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Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack

Frank R. Herrmann and Brownlow M. Speer*

I. The Right to Stand Mute When Arrested.

Dean Erwin Griswold suggested in 1955 that "the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized."¹ Since that time, *Miranda v. Arizona*² and its progeny have made the privilege effectively available to the ordinary person taken into custody and charged with crime. *Miranda* accomplishes this end by requiring that an arrested person be advised of the privilege against self-incrimination before being questioned by the police--in short, that the person has a right to remain silent and decline to answer questions.³ From the right to remain silent in the face of police questioning probably everyone instinctively understands that there is a right to *be* silent when arrested. The privilege against self-incrimination includes the right to stand "mute...in the face of accusation."⁴ An arrested person is "under no duty to speak."⁵ "At the time of

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¹ ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

² 384 U.S. 436 (1966).

³ "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning...[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 478-479.

⁴ *Id.* at 468 n.37.

⁵ *United States v. Hale*, 422 U.S. 171, 176 (1975).

arrest..., innocent and guilty alike...may find the situation so intimidating that they may choose to stand mute."⁶

This fundamental premise, however, is under attack in the United States Courts of Appeals for the Fourth, Eighth, and Eleventh Circuits. Those courts have proclaimed the novel doctrine that a person's mere failure to say anything when being placed under arrest allows an inference of guilt. A striking example of testimony held to give rise to such an inference is set out in a decision of the Eighth Circuit. The testimony begins with an arresting officer's statement that he told the defendant he was under arrest "for suspicion of narcotics."⁷

[Prosecutor]: What was [the defendant]'s reaction when you placed him in custody?

[Officer]: There really wasn't a reaction.

[Prosecutor]: Was he angry?

[Officer]: No, sir.

[Prosecutor]: Was he surprised?

[Officer]: No, sir.

[Prosecutor]: Did he become combative?

[Officer]: No, sir.

[Prosecutor]: Did he say anything to you?

[Officer]: No, sir.

[Prosecutor]: Did he do anything when you put the handcuffs on him?

[Officer]: No, sir.⁸

If such evidence, in fact, is permitted to allow an inference of guilt, then, as a judge of the District of Columbia Circuit has trenchantly observed:

an arrested but not *Miranda*-ized defendant would be faced with two courses of conduct: he could make a voluntary utterance, which could be used against him; or he could stand silent, which could be used against him....⁹

⁶ *Id.* at 177

⁷ *United States v. Frazier*, 408 F.3d 1102, 1109 (8th Cir. 2005), cert. denied, 546 U.S. 115 (2006).

⁸ *Id.*

This article will demonstrate that imputing guilt from a defendant's failure to speak when arrested is incompatible with constitutional and Common Law protections against compelled self-incrimination.

Part II will briefly sketch the historical development of those protections over a period of more than five centuries. Part III will examine the evidentiary principle of tacit admission which sometimes conflicted with the Common Law's recognition that a defendant is entitled to be silent after arrest. Part IV will address the doctrines of *Doyle v. Ohio*¹⁰ and *Fletcher v. Weir*,¹¹ regarding use of a defendant's post-arrest silence for impeachment. Part V will explain how the Fourth, Eighth, and Eleventh Circuits have misused those doctrines to fashion a rule imputing guilt from silence, contrary to the principles of the Fifth Amendment. Part VI will explain why imputation of guilt from silence represents a novel and dangerous departure from Common Law and constitutional principles.

II. Historical Background.

The medieval English Common Law rejected any compulsion on a criminal defendant to submit to any sort of interrogation¹² or to confess to the charged offense.¹³

⁹ *United States v. Moore*, 110 F.3d 99, 100 (D.C. Cir. 1997) (on appellee's suggestion for a rehearing *en banc*) (Sentelle, Circuit Judge, concurring).

¹⁰ 426 U.S. 610 (1976).

¹¹ 455 U.S. 603 (1982).

¹² See 4 ROTULI PARLIAMENTORUM 84, no. 46 (1415) (Commons protest to King Henry V against practice of Chancery in subpoenaing defendants "against the form of the common law of your Kingdom" ["encontre la fourme de la commune ley de vostre Roialme"]) to be inquired of by "examination and oath...according to the form of civil law and canon law, in subversion of your common law." ["examination et serement..., solonc la fourme de ley cyvle et ley de Seinte Esglise, en subvercion de vostre commune ley"]); D.M. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF

Therefore, the Committal Statute of 1555 (2&3 Philip & Mary, c. 10) represented a seismic shift in English criminal procedure. It required a justice of the peace to "take the examination of [the] Prisoner...of the fact and circumstance" of the alleged crime.¹⁴ The magnitude of this change is evidenced in the 1582 *Eirenarcha* of William Lambard,¹⁵ a standard work on the functions and duties of a justice of the peace. Lambard, a legal scholar of enormous authority,¹⁶ refers to a confession resulting from a justice of the peace's

CHANCERY 43-44 (Cambridge, Cambridge University Press 1890). See also JAMES F. BALDWIN, *THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES* 296-298 (1913) (comparing practice of Common Law, as to which "[n]othing...was more antagonistic...than to require a man...to incriminate himself," with the "inquisitorial examination" procedure derived from the ecclesiastical courts and followed by the King's Council and in Star Chamber).

¹³ See William Staunford, *LES PLEES DEL CORON*, ch. 51, fol. 142 (photo. reprint 1971) (n.p., Richard Tottell 1557) (judge must not accept or record confession he perceives to be product of "fear, menace, or duress" ["pauour, manace, ou duress"]), citing a case reported in *LIBER ASSISSARUM*, anno 27, no. 40 (1353), printed in *LE LIVRE DES ASSISES* 137 (photo. reprint 1981) (London, George Sawbridge et al. 1679), in which the assize judges did not accept the confession of a woman charged with having stolen bread who claimed to have done so at the command of her husband. See also FERDINANDO PULTON, *DE PACE REGIS ET REGNI* fol. 184 (photo. reprint 1973) (London, Companie of Stationers 1609) (confession must "procede freely and of [offendour's] owne good will, without menace, threats, rigor, or other extreamities"), citing the same case from the *Liber Assissarum*.

The Treasons Act of 1547 provided that one confessing to treason had to do so "willingly without violence." 1 Edw. VI, c. 12, §22. This statute "may be regarded as a collateral antecedent of the involuntary confession rule." Lawrence Herman, *The Unexplained Relationship Between the Privilege Against Self-Incrimination and the Involuntary Confession Rule* (pt.1), 53 *OHIO ST. L. J.* 101, 115 (1992).

¹⁴ The Bail Statute of the preceding regnal year (1&2 Philip & Mary c.13) required a justice of the peace to "take the examination" of a prisoner before admitting the prisoner to bail. The Marian statutes are exhaustively analyzed in JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* 5-20 (1974).

¹⁵ William Lambard, *EIRENARCHA* (photo. reprint 1972) (London, Ra. Newbery & H. Bynneman 1581). The year of publication was 1582 by modern reckoning, the dating of a new year then having begun on March 25. See B.H. Putnam, *The Earliest Form of Lambard's 'Eirenarcha' and a Kent Wage Assessment of 1563*, 41 *ENG. HIST. REV.* 260, 266 n.7 (1926).

¹⁶ See P.R. Glazebrook, *Introduction to WILLIAM LAMBARD, EIRENARCHA OR THE OFFICE OF JUSTICES OF PEACE* 3, 3-4, 9-11 (P.R. Glazebrook ed. 1972); Wilfrid Prest, *William*

examination of a prisoner as *per se* "forced."¹⁷ Elsewhere in his treatise, Lambarde explicitly characterizes the 1555 statute's provision for formal questioning of a defendant in custody as a radical departure from the protection of the Common Law:

There [in 2&3 Philip & Mary c. 10 (1555)¹⁸] also you may see (if I bee not deceived) the time when the examination of the Felon himselfe, was first warranted by our Law. For at the Common Lawe, his faulte was not to bee wrong out of himself but rather to be proved by others.[¹⁹]

In the second, 1588, edition of *Eirenarcha*,²⁰ Lambarde adds to this passage the maxim *nemo tenetur seipsum prodere* (no one is held to betray himself),²¹ but he puts it in

Lambarde, Elizabethan Law Reform, and Early Stuart Politics, 14 J. BRIT. STUD. 464, 464-466 (1995); James D. Alsop & Wesley M. Stevens, *William Lambarde and the Elizabethan Polity*, 8 STUD. MEDIEVAL & RENAISSANCE HIST. (n.s.) 231, 235-236 (1986); RETHA M. WARNICKE, WILLIAM LAMBARDE: ELIZABETHAN ANTIQUARY 1536-1601, at 70-71, 140-141 (1973).

¹⁷ "The forced Confession, whereof I spake, is that which the Justices do wring out of the partie by the Examination of him, in such cases wherein it is permitted." LAMBARD, *supra* note 15 at 427.

¹⁸ For the statutory reference, see LAMBARD, *supra* note 15 at 205-206.

¹⁹ LAMBARD, *supra* note 15 at 208-209. Lambarde cites no authority for this conclusion, but modern scholarship demonstrates its essential accuracy. JOHN G. BELLAMY, CRIMINAL LAW AND SOCIETY IN LATE MEDIEVAL AND TUDOR ENGLAND 25-26, 30-31 (1984).

²⁰ WILLIAM LAMBARD, EIRENARCHA (London, Ralph Newbery, 2d ed. 1588).

²¹ The *nemo tenetur* maxim entered into English legal parlance in the decade of the 1580's. It appears in slightly corrupted form ("*nullus*" in place of "*nemo*" and "*perdere*" in place of "*prodere*" in Richard Crompton's 1584 revision of Anthony Fitzherbert's treatise on the justices of the peace: "One is not to be examined on his oath about a matter which sounds to his reproach, *et nullus tenetur seipsum perdere*, as that he committed such felony, or that he was a perjurer, or such like etc. for the law presumes that one does not want to discredit or accuse himself in such a case." ("Home ne serra examine sur son serement de chose que sounde a son reproche, *et nullus tenetur seipsum perdere*, come le quel il fist tiel felony, ou le que il fuit periure, ou tiel semble etc. car le ley intend que home ne voile luy mesme discrediter ou accuser in tiel case.") ANTHONY FITZHERBERT, LOFFICE ET AUCTHORITIE DE JUSTICES DE PEACE fol. 152 (photo. reprint 1972) (London, Richard Tottell, R. Crompton rev. 1584). See M.R.T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 70 & n.24 (1990) (citing this source and observing that maxim also appears in canon law sources).

the past tense, perhaps indicating the magnitude of the change in criminal procedure occasioned by the Marian legislation.²²

The *nemo tenetur* maxim thereafter became the standard shorthand expression for the principle against compelled self-incrimination.²³ It informed the Common Law of the newly independent American states,²⁴ the Fifth Amendment,²⁵ and the cognate provisions of state constitutions.²⁶

As Lambarde, however, observed, the Marian procedure of pre-trial examination of defendants in custody largely nullified their rights to be silent.²⁷ This was equally true in the American colonies where that procedure was in force.²⁸

The *nemo tenetur* maxim is ultimately derived not from the English Common Law but from continental European civil and canon law sources, collectively styled the *ius commune*. See R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U.L.REV. 962, 964 & n.12, 967 & nn. 26, 27 (1990); R.H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, in R. H. HELMHOLTZ ET AL, THE PRIVILEGE AGAINST SELF-INCrimINATION: ITS ORIGINS AND DEVELOPMENT 17, 17-18 (1997).

²² "Here [in 2&3 Philip & Mary c.10] you may see (if I be not deceived) when the examination of a Felon began first to be warranted amongst us. For at the common Law, *Nemo tenebatur prodere seipsum*, and then his fault was not to be wrung out of himselfe, but rather to be discovered by other meanes and men." LAMBARD, *supra* note 20, at 213. Compare the 1582 text accompanying note 15, *supra*.

²³ Sollom Emlyn, *Preface* to 1 STATE TRIALS (2d. ed.) XXV (London, R.Bagshaw 1809), (1730), quoted in LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 327 (paperback ed. 1999) (1968) ("In other countries, Racks and Instruments of Torture are applied to force from the Prisoner a Confession, sometimes of more than is true; but this is a practice which Englishmen are happily unacquainted with, enjoying the benefit of that just and reasonable Maxim, *nemo tenetur accusare seipsum*").

²⁴ See *id.* at 428-430.

²⁵ *Bram v. United States*, 168 U.S. 532, 596 (1897).

²⁶ *Brown v. Walker*, 161 U.S. 591, 596 (1896). See Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in HELMHOLTZ ET AL., *supra* note 21, at 109, 135-136.

²⁷ LEVY, *supra* note 23, at 325.

²⁸ Moglen, *supra* note 26, at 114-117.

But the principle of a right to silence remained alive. It is manifest in the bar against examining defendants under oath²⁹ and in the exclusion from evidence of involuntary confessions.³⁰ In addition, the historical sources show that at least some examining magistrates followed a practice of advising defendants of their right to remain silent.³¹

A defendant's right not to respond to an official accusation of criminal conduct, however limited that right may have been at times as a practical matter, is anchored in over five centuries of Anglo-American legal tradition. Has this right ever been so attenuated that a defendant's mere silence upon arrest can give rise to an inference of guilt?

III. "Qui tacet."

The exploration of this question involves consideration of a Common Law evidentiary rule of "tacit" or "adoptive" admissions. This rule is derived from the canonical maxim *qui*

²⁹ LEVY, *supra* note 23, at 325. Compare the 1415 protest of the Commons to King Henry V quoted *supra* note 12.

³⁰ LEVY, *supra* note 23, at 326. See also *id.* at 495-497 n. 43 (disputing Wigmore's view that privilege against self-incrimination and bar on involuntary confessions are wholly separate rules); Herman, *supra* note 13, at 176-189 (same); LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 41-42 (photo. reprint 2007) (London, J. Butterworth 1802) (before confession of prisoner made on examination by justice of the peace may be read in evidence, there must be testimony that it was "made freely, without any menace or terror, or any species of undue influence imposed upon the prisoner"), citing MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE 284 (photo. reprint 1971 (before 1676) (London, E. Nutt et al., 1736)

³¹ The Utilitarian philosopher Jeremy Bentham (1748-1832), an outspoken opponent of the privilege against self-incrimination (see *Wilson v. United States*, 221 U.S. 361, 392 [1911] [McKenna, J., dissenting]), in addressing the Marian statutes providing for examination of prisoners (see *supra* note 14 and accompanying text) wrote disapprovingly that "[i]f the magistrate...wishes to make a parade of clemency, or show partial favour to the accused, he follows the rule of the common law, and even tells the prisoner to be on his guard, and to say nothing which may turn to his disadvantage." JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 242 (London, J.W. Paget 1825).

tacet consentire videtur (one who is silent seems to consent).³² In criminal cases, this rule exists in tension with the principle of *nemo tenetur seipsum prodere*. It allows an inference of guilt to attach to a person who remains silent in the presence of a statement imputing guilt to him of a particular crime.³³ By remaining silent upon hearing the accusatory statement, the person is said to "adopt" the statement. By failing to speak up and deny it, the defendant makes it his or her own. This is a venerable rule.³⁴

"The tacit admission rule has during the years been accepted by every court, state and federal, with few exceptions."³⁵ Its validity, as a matter of common sense, is obvious, but only in circumstances where a denial of the accusation would be natural. An influential nineteenth-century treatise writer states this reservation succinctly:

³² Boniface VIII, Liber Sext, Decretalium, lib. 5, tit. 12, de regulis iuris, reg. 43 (1298) ("Qui tacet, consentire videtur"). The eighty-eight *regulae* of the Sext are the source of numerous Latin maxims used by English lawyers, and most of them are derived from *regulae* collected in the corresponding title of Justinian's Digest. See PETER STEIN, *REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* 149, 155 (1966). The "qui tacet" *regula* of the Sext is obviously traceable to its more nuanced counterpart in Dig. 50, 17, 142 (533 C.E.) (Paulus, Ad Edictum 50) ("Qui tacet, non utique fatetur: sed tamen verum est eum non negare" ["One who is silent at least does not confess, but nevertheless, it is true he does not deny."]) Paulus was a jurist of the early third century C.E. whose "reputation in later times and...influence were immense." H.F. JOLOWICZ & BARRY NICHOLS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 392 (3d ed. 1972).

³³ For American cases specifically quoting the maxim *qui tacet consentire videtur*, see *Packer v. United States*, 106 F. 906, 910 (2d Cir. 1901); *Caldwell v. State*, 282 Ala. 713, 718 (1968); *Campbell v. State*, 55 Ala. 80, 84 (1876); *Johnson v. State*, 151 Ga. 21, 24-25 (1921); *People v. Kozlowski*, 368 Ill. 124, 128 (1938); *McKee v. People*, 36 N.Y. 113, 116 (1867); *State v. Epstein*, 25 R.I. 131, 138 (1903); *State v. Sudduth*, 74 S.C. 498, 500 (1906).

³⁴ "If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statements may be put in evidence against B., whenever B.'s silence is of such a nature as to lead to the inference of assent." FRANCIS WHARTON, *A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES* §679, at 581 (Philadelphia, Kay & Bro., 8th ed. 1880), citing four English and thirty-six American cases. "Statements silently acquiesced in may be treated as admissions." *Id.*

³⁵ *Caldwell v. State*, 282 Ala. 713, 719 (1968).

[T]o affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an occasion when a reply from him might be properly expected.^[36]

Whether it would be "unnatural" for a defendant to remain silent in the face of an accusatory statement made in the defendant's presence and hearing when he or she is under arrest has historically been a controversial question. In an early and seminal case followed in many jurisdictions, Massachusetts adopted a *per se* rule that the silence of an arrested defendant in the face of an accusatory remark cannot be the basis for an inference that the defendant has adopted the accusation and, thereby, made it the defendant's own. In *Commonwealth v. Kenney*,³⁷ the defendant was charged with theft. The trial judge admitted evidence that a town watchman, having Kenney in custody, said in the defendant's presence, "Here is a man that has been robbing a man," and that the defendant said nothing in response.³⁸ A while later, the purported victim of the robbery appeared where the defendant was held under arrest and, seeing a bag he claimed had been taken from him, said in the hearing of Kenney, "Here is the bag." Kenney again remained silent.³⁹ On appeal, the Supreme Judicial Court of Massachusetts, in an opinion written by Chief Justice Lemuel Shaw,⁴⁰ granted a new trial. It distinguished situations

³⁶ 2 JOHN P. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 527 (London, William Maxwell & Son 1878).

³⁷ 53 Mass. 235 (1847).

³⁸ *Id.*

³⁹ *Id.* at 235-236.

⁴⁰ Shaw was one of the most eminent nineteenth century American jurists. "No other state judge through his opinions alone had so great an influence on the course of American law." LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 3 (paperback ed. 1967) (1957).

where an arrested defendant stands mute in the face of charges from those scenarios where a person not in custody remains silent in the presence of accusatory remarks. "In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts,"⁴¹ provided the person hears, understands, and is at liberty to reply to the accusations. But where a defendant is under arrest, the defendant's silence is not to be taken as an implicit admission of the truth of the accusations made in his presence.

The declaration made by the officer, who first brought the defendant to the watch house, he certainly had no occasion to reply to. The subsequent statement, if made in the hearing of the defendant, (of which we think there was evidence,) was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to the officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say any thing until regularly called upon to answer.^[42]

Other states adopted the Massachusetts's *per se* rule barring any inference of guilt from an arrested defendant's standing mute before accusations.⁴³ In New York, Chief

⁴¹ 53 Mass. at 237.

⁴² *Id.* at 238. The Massachusetts court framed the rule succinctly in *Commonwealth v. McDermott*, 123 Mass. 440, 441 (1877) ("The defendant..., while held in custody, had a right to keep silence as to the crime with which he was charged, and all circumstances connected with it, and was not called upon to reply to or contradict any statements made in his hearing").

⁴³ See *State v. Weaver*, 57 Iowa 730, 732 (1882) (where one is under arrest, charged with a crime, his mere silence and failure to deny statements made in his presence tending to criminate him, cannot be interpreted as an admission of the truth of such statements); *State v. Diskin*, 34 La. Ann. 919, 921 (1882) (mere silence, while a party is held in custody under a criminal charge, affords no inference whatever of acquiescence in statements of others made in his presence. He has the undoubted right to keep silence as to the crime with which he is charged, and is not called upon to reply to or contradict such statements; statements so made are not admissible against the prisoner, because they

Justice Roscoe Pound, writing for the court in *People v. Rutigliano*⁴⁴, expressly adopting the Massachusetts rule, characterized it as "a wise rule."⁴⁵

Among commentators, Wharton favored the rule:

nor can silence, where a party in under arrest, be used as sustaining the hypothesis of acquiescence.⁴⁶

do not even tend to support the hypothesis of acquiescence); *Jackson v. Commonwealth*, 100 Ky. 239, 261 (1896) (not incumbent upon the arrested defendant to speak at all; "he had the right to remain silent when charged with a crime, and guilt is not to be imputed to him by reason of that silence."); *People v. Marendi*, 213 N.Y. 600, 613 (1902) (silence of a defendant standing mute cannot be construed as an admission, because he was then under arrest and not called upon to speak or deny an accusation); *State v. Epstein*, 25 R.I. 131, 136-137 (1903) (arrested defendant has right and privilege to remain silent; fact that he does so ought not to be allowed to raise any inference against him); *Ellis v. State*, 8 Okla. Crim. 522, 524 (1913) (if it be admitted that, while a person is under arrest, his failure to reply to statements made in his presence can be construed as an admission of the truthfulness of such statements, then the state would be able to do indirectly what the Constitution expressly provides it shall not do directly); *State v. Higgins*, 321 Mo. 570, 576 (1928) (while a defendant is in custody or under arrest, statements of a third party, made in his presence, and not denied, are inadmissible at the trial); *Diblee v. State*, 202 Ind. 571, 579 (1931) (statements made by complaining witnesses and third persons in the presence and hearing of the one accused of a crime are not competent evidence from which a jury might draw the inference that the accused, by his silence after the statement was made, admitted the facts so stated to be true, if the accused was at that time under arrest); *Weathered v. State*, 129 Tex. Crim. App. 514, 523 (1936) (accused has a right to keep silent when arrested, and the fact of such silence may not be brought out by the State either in testimony or in argument as a guilty circumstance); *State v. McKenzie*, 184 Wash. 32, 37-40 (1935) (agreeing with authorities adopting the per se rule); *Territory v. Corum*, 34 Haw. 167, 174-181(1937) (approving authorities adopting per se rule); *State v. Bowdry*, 346 Mo. 1090, 1096 (1940) (silence of an accused while under arrest is not admissible in evidence against him as he is then under no duty to make any statement); *State v. Bates*, 140 Conn. 326, 329 (1953) (agreeing with authorities holding that mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements then made in his presence). See also Henry S. Hilles, Jr., Note, *Tacit Criminal Admissions*, 112 U. PA. L. REV. 210, 254 n.278 (1963) (collecting cases adopting the Massachusetts rule).

⁴⁴ 261 N.Y. 103 (1933).

⁴⁵ *Id.* at 106.

⁴⁶ FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE §680, at 546 (Philadelphia, Kay & Bro., 8th ed. 1880).

Similarly, Bishop held the view that an arrested defendant's silence in the presence of an accusation could not raise an inference of guilt.⁴⁷

Nonetheless, authorities continued to be in conflict over the issue. Federal Circuit Courts of Appeal generally barred the use of an arrested defendant's silence as proof of guilt.⁴⁸ Many state jurisdictions made no hard-and-fast rule on the subject. Although wary of the dangers of such evidence, they left the resolution of the matter to the general principles applicable to tacit admissions, carving out no specific exception for silence under arrest.⁴⁹ Wigmore agreed with this approach, believing that "the better rule would

⁴⁷ JOEL P. BISHOP, 2 NEW CRIMINAL PROCEDURE §1253, at 1072 (2d ed. 1913). See also H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE §123 (Indianapolis & Kansas City, Bowen-Merrill Co. 1898), at 155-156 (citing state cases holding arrest excludes any inference that silence is acquiescence in others' statements).

⁴⁸ See *McCarthy v. United States*, 25 F.2d 298, 299 (6th Cir. 1928) (after arrest defendant has right to say nothing in response to accusatory statement and no derogatory inference may be drawn from silence); *Yep v. United States*, 83 F.2d 41, 43 (10th Cir. 1936) (arrested defendant's failure to deny statements of others made in his presence not admissible); *United States v. LoBiondo*, 135 F.2d 130, 131 (2d Cir. 1943) (arrested defendant's failure to respond to accusatory statements inadmissible); *Helton v. United States*, 221 F.2d 338, 341-342 (5th Cir. 1955) (rejecting prosecution's attempt to convict arrested defendant by his silence); *Fagundes v. United States*, 340 F.2d 673, 677 (1st Cir. 1965) (jury may not draw adverse inference from defendant's silence in face of accusation because right to silence at arrest akin to right to decline to testify). But see *Sparf v. United States*, 156 U.S. 51, 55-56 (1895) (defendant's confession by tacit admission not involuntary merely because he was in custody); *Dickerson v. United States*, 65 F.2d 824, 826-827 (D.C. Cir. 1933) (upholding against voluntariness objection admission of arrested defendant's silence in face of co-defendant's confession); *Rocchia v. United States*, 78 F.2d 966, 972 (9th Cir. 1935) (arrested defendant's failure to reply to accusation that he tried to bribe his way out of custody admissible as exception to ordinary rule that "a defendant under arrest is entitled to remain silent, notwithstanding statements by the arresting officers in his presence, and his silence should not be construed against him").

⁴⁹ See *Murphy v. State*, 36 Ohio St. 628, 630, 631 (1881) (arrested defendant's silence in face of co-defendant's statement implicating defendant admissible); *Ackerson v. State*, 124 Ill. 563, 571-573 (1888) (defendant's post-arrest silence in face of complainant's identification of him as robber admissible); *Green v. State*, 97 Tenn. 50, 66 (1896) (fact that a person charged with a crime is under arrest does not render silence inadmissible); *Raymond v. State*, 154 Ala. 1, 2-3 (1908) (mere fact that defendant was under arrest does

seem to allow some flexibility"⁵⁰ with respect to making an inference of guilt from the silence of a person under arrest who is faced with an accusatory statement.⁵¹

The Common Law debate over "tacit admissions" expanded to include constitutional considerations when, in 1964, the Supreme Court made the Fifth Amendment applicable to the States in *Malloy v. Hogan*⁵² and safeguarded the privilege two years later in *Miranda v. Arizona*.⁵³ Promptly thereafter, the Pennsylvania Supreme Court abandoned its prior "tacit admission" rule in post-arrest circumstances.⁵⁴ In *Commonwealth v. Dravec*,⁵⁵ it held inadmissible an arrested defendant's failure to

not make his silence inadmissible as tacit admission of larceny complainant's accusation made in his presence); *State v. Booker*, 68 W.Va. 8, 9-10 (1910) (silence of an arrested defendant in face of accusatory statement admissible, if an innocent person would have made a denial); *People v. Byrne*, 160 Cal. 217, 234-237 (1911) (defendant's silence in face of accusatory statement made in his presence implicating him in murder admissible); *People v. Courtney*, 178 Mich. 137, 150 (1913) (mere fact defendant is in custody does not exclude acquiescence in accusatory statement); *Diamond v. State*, 195 Ind. 285, 291-292 (1924) (mere fact of arrest does not bar admissibility of defendant's silence in face of accusatory statement); *State v. Won*, 76 Mont. 509, 519 (1926) (jury may infer guilt from arrested defendant's silence in face of accusations of murder).

⁵⁰ JOHN H. WIGMORE, 2 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT THE COMMON LAW §1072 (1904), at 1258. Wigmore was a critic of the privilege against self-incrimination: "Every day, in some court of some city, justice is miscarrying because of this extraordinary maxim..., '*nemo tenetur seipsum prodere*.'" John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 88 (1892).

⁵¹ See also 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (16th ed.) §197 (Boston, Little Brown 1899), annotated by John H. Wigmore, at 330: "That the accused is in custody when the statements are made to him does not of itself render it unnatural for him to deny what he considers false."

⁵² *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁵³ 384 U.S. 436 (1966).

⁵⁴ Pennsylvania had previously formulated its "tacit admission" rule in *Commonwealth v. Vallone*, 347 Pa. 419 (1943): "The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made." *Id.*, at 421.

⁵⁵ 424 Pa. 582 (1967).

respond to an accusatory statement read to him by the police. The court declared "all cases which were decided in Pennsylvania prior to the *Malloy* decision are no longer authoritative if they conflict with the Fifth Amendment...."⁵⁶ The court pointedly criticized its prior rule admitting an arrested defendant's silence:

[U]nder the [court's earlier] holding, an accusatory statement made in any place chosen by the accuser, whether on the street, in the fields, in an alley or a dive, if unreplyed to, may be used as an engine in court to send the defendant to prison or to the electric chair.
 ...[T]he rule is founded on a wholly false premise. One can understand how a principle of law built on solid rock might incline to slant from the perpendicular because of over-heavy superstructure piled on it as it rises higher and higher into the realm of hypothesis, but the tacit admission rule has no solid foundation whatsoever. It rests on the spongy maxim, so many times proved unrealistic, that silence gives consent.^[57]

In a 1979 case,⁵⁸ the Florida Supreme Court observed "[i]t had been the rule in Florida that an accusation of crime otherwise excludable as hearsay could be admitted into evidence if it was made in the presence of a defendant who remained silent under circumstances which naturally and reasonably call for a reply. This is no longer the rule of law in Florida, however, since all 'admissions' derived from a defendant's silence in the course of a custodial interrogation (as occurred in this case) are absolutely barred from the defendant's trial."⁵⁹ Similarly, Georgia's Supreme Court held "it is reversible error to instruct the jury in a criminal case...that silence or acquiescence by a person in police custody may amount to an admission (of guilt). Restated, we hold that, in view of

⁵⁶ *Id.*, at 584-585.

⁵⁷ *Id.* at 586.

⁵⁸ *State v. Brown*, 367 So.2d 616 (Fla. 1979).

⁵⁹ *Id.*

Miranda, police interrogation is not such a circumstance as requires an answer or denial...."⁶⁰

Despite conflicting approaches to the acceptance or rejection of inferences of guilt from an arrested defendant's silence, it is important to observe that all the state and federal cases, as well as commentators, address situations in which a third party--be it an eye-witness, an accomplice, a police officer, or a complainant-- made an accusatory statement in which a defendant could possibly acquiesce by his silence. In short, it has unanimously been understood that the doctrine of "adoptive admissions" requires there to be something to adopt.⁶¹

⁶⁰ *Howard v. State*, 237 Ga. 471, 475 (1976). See also *People v. Cockrell*, 63 Cal. 2d 659, 670 (1965) (although arrested defendant made no statement invoking right against self-incrimination, he had a right to remain silent and no adverse inference could be drawn); *People v. Bobo*, 390 Mich. 355, 360-361 (1973) (arrested defendant has Fifth Amendment right to remain silent even in the face of specific accusation of crime); *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972) (evidential use of tacit admissions of an accused offends right against self-incrimination "and is therefore no longer permissible in criminal trials within this jurisdiction").

⁶¹ FRANCIS WHARTON, 1 A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES §696 (Philadelphia, Kay & Bro. 1874), at 614: "[W]here a man at full liberty to speak, and, not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, *makes no denial of the accusation* by word or gesture, his silence is a circumstance which may be left to the jury"; ARTHUR P. WILL, A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE (Philadelphia, T. & J.W. Johnson & Co. 1896), at 128: "The silence of a prisoner *when accused by a companion of committing the crime* for which he is indicted is a circumstance, though very slight, for the consideration of the jury"; H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE §122 (Indianapolis and Kansas City, Bowen-Merrill Co. 1898), at 153: "The silence of the accused *as regards statements in his hearing* which implicate him directly or indirectly may be proved *with the statements*"; SIMON GREENLEAF, 1 A TREATISE ON THE LAW OF EVIDENCE §197 (Philadelphia, Rees Welsh & Co. 1899), at 314: "And whether it is acquiescence *in the conduct or in the language of others*, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence"; CHARLES C. MOORE, 2 A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE §1162 (1908), at 1300: "Silence of a party *when statements or accusations* touching his own interest are made to him or in his presence sometimes supports an inference of his assent to their truth" (emphases added).

IV. Impeachment Use of Post-Arrest Silence.

By three decisions in the mid-twentieth century, the United States Supreme Court guaranteed observation by the States of a state criminal defendant's privilege against self-incrimination. In the 1936 case of *Brown v. Mississippi*,⁶² it held that the Due Process Clause of the Fourteenth Amendment barred use in a state prosecution of a defendant's involuntary confession.⁶³ In the 1964 case of *Malloy v. Hogan*,⁶⁴ it held the Fifth Amendment's prohibition of compelled self-incrimination applicable to state prosecutions. And in the landmark 1966 case of *Miranda v. Arizona*,⁶⁵ it declared what can fairly be described as a "constitutional code of rules"⁶⁶ establishing, as an "absolute prerequisite"⁶⁷ to admission in evidence of anything a defendant might say in response to custodial interrogation, that the defendant be explicitly warned of four specific rights,⁶⁸ beginning with "the right to remain silent."⁶⁹

It is important to note that the holding of *Miranda* "is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."⁷⁰ It creates "prophylactic" rules only.⁷¹ It makes no change in the *content* of the privilege against self-incrimination, but rather creates a procedure by which a

⁶² 297 U.S. 278 (1936).

⁶³ In *Bram v. United States*, 168 U.S. 532, 542 (1897), the Court had held that the privilege against self-incrimination of the Fifth Amendment barred use in a federal prosecution of a defendant's involuntary confession.

⁶⁴ 378 U.S. 1 (1964).

⁶⁵ 384 U.S. 436 (1966).

⁶⁶ *Id.* at 504 (Harlan, J., dissenting).

⁶⁷ *Id.* at 471.

⁶⁸ *Id.* at 479.

⁶⁹ *Id.* at 468.

⁷⁰ *Id.* at 442.

⁷¹ *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (plurality opinion).

defendant in custody is enabled intelligently to exercise it when subjected to police interrogation.⁷²

It is ironic, therefore, that the creation of the prophylactic *Miranda* procedure has led to confusion as to the extent to which the constitutional privilege against self-incrimination protects an arrested defendant's right to silence. The confusion arises from two post-*Miranda* cases turning on the point in time at which a defendant under arrest was advised of the *Miranda* warnings, *Doyle v. Ohio*⁷³ and *Fletcher v. Weir*.⁷⁴

In *Doyle*, the defendants Doyle and Wood were arrested together and charged with selling ten pounds of marijuana to an informant.⁷⁵ They were arrested near the scene of the alleged transaction and given *Miranda* warnings by the arresting officer, Beamer.⁷⁶ They were tried separately, and each testified at his trial that their arrangement with the informant had been to buy, not sell, the marijuana and that the informant had "framed" them.⁷⁷ Both Doyle and Wood were extensively cross-examined by the trial prosecutor as to why they had not told the "frame up" story to agent Beamer at the time of their arrest.⁷⁸

The State did not contend that Doyle's and Wood's post-arrest silence could be used as evidence of guilt.⁷⁹ Rather, it sought "only the right to cross-examine a defendant

⁷² See Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 384, 392, 397 (2006)

⁷³ 426 U.S. 610 (1976).

⁷⁴ 455 U.S. 603 (1982).

⁷⁵ *Doyle v. Ohio*, 426 U.S. at 611.

⁷⁶ *Id.* at 612.

⁷⁷ *Id.* at 611, 613.

⁷⁸ *Id.* at 613-614 n.5.

⁷⁹ *Id.* at 617.

as to post-arrest silence for the limited purpose of impeachment."⁸⁰ The Supreme Court, however, held that the use for impeachment purposes of Doyle's and Wood's silence, "at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."⁸¹

The *Doyle* court reached its Fourteenth Amendment due process holding on two distinct grounds. The first followed the Court's earlier opinion in *United States v. Hale*.⁸² As in *Hale*, the Court held that the giving of *Miranda* warnings to a defendant rendered his subsequent silence not necessarily inconsistent with his exculpatory trial testimony.⁸³ After the receipt of *Miranda* warnings, a defendant's silence is "insolubly ambiguous" because it "may be nothing more than...exercise of these *Miranda* rights."⁸⁴

The second ground of the *Doyle* due process holding was that it would be "fundamentally unfair" to impeach a defendant's testimony with his pretrial silence after receipt of *Miranda* warnings, because the warnings themselves convey implicit assurance that "silence will carry no penalty."⁸⁵ This ground was based on the concurring opinion of Justice White in *Hale*.⁸⁶

In *Fletcher v. Weir*, decided by the Supreme Court six years after *Doyle*, the defendant had been convicted of manslaughter in the stabbing death of one Buchanan.⁸⁷ At trial, he testified in his own defense and claimed that the stabbing had been both

⁸⁰ *Id.* at 616.

⁸¹ *Id.* at 619.

⁸² 422 U.S. 171 (1975).

⁸³ *Doyle*, 426 U.S. at 617; *Hale*, 422 U.S. at 177-180.

⁸⁴ *Doyle*, 426 U.S. at 617.

⁸⁵ *Id.* at 618.

⁸⁶ *Id.* at 618-619; *Hale*, 422 U.S. at 182-183 (White, J., concurring).

⁸⁷ *Fletcher v. Weir*, 455 U.S. at 603-604.

accidental and the result of self-defense.⁸⁸ The trial prosecutor impeached him in cross-examination with his failure to advance his exculpatory explanation to the arresting officers.⁸⁹

The difference between *Weir* and *Doyle* was that the record did not indicate that Weir had received *Miranda* warnings before remaining silent immediately after his arrest.⁹⁰ The Supreme Court found the difference significant.⁹¹ It stated that in several post-*Doyle* cases, it had "explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him."⁹² Because no such "affirmative assurances" had been give to Weir, the Court held that cross-examination of him as to his post-arrest silence did not violate due process.⁹³

Both the *Doyle* and *Weir* decisions invite confusion as to the limits of their holdings. This is so because neither case explains the difference between *substantive* evidence and evidence admissible for the limited purpose of *impeachment* of a witness. The difference is obliquely referred to in *Doyle*⁹⁴ and omitted entirely in *Weir*.

The difference between substantive evidence and impeachment evidence is critical in the context of a criminal case. Substantive evidence is what a party offers in its

⁸⁸ *Id.* at 603.

⁸⁹ *Id.* at 603-604.

⁹⁰ *Id.* at 605.

⁹¹ *Id.*

⁹² *Id.* at 606, citing *Roberts v. United States*, 445 U.S. 552,561 (1980), *Jenkins v. Anderson*, 447 U.S. 231, 239-240 (1980), and *Anderson v. Charles*, 447 U.S. 404, 407-408 (1980).

⁹³ *Weir*, 455 U.S. at 607. The Court left it to the States to determine under their own rules of evidence whether such post-arrest but pre-*Miranda* silence is usable for impeachment. *Id.*

⁹⁴ *Doyle v. Ohio*, 426 U.S. at 616-617 (statement "inadmissible as evidence of guilt" may be admissible for "limited purpose of impeachment").

case-in-chief "for the purpose of proving a fact in issue."⁹⁵ With respect to the government in a criminal case, "substantive evidence" is evidence which goes towards proving the defendant's guilt of a crime charged. By contrast, "impeachment evidence" introduced by the government cannot be considered by the jury as proof of the defendant's guilt. Its use is limited to discrediting ("impeaching") a witness's trial testimony and, however indicative of the defendant's guilt it may be to a jury, the jury may not treat it as substantive evidence, that is, as evidence of guilt.⁹⁶

Any witness, including a defendant who testifies in the defense case, may be impeached by the government with a prior statement by the witness which is inconsistent with his or her trial testimony.⁹⁷ A kind of sub-category of such impeachment evidence is impeachment of witnesses by their previous failure to state a fact asserted in their trial testimony in circumstances in which that fact naturally would have been asserted.⁹⁸

That was the kind of "impeachment" the government assayed in cross-examination of the defendants in *Doyle* and *Weir*, by eliciting acknowledgments of the respective defendants' post-arrest silence with respect to the exculpatory versions claimed in their trial testimony. Neither opinion gives any intimation that pre-*Miranda* post-arrest silence could have been introduced in the government's case-in-chief as evidence of guilt.

⁹⁵ BLACK'S LAW DICTIONARY 1281 (5th ed. 1979).

⁹⁶ The distinction between "substantive" and "impeachment" evidence is comprehensively explained and illustrated in *Commonwealth v. Rosa*, 412 Mass. 147, 156-160 (1992).

⁹⁷ See *Harris v. New York*, 401 U.S. 222, 225-226 (1971).

⁹⁸ 3 H. J. WIGMORE, EVIDENCE §1042, at 1056 (Chadbourn rev. 1970).

The dissenting opinion of Justice Stevens in *Doyle*⁹⁹ is explicit on the point that the use of a defendant's post-arrest silence to prove guilt is improper:

[P]ortions of the prosecutor's argument to the jury overstepped permissible bounds. In each trial, he commented upon the defendant's silence not only as inconsistent with his testimony that he had been "framed," but also as inconsistent with the defendant's innocence. Comment on the lack of credibility of the defendant is plainly proper; it is not proper, however, for the prosecutor to ask the jury to draw a direct inference of guilt from silence--to argue, in effect, that silence is inconsistent with innocence....^[100]

V. Expansion of the Rule of *Fletcher v. Weir*.

Justice Stevens's assumption in *Doyle* that the prosecution may not invite a direct inference of guilt from a defendant's post-arrest silence has been shared by the full Court at least from the time that the Fifth Amendment privilege against self-incrimination was held applicable to the States. In *Malloy v. Hogan*,¹⁰¹ the incorporating decision, the Court stated that the privilege "guarantees...the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty...for such silence."¹⁰² In *Escobedo v. Illinois*,¹⁰³ the Court stated that, when the police accused the defendant of murder at the time of the defendant's arrest, the defendant had "an

⁹⁹ Justice Stevens thought cross-examination of the defendants about their post-*Miranda* silence was proper because there was no evidence that the defendants, in remaining silent, were relying on the *Miranda* warnings. See *Doyle v. Ohio*, 426 U.S. at 620-623 (Stevens, J., dissenting).

¹⁰⁰ *Id.* at 633-635 (Stevens, J. dissenting). Examples of such improper invitations at the *Doyle* trials of inferences of guilt from the defendant's silence are collected *id.* at 634 n. 12.

¹⁰¹ 378 U.S. 1 (1964).

¹⁰² *Id.* at 8.

¹⁰³ 378 U.S. 478 (1964).

absolute right to remain silent in the face of this accusation."¹⁰⁴ The *Miranda* decision itself is replete with assumptions that the right of silence exists prior to any attempt to interrogate a person in custody.¹⁰⁵

Along with the Court, the American public shared the same assumption. Long before the *Miranda* decision, it was "common knowledge" that a person under arrest "has a right to say nothing."¹⁰⁶ It became a "popular notion, buttressed by television and radio programs, that arrested persons have the right to remain silent and that 'anything you say may be used against you.'"¹⁰⁷

Despite the well-founded understanding that an arrested person's silence is an exercise of the privilege against self-incrimination, three federal Courts of Appeals have rejected it.

In *United States v. Love*,¹⁰⁸ a Georgia farm was the suspected primary landing site for a major drug smuggling operation.¹⁰⁹ Law enforcement agents had the farm under surveillance when the defendants Love and Youngblood drove to it and parked in the

¹⁰⁴ *Id.* at 485. The Court took specific note of the distinction between "interrogation" and "accusation." *See id.* at 485 n.5.

¹⁰⁵ *See Miranda v. Arizona*, 384 U.S. at 465 (arrested person's choice to speak to police is "abdication of the constitutional privilege"), 466 (by choosing to remain silent or to speak, arrested person "exercise[s] the privilege"), 467 (privilege "protect[s] persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"), 467-468 (arrested person possesses privilege prior to being made "aware" of it by warning), 468 (interrogator's imprecation that arrested person's "silence in the face of accusation is itself damning" rejected), 468 (arrested person may be "aware" of privilege before being given warning), 478 (arrested person's privilege is "jeopardized" when he or she is subjected to questioning), 479 (arrested person must be "notif[ied]" of right of silence to "protect" privilege).

¹⁰⁶ *McCarthy v. United States*, 25 F.2d 298, 299 (6th Cir. 1922). *See also Note, Silence as Incrimination in Federal Courts*, 40 MINN. L. REV. 598, 607 (1956).

¹⁰⁷ Hilles, *supra*, n.43, at 246.

¹⁰⁸ 767 F.2d 1052 (4th Cir. 1985).

¹⁰⁹ *Id.* at 1057.

carport.¹¹⁰ Agent Hill "advised Love that he and Youngblood could leave if they helped the officers determine that they were at the farm innocently and were not involved in the drug smuggling operation."¹¹¹ However, Love and Youngblood did not offer any explanation for their presence at the farm.¹¹² Other agents arrived and placed them under arrest.¹¹³

Love and Youngblood contended on appeal that the trial judge should have declared a mistrial after Agent Hill's testimony about their failure, while in custody at the farm, to explain their presence there.¹¹⁴ The Fourth Circuit rejected the contention. It observed that the Supreme Court in *Doyle* had held "that testimony concerning a defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' is inadmissible."¹¹⁵ However, citing *Weir*, the Fourth Circuit stated that the Supreme Court had "subsequently refined its rule in *Doyle* to permit testimony concerning a defendant's silence where the defendant has not 'received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.'"¹¹⁶ The Fourth Circuit concluded:

In this case neither Love nor Youngblood had been given any *Miranda* warnings at the time Agent Hill observed their silence. As a result under *Doyle* and [*Weir*], Agent Hill's testimony was properly admitted.[¹¹⁷]

¹¹⁰ *Id.* at 1057-1058.

¹¹¹ *Id.* at 1058.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1058, 1063.

¹¹⁵ *Id.* at 1063, quoting *Doyle v. Ohio*, 426 U.S. at 619.

¹¹⁶ *Id.* at 1063, quoting *Fletcher v. Weir*, 455 U.S. at 605.

¹¹⁷ *Id.* at 1063.

The fallacy in *Love* is immediately apparent. The decision shows no recognition of the distinction, critical to both *Doyle* and *Weir*, between evidence used for the limited purpose of *impeachment* of a defendant as a witness and evidence used *substantively* in the government's case to prove the defendant's guilt. *Weir* provides no support at all for substantive use of a defendant's post-arrest silence.

In *United States v. Rivera*,¹¹⁸ the defendant Vila and her three-year old child had arrived at Miami International Airport on a flight from Colombia.¹¹⁹ They were traveling with Vila's brother-in-law Rivera and her friend Stroud.¹²⁰ A variety of factors aroused Customs Inspector Schor's suspicion of the group and he directed them to a table in an inspection area.¹²¹ The Eleventh Circuit assumed without deciding that Vila was in custody at this time.¹²² In Vila's presence, Schor punctured the bottom of Stroud's suitcase with a screwdriver "and after withdrawing it, noticed a white powder on it which was tested as being cocaine."¹²³ Schor testified that Vila and her companions "showed no surprise, agitation, or protest while he was probing Stroud's luggage."¹²⁴ The prosecutor deliberately elicited this episode of silence and later highlighted it in closing argument.¹²⁵

The Eleventh Circuit held that the prosecutor "was clearly entitled to comment on Vila's demeanor...as Stroud's suitcase was being searched."¹²⁶ Citing *Weir*,¹²⁷ it ruled that:

¹¹⁸ 944 F.2d 1563 (11th Cir. 1991).

¹¹⁹ *Id.* at 1565.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1568.

¹²³ *Id.* at 1565.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1569.

¹²⁶ *Id.*

the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given...[E]ven if [Vila] was in custody at that time, the government could comment on her silence as she viewed Schor's inspection of Stroud's suitcase because she had not yet been given her *Miranda* warnings.¹²⁸

Because Vila had not yet been given the *Miranda* warnings, the Eleventh Circuit reasoned, again citing *Weir*, she had not yet been "given the implicit assurance that her silence would not be used against her."¹²⁹ "Because she had not yet received such affirmative assurances when Stroud's suitcase was being searched, the government could unquestionably comment on her silence during that phase of the encounter."¹³⁰

The flaw in the Eleventh Circuit's decision in *Rivera* is identical to that of the Fourth Circuit's decision in *Love*. Again, there is no judicial awareness that *Weir* deals solely with the *impeachment* use of an arrested defendant's pre-*Miranda* silence, not its *substantive* use as evidence of a defendant's guilt.

In *United States v. Frazier*,¹³¹ Frazier was driving a U-Haul truck which police officers suspected of containing drugs on the basis of its appearance and route of travel.¹³² Trooper Rasgorshek stopped the vehicle for a traffic violation.¹³³ He and other officer's searched it with Frazier's consent.¹³⁴ Behind two mattresses in the back of the truck, they discovered boxes containing large plastic bags filled with white pills, believed

¹²⁷ *Id.* at 1568 n.11.

¹²⁸ *Id.* at 1568.

¹²⁹ *Id.* at 1568 n.12.

¹³⁰ *Id.*

¹³¹ 408 F.3d 1102 (8th Cir. 2005), cert. denied, 546 U.S. 115 (2006).

¹³² *Id.* at 1106.

¹³³ *Id.*

¹³⁴ *Id.* at 1106-1107.

to be pseudoephedrine.¹³⁵ Frazier was placed under arrest.¹³⁶ "Trooper Rasgorshek testified that when Frazier was arrested, his reaction was neither angry, surprised, nor combative. Frazier did not say anything when the officers told him why he was being arrested."¹³⁷

In closing, the prosecutor argued that the jury should infer guilt from Frazier's silence at the time of his arrest.¹³⁸ On appeal, Frazier argued that "because the introduction of his silence was not for impeachment purposes, it was improper."¹³⁹ He contended that the eliciting of testimony about his post-arrest silence in the government's case-in-chief "violated his Fifth Amendment right against self-incrimination."¹⁴⁰

Unlike the courts in *Love* and *Rivera*, the Eighth Circuit in *Frazier* did not fail to observe the distinction between evidence of a defendant's post-arrest silence offered for the limited purpose of *impeachment* of the defendant as a witness and the same evidence offered as *substantive* proof of guilt in the government's case-in-chief. It correctly saw that Frazier's case involved the substantive use of his post-arrest pre-*Miranda* silence and, consequently, did not involve the Fourteenth Amendment Due Process principles of *Doyle* and *Weir* governing impeachment of a defendant who testifies.¹⁴¹ The issue was whether the government had properly used that silence in its case-in-chief as direct proof of guilt.¹⁴²

¹³⁵ *Id.* at 1107.

¹³⁶ *Id.*

¹³⁷ *Id.* See text accompanying n.8 *supra*.

¹³⁸ *Id.* at 1109.

¹³⁹ *Id.* at 1110.

¹⁴⁰ *Id.* at 1109.

¹⁴¹ *Id.* at 1110.

¹⁴² *Id.* at 1109.

The Eighth Circuit resolved the issue against Frazier. First, it quoted a statement by Justice Stevens, concurring in a case involving a defendant's pre-arrest silence: the "privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."¹⁴³ Then it applied that statement to Frazier's post-arrest pre-*Miranda* silence:

The crux of our inquiry today is to determine at what point a defendant is under "official compulsion to speak" because silence in the face of such compulsion constitutes a "statement" for purposes of a *Fifth Amendment* inquiry.

Does the use of postarrest pre-*Miranda* silence during the government's case-in-chief constitute an impermissible use of an accused's coerced incriminating "statement?" ...On the facts before us, we find no *Fifth Amendment* violation.

....[T]he...issue is whether Frazier was under any compulsion to speak at the time of his silence. He was not. Although Frazier was under arrest, there was no governmental action at that point inducing his silence. Thus he was under no government-imposed compulsion to speak. It is not as if Frazier refused to answer questions in the face of interrogation. We are speaking in this case only of the defendant's silence during and just after his arrest....Therefore, on these facts, the use of Frazier's silence in the government's case-in-chief as evidence of guilt did not violate his *Fifth Amendment* rights....^[144]

This rationale contains two false assumptions. First, there is no rule of law that postpones the protection of an arrested defendant's privilege against self-incrimination until he or she is under "official compulsion to speak," i.e., subjected to custodial interrogation by law enforcement authorities. Second, the Eighth Circuit is necessarily assuming that the giving of *Miranda* warnings in itself

¹⁴³ *Id.* at 1110, quoting *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring).

¹⁴⁴ *Id.* at 1110-1111 (emphases original).

constitutes an "official compulsion" of an arrested defendant "to speak." On this reasoning, the privilege against self-incrimination comes into existence only when there is such "compulsion." Consequently, the police can withhold the privilege against self-incrimination simply by not advising an arrested person of the *Miranda* warnings. In that case, a person's silence after his or her arrest *can* be used as direct proof of guilt. This turns on its head the privilege that *Miranda* was intended to protect.

There is a split among the Circuits on the issue of substantive use of a defendant's post-arrest pre-*Miranda* silence.¹⁴⁵ Decisions of the Ninth, District of Columbia, and Seventh Circuits hold that the Fifth Amendment privilege against self-incrimination is effective at least from the time of arrest.¹⁴⁶ The Sixth Circuit has reached the same conclusion in the context of a case involving the substantive use of a defendant's pre-arrest silence¹⁴⁷ A judge of the Eighth Circuit has incisively criticized the reasoning of the *Frazier* case in a subsequent decision,¹⁴⁸

¹⁴⁵ The Fifth Circuit has retreated from what appeared to be approval, in *United States v. Garcia-Gil*, 133 Fed. Appx. 102, 107-108 & n.6, cert. denied, 546 U.S. 922 (2005), of the use of a defendant's post-arrest pre-*Miranda* silence (there, that *Garcia-Gil*, upon being informed that he was under arrest, did not ask "what he was under arrest for") as substantive evidence of guilt. However, *Garcia-Gil* was an unpublished and non-precedential opinion, *id.* at 103 n.*, and in *United States v. Salinas*, 480 F.3d 750 (5th Cir. 2007), the Fifth Circuit, observing the split among Circuits on the issue, *id.* at 758, and leaving the issue undecided, *id.* at 759, "expressly decline[d] to endorse the reasoning of the non-precedential opinion in *Garcia-Gil*." *Salinas, supra* at 758 n.8.

¹⁴⁶ See *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-1030 (9th Cir. 2001); *United States v. Moore*, 104 F. 3d 377, 384-389 (D.C. Cir. 1997); *United States v. Hernandez*, 948 F.2d 316, 321-324 (7th Cir. 1991).

¹⁴⁷ See *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000).

¹⁴⁸ *United States v. Osuna-Zepeda*, 416 F.3d 838, 845 (8th Cir. 2005), cert. denied, 547 U.S. 1056 (2006) (Lay, Circuit Judge, concurring).

emphasizing that "[s]tanding mute" invokes the privilege against self-incrimination.¹⁴⁹

State courts have reached similar conclusions on policy grounds or in construing cognate provisions of their state constitutions.¹⁵⁰

VI. An Inference of Guilt from Pure Silence.

At first sight, it may seem that the inference of guilt from post-arrest silence, as exemplified by the Fourth, Eighth, and Eleventh Circuit cases, is a modern application of the ancient maxim *qui tacet consentire videtur*. But a close consideration of the facts of these cases will show that the predicate for the maxim's application is wholly lacking. The maxim posits that there is an accusatory statement that the defendant by silence effectively adopts, thereby making it his or her own statement.

¹⁴⁹ *Id.* at 846 (Lay, Circuit Judge, concurring).

¹⁵⁰ See *Coleman v. State*, 111 Nev. 657, 663-664 (1995) (declining on policy grounds to distinguish between post-arrest post-*Miranda* silence and and post-arrest pre-*Miranda* silence); *Nelson v. State*, 691 P.2d 1056, 1059 (Alaska App. 1984) (use of defendant's post-arrest silence barred under state constitution); *State v. Davis*, 38 Wash. App. 600, 606 (1984) (use of defendant's post-arrest silence, regardless of whether it followed *Miranda* warnings, barred by state constitution); *People v. Jacobs*, 158 Cal. App.3d 740, 750 (1984) (questioning defendant at trial about his silence during and after arrest violated state constitution); *Commonwealth v. Turner*, 499 Pa. 579, 584 (1982) (declining to hold, under state constitution, that the existence of *Miranda* warnings, or their absence, affects a person's legitimate expectation not to be penalized for exercising the right to remain silent); *Clenin v. State*, 573 P.2d 844, 846 (1978) (any comment upon an accused's exercise of his right of silence, whether by interrogation of the accused himself, or by interrogation of others, inherently is prejudicial under state constitution); *People v. Bobo*, 390 Mich. 355, 357, 361 (1973) ("If silence in the face of specific accusation may not be used, it would be a strange doctrine indeed that would permit silence absent such an accusation to be used as evidence of guilt[,] citing state constitution).

The Fourth, Eighth, and Eleventh Circuits cases, however, address a wholly different species of evidence. They attach an inference of guilt to pure silence. These cases compel defendants to proclaim their innocence at the moment they are taken into custody, or suffer an inference of guilt from their silence.

Opponents of the privilege against self-incrimination, like Bentham and Wigmore, have contended that it impedes the truth-finding function of the trial. Inferences of guilt from post-arrest silence alone, however, do nothing to serve that truth-finding function. The *Miranda* warnings have become, in Chief Justice Rehnquist's memorable phrase, "part of our national culture."¹⁵¹ As one commentator has astutely observed:

If most people are at least generally aware of their right to remain silent, it follows that a reasonable person who is aware of this right might naturally exercise the right when faced with arrest, even before the express warning is given. Thus, the use of a criminal defendant's post-arrest silence as substantive evidence of guilt is highly questionable, regardless of whether the defendant has received the requisite *Miranda* warnings.^[152]

Nonetheless, the Fourth, Eighth, and Eleventh Circuits have allowed the prosecution to invite an inference of guilt from silence without foundation in prior law or in common experience. If their doctrine were to prevail, "the customary formula of warning should be changed, and the

¹⁵¹ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

¹⁵² Skrapka, *supra* n.72 at 358-359.

[arrested person] should be told, 'If you say anything, it will be used against you. If you do not say anything, that will be used against you.'"¹⁵³

¹⁵³ McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928).