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Post-*Miranda* Silence: A Constitutional Dilemma with an Evidentiary Answer

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Post-*Miranda* Selective Silence

A CONSTITUTIONAL DILEMMA WITH AN EVIDENTIARY ANSWER

INTRODUCTION

When a defendant is arrested and invokes his constitutional right to remain silent, the law explicitly prohibits a prosecutor from commenting adversely on that silence during the defendant's trial.[1] But what happens when a defendant, after receiving a *Miranda* warning,[2] does not actually remain silent, but instead answers some of the officer's questions but not others? At trial, is the prosecutor permitted to argue that the jury may draw an inference of guilt from the defendant's decision not to answer some questions, that is, the defendant's "selective silence"?[3] Circuits are currently split on this issue.[4]

Courts' treatment of selective silence has important implications for defendants and law enforcement officials alike. As the Supreme Court notes in *Miranda*, while recognizing the importance of "protecting individual rights," its "decision is not intended to hamper the traditional function of police officers in investigating crime."[5] With those concerns in mind, this note identifies a solution grounded in the Federal Rules of Evidence to competing constitutional, practical, and policy concerns that come into play if and when the Supreme Court addresses selective silence. Specifically, it contends that while a suspect's selective silence is not constitutionally protected, courts may rely on Federal Rule of Evidence 403 and analogous state

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[1] Doyle v. Ohio, 426 U.S. 610, 618-19 (1976) (citing United States v. Hale, 422 U.S. 171, 182-83 (1975)).

[2] Miranda v. Arizona, 384 U.S. 436, 467-68 (1966) ("At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.").

[3] McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 104 (3d Cir. 2012).

[4] Circuits that do not protect a defendant's selective silence from being used against him at trial include the First, Fifth and Eighth Circuits. Circuits that do protect a defendant's silence from being used against him at trial include the Seventh, Ninth, and Tenth Circuits. *Id.* at 104-05.

[5] *Miranda*, 384 U.S. at 477, 481.

provisions to adequately protect a defendant from unfair prosecutorial use of selective silence. As the Supreme Court has found that silence carries an inherently low probative value, courts have room to aggressively apply Rule 403 and prohibit such evidence when used in a misleading or unfair way.

Part I provides a brief background on the Fifth Amendment and the constitutional right to remain silent. Part II describes selective silence. Part III identifies two contrasting lines of reasoning that have resulted in a circuit split over whether a defendant's selective silence is admissible at trial. Part IV argues that the Supreme Court's reasoning in *Miranda* suggests that selective silence should not be constitutionally protected. Finally, Part V argues that Federal Rule of Evidence 403 and analogous state provisions provide sufficient protection against creating unfair inferences of guilt through prosecutorial use of post-*Miranda* selective silence.

I. THE FIFTH AMENDMENT AND *MIRANDA*

The Fifth Amendment commands that no person "shall be compelled in any criminal case to be a witness against himself."[6] The Fifth Amendment privilege, however, is not confined to the context of a courtroom; it applies in pre-trial settings as well. The privilege "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[7] The Supreme Court decided *Miranda v. Arizona* in 1966 in response to reports of police compulsion and brutality by holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[8] Specifically, the Court stated that "[p]rior to any questioning, the person 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."[9]

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[6] U.S. CONST. amend. V.

[7] *Miranda*, 384 U.S. at 467.

[8] *Id.* at 444; *see also id.* at 446-52 (discussing coercive and deceptive interrogation techniques used by police forces).

[9] *Id.* at 444.

Due process considerations prohibit a suspect's decision to remain silent from being used against him at trial. As the Supreme Court reasoned in *Jenkins v. Anderson*,

> *Miranda* warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him. Accordingly, "it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony."[10]

As the *Miranda* court explained,

> [o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege.[11]

A suspect, however, may also waive his Fifth Amendment privilege "provided [that] the waiver is made voluntarily, knowingly and intelligently."[12] For example, "[a]n express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement could constitute a waiver."[13] In addition, a defendant who sufficiently demonstrates that he understands his right, and subsequently responds to a question, could also constitute a waiver.[14]

II. SELECTIVE SILENCE

For the purposes of this note post-*Miranda* "selective silence" refers primarily to a defendant's refusal to answer some, but not all, of a police officer's or investigator's questions during an interrogation in which the defendant initially waived his right to silence.[15] For example, a suspect in police custody, who has been told of his right to remain silent under *Miranda*, may unambiguously waive this right to silence, often by signing a waiver, and begin to answer questions posed by officers.

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[10] Jenkins v. Anderson, 447 U.S. 231, 239-40 (1980) (citing Doyle v. Ohio, 426 U.S. 610, 619 (1976) (internal quotation marks omitted).

[11] *Miranda*, 384 U.S. at 473-74 (footnote omitted).

[12] *Id.* at 444.

[13] *Id.* at 475.

[14] *See* Berghuis v. Thompkins, 560 U.S. 370, 382-87 (2010).

[15] *See* Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010) ("A suspect may remain selectively silent by answering some questions and then refusing to answer others . . . .").

Perhaps, however, the suspect does not wish to answer one of the officer's questions and declines to respond, but subsequently continues to answer other questions. Had the defendant requested that questioning stop and refused to answer any further questions, his invocation of the right to silence would be readily apparent. Accordingly, it would be a violation of the Fifth Amendment for a prosecutor to introduce evidence of the defendant's silence at trial to draw an inference of guilt. In such cases, the defendant's silence is clearly entitled to protection.

Post-*Miranda* "selective silence" can also refer to a defendant's omission of details in an explanation or account of events.[16] In *Anderson v. Charles*, for example, the Court stated that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But [prior Supreme Court decisions] do[] not require any such formalistic understanding of 'silence.'"[17] For the purposes of this note "selective silence" will refer to both a defendant's refusal to answer a question in the course of interrogation and a defendant's omission of relevant details during an interrogation. Furthermore, for the purposes of this note, "selective silence" will be distinguished from "pure silence" where a defendant cuts off questioning entirely and does not responded to any further questions.[18]

In determining whether selective silence is constitutionally protected, circuit courts have struggled to define the scope of the Fifth Amendment privilege; whether the privilege is absolute—protecting all silence regardless of context—or whether the right to silence must be intermittently invoked, waived, and re-invoked.

III. CIRCUIT SPLIT

A. Circuits That Have Permitted a Prosecutor to Impeach/Draw Inferences from Selective Silence

Circuits that permit a prosecutor to draw inferences of guilt from a defendant's selective silence, such as the First, Fifth, and Eighth Circuits,[19] tend to focus solely on whether a

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[16] *See* Anderson v. Charles, 447 U.S. 404, 409 (1980).

[17] *Id.*

[18] *See* Thomas v. Indiana, 910 F.2d 1413, 1414, 1416 (7th Cir. 1990) (referring to the defendant's refusal to speak at all after being read his *Miranda* rights as a case of "pure silence").

[19] *See, e.g.*, McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 104-05 (3d Cir. 2012) (citing *United States v. Andujar-Basco*, 488 F.3d 549, 556 (1st Cir. 2007);

suspect has invoked or waived his Fifth Amendment rights. That is, they tend to focus on the suspect's actions—whether his behavior indicated an unambiguous intention to re-invoke the right to silence—without reaching the constitutional issue of whether selective silence is protected. This approach, however, requires the court to infer a suspect's intent from an ambiguous response: silence.

For example, in the First Circuit case of *United States v. Goldman*, FBI agents arrested a defendant for allegedly forging a check.[20] Prior to interrogation, the FBI investigator informed the defendant of his rights under *Miranda*.[21] The investigator then gave the defendant a "Waiver of Rights" form, which stated that, "I understand what my rights are. I am willing to make a statement and answer questions . . . I understand and know what I am doing."[22] The defendant signed the form and began answering the interrogator's questions.[23] In the course of the interrogation the defendant insisted that the check was not forged, but that it contained "the genuine signature of [one of his] business associate[s]."[24] The interrogator, however, pointed out that the defendant was also carrying four other blank checks and asked why the business associate would give him blank checks.[25] The defendant explained that it had to do with a transaction involving the business associate's cousins.[26] When the interrogator followed up by asking for the names and addresses of the cousins, the defendant did not respond.[27] At trial the prosecutor called the investigator as a witness and elicited the following testimony:

> Q: You inquired about those [blank] checks of [the defendant], am I correct?
>
> A: Yes, I did.
>
> Q: What did he tell you?
>
> A: Nothing, he didn't respond.[28]

United States v. Pando Franco, 503 F.3d 389, 397 (5th Cir. 2007); *United States v. Burns*, 276 F.3d 439, 442 (8th Cir. 2002)).

[20] United States v. Goldman, 563 F.2d 501, 502 (1st Cir. 1977).

[21] *Id.*

[22] *Id.* at 503 & n.1.

[23] *Id.* at 503.

[24] *Id.*

[25] *Id.* at 503 n.2.

[26] *Id.*

[27] *Id.*

[28] *Id.*

During his closing statement to the jury, the prosecutor highlighted the defendant's failure to respond to this question.[29] The jury subsequently convicted the defendant of transporting a forged check in interstate commerce.[30] On appeal to the First Circuit, the defendant objected to the prosecutor's use of his silence in response to this question, arguing that he had exercised his right to silence, and that, under *Miranda*, the prosecution was not entitled to introduce evidence of that silence at trial.[31] The First Circuit acknowledged that *Miranda* protects a defendant when he has exercised his right to silence and that a prosecutor would not be able to comment on that silence during summation.[32] The court determined, however, that "the defendant did not stand on his rights. After hearing the *Miranda* warnings, he chose to make an exculpatory statement, and he answered most of the agent's questions probing that statement."[33] By signing the waiver and offering an exculpatory explanation, the defendant did not exercise his constitutional privilege.

The court also rejected the defendant's argument that he had reasserted his right to remain silent when he did not respond to the interrogator's question.[34] The court noted that although "*Miranda* clearly gives a suspect under interrogation the right to indicate in any manner, at any time prior to or during questioning, that he wishes to remain silent[,] [w]e can find no passage in the record . . . where [the defendant] did indicate that he wished to reassert his right to remain silent."[35] The court also noted that his decision to not answer the question "was simply a strategic choice, perhaps based on the fear that any answer might weaken the story."[36] Thus, in holding that the defendant's silence alone was insufficient to re-invoke the right to silence, the court avoided the issue of whether the Fifth Amendment afforded the defendant a right to selectively answer questions.

Other circuits, in confronting the issue of selective silence, have similarly avoided addressing the Fifth Amendment issue by focusing on whether a defendant has sufficiently invoked the right. For example in *United States v. Burns*, the

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[29] *Id.* at 503.
[30] *Id.* at 502.
[31] *Id.* at 503.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 504.
[35] *Id.* (citation and internal quotation marks omitted).
[36] *Id.*

Eighth Circuit, in allowing a defendant's selective silence into evidence, explained that "a defendant's equivocal conduct generally is not sufficient to invoke his or her fifth amendment right to remain silent."[37] There, the defendant had been arrested on suspicion of involvement in a fraudulent check-cashing scheme.[38] The defendant was arrested, waived his *Miranda* rights, and then began to answer questions put to him by a United States Secret Service Agent.[39] During the trial the agent testified that the defendant admitted to cashing fraudulent checks, but "when asked whether he had recruited others to cash checks he did not respond and 'just looked' at those questioning him."[40] The defendant, however, answered subsequent questions and eventually requested that the interrogation stop, at which point the interrogation ceased.[41]

In finding that the prosecutor's use of the defendant's selective silence was permissible, the court reasoned "we do not believe that [the defendant] invoked [his] constitutional right when he was silent in response to a question."[42] The court added that, "where the accused initially waives his or her right to remain silent and agrees to questioning, but 'subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between police and the accused.'"[43] Like the *Goldman* court, the Eighth Circuit avoided addressing the constitutional issue by focusing on the mechanics of invoking the right to silence.[44] Interestingly, however, the court makes a formal distinction, determining that a defendant's selective silence cannot be viewed in isolation, but rather is *a*

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[37] United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002).

[38] *Id.* at 441.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 442.

[43] *Id.* (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

[44] *See* United States v. Pando Franco, 503 F.3d 389, 397 (5th Cir. 2007) (holding that the defendant "waived his right to have the entire conversation, including the implicit references to his silence contained therein, used against him as substantive evidence of guilt"); United States v. Teleguz, 492 F.3d 80, 88 (1st Cir. 2007) ("A defendant's choice, after signing a *Miranda* waiver, to selectively answer questions, is not in itself an unequivocal assertion of his right to remain silent."); United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) (finding the defendant's selective silence admissible since he waived his right by responding to the deputy's questions); United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992) (noting that once a defendant allows questioning, but "subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused").

part of the entire, unprotected conversation. In doing so, the court acknowledges, implicitly, that there is a difference between blanket silence and selective silence.

The problem with focusing on invocation and waiver in the context of selective silence, is that silence, as the Supreme Court itself admitted, is "insolubly ambiguous."[45] Therefore it may be difficult to determine whether a suspect has in fact invoked the Fifth Amendment privilege. While a suspect who says absolutely nothing after being given a *Miranda* warning has clearly demonstrated his intention to invoke the right, the same cannot be said of a suspect who merely avoids answering one or two questions in the context of a larger interrogation; his silence in this context is more ambiguous as to whether he has invoked his right. Judicial decisions based on such ambiguous behavior could lead to arbitrary and inconsistent results.

B. Circuits That Have Prohibited a Prosecutor from Drawing Inferences from a Defendant's Selective Silence

In contrast to circuit courts that have allowed a prosecutor to comment on or draw inferences of guilt from a suspect's selective silence, circuit courts that prohibit a prosecutor from doing so—the Seventh, Ninth, and Tenth Circuits[46]—approach the constitutional issue head on. These courts emphasize that the right to silence is absolute, that it need not be re-invoked. Simply, when a person is silent that silence is protected, regardless of the context.

Take, for example, *Hurd v. Terhune*, where the Ninth Circuit held that "*Miranda* does not apply only to specific subjects or crimes. It applies to every question investigators pose."[47] In *Hurd*, a defendant was convicted of murdering his wife after a trial court allowed the prosecution to introduce into evidence the defendant's refusal during a police interrogation to reenact his allegedly accidental shooting.[48] The defendant and his wife had separated about a month before her death.[49] On the morning of the shooting, the defendant's wife went to the defendant's home to pick up their two children.[50] The defendant and his wife were in an upstairs room when one of

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[45] Doyle v. Ohio, 426 U.S. 610, 617 (1976).
[46] McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 104 (3d Cir. 2012).
[47] Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010).
[48] *Id.* at 1082-83.
[49] *Id.* at 1083.
[50] *Id.*

their children heard a shot and then witnessed his mother walk down the stairs and collapse.[51] She had been shot in the chest.[52] Police arrested the defendant and informed him of his *Miranda* rights.[53] The defendant, however, agreed to talk and told the police his version of what had happened.[54] He claimed that while they were upstairs that morning, his wife told him that she was concerned about the possibility of riots following the pending Rodney King verdict.[55] The defendant told investigators that he agreed to give his wife a gun so that she could protect herself and that "it accidentally discharged" while he was inspecting it.[56] The police then asked the defendant to demonstrate how the shooting occurred. The defendant refused, but continued to talk to the investigators.[57] Throughout the remainder of the investigation, the investigators continued to ask the defendant to demonstrate how the shooting happened and the defendant refused each time.[58]

At a pre-trial suppression hearing, the defendant argued that in refusing to reenact the shooting he had invoked his constitutional right to remain silent and that, accordingly, this part of the interrogation could not be put before the jury.[59] The trial court, however, denied the defendant's motion and allowed the prosecutor to refer to the defendant's "refusal to reenact the shooting as affirmative evidence of his guilt" throughout the trial.[60] The prosecutor subsequently counted to the jury how many times the defendant refused to reenact the shooting.[61]

The Ninth Circuit reversed and remanded the trial court's decision, holding that the defendant's rights were "substantially and injuriously affected by the prosecutor's multiple references to his post-*Miranda* silence at trial."[62] The court explained that "the right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1084.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1091.

him at trial."[63] Specifically, the court emphasized that *Miranda* "applies to every question investigators pose."[64] In essence, then, all silence is protected, regardless of whether the defendant is completely silent or partially silent.[65]

The Tenth Circuit, in *United States v. May*, similarly recognized that a defendant's selective silence is constitutionally protected, but nonetheless allowed the prosecutor to present the jury with evidence of the defendant's selective silence by making a subtle distinction between an inference of guilt and an impeachment by the prosecutor. There, the court held that "when a defendant is 'partially silent' by answering some questions and refusing to answer others, this partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*."[66] In *May*, the defendant was charged with conspiracy after his associate was arrested for attempting to purchase a kilogram of cocaine from an undercover officer.[67] The defendant was at the scene of the purchase and was carrying a firearm.[68] Police then searched the defendant's home, business, and vehicles and discovered 220 grams of cocaine.[69] After his arrest, the defendant "made several statements to the police which contained both contradictions and omissions."[70] Specifically, he told police that on the night of his arrest he had carried money to give to the other person so that the other person could use it to buy cocaine.[71]

To defend against the conspiracy charges at trial, the defendant testified that he withdrew from the conspiracy prior to the time of his arrest.[72] Noting that the defendant never mentioned any withdrawal from the conspiracy during his post-arrest interrogations with police, the prosecutor stated to the jury:

> Never once did [the defendant] say [to the authorities], [Y]ou know, on the 28th or the 27th, I actually got out of this deal. I stopped doing this, police. I—you know, I got out of this. That was never in any of the [previous] stories. Never once did he ever tell the police the story of a day or two before I got caught, I decided to get out.

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[63] *Id.* at 1087.

[64] *Id.*

[65] *Id.* at 1087-88. The court went on to find, however, that the defendant had invoked his right to silence. *See id.* at 1088-89.

[66] United States v. May, 52 F.3d 885, 890 (10th Cir. 1995) (citing United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993)).

[67] *Id.* at 886.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 886-87.

[72] *Id.* at 887.

> That story only came up today. Now [after his arrest], he talked with Ken Coffey, and when he talked to Agent Coffey right after his arrest, he again repeated this story. He said, I was only trying to help [the other person who was arrested]. You know she needed the money. I had fired her. I was trying to help her get some money. He didn't even say then that the day or two before he decided not to do it. That has only come up now, now that he has a lawyer, now that he sees withdrawal as a legal defense. [73]

Reviewing for plain error, the court found that the prosecutor's comments "were not 'manifestly intended' to be a comment on defendant-appellant's 'partial silence' nor would the jury 'naturally and necessarily' take them as such."[74] Instead, the court held that the comments "were designed to call attention to prior inconsistent statements" and therefore did not amount to a constitutional violation.[75]

Yet, it seems impossible to separate the inferences of guilt (the implication that if he was truly innocent he would have said something to the police) from the intent to impeach (he did not say it then, but he did say it now). It could be argued that both interpretations of the prosecutor's intent are equally valid. In interpreting the comments in this way, perhaps the court recognized that such use of the defendant's selective silence was not fundamentally unfair.[76] Certainly the court would not have allowed the prosecutor to make such an impeachment if the defendant had remained "purely" silent, that is, said nothing at all to investigators.[77] Regardless, the court was acknowledging that there is a significant difference between selective silences, in this case by omission, and "pure silence."

In sum, while some circuit courts maintain that there is a constitutionally protected right to selective silence, they very often still seem inclined to allow the prosecutor to use the silence at trial. This unwillingness on the part of the circuit courts to strongly stand by the right to selective silence indicates a lukewarm endorsement of the right. Thus, neither line of circuit court decisions presents a satisfying solution to whether the Constitution does, or should, protect a suspect's selective silence.

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[73] *Id.* (some alterations in original) (internal quotation marks omitted).

[74] *Id.* at 890.

[75] *Id.*

[76] *Id.* (holding that "such comments do not constitute a violation of [the defendant's] due process rights under *Doyle*").

[77] *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976); *see also* Thomas v. Indiana, 910 F.2d 1413, 1414, 1416 (7th Cir. 1990) (referring to the defendant's refusal to speak at all after being read his *Miranda* rights as a case of "pure silence").

IV. SELECTIVE SILENCE SHOULD NOT BE CONSTITUTIONALLY PROTECTED

A close reading of *Miranda* and its progeny suggests that selective silence should not be constitutionally protected. *Miranda*, as discussed above, holds that the prosecution is barred from using a defendant's statements made during a custodial interrogation against the defendant unless the defendant was effectively informed of his privilege against self-incrimination and waives that privilege.[78] The rule is meant to protect a defendant who is unaware that he possesses a right under the Fifth Amendment from being "compelled in any criminal case to be a witness against himself."[79] The *Miranda* Court, however, does not clearly indicate whether the right can be intermittently waived and invoked, again and again, throughout an interrogation. The plain language of *Miranda* suggests that the right to silence cannot be exercised in this on-and-off-again manner.[80] The Court refers to the right of silence during interrogation as "the right to 'cut off' questioning."[81] According to the Court, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[82] It appears, therefore, that the Court did not contemplate that the right could or should apply to a defendant who does not cut off questioning, but instead chooses to selectively answer the interrogator's questions.

Furthermore, the Supreme Court's concern for fairness in *Doyle v. Ohio* is not applicable to selective silence. In *Doyle v. Ohio*, decided 10 years after *Miranda*, the Supreme Court held that a prosecutor cannot use post-*Miranda* silence to impeach a defendant's testimony.[83] The Court emphasized:

> [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

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[78] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[79] U.S. CONST. amend. V; *Miranda,* 384 U.S. at 442.

[80] *See* Gerardo Schiano, Note, *"You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 189-90 (2012).

[81] *Miranda*, 384 U.S. at 474.

[82] *Id.* at 473-74.

[83] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

> of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.[84]

In *Doyle*, the Court focused on the fact that the government had induced the defendant's silence by making assurances that the silence would not be used against him.[85] But in cases of post-*Miranda* selective silence, it is hard to argue that the Government has induced a defendant's silence. *Miranda* requires that, "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the *right to remain silent*. For those unaware of the privilege, the warning is needed simply to make them aware of it . . . ."[86] *Remain* is an important word in this warning and is commonly understood to mean: "To continue in one place, condition, or character" or "To endure or last; abide."[87] A suspect, therefore, is not warned that he or she has a right to be intermittently silent, or a right to only answer select questions. While the right to "remain silent" could be relative to each question posed by an interrogator, such a reading would also require that the prosecutor cut off questioning, perhaps a severe consequence in the context of most instances of selective silence.

In *Anderson v. Charles*, the Court also alluded to this notion, stating

> *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.[88]

If selective silence is an inseparable part of an otherwise admissible conversation, as the Eighth Circuit has held,[89] then a suspect's inconsistencies as well as his selective silence should be admissible as neither would make unfair use of his silence.

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[84] *Id.*

[85] *Doyle*, 426 U.S. at 619; *see also* Fletcher v. Weir, 455 U.S. 603, 605 (1982) (per curiam) ("[W]e held in *Doyle v. Ohio* . . . that because of the nature of *Miranda* warnings it would be a violation of due process to allow comment on the silence which the warnings may well have encouraged.");

[86] *Miranda*, 384 US at 467-68 (emphasis added).

[87] FUNK & WAGNALLS NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1065 (encyclopedic eds., 1978) (citing definitions 2 & 4).

[88] Anderson v. Charles, 447 U.S 404, 408 (1980) (per curiam).

[89] *See supra* Part III.A

A defendant's decision to speak in post-*Miranda* interrogation is analogous to the decision to put a defendant or witness on the stand during trial—a strategic choice, perhaps. In this sense, it is not unfair to use a defendant's post-*Miranda* silence at trial. In *Jenkins v. Anderson*, the Court stated:

> A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, the interests of the other party and regard for the function of 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.[90]

Similarly, a defendant who decides to waive his right to a lawyer and his right to silence by speaking to an officer has made a tactical decision to "cast aside his cloak of silence."[91] Like a witness who has agreed to testify in court, he has altered the "scope and limits of [his] privilege against self-incrimination."[92]

More recently, in *Berghuis*, the Court held that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."[93] In that case, a defendant faced interrogation about a shooting.[94] Prior to the interrogation, officers informed the defendant of his *Miranda* rights.[95] Officers then posed questions to the defendant, who gave only "a few limited verbal responses . . . such as 'yeah,' 'no,' or 'I don't know.'"[96] The defendant, according to the Court, remained "'[l]argely' silent during the interrogation, which lasted about three hours."[97] Approximately two hours and forty-five minutes into the interrogation, however, an officer asked the defendant, "Do you believe in God?"[98] The defendant's eyes "well[e]d up with tears."[99] The interrogating officer then asked, "Do you pray to God to forgive you for shooting that boy down?"[100] The defendant

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[90] Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (citations omitted) (internal quotation marks omitted).

[91] *Id.*

[92] *Id.*

[93] Berghuis v. Thompkins, 560 U.S. 370, 388-89 (2010).

[94] *Id.* at 374.

[95] *Id.* at 374-75.

[96] *Id.* at 375.

[97] *Id.* (alteration in original).

[98] *Id.*

[99] *Id.* (alteration in original).

[100] *Id.*

"answered 'Yes' and looked away."[101] His statements were admitted at trial, and the jury subsequently found him guilty.[102]

The Supreme Court rejected the defendant's argument that he had unambiguously invoked his right to silence under the Fifth Amendment "by not saying anything for a sufficient period of time."[103] The defendant, according to the Court, "did not say that he wanted to remain silent or that he did not want to talk with police. Had he made either of these simple, unambiguous statements he would have invoked 'his right to cut off questioning.'"[104] Thus, the Court held that "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[105]

While the Court's decision in *Berghuis* suggests that a defendant who remains selectively silent has not invoked a Fifth Amendment right to remain silent and cut off questioning, it does not address whether that silence can be used against the defendant at trial. After all, in *Berghuis*, the prosecution was attempting to admit the defendant's post-Miranda *statements* not his *silence*. Thus, whether a defendant's silence is protected regardless of waiver or invocation of the Fifth Amendment privilege remains unanswered by the Supreme Court.

Furthermore, protecting selective silence would impede effective law enforcement.[106] Under *Miranda* a police officer is required to "cut off questioning" immediately when a defendant invokes his Fifth Amendment privilege.[107] If the defendant's refusal to answer a select question constitutes an invocation of the right to silence, then the interrogator must cut off questioning. Considerations like this would likely interfere with important fact finding.[108] As the *Berghuis* Court noted, "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'"[109]

One could argue, however, that a defendant's selective silence would only require the prosecutor to cut off questioning

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101 *Id.*
102 *Id.* at 376, 378.
103 *Id.* at 380-81.
104 *Id.* at 382.
105 *Id.* at 384.
106 *See* Schiano, *supra* note 80, at 193.
107 Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).
108 *See* Schiano, *supra* note 80, at 193-94.
109 *Berghuis*, 560 U.S. 370, 382 (quoting Davis v. United States, 512 U.S. 452 (1994)).

about the particular subject matter that led to the defendant's silence. This conceptualization, however, might provide police officers and interrogators little guidance as they try to make spur-of-the-moment decisions about what is a sufficiently different subject or line of questioning. As a result, they might be hesitant to ask critical questions, or continue to follow up on a particularly important line of questioning. Moreover, if the solution to this problem is to say that *Miranda* does not compel an interrogator to cut off questioning, but the Fifth Amendment proscribes the use of silence against a defendant at trial, another problem will follow: a defendant will, in essence, have editorial power over the interrogation. The jury and judge will see and hear only what he wishes them to see or hear, and will not be able to evaluate his selective silence, something that, given the context of selective silence, the fact finder is qualified to do.

V. A COURT'S DECISION TO ADMIT SELECTIVE SILENCE SHOULD BE MADE PURSUANT TO FEDERAL RULE OF EVIDENCE 403 AND ANALOGOUS STATE PROVISIONS

Although the use of selective silence may be constitutionally permissible, courts have a practical and workable solution at their disposal to prohibit or permit a prosecutor from drawing inferences of guilt to the jury from a suspect's selective silence. That is, courts should rely on evidentiary rules, specifically Federal Rule of Evidence 403 and analogous state provisions[110] to determine whether a defendant's "selective silence" should be admitted into evidence at trial. Federal Rule of Evidence 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[111] Using Federal Rule of Evidence 403, courts should, *sua sponte*, balance the probative value of the defendant's

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[110] At least forty-three states have adopted a similar or identical provision to FRE 403. *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS T-38-43 (2d ed. 2013) (reporting forty-two states that have adopted a similar or identical provision); *see also* People v. Scarola, 525 N.E.2d 728, 732 (N.Y. 1988) ("[Relevant evidence] may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury.").

[111] FED. R. EVID. 403.

selective silence against the risk of unfair prejudice. This approach will be a practical, effective, and, ultimately, more fair way than the approaches discussed above to determine whether a defendant's selective silence should be admissible in court.

A. Selective Silence under Federal Rule of Evidence 403

1. The Probative Value of Selective Silence

It is well established that silence has a low probative value. In *United States v. Hale*, the Court stated, "[i]n most circumstances silence is so ambiguous that it is of little probative force."[112] One year later, in *United States v. Doyle*, the Court explained that "every post-arrest silence is insolubly ambiguous."[113] After all, a defendant in custody has been advised of his right to remain silent under *Miranda*, and that "anything he says may be used against him."[114] Thus, the *Doyle* court reasoned that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights."[115] Indeed, the government has "induced" the defendant's silence and it would be fundamentally unfair to then use the defendant's silence against him or her at trial. The defendant is also made immediately aware that he does not have to answer and therefore may choose not to at that moment. Moreover, as the Supreme Court noted in *Dickerson v. United States*, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[116] An innocent person, therefore, may choose to remain silent simply because he or she is aware that remaining silent is the most prudent thing to do in such a circumstance.

Silence, however, depending on the context, is not always ambiguous. In many cases we would expect an innocent person to speak up, and in such instances silence has been said to have meaning. For example, the Federal Rules of Evidence consider silence, in some instances, to be an adoptive admission—a statement for the purposes of the Hearsay Rule.[117] The Advisory Committee Notes to Rule 801 state that "[u]nder established principles an admission may be made by adopting or acquiescing

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[112] United States v. Hale, 422 U.S. 171, 176 (1975).
[113] Doyle v. Ohio, 426 U.S. 610, 617 (1976).
[114] *Id.*
[115] *Id.*
[116] Dickerson v. United States, 530 U.S. 428, 443 (2000).
[117] *See* FED. R. EVID. 801(d)(2)(B) and advisory committee's note.

in the statement of another. . . . When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue."[118] Indeed, in *Hale* the Court emphasized that "[s]ilence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation."[119] While the Advisory Committee acknowledges that it is problematic to infer meaning from silence in the criminal context, when a person has been advised of his right to remain silent, the Committee states that "[t]he decision in each case calls for an evaluation in terms of probable human behavior."[120] The Advisory Committee underscores an important point: the meaning of a defendant's silence is dependent upon context and will typically be a fact-sensitive question. Accordingly, the probative value of "selective silence" should be analyzed in terms of its context.

Selective silence, unlike "pure silence,"[121] is arguably not "insolubly ambiguous"[122] because of the context in which it occurs. First, the innocent reasons for a defendant's silence, such as simply invoking the right or exercising prudence under the right to silence, are not evident in this context. The defendant, arguably, has not invoked his right to silence; he has started speaking. It can no longer be said that the defendant's silence has no meaning other than evincing an intent to exercise a right. Second, whereas "pure silence" provides little expressive context or substance from which to draw inferences, selective silence occurs within a richer expressive context from which a jury can gauge the credibility of a defendant, and perhaps draw meaning from the silence. A defendant's refusal to answer one question among many questions carries with it an inference or a meaning. That is, the defendant's other statements may provide a sufficient context to understand why the defendant has decided not to answer. It is arguably no longer unfair to "evaluat[e] in terms of probable human behavior" what the defendant's silence may indicate.[123] Unlike "pure silence," there is an inference to be

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[118] *Id.* The Advisory Committee acknowledges, however, that an inference from silence to guilt may be weak: "In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that 'anything you say can be used against you.'" *Id.*

[119] United States v. Hale, 422 U.S. 171, 176 (1975).

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

[121] *See supra* note 18 and accompanying text.

[122] *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976).

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

made in this context, and a defendant's selective silence does carry more probative value.

Circuit courts have indicated that selective silence carries more probative weight than "pure silence" due to contextual factors. For example, in *United States v. Goldman*, discussed above, the First Circuit noted that "[w]hat [the defendant] said [during the 'exculpatory story' delivered during his interrogation following the waiver of his *Miranda* rights] provided a context that enhanced the probative value of his silent response to a particular question."[124] In *United States v. Agee*, the Third Circuit stated that when a defendant "simply did *not* remain silent regarding the facts of the crime with which he was charged . . . what he chose to do and say when he approached the police officer provided a context which emphasized the probative value of what he chose *not* to say to the police."[125] There, the court allowed the prosecutor to comment on the defendant's silence, finding that the defendant had not sufficiently invoked his right.

United States v. Pando Franco, a case decided by the Fifth Circuit, demonstrates that a defendant's selective silence, even through omission, will have significant probative value. In *Pando Franco*, officials stopped a defendant when he entered the United States from Mexico.[126] The defendant was driving a van with a trailer attached that contained a "shoddily made" wooden table.[127] Officers scanned the table with a density meter and discovered abnormally high-density areas along the edges of the table.[128] They drilled into the table and found 17.4 kilograms of marijuana.[129] The defendant was arrested, but was not told specifically that he had been arrested as a result of the drugs found in the table.[130] The defendant received a *Miranda* warning and was subsequently interviewed.[131] During the interview he told officers about the price of fuel, his trip, his destination, and that he was delivering the table to someone in Oklahoma. Next, "[w]ithout any prompting from the officers, [defendant] then stated, 'that's where my mistake is, specifically agreeing to transport the table.'"[132]

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124 United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977)).
125 United States v. Agee, 597 F.2d 350, 356-57 (3d Cir. 1977) (emphasis added).
126 United States v. Pando Franco, 503 F.3d 389, 391 (5th Cir. 2007).
127 *Id.* at 391-92.
128 *Id.* at 392.
129 *Id.*
130 *See id.*
131 *Id.*
132 *Id.*

At trial, the prosecutor made several references to the fact that the defendant had failed during the interview to ask why he had been arrested.[133] Had the defendant said nothing at all, his blanket silence would have had little or no probative value. However, in choosing to speak, the defendant, not only incriminated himself, but also boosted the probative value of his failure to ask why he had been arrested.

Thus, selective silence in context, unlike "pure silence," is not "insolubly ambiguous." Rather, the probative value of selective silence will vary with the circumstances and substance of the interrogation. Courts are equipped to evaluate these circumstances and determine the probative value of a defendant's selective silence on a case-by-case basis.

2. Danger of Unfair Prejudice

Using a defendant's "selective silence" at trial to draw inferences of guilt certainly carries the potential to unfairly prejudice a defendant. In *Hale*, the Court commented that:

> [t]he 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 negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest. [134]

Indeed, a jury may not be as acutely aware or cognizant of the effect of *Miranda* warnings on a defendant that may induce the defendant to be silent. Or, perhaps a prosecutor could twist the defendant's silence and ask the jury to make unfair inferences. As the Advisory Committee to the Federal Rules of Evidence warns, when silence is motivated by an awareness of one's rights under Miranda, "unusual opportunity is afforded to manufacture evidence."[135] In other words, the prosecutor can suggest that the silence means whatever he wants it to mean. Thus, in most cases a defendant's selective silence will carry a high risk of unfair prejudice.

Because the probative value and risk of unfair prejudice varies widely among instances of selective silence, courts are

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[133] *Id.*

[134] United States v. Hale, 422 U.S. 171, 180 (1975).

[135] FED. R. EVID. 801(d)(2)(B) advisory committee's note. While use of a defendant's "pure silence" would seem to clearly implicate the Fifth Amendment's provision that a person may not be compelled to testify against himself, the implication is not as clear in the context of "selective silence." After all, the defendant has, arguably, not remained silent. And a refusal to answer a question can constitute a statement.

bound to reach widely varied results depending on context. While there is potential for some inconsistency in making these evidentiary determinations, it would be no more inconsistent than when a court attempts to determine whether a suspect sufficiently re-invoked a right to silence in order to admit or exclude selective silence. Each approach seems equally prone to inconsistent and fact-sensitive results. But in making a determination pursuant to Federal Rule of Evidence 403, the court will be considering, in large part, the *fairness*, or *unfairness*, of the grounds for admission, as opposed to simply whether the suspect formally or mechanistically invoked the right, an inquiry that could lead to arbitrary results. By focusing on the fairness, potential prejudice, and probative value of the evidence, the court will be able to render decisions that permit a police officer to vigorously interrogate suspects within the bounds of the law, while in some instances protecting a defendant from prosecutorial misuse of that selective silence.

B. Is a Specialized Federal Rule of Evidence Barring the Use of Silence at Trial Necessary to Reach Fair and Consistent Results?

In analyzing selective silence under Federal Rule of Evidence 403, it is instructive to consider a proposal by Professor Mikah K. Story Thompson, who argues that a defendant's silence has so little probative value and such a high risk of prejudice that a new specialized rule of evidence should be adopted that bars evidence of pre-trial silence.[136] The proposed rule reads:

> 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.[137]

While this approach seems quite effective in dealing with "pure silence," it fails to take into account the relatively higher probative value that may exist in many instances of selective silence and underscores differences between selective silence and "pure silence."[138] In the case of selective silence, the

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[136] Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV 21, 53, 55 (2008).

[137] *Id.*

[138] *See supra* Part V.A.1.

specialized rule will benefit a defendant who tries to deceive authorities while impairing legitimate police work and society's interest in truth at trial. An examination of *United States v. Agee* under Professor Thompson's proposed special rule illustrates this possibility. In *Agee*, a defendant was pulled over for a traffic violation while driving with one passenger.[139] Police, who were suspicious of the defendant, began to ask him if there were drugs in the car.[140] The defendant denied possessing any drugs, and then attempted to direct the police to the trunk of his car to prove that he had no drugs.[141] The police, however, went straight to the car's passenger compartment and found heroin underneath a seat.[142] At trial, the defendant admitted that he was aware of the drugs inside the car, but claimed that they belonged to his passenger, who had only revealed that he was carrying drugs moments before they were pulled over.[143] The defendant claimed that the passenger "throwed [sic] a bag of silver foil bag [sic] over across over [sic] to me and I picked it up. I was going to throw it back on him" but instead "I put it under my seat." [144]

The prosecutor cross-examined Agee on why he failed to tell the police that he knew about the drugs and that they belonged to his passenger.[145] During summation, "[t]he prosecutor reviewed Agee's account of what he did and did not tell the police prior to his arrest."[146] Agee argued on appeal that these references to his silence were improper.[147] The court, however, rejected Agee's argument, in part, since "it was this attempted deception, not Agee's 'silence,' that was emphasized by the prosecutor in her summation."[148]

Applying the specialized rule to this situation would result in the opposite outcome. Part one of the rule would prohibit the prosecutor from using the defendant's omission while he was pulled over to draw an inference of guilt. And part two of the rule would prohibit the prosecutor from using the defendant's omission to even point out the defendant's deceitfulness—that is, to impeach him. Thus, applying the

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139 United States v. Agee, 597 F.2d 350, 351-52 (1979).
140 *Id.* at 352.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* at 353.
146 *Id.*
147 *Id.*
148 *Id.* at 354.

specialized rule to the facts of *Agee* would result in a windfall to the defendant who has tried to deceive police. In the context of selective silence, courts should therefore apply Federal Rule of Evidence 403 as it exists, making decisions on a case-by-case basis in light of each set of unique facts.

C. Relying on Federal Rule of Evidence 403 and Analogous State Provisions Will Resolve Policy Concerns

Miranda's holding was, in part, a response to concerns about interrogations that occurred in secret and were often accompanied by "physical brutality and violence,"[149] on the part of the police. The *Miranda* Court was worried about psychological coercion as well as physical coercion during an interrogation.[150] The Court noted examples of beatings, and protracted questioning that were used to extract confessions, as well as studies such as the Wickersham Report and the Commission on Civil Rights, which pointed to an alarming history of police violence.[151] Moreover, the Court was especially concerned that physical and psychological coercion went on behind closed doors and that it is difficult to know what really happens in the interrogation room.[152] Thus, the Court concluded that, "[u]nless a proper limitation upon custodial interrogation is achieved[,] . . . there can be no assurance that practices of this [brutal and violent] nature will be eradicated in the foreseeable future."[153] Indeed, informing a defendant of his rights and protecting his decision not to say anything at all furthers these goals. But allowing a defendant to edit his own story and to answer questions based on a "strategic choice"[154] does not further this goal. Rather, as discussed above, it could harmfully impede the truth-seeking function of the courts.

The *Miranda* Court instructed that "[t]he limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement."[155] Moreover, the "decision is not intended to hamper the traditional function of police officers in investigating crime."[156] However, as discussed above, relying only on Federal Rule of

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149 Miranda v. Arizona, 384 U.S. 436, 445-46 (1966).
150 *Id.* at 448.
151 *Id.* at 445-46.
152 *Id.* at 448.
153 *Id.* at 447.
154 United States v. Goldman, 563 F.2d 501, 504 (1st Cir.1977).
155 *Miranda*, 384 U.S. at 481.
156 *Id.* at 477.

Evidence 403 will relieve the burden on police. That is, police will be able to engage in fact-finding without worrying about parsing out what constitutes a sufficient invocation or waiver of the right. The nature of the testimony and its admissibility can be determined on a case-by-case basis.

D. Federal Rule 403 Will Be More Practical to Implement in Situations Where the Court Is Called Upon to Determine the Admissibility of "Selective Silence"

It appears that courts have struggled to determine what constitutes a valid waiver or invocation of the right to silence.[157] In *Miranda*, the Court stated, "[p]rior to any questioning, the person must be warned that he has a right to remain silent [and] that any statement he does make may be used as evidence against him."[158] However, "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."[159] Determining whether the statement was made knowingly and intelligently, especially in instances where a defendant has remained selectively silent, can be a difficult undertaking.

The primary difficulty is that the court must deal with the defendant's contradictory behavior. In many instances, the defendant has explicitly waived the right to silence by signing a paper attesting that he has done so voluntarily, knowingly, and intelligently. The defendant then, during the course of the interrogation, may simply refuse to answer one of many otherwise permissible questions.

Instead of focusing on waiver or invocation of the right, the courts should focus on the substance and context of what was actually said or not said, and weigh its probative value against the risk of unfair prejudice in order to determine admissibility at trial. Allowing post-*Miranda* selective silence to be used at trial, only so long as it satisfies Federal Rule of Evidence 403, will avoid the difficult task of determining when a person has invoked or waived his right to silence. The courts will not have to engage in a task that may be practically difficult, and potentially arbitrary. Instead, the focus will be on the merits of what was actually said, and not said, rather than on whether a mechanical invocation or waiver was made.

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[157] *See supra* note 44 and accompanying text.
[158] *Miranda*, 384 U.S. at 444.
[159] *Id.*

This way, courts will have flexibility, but that flexibility will be exercised where it counts, on the issue of fairness. Rather than creating an absolute rule on admissibility or inadmissibility, courts will be equipped to make fair determinations on the facts of each particular case. Thus, a case-by-case balancing of the probative value of particular instances of selective silence against their likely prejudicial effect will be practical, easier to administer, and likely to result in a more consistent and fair admission and exclusion of evidence.[160]

E. Case Studies: The Court Has Used Rule 403 Balancing to Effectively Resolve Selective Silence Issues

1. *United States v. Hale*

The Supreme Court's decision in *United States v. Hale* is especially instructive because there, the Court balanced the probative value of a defendant's pure silence against the risk of confusing the jury, finding that the prosecutor impermissibly cross-examined a suspect about his silence.[161] In *Hale*, decided in 1975, a defendant was arrested for robbery.[162] He was subsequently taken to a police station and advised of his right to remain silent. Police found $158 on his person and asked him where he had gotten the money, to which the defendant made no response.[163] At trial, the prosecutor attempted to impeach the defendant's testimony by drawing the jury's attention to his failure to respond to the police officer's question about where he got the money.[164] Declining to reach the constitutional question, the Court held that the silence was inadmissible because "the probative value of respondent's pretrial silence was outweighed by the prejudicial impact of admitting it into evidence. Affirming the judgment on this ground, we have no occasion to reach the broader constitutional question . . . "[165]

The *Hale* Court emphasized the unique facts and circumstances of the defendant's situation.[166] In evaluating the

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[160] The Advisory Committee, however, has explicitly rejected a balancing approach to hearsay evidence. "The Advisory Committee has rejected this [case-by-case balancing] approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial . . . ." FED. R. EVID. 801 advisory committee's introductory note.

[161] United States v. Hale, 422 U.S. 171, 180-81 (1975).

[162] *Id.* at 172.

[163] *Id.* at 173-74.

[164] *Id.* at 174.

[165] *Id.* at 173.

[166] *Id.* at 179.

probative value of the defendant's silence, the Court noted that "he had substantial indication that nothing he said would influence the police decision to retain him in custody" and that he "knew that the case against him was built on seemingly strong evidence."[167] Therefore, he "could not have expected the police to release him merely on the strength of his explanation."[168] The Court also noted that the defendant had been given a *Miranda* warning and was "particularly aware of his right to remain silent."[169] In other words the defendant had many other reasons not to speak and his failure to answer the question was of little probative value.

In assessing the prejudicial value, the Court noted that "[t]he danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted."[170] Moreover, the Court found that "permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest."[171] After concluding that the probative value of this evidence was substantially outweighed by its danger of unfair prejudice and confusion, the Court granted the defendant a new trial.[172]

2. *United States v. Hampton*

More recently, the United States District Court for the Eastern District of Pennsylvania used Federal Rule of Evidence 403 to reach a decision involving selective silence. In *United States v. Hampton*, the government charged a defendant with being a felon in possession of a firearm.[173] Secret Service agents had conducted a search of the defendant's home after obtaining a photograph from defendant's Facebook profile depicting the defendant with a gun in his belt.[174] After he was arrested, the defendant signed a waiver of his *Miranda* rights and took part in an interview.[175] During the interview, the defendant refused

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[167] *Id.*
[168] *Id.* at 180.
[169] *Id.* at 177.
[170] *Id.* at 180.
[171] *Id.*
[172] *Id.* at 180-81.
[173] United States v. Hampton, 843 F. Supp. 2d 571, 573 (E.D. Pa 2012).
[174] *Id.*
[175] *Id.*

to answer questions about the recovered firearm.[176] He also refused to identify the gun depicted in the photograph.[177] Subsequently, however, the defendant answered a general question about the photograph and identified himself as the person in the photograph.[178]

At trial, the defendant argued that the gun in the Facebook photograph was a toy.[179] In response, the prosecution sought to enter the defendant's silence as "evidence that, having waived his *Miranda* rights, the defendant failed to respond to questions put to him about (i) the gun found during the search [of his house] and (ii) the gun pictured in the Facebook Photograph."[180] Essentially, the government wanted to prove that the gun in the photograph was, in fact, a real gun by pointing to the fact that the defendant had not denied it was real when asked about it initially.

In considering the admission of the evidence, the court considered issues of waiver and invocation. For example, the court stated, "First, Hampton's 'selective silence' *may* be admissible since a reasonable jury could find on the facts here that he waived his *Miranda* rights, did not remain silent, and did not unequivocally re-invoke his right to remain silent."[181] The court continued, "Second, despite Hampton's contention that his privilege against self-incrimination would be violated, a reasonabl[e] jury could . . . have found that he waived and did not re-invoke his *Miranda* rights."[182]

Despite having evaluated whether the defendant formally re-invoked his right to silence, the court ultimately based its decision on a Rule 403 analysis.[183] After considering that the defendant "neither confirmed nor denied know[ing] anything about the gun that was found"[184] and having articulated only one comment, that he was the person in the photograph, the court found that Hampton's silence was "only

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176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.* at 575.

180 *Id.* at 574. Hampton's first trial was declared a mistrial after the jury was unable to reach a verdict. *Id.* at 572. During the first trial, the district court sustained defendant's objections to the government's reference to his silence during closing arguments and "instructed the jury to disregard those references." *Id.* at 574. Prior to the second trial, "the Government filed a motion *in limine* to admit evidence of defendant's choice not to answer certain questions during his custodial interview." *Id*. at 572-73.

181 *Id.* at 577.

182 *Id.* at 578.

183 *Id.* at 580.

184 *Id.* at 576.

marginally probative" and "an adverse inference would be too speculative to pass Rule 403 muster."[185]

In reaching this conclusion, the court noted that "the probative heft of this silence is offset since [defendant] never offered an exculpatory story during his interrogation or at trial from which any inconsistency or ulterior motive could be inferred."[186] One could read this as indicating that the probative value of silence increases as a defendant says more around the silence. Here, the court was able to infer that the defendant was indeed "*wary and cautious*"[187] and provided an alternative explanation for his silence.

In assessing the risk of unfair prejudice, the court stated:

> Th[e] potential for unfair prejudice is especially grave here because [defendant] *never* provided a contradictory statement—or, indeed, any exculpatory statement—regarding evidence pertinent to his felon in possession case. As a result, [defendant's] "story," in a sense, has been consistent over the course of this litigation because he never advanced one.[188]

Thus, the court, recognizing the low probative value of the defendant's selective silence and the substantially high danger of unfair prejudice, "denied the Government's motion to admit and comment on evidence of [defendant's] silence in its case-in-chief and in closing argument."[189]

By basing the admissibility of selective silence on evidentiary considerations, which put the focus on fairness rather than whether the right was formally re-invoked by the defendant, the court reached the right result for the right reason. That is, it spent its time and focus evaluating what, in this context, based on the facts before it, was fair. Had the court failed to consider Federal Rule of Evidence 403 it would only have focused on what the defendant did or did not do to re-invoke his right to silence, and perhaps the idea, or even the goal, of fairness would have been lost in the inquiry.

CONCLUSION

In both *Hale* and *Hampton*, the Supreme Court and the District Court for the Eastern District of Pennsylvania demonstrated that a practical and effective way to determine the

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185 *Id.* at 581-82 (alteration in original) (internal quotation mark omitted).
186 *Id.* at 582.
187 *Id.* at 580.
188 *Id.* at 583.
189 *Id.*

admissibility of selective silence is by conducting a careful and thorough Rule 403 balancing on the record. In doing so, both courts achieved a fair and rational result. Until the Supreme Court has the opportunity to address the constitutionality of prosecutorial use of selective silence, courts should frame the issue of selective silence as an evidentiary problem, rather than a constitutional problem. This approach will be practical and workable. As a result, courts will be able to protect a defendant from an unfair abuse while simultaneously protecting the truth-seeking function of the court.

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