.

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because the non-testifying defendant did not offer an exculpatory story at trial but "relied on the protection guaranteed by the [F]ifth [A]mendment from the first police interrogation through trial").

[101] *Combs*, 205 F.3d at 283.

[102] *See* United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998).

[103] *See supra* notes 70-75 and accompanying text.

[104] *Id.*

[105] *Combs*, 205 F.3d at 285.

D. Court Decisions Assessing the Probative Value of Silence

The purpose of this Article is to analyze the probative value of silence in determining the guilt or innocence of a defendant. Before considering interpretations of silence from other disciplines, it is important to examine what weight the courts place upon a defendant's silence. The opinions vary greatly, for even the Supreme Court has contradictory pronouncements regarding the value of silence. In *Grunewald v. United States*,[106] the Court held that a defendant's invocation of his self-incrimination privilege carried very little evidentiary value as compared to the risk that the evidence would unfairly prejudice the defendant.[107] The Court noted that it was natural for a defendant to remain silent before the grand jury because it was clear that he was a potential defendant.[108] The Court found that even though many believe invocation of the privilege indicates a defendant's guilt,[109] in reality it was "quite consistent with innocence [for a defendant] to refuse to provide evidence which could be used by the Government in building its incriminating chain."[110] Ultimately, the *Grunewald* Court found that evidence of a defendant's silence during grand jury proceedings should not have been offered against him at trial.[111] Similarly, Justice Marshall, dissenting in *Jenkins v. Anderson*, argued that a defendant's failure to report a crime could carry many meanings:

> It is conceivable that a person who had acted in self-defense might believe that he had committed no crime and therefore had no call to explain himself to the police. Indeed, all the witnesses agreed that after the stabbing the victim ran across the street and climbed a flight of stairs before collapsing. Initially, at least, then, petitioner might not have known that there was a homicide to explain.[112]

At other times, the Court has found evidence of silence to be quite important. In *Baxter v. Palmigiano*,[113] where the Court held that a civil party's

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[106] 353 U.S. 391 (1952).

[107] *Id.* at 424. The Court was engaging in an analysis under Federal Rule of Evidence 403, which allows a court to exclude otherwise admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice to a party. FED. R. EVID. 403; *see also infra* Part V.A.

[108] *Grunewald*, 353 U.S. at 423.

[109] *Id.* at 421.

[110] *Id.* at 423.

[111] *Id.* at 424.

[112] 447 U.S. 231, 248 (1980) (Marshall, J., dissenting).

[113] 425 U.S. 308 (1976).

invocation of her privilege against self-incrimination could be used against her,[114] it noted that "[s]ilence is often evidence of the most persuasive character."[115] Likewise, in his concurring opinion in *Jenkins*, Justice Stevens suggested that the failure to report a crime did carry some probative value in assessing whether a defendant's self-defense story was credible.[116]

It must be noted that the reading of *Miranda* warnings has a significant impact on the probative value of silence. In addition to addressing the constitutionality of the government's actions, the *Doyle* Court also discussed the evidentiary value of silence following the reading of *Miranda* warnings.[117] The Court found post-*Miranda* silence "insolubly ambiguous."[118] Rather than serving as impeachment evidence, silence following *Miranda* "may be nothing more than the arrestee's exercise of these *Miranda* rights."[119] The *Doyle* Court's argument about the probative value of silence is equally true if the purpose of the evidence is to establish substantive guilt or an adoptive admission. The reading of *Miranda* warnings destroys any probative value that silence might otherwise carry. In *United States v. Hale*,[120] a Supreme Court case decided one year prior to *Doyle*, the Court found that an arrestee's silence means very little, since "he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court."[121] Thus, an arrestee's silence can "as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony [offered at trial] was a later fabrication."[122] Clearly, post-*Miranda* silence carries very little evidentiary value in helping a jury assess a defendant's credibility or determine his guilt or innocence.

A credible argument exists that the mere existence of the self-incrimination privilege renders all silence in the face of law enforcement "insolubly

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[114] *Id.* at 318.

[115] *Id.* at 319 (internal quotations omitted).

[116] 447 U.S. at 243 (Stevens, J., concurring) ("We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out.").

[117] Doyle v. Ohio, 426 U.S. 610, 617 (1976).

[118] *Id.*

[119] *Id.*

[120] 422 U.S. 171 (1975).

[121] *Id.* at 176.

[122] *Id.* at 177.

ambiguous."[123] In *Jenkins*, Justice Marshall noted that arrestees may know of their right to remain silent even before they are advised of their *Miranda* rights, especially where the defendant has previously been arrested.[124] Indeed, the Sixth Circuit noted that defendants may remain silent prior to arrest because they know of their right to remain silent.[125] The statement of rights has become so ubiquitous that many Americans can probably recite the *Miranda* warnings from memory. To be sure, citizens' knowledge of their constitutional right to remain silent without a warning from law enforcement is a good thing; however, this widespread knowledge undermines the major premise that innocent people always proclaim their innocence.[126]

According to the drafters of the adoptive admissions rule, any assessment of the probative value of silence requires "an evaluation in terms of probable human behavior."[127] Let us now engage in that evaluation based on research conducted by those better equipped than most in their ability to assess human behavior: psychology, sociology, and communications experts.

IV. WHAT SILENCE REALLY MEANS

The reader might wonder why exploration of the meaning of silence is necessary. As previously stated, the Supreme Court has made pronouncements about the conclusions a jury might infer from a defendant's silence. This Article argues that common sense assumptions about the meaning of silence may very well be incorrect. Psychology professor George Dudycha explains in detail the differences between common sense assumptions and justified conclusions based on scientific psychology.[128] Dudycha argues that while common sense expects a person to jump to conclusions, psychology uses the scientific method and requires "one [to] suspend judgment until the facts fairly speak for themselves."[129] Dudycha provides the following example of

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[123] *Doyle*, 426 U.S. at 617.

[124] Jenkins v. Anderson, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting) ("Since we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights, we must recognize that petitioner may have acted in reliance on the constitutional guarantee. In fact, petitioner had most likely been informed previously of his privilege against self-incrimination, since he had two prior felony convictions.").

[125] Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000).

[126] *See supra* Part I.

[127] FED. R. EVID. 801(d)(2)(B) advisory committee's note.

[128] George Dudycha, *What is Psychology?*, *in* PSYCHOLOGY FOR LAW ENFORCEMENT OFFICERS 1, 4-5 (George Dudycha ed. 1973).

[129] *Id.* at 4.

erroneous conclusions based on common sense: "A person who refuses to talk must be guilty. This idea is commonly held. And certainly at times it may be true, but to jump to the conclusion that it is always true, without considering the other factors that may lead to blocking, indicates a lack of scientific restraint."[130] The use of research from other disciplines necessarily informs the discussion on the probative value of silence. As Professors Robert Hutchins and Donald Slesinger observed, "[b]y careful use of [scientists'] proved results in these and other fields, we may yet build a law of evidence more closely related to the facts of human behavior."[131]

A. "I'm Silent Because I Am Guilty."

The most common interpretation of silence, and the one used by many courts and lawmakers, is that silence is evidence of a listener's agreement with statements made by others.[132] Common sense dictates that individuals speak when they disagree and remain silent when they agree.[133] However, as this Article will demonstrate, courts and jurors must not always assume that silence means assent. "Indeed, in some cultures and contexts, silence may actually constitute disagreement or dissent with an adverse statement or condition."[134] Thus, while silence can communicate a suspect's assent to accusations made by law enforcement officers, it may also hold other meanings.

B. "Why Talk? They Won't Believe Me Anyway."

Arrestees may remain silent in the face of accusations by police officers or fail to report crimes to police officers because they think that proclaiming their innocence is useless. They may believe that communication with law enforcement will result in their arrest and conviction even if they are actually innocent of any wrongdoing. Research demonstrates that many arrestees believe law enforcement officers will deem them guilty even if they are innocent. More importantly, social scientists have found that an arrestee's claims of innocence may indeed mean nothing to law enforcement officers

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[130] *Id.*

[131] Robert Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – Memory*, 41 HARV. L. REV. 860, 873 (1928).

[132] *See supra* Part II.

[133] *See* Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 220-21 (2001) (citing communications scholars who agree that silence can be interpreted to mean agreement or assent).

[134] *Id.* at 248.

because they are more inclined to presume guilt even when evidence of innocence exists.

1. Public Perceptions of Law Enforcement

Arrestees who are distrustful of law enforcement may believe that their proclamations of innocence will be ignored and may therefore choose to remain silent. While it would be an overstatement to argue that the public in general is distrustful of law enforcement and the criminal justice system, sociologists Ronald Weitzer and Steven Tuch found that an arrestee's race may affect his perception of the criminal justice system. In 2002, Weitzer and Tuch surveyed nearly 1800 U.S. residents to determine whether they perceived the criminal justice system as fair and impartial.[135] The researchers found that the citizens' perceptions divided along racial lines:

> [B]lacks and Hispanics are also much more likely than whites to believe that police prejudice is a problem. Three times as many blacks as whites believe that police prejudice is "very common" throughout the U.S., and blacks are about six times as likely as whites to believe it is very common in their own city.[136]

In contrast, Weitzer and Tuch found that more than seventy-five percent of whites surveyed believed that the American criminal justice system is impartial.[137] In another study, Weitzer and Tuch found that race was a very strong predictor of attitudes toward law enforcement even when they factored in class. They found that middle-class and more highly educated blacks are more critical of criminal justice agencies than lower-class blacks.[138] Ultimately,

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[135] Ronald Weitzer & Steven Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1012 (2005).

[136] *Id.* at 1017.

[137] *Id.* at 1025. Weitzer and Tuch attributed the differences in perception to several factors, including whether the respondents had personally experienced discrimination at the hands of the police, whether the respondents knew someone who had been treated unfairly by the police, and whether the respondents had seen media coverage of police abuse. *Id.* at 1026. The researchers found that these factors were present with black and Hispanic respondents and absent from the experiences of white respondents. *Id.*

[138] Ronald Weitzer & Steven Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQUENCY 494, 502 (1999). Weitzer and Tuch argued that middle-class blacks are more critical of law enforcement because they "are acutely aware of race-based discrimination due to an expectation that class position should shield middle-class Blacks from mistreatment." *Id.* They also theorized that "better educated Blacks are more cognizant of racially charged mass-media events than are either less educated Blacks or better educated

Weitzer and Tuch determined that, regardless of their socioeconomic status, blacks "lack confidence in the ability of the police to treat individuals impartially in their communities,"[139] while whites "are more reluctant than Blacks to acknowledge racism in American society, whether in the police or in other institutions."[140]

Similarly, Weitzer found in a 1997 study that black residents in the Washington, D.C. metropolitan area believed that, upon arrest, law enforcement would presume them guilty because of their race.[141] As one black respondent stated, "[i]f you're black there's a presumption of guilt, a presumption of wrongdoing if you're stopped. . . . The racial problems in this country just filter right on down to the police department."[142]

These differences in perceptions of the police may explain why some arrestees choose to remain silent. If arrestees believe they will receive unfair treatment regardless of what they say, or if arrestees believe the police have already decided their guilt, they may conclude that silence is their best option. As the following two sections demonstrate, there is wide support for the belief that police officers presume guilt prior to their interrogation of a suspect. If this is true, then innocent arrestees probably should remain silent.

2. *Investigator Bias*

Psychology professors Christian Meissner and Saul Kassin discovered evidence of "investigator bias"—that is, "a tendency to perceive interview suspects as guilty."[143] Meissner and Kassin argue that law enforcement investigators often presume the guilt of suspects prior to the commencement of

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Whites. Greater exposure to controversial events involving the police and the larger criminal justice system likely has the cumulative effect of reinforcing a critical perspective on these institutions." *Id.* at 502-03.

[139] *Id.* at 503; *see also* Scott Wortley, John Hagan & Ross MacMillan, *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Justice*, 31 LAW & SOC'Y REV. 637, 647, 665 (1997) (finding that blacks are more likely to perceive bias and discrimination within the criminal justice system than whites after accounting for class, education, income, and age and speculating that "the legacy of slavery may lead blacks in both Canada and the United States to distrust 'white' social institutions").

[140] Weitzer & Tuch, *supra* note 138, at 503.

[141] Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 131, 137-38 (2000).

[142] *Id.* at 138.

[143] Christian A. Meissner & Saul M. Kassin, *You're Guilty So Just Confess! Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 89 (G. Daniel Lassiter ed., 2004).

an interview or interrogation. Investigators then use the interview or interrogation to confirm their suspicion of guilt.[144] Meissner and Kassin also found that once law enforcement investigators, like all other people, "form an initial belief or expectation, they unwittingly search for, interpret, and create subsequent information in ways that verify these existing beliefs, while overlooking data that are contradictory."[145] The research indicates that police training in the detection of truth increases the likelihood that law enforcement officers will make premature determinations of guilt.[146] Additionally, Meissner and Kassin found that although experienced law enforcement officers are more likely to possess investigator bias and a high level of confidence in their initial conclusions, they demonstrated no better than chance-level accuracy in their determinations of guilt or innocence.[147]

The concept of investigator bias breeds several negative consequences when law enforcement investigators assume that an innocent person is guilty. Principal among these is the risk of false confession. Research demonstrates that investigator bias results in highly aggressive interrogation methods, and in turn, those interrogation methods increase the risk of false confessions.[148] Other consequences of investigator bias include investigators "ask[ing] more guilt-presumptive questions, more frequently judg[ing] the suspect to be guilty, us[ing] more interrogation techniques, tr[ying] harder and exert[ing] more pressure on suspects to confess, and ma[king] innocent suspects sound more defensive and guilty to observers."[149] A suspect facing such tactics will likely become more nervous and defensive, thereby confirming the investigator's initial belief that the suspect is guilty.[150]

3. Problems with Deception Detection

Interrogation manuals provided to police officers list many factors that will assist officers in determining whether a particular suspect is lying. These

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[144] *Id.* at 91.

[145] *Id.* at 88; *accord* JAMES MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 10 (2d ed. 1980) ("[Psychology] treats perception itself as the individual's awareness of a 'thing' or 'happening' conditioned by his similar experiences in the past and designed to direct his behavior in the future to be consistent with what he already knows.").

[146] Meissner & Kassin, *supra* note 143, at 91.

[147] *Id.* at 92.

[148] *Id.* at 87. The false confession phenomenon is real. Innocence Project research states that about 25 percent of all DNA exoneration cases involved false confessions. *Id.* at 86.

[149] *Id.* at 95.

[150] *Id.*

manuals indicate that the following behaviors are signs of guilt: posture shifts; placing a hand over the mouth; jerky, abrupt, or swift movements; cold and clammy hands; stuttering; mumbling; fidgeting; and scratching.[151] Empirical research demonstrates that these behaviors are not indicators of guilt, but are an illustration of common misconceptions about the link between nonverbal conduct and deception.[152] Psychology researchers warn that investigators' reliance on interrogation manuals will result in misinterpretations of suspects' body language and may "fuel suspect-driven investigations that might ultimately result in miscarriages of justice."[153]

Psychologists Par Anders Granhag and Aldert Vrij posit that investigators, like all other people, are poor at detecting deception.[154] Granhag and Vrij provide six reasons for investigators' poor lie-detection skills:

(1) They do not know which nonverbal cues indicate guilt and which ones do not;

(2) They over-rely on the content of a suspect's statement rather than analyzing how the suspect speaks;

(3) They are influenced by their bias;

(4) Their beliefs about the behavior of liars are incorrect;

(5) They believe any deviations from the norm indicate deception;[155]

(6) Their lie-detection abilities are affected by their own social-emotional intelligence, which varies among investigators.[156]

Clearly, an investigator's perceived inability to differentiate truth from non-truth might influence an arrestee in his decision to remain silent. Research indicates a distinct possibility that a truthful, innocent arrestee may be perceived as guilty and untrustworthy.

The above research confirms that arrestees' perceptions of law enforcement officers may sometimes be true. Thus, silence may better serve an arrestee,

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[151] Par Anders Granhag & Aldert Vrij, *Deception Detection*, *in* PSYCHOLOGY AND THE LAW 43, 49 (Neil Brewer & Kipling D. Williams eds., 2005).

[152] *Id.* at 49-50.

[153] *Id.* at 50.

[154] *Id.* at 64.

[155] Granhag and Vrij argue that "a baby-faced, extraverted, and 'nonweird' person is likely to be judged as truthful." *Id.*

[156] *Id.* at 64-65.

although he will necessarily find himself between the proverbial rock and hard place: "Suspects are seemingly in a no win situation if they protest their innocence[:] the interviewer merely takes this as confirmation of guilt. If they say nothing, perhaps using their right to silence, this too is taken as confirmation of guilt."[157]

C. *"I Won't Let Them Trick Me into Confessing."*

Arrestees and potential arrestees may remain silent to avoid being tricked into confessing. Because false confessions are a reality in the American criminal justice system, innocent and guilty individuals must recognize that police interrogation could result in a confession.[158] Additionally, as demonstrated in the previous section, many members of society distrust law enforcement and believe that bias and discrimination are rampant.[159] This section will address the "tricks" investigators sometimes employ to obtain a confession.

In his book *Psychology for Law Enforcement Officers*, psychology professor Dudycha advises officers to avoid "yes or no" questions and to opt instead for open-ended questions.[160] To illustrate his point, he discusses the quintessential trick question, "Do you still beat your wife?" Dudycha states that this is a trick question because a suspect who has never beaten his wife cannot answer the question with a yes or a no. If he says yes, he admits that he beats his wife. If he says no, he admits that he beat his wife in the past.[161] Psychiatrist Gisli Gudjonsson argues that the question "Do you still beat your wife?" is leading because it is based on the assumption that the interviewee is married and has beat his wife in the past.[162] Gudjonsson claims that if the investigator's assumptions are incorrect or uninformed, then her use of the leading question might result in the interviewee admitting guilt when he is actually innocent.[163] According to Gudjonsson, closed-end, leading questions

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[157] Stephen Moston, *From Denial to Admission in Police Questioning of Suspects, in* PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE: INTERNATIONAL DEVELOPMENTS IN RESEARCH AND PRACTICE 91, 92-93 (Graham Davies et al. eds., 1996).

[158] *See* Messiner & Kassin, *supra* note 143, at 86-87; *see also supra* Part IV.B.2.

[159] *See supra* Part IV.B.

[160] *See* Dudycha, *supra* note 128, at 67, 79.

[161] *Id.*

[162] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 12 (1993). Gudjonsson defines a leading question as "the type of question that indicates the wanted answer." *Id.*

[163] *Id.*

increase the likelihood that the interviewee will agree with an inaccurate premise.[164]

Gudjonsson's research demonstrates that an arrestee could be fooled into admitting information that is untrue. Still, one might argue that arrestees are overly concerned with the risk that their words can be turned against them. The research in this area demonstrates that arrestees *should* be concerned because "[p]sychological deception has replaced physical coercion as one of the most salient, defining features of contemporary police interrogation."[165] Criminologist Richard Leo studied the increasingly deceptive nature of police interviews and interrogations and found that "police questioning now consists of subtle and sophisticated psychological ploys, tricks, stratagems, techniques, and methods that rely on manipulation, persuasion, and deception for their efficacy."[166] Leo found several common methods of deception. Those methods include (1) misrepresenting the purpose or nature of the questioning, which can be accomplished by informing the suspect that he can leave at any time, thereby turning a custodial interrogation into a non-custodial interrogation; (2) misrepresenting the seriousness of the alleged crime, which might occur where an investigator convinces a murder suspect that the victim is still alive; (3) misrepresenting the moral seriousness of the crime by telling the suspect that his actions were justified or that he is not responsible for his actions; (4) misrepresenting the investigator's identity by having the investigator pose as a priest, lawyer, news reporter, or psychologist; this tactic allows the interrogation to begin without the suspect's knowledge; and (5) the fabrication of evidence, which might occur if the investigator tells the suspect that he has been identified by someone else or that law enforcement has DNA or fingerprint evidence against him.[167] Leo's research serves as a wake-up call for anyone who believes that psychological deception is not a part of police interviewing and interrogation. To avoid psychological manipulation and a possible false confession, arrestees may choose to remain silent.

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[164] *Id.* at 12-13.

[165] Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 65 (Richard A. Leo & George C. Thomas III eds., 1998).

[166] *Id.*

[167] *Id.* at 66-70.

D. "I Want to Assert My Power. I'm in Control."

Rather than indicating an arrestee's guilt, silence might reflect the arrestee's desire to remain in control. Researchers in the communications field found that silence can be used to communicate an assertion of power.[168] According to one commentator, "In situations when speech is expected, a communicator, by refraining from words, can attempt to take control of the discourse. She communicates, in essence, 'As much as you may want me to respond, I'm just not going to do it!'"[169] Communications research indicates that a suspect in custody may decide to remain silent to challenge the questioner and send her a message that she cannot force the suspect to talk.[170]

Psychological research accords with communications research. Feminist psychologist Maureen Mahoney argues that women can successfully assert their power by remaining silent at times.[171] Mahoney states that silence is often used when a speaker is too embarrassed to make certain statements. According to Mahoney, silence is a powerful tool in shielding the speaker from shame or ridicule.[172] The risk of shame or embarrassment provides some justification for arrestees' silence. If Mahoney's premise is correct, arrestees may choose to remain silent so that they can avoid disclosing information that may be non-criminal but embarrassing. Silence therefore allows arrestees to control the dispensation of private information.

Mahoney also notes that silence can be a very powerful tool in resisting "unwelcome probing."[173] Mahoney tells the story of researchers who traveled to a school to study its students. The girls at the school did not like the presence of the researchers and chose not to answer any of the researchers' questions as a silent protest of sorts.[174] Mahoney found the protest was a very effective way of communicating that the researchers were unwelcome.[175] Again, one could analogize the situation of arrestees or potential arrestees to the girls in Mahoney's study. If officers go to a suspect's home and attempt to

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[168] Krieger, *supra* note 133, at 224 (citing Dennis Kurzon, *When Silence May Mean Power*, 18 J. PRAGMATICS 92 (1992)).

[169] *Id.* at 224-25.

[170] *Id.* at 225 (citing Kurzon, *supra* note 168, at 94).

[171] Maureen A. Mahoney, *The Problem of Silence in Feminist Psychology*, 22 FEMINIST STUD. 603, 604 (1996).

[172] *Id.* at 605.

[173] *Id.* at 614.

[174] *Id.* at 613.

[175] *Id.*

question her, the suspect may respond with silence in order to protest the unwelcome intrusion into her home. Additionally, the suspect may find some of the officers' questions offensive and might respond to those questions with silence to indicate her distaste for them.

Arrestees may choose to remain silent to change the power dynamic between the police officers and themselves. As Mahoney recognized, "Silence, or not communicating, can be a healthy response . . . to a sense of being controlled."[176]

E. "I Refuse to Talk Because I'm Angry or I'm Afraid."

Arrestees may decide to remain silent because they are angry. Gudjonsson notes that both innocent and guilty suspects may become angry during interviews or interrogations.[177] He states that "innocent suspects may be genuinely angry, and on occasions outraged, about being accused or suspected of a crime of which they are innocent."[178] Likewise, guilty suspects may feign anger or outrage to convince others of their innocence.[179] Psychological researchers have noted that some differences exist between the anger of the innocent and the anger of the guilty, including duration of time. Innocent suspects will remain angry over a longer period of time than guilty suspects because guilty suspects will find it difficult to sustain the emotion over time.[180]

Because innocent suspects could potentially remain angry with law enforcement authorities over long periods of time, their anger may result in silence. Communications researchers found that angry people use silence as a weapon.[181] Angry people often use silence to sustain a conflict. According to one commentator, "[u]se of the 'silent treatment' sends a message of indifference or even outright disdain for the party, her conduct, or her position on an issue."[182] Indeed, "silent treatment of the opponent may be even more powerful than uttering the harshest of words and drives many people crazy."[183]

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[176] *Id.* at 617.

[177] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 28 (2003).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Krieger, *supra* note 133, at 232.

[182] *Id.* (citing Joseph A. DeVito, *Silence and Paralanguage as Communication*, 46 ETC. 153, 154 (1989)).

[183] *Id.* (internal quotations omitted).

Innocent but angry arrestees may decide to use the silent treatment to upset the investigator or communicate their dislike. While this conduct may be counterproductive, it does not reflect the arrestee's guilt.

Arrestees may also remain silent because they are afraid. Gudjonsson notes that innocent and guilty suspects alike may be fearful and nervous during police questioning.[184] He lists three reasons why innocent people may be nervous when questioned: "(1) they may be worried that they are erroneously assumed to be guilty; (2) they may be worried about what is going to happen to them whilst in custody and during interrogation; (3) they may be concerned that the police may discover some previous transgressions."[185] He also notes that the innocent and the guilty are under a certain level of stress when they enter the police station. They are stressed by the environment itself.[186] If they have never been to a police station before, they may be jarred by the lack of free movement and the invasion of their personal space.[187] Psychology professor Donald Lindsley argues that innocent and guilty suspects are fearful of what might happen if they are perceived as guilty.[188] He discovered that repeat offenders will have much less fear of the consequences of guilt as compared to an "innocent and respected citizen, who has a considerable reputation and esteem of his family, friends and others to consider."[189] Thus, even if the innocent person appears to be nervous or upset, officers should not take these emotions to indicate guilt.[190]

Research suggests that fearful people often choose to remain silent. Communications researchers have found that members of organizations often fail to report problems to management or engage in whistle-blowing activity out of fear that there might be negative consequences for speaking up.[191] These individuals likely worry that their actions might result in isolation or the loss of a job. A potential arrestee may have similar worries that dissuade her from reporting alleged crimes to law enforcement. She may fear that a report will result in isolation or physical harm if she implicates someone else or the loss of

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[184] Gudjonsson, *supra* note 177, at 25.

[185] *Id.*

[186] *Id.* at 26.

[187] *Id.*

[188] Donald B. Lindsley, *The Psychology of Lie Detection*, *in* PSYCHOLOGY FOR LAW ENFORCEMENT OFFICERS 1, 118-19 (George Dudycha ed., 1973).

[189] *Id.* at 124-25.

[190] *Id.* at 125.

[191] Elizabeth Wolfe Morrison & Frances J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 707 (2000).

freedom if she unknowingly implicates herself. These fears may be potent enough to convince the potential arrestee that she should remain silent.

F. "I'm Silent Because I Don't Know What to Say."

Finally, arrestees may remain silent because they have no idea how to respond to the questions posed to them. As one commentator notes, "When individuals are unsure of how to respond to ambiguous comments or conduct by others, they may remain silent to gauge the situation and determine whether or not to respond or terminate discourse."[192] Individuals may not know how they should react to embarrassing or socially awkward situations and instead choose silence.[193]

Cross-cultural differences may also explain why some arrestees remain silent. Research demonstrates that silence carries different meanings in different cultures.[194] Additionally, children of different cultures learn different norms regarding the use of silence which tell them when, where, and how they should be silent.[195] The widely held belief in many countries is that a quiet child is a well-behaved child.[196] Once these children become adults and find themselves the subject of a police investigation, it is possible that their cultural teachings about the use of silence may surface. Indeed, any language barrier between the arrestee and the investigating officer might result in silence due to the arrestee's inability to understand the investigator's language.[197] Again, the use of silence in this context does not indicate the arrestee's guilt.

V. LIMITING THE USE OF SILENCE

Conventional wisdom tells us that silence by an arrestee indicates guilt, or at least a lack of credibility, and courts have admitted evidence of silence based on this premise. Yet the interdisciplinary research cited above demonstrates

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[192] Krieger, *supra* note 133, at 231.

[193] *Id.*

[194] Sibel Tatar, *Why Keep Silent? The Classroom Participation Experiences of Non-Native-English-Speaking Students*, 5 LANGUAGE & INTERCULTURAL COMM. 284, 286 (2005).

[195] *Id.*

[196] *Id.* (internal quotations omitted).

[197] *See* United States v. Osuna-Zepeda, 416 F.3d 838, 846 (8th Cir. 2005) (Lay, J., concurring) ("The fact that [defendant] did not speak English only added to the ambiguity [of his silence]. Even if he understood the arresting officer, he may have stood mute because he lacked sufficient ability to articulate a protest of his innocence in English. Under these facts, it is rank speculation to conclude that his silence demonstrated guilt.").

that the premise is faulty. It is time that the courts reconfigure what silence really means. At best, the social science research establishes that silence is "insolubly ambiguous"[198] whenever law enforcement is on the receiving end of the silence. Before formulating a new solution to this inappropriate use of silence, one must explore existing evidentiary tools and determine whether they will solve the problem.

A. Federal Rule of Evidence 403

Rule 403 permits exclusion of relevant evidence under certain circumstances. The rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[199] Rule 403 authorizes judges to balance the probative value of the evidence against the likelihood that the evidence will unfairly harm a party, confuse the jury, or waste the court's time. Rule 403 balancing involves assessing the probative value of a piece of evidence against the risk of unfair prejudice to a party. The Advisory Committee Notes following Rule 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[200]

On at least two occasions, the Supreme Court has found that the probative value of an arrestee's silence is substantially outweighed by the danger of unfair prejudice associated with such evidence. In *Hale*,[201] the Court found that while the defendant's silence at the time of his arrest was not very helpful in determining his credibility as a witness, it was highly prejudicial to the defendant.[202] The Court explained:

> The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong

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[198] Doyle v. Ohio, 426 U.S. 610, 617 (1976); *see also supra* Part IV.

[199] FED. R. EVID. 403.

[200] FED. R. EVID. 403 advisory committee's note; *see also* Old Chief v. United States, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

[201] 422 U.S. 171 (1975).

[202] *Id.* at 179-80.

> negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.[203]

Likewise, in *Grunewald*,[204] the Court found that the defendant's invocation of his self-incrimination privilege during grand jury proceedings should not have been admitted to impeach his credibility at trial.[205] In assessing the evidence of the defendant's silence, the Court determined that there was a great risk of unfair prejudice associated with the silence.[206] The Court noted that "'[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.'"[207]

In both *Hale* and *Grunewald*, the ambiguity of the defendant's silence, when balanced against the high risk of unfair prejudice, called for exclusion of the evidence. The social science research cited above demonstrates that an arrestee's silence is ambiguous and not as probative as some courts would hold.[208] In fact, the exclusion of this kind of evidence does not require an in-depth analysis by courts. In almost every instance, a defendant's silence in the face of law enforcement lacks probative value and carries with it an unfair degree of prejudice. Therefore, this Article proposes a new rule of evidence that will exclude such evidence without the need for case-by-case analyses by the courts.

B. The Proposal – A New Federal Rule of Evidence

1. The Precedent – Article IV of the Federal Rules of Evidence

It is not unprecedented for a rule of evidence to declare that certain evidence will always violate Rule 403's balancing test when offered for a particular purpose. According to the Advisory Committee Notes following Rule 403, several provisions contained in Article IV of the Federal Rules of Evidence, including Rules 404,[209] 407,[210] 408,[211] and 410,[212] are concrete

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[203] *Id.* at 180.

[204] 353 U.S. 391 (1957).

[205] *Id.* at 424.

[206] *Id.*

[207] *Id.* at 421 (quoting Ullmann v. United States, 350 U.S. 422, 426 (1956)).

[208] *See supra* notes 128-57 and accompanying text.

[209] Rule 404 generally excludes "evidence of a person's character or trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a).

applications of Rule 403. Each of these rules concerns a situation where the unfair prejudice, confusion of the issues, or redundancy resulting from a piece of evidence substantially outweighs any probative value associated with the evidence.[213] For example, Rule 408 generally excludes evidence of offers to compromise and statements made during settlement talks because such evidence is irrelevant.[214] Such evidence has no tendency to make a defendant's liability more or less probable, because the offer could be "motivated by a desire for peace rather than from any concession of weakness of position."[215] Although evidence of an offer to settle lacks probative value, jurors might place too much weight on such an offer, and unfair prejudice would result to the party making the offer. It is important to note that Rule 408's exclusion also reinforces a public policy interest in promoting the settlement of cases before trial.[216] If courts generally allowed settlement offers into evidence, parties would be less likely to enter into settlement talks or make offers to compromise. The drafters of the Federal Rules wanted to avoid admitting evidence that might encourage parties to proceed to trial without considering settlement.[217]

Similarly, Rule 407 is a concrete application of Rule 403's balancing test. Rule 407 bars evidence of subsequent remedial measures when offered to prove culpability.[218] The rule bars such evidence because a defendant's corrective action following an accident is not necessarily probative of her liability.[219] However, jurors might place great weight on a defendant's decision to take corrective action, thereby creating unfair prejudice to the defendant.[220] The drafters of the Federal Rules also barred evidence of subsequent remedial measures in order to "encourage[e] people to take, or at least not discourag[e]

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[210] Rule 407 excludes evidence of subsequent remedial measures when offered to prove negligence or culpability. FED. R. EVID. 407.

[211] Rule 408 generally excludes evidence of offers to compromise or statements made during compromise negotiations when offered to prove liability or to impeach through a prior inconsistent statement. FED. R. EVID. 408(a).

[212] Rule 410 generally excludes evidence of a defendant's withdrawn plea of guilt or no contest or any statement made during plea negotiations. FED. R. EVID. 410.

[213] FED. R. EVID. 403 advisory committee's note.

[214] *See* FED. R. EVID. 408 advisory committee's note.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] FED. R. EVID. 407.

[219] FED. R. EVID. 407 advisory committee's note.

[220] *See* Columbia & P.S.R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892) (finding that evidence of subsequent remedial measures "is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant").

them from taking, steps in furtherance of added safety."[221] Each of the above rules, in addition to other rules found in the Federal Rules of Evidence, have laid the groundwork for a new rule that would exclude evidence of a defendant's silence not only because it lacks probative value, but also because its exclusion would promote a strong social policy of not discouraging defendants from asserting their Fifth Amendment privilege against self-incrimination.

2. New Rule Barring Evidence of Silence

As indicated earlier, although it is clear that evidence of a criminal defendant's silence in the face of law enforcement will almost always violate Rule 403's balancing test, courts may decide to admit such evidence based on their own belief that silence is probative of the defendant's guilt or credibility. A federal rule excluding evidence of silence would ensure the fair treatment of defendants regardless of their trial jurisdiction. The proposed rule states as follows:

> Inadmissibility of Evidence of Silence.
>
> Evidence of a criminal defendant's pre-trial failure to communicate with law enforcement is not admissible in a criminal proceeding on behalf of any party, when offered to (1) prove the defendant's guilt for the crime charged; (2) establish the defendant's adoption of an accusation by law enforcement under Rule 801(d)(2)(B); or (3) impeach a testifying defendant through a prior inconsistent statement or contradiction under Rule 613.

The new rule seeks to bar evidence of a defendant's failure to speak to law enforcement officers. The rule does not bar the use of a defendant's silence in the face of non-law enforcement because the mere thought of communicating with police officers might trigger some of the reasons for silence highlighted in an earlier section of this Article.[222] While an individual may be unafraid to respond to questions or accusations by family members or friends, she might be quite fearful of attempting to plead her innocence to law enforcement. It may very well be natural for an individual to plead her innocence to those close to her yet unnatural to proclaim innocence to police officers whom she feels she cannot convince anyway.

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[221] FED. R. EVID. 407 advisory committee's note.

[222] *See supra* Part IV.

Accordingly, the new rule excludes evidence when a defendant's pre-trial silence is so ambiguous that its probative value in establishing the defendant's guilt is questionable, there is proof of an adoptive admission by the defendant, or the evidence is offered to prove the defendant's lack of credibility by way of a prior inconsistent statement.[223] Similar to the manner in which courts apply the other Article IV rules,[224] if a party offers evidence of a defendant's silence for a purpose other than those prohibited by the rule, the evidence would not violate the rule.[225] This limitation on the prohibited purposes recognizes that evidence of silence is almost universally used for one of the three purposes listed in the rule. The limitation also provides the trial judge with some discretion to admit the evidence if its proponent formulates a novel purpose for it. Evidence admissible under the new rule, however, would still remain subject to the Rule 403 balancing test. If the trial court finds that the evidence lacks sufficient probative value and unfairly prejudices the defendant, it has the power to exclude the evidence.[226]

Like the other rules in Article IV of the Federal Rules, the new rule excludes evidence of silence not only because it lacks probative value, but also because the exclusion promotes important public policy interests. The new rule ensures that arrestees will not be improperly discouraged from asserting their Fifth Amendment privilege to remain silent. It also recognizes that arrestees may know of the existence of their privilege against self-incrimination even before they receive *Miranda* warnings and acknowledges that their decision to remain silent may very well be an assertion of the privilege.[227] This protection of an important social policy makes the new rule analogous to the other Article IV rules that promote public policy interests. Indeed, consistent with the Advisory Committee's recognition concerning other Article IV exclusions, the public policy protection that the new rule provides in relation to the Fifth Amendment privilege is a more impressive ground supporting the exclusion of

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[223] *See supra* Part II.

[224] *See supra* Part V.B.1.

[225] *See, e.g.*, FED. R. EVID. 407 ("This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose . . . ."); FED. R. EVID. 408(b) ("This rule does not require the exclusion of the evidence if the evidence is offered for purposes not prohibited by subdivision (a).").

[226] *See* FED. R. EVID. 407 advisory committee's note ("Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.").

[227] *See supra* notes 118-22 and accompanying text.

evidence of silence than is the finding that the evidence lacks probative value.[228]

VI. CONCLUSION

Ultimately, rules of evidence should reflect what a culture knows about human behavior. The Federal Rules of Evidence reflect collective wisdom about what kinds of evidence are relevant and reliable, as well as what jurors are likely to do with the evidence presented to them. The Rules also serve to reinforce certain extrinsic public policy goals that often outweigh consideration of the relevance or reliability associated with a piece of evidence. What is now known about evidence of a defendant's silence is clear: A defendant might choose to remain silent for various reasons, and most of those reasons have nothing to do with the defendant's guilt, innocence, or lack of credibility. These various reasons for silence make such evidence "insolubly ambiguous" and of little value to the fact-finder. Researchers also know that jurors, and often judges, find evidence of silence to be more probative than it actually is. This kind of reasoning results in unfair prejudice to the defendant. Finally, of the various reasons one might choose to remain silent, one reason, the existence of the privilege against self-incrimination, deserves the greatest protection. The new evidentiary rule this Article proposes recognizes the low probative value of and unfair prejudice associated with a defendant's silence. The rule also ensures that the government will place no improper burden upon a defendant's Fifth Amendment privilege. In the end, the new rule is one step toward achieving a more perfect body of evidentiary laws.

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[228] *See, e.g.*, FED. R. EVID. 407 advisory committee's note ("The other, and more impressive, ground for exclusion [of subsequent measures] rests on . . . social policy . . . ."); FED. R. EVID. 408 advisory committee's note ("A more consistently impressive ground [for exclusion of offers to compromise] is promotion of the public policy favoring the compromise and settlement of disputes.").