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Prosecutorial Ventriloquism: People v. Tom and the Substantive Use of Post-Arrest, Pre-Miranda Silence to Infer Consciousness of Guilt

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PROSECUTORIAL VENTRILOQUISM: *PEOPLE V. TOM* AND THE SUBSTANTIVE USE OF POST-ARREST, PRE-*MIRANDA* SILENCE TO INFER CONSCIOUSNESS OF GUILT

Joshua Bornstein∗

I. INTRODUCTION

Will Rogers wisely wrote, "Never miss a good chance to shut up."[1] In California, a criminal suspect in police custody, who follows this once sage advice, may now find his post-arrest silence used against him at trial.[2] The recent California Supreme Court case, *People v. Tom*,[3] held that the Fifth Amendment's privilege against self-incrimination is not violated when the government uses a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt.[4] In so holding, the *Tom* court reached a decision that was impractical and counterintuitive.[5]

Part II of this Comment details the facts of *People v. Tom*. Part III sets forth the historical background behind the Fifth Amendment privilege against self-incrimination. After analyzing the reasoning of the court in Part IV, Part V considers the implications and shortcomings of the court's holding in *Tom*. Finally, Part VI concludes that *Tom* was incorrectly decided because it has the potential to lead to unfair results not in concert with the spirit of the Fifth Amendment privilege against self-incrimination.

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1. THE OFFICIAL WEBSITE OF WILL ROGERS, http://www.cmgww.com/historic/rogers/about/miscellaneous.html (last visited Feb. 18, 2015).
2. *See* People v. Tom (*Tom II*), 331 P.3d 303 (Cal. 2014).
3. *Id.*
4. *Id.* at 305.
5. *See infra* Part V.

II. STATEMENT OF FACTS

A. Factual Background

On the night of February 19, 2007, Richard Tom got behind the wheel of his Mercedes E320.[6] He had been drinking.[7] How much he had to drink that evening is unknown.[8] What is not disputed, however, is that Tom's Mercedes crashed into another vehicle, killing one of its passengers and seriously injuring the remaining two.[9]

When police first arrived, Tom was still behind the wheel of his Mercedes.[10] After paramedics inspected him, Tom waited inside a friend's car, which was parked near the scene of the accident.[11] Fifteen minutes later, a police officer approached the car.[12] Tom asked the officer if he was free to walk home.[13] The officer rejected Tom's request, stating that the circumstances "obviously" constituted an ongoing investigation.[14]

About an hour after police first arrived at the scene, another officer, Sergeant Alan Bailey, discovered Tom waiting in his friend's car.[15] Sergeant Bailey ordered that Tom be placed in the backseat of a patrol vehicle.[16] While there, Tom was not handcuffed.[17] Sergeant Bailey asked if Tom would submit to a voluntary blood alcohol test.[18] Tom agreed and was taken to the police station because blood could not be drawn at the scene.[19]

A paramedic was dispatched to draw Tom's blood.[20] However, the city's contract with the paramedic company did not authorize a blood draw for suspects who had not been placed under arrest.[21]

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6. *Tom II*, 331 P.3d at 306.
7. *Id.* at 305.
8. *Id.*
9. People v. Tom (*Tom I*), 139 Cal. Rptr. 3d 71, 73 (Cal. Ct. App. 2012), *rev'd*, 331 P.3d 303 (Cal. 2014).
10. *Tom II*, 331 P.3d at 307.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 306–08.
16. *Id.* at 308.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

Because Tom had not been officially arrested,[22] he was asked if he would be willing to go to the hospital to get his blood drawn there.[23] Tom asked whether he had a right to refuse this blood test.[24] In response, Tom was told that it would be "in his interest to prove that he had nothing in his system."[25]

Shortly thereafter, while still at the police station, Tom used the restroom.[26] Sergeant Bailey accompanied him.[27] While in the restroom, Sergeant Bailey noticed the smell of alcohol coming from Tom.[28] Three field sobriety tests were then administered.[29] Officers determined that Tom was intoxicated.[30] At this point, Tom was officially placed under arrest.[31] Prior to his arrest, Tom never asked any of the police officers about the welfare of the other people involved in the collision.[32]

B. Procedural History

1. The Trial

Tom was charged with "gross vehicular manslaughter while intoxicated, driving under the influence causing harm to another, and driving with a blood-alcohol level of 0.08% or higher causing harm to another, along with various enhancement allegations."[33] At trial, Tom never testified.[34]

During the prosecutor's case-in-chief, the district attorney used the fact that Tom never asked about the wellbeing of the passengers in the other car to prove that he acted with gross negligence.[35] This, it appears, likely carried significant weight with the jury.[36]

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22. The appellate court determined that Tom was under de facto arrest during the time when he was transported to the police station in a patrol vehicle. *See id.* at 310.
23. *Id.* at 308.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 305.
34. *Tom I*, 139 Cal. Rptr. 3d 71, 88 (Cal. Ct. App. 2012), *rev'd*, 331 P.3d 303 (Cal. 2014).
35. *Tom II*, 331 P.3d at 309, 332.
36. *Id.* at 332 (Liu, J., dissenting) ("Given [the] conflicting expert testimony [as to Tom's speed], the prosecutor's emphasis on Tom's failure to ask about the crash victims was a

The district attorney argued before the jury that it was "particularly offensive" that Tom "never, ever asked, hey, how are the people in the other car doing? Not once . . . Because he knew he had done a very, very, very bad thing, and he was scared. He was scared or—either that or too drunk to care."[37] At the conclusion of the trial, the jury acquitted Tom of the alcohol-related charges but convicted him of vehicular manslaughter with gross negligence.[38] The court sentenced Tom to seven years in prison.[39]

Tom filed an appeal asserting multiple grounds for reversal of the judgment, including deprivation of his constitutional rights, prosecutorial misconduct, improper admission of opinion testimony, prosecutorial failure to disclose exculpatory evidence, ineffective assistance of counsel, and sentencing error.[40] Tom also collaterally attacked the judgment through a petition for a writ of habeas corpus.[41] The California appellate court consolidated the two cases.[42]

2. Appellate Court

The appellate court first determined that Tom was under de facto arrest prior to being transported to the police station because the stop was neither "temporary" nor "brief."[43] The court reached this determination based upon the fact that Tom was held at the scene for over an hour—in "an increasingly coercive" situation—and was not free to leave.[44] Under the totality of the circumstances, the court found "the police restraints placed upon [Tom] ripened into those 'tantamount to a formal arrest' when police transported defendant from the accident scene in a patrol car."[45]

After determining that Tom was "in custody for *Miranda* purposes," the appellate court then addressed whether the district attorney's references to Tom's post-arrest, pre-*Miranda* silence

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significant aspect of her claim that Tom 'was driving down that night . . . without a care of what was going to happen. I don't care is the attitude that he had.'").

37. *Id.* at 309.

38. *Id.* at 305–06.

39. *Id.* at 306.

40. *Tom I*, 139 Cal. Rptr. 3d 71, 73–74 (Cal. Ct. App. 2012), *rev'd*, 331 P.3d 303 (Cal. 2014).

41. *Id.* at 74.

42. *Id.*

43. *Id.* at 83 (relying upon and distinguishing from the holding of Berkemer v. McCarty, 468 U.S. 420 (1984)).

44. *Id.*

45. *Id.* (quoting People v. Pilster, 42 Cal. Rptr. 3d 301, 307 (Cal. Ct. App. 2006)).

violated Tom's Fifth Amendment right against self-incrimination.[46] The appellate court held, "the right of pretrial silence under *Miranda* is triggered by the inherently coercive circumstances attendant to a de facto arrest and therefore the government may not introduce evidence in its case-in-chief of a defendant's silence after arrest, but before *Miranda* warnings are administered, as substantive evidence of defendant's guilt."[47] Following the appellate court's decision, the People petitioned for, and the California Supreme Court granted, review.[48] That court limited its focus to the admissibility of Tom's post-arrest, pre-*Miranda* silence under the Fifth Amendment.[49]

III. HISTORICAL BACKGROUND OF THE FIFTH AMENDMENT

The Fifth Amendment's self-incrimination clause states, "No person . . . shall be compelled in any criminal case to be a witness against himself."[50] In the seminal case of *Miranda v. Arizona*,[51] the U.S. Supreme Court considered this privilege in the context of custodial interrogation.[52] The *Miranda* Court held that a prosecutor "may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[53] These safeguards were explicated in the now-famous *Miranda* warnings.

Prior to custodial interrogation, an individual 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."[54] *Miranda* requires "that a person taken into custody be advised immediately that he has the right to remain silent."[55]

46. *Id.* at 84.
47. *Id.* at 88.
48. *Tom II*, 331 P.3d 303, 310 (Cal. 2014).
49. *Id.*
50. U.S. CONST. amend. V.
51. 384 U.S. 436 (1966).
52. *Id.*
53. *Id.* at 444.
54. *Id.*
55. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

At trial, a prosecutor may not comment on a defendant's refusal to testify at trial.[56] A prosecutor, however, is not categorically barred from addressing a criminal defendant's pretrial silence.[57] For example, when a criminal defendant takes the stand in his own defense, "[t]he prosecution may use a defendant's pretrial silence as impeachment, provided the defendant [had] not yet been Mirandized."[58]

On the other hand, a criminal defendant may not be impeached by his post-*Miranda* silence.[59] Courts distinguish the difference between pre- and post-*Miranda* silence based upon the reliance that the *Miranda* warnings elicit.[60] "[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."[61]

A suspect in custody who wishes to invoke his privilege against self-incrimination must do so objectively and unambiguously.[62] This objective invocation rule is intended to give "guidance to officers on how to proceed in the face of ambiguity."[63] Therefore, counter-intuitively, in order to invoke one's right to remain silent prior to interrogation, an individual must speak and convey unambiguously to an arresting officer that he wishes to utilize his privilege against self-incrimination.[64] Put differently, prior to receiving a *Miranda* warning, silence alone does not activate the right to remain silent.[65] While the privilege exists, it is not self-activating.[66]

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56. Griffin v. California, 380 U.S. 609, 615 (1965).

57. *Tom II*, 331 P.3d 303, 311 (Cal. 2014).

58. *Id.*

59. *See Doyle*, 426 U.S. at 611 (holding that after receiving *Miranda* warnings at the time of his arrest, a defendant may not be impeached through cross-examination about his failure to tell an exculpatory story prior to trial).

60. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) ("In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand.").

61. *Doyle*, 426 U.S. at 618.

62. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

63. *Id.* (quoting Davis v. United States, 512 U.S. 453, 458–59 (1994)).

64. Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) ("Although 'no ritualistic formula is necessary in order to invoke the privilege,' . . . a witness does not do so by simply standing mute.") (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

65. *Id.*

66. *Id.*

In *Salinas v. Texas*,[67] the U.S. Supreme Court applied the objective invocation rule outside the context of custodial interrogation.[68] There, the police questioned the petitioner, Salinas, about a homicide they were investigating.[69] During this interview, Salinas was not in custody nor had he been given a *Miranda* warning.[70] Salinas freely answered the police's questions until he was asked whether the shell casings found at the crime scene would match his shotgun.[71] Then, Salinas fell silent, looked at the floor, and bit his lip.[72] At Salinas' murder trial, despite the fact that Salinas did not testify, the prosecutors argued that his silence was evidence of his guilt.[73] Justice Alito's plurality opinion held that pre-custodial, pre-*Miranda* silence could be used against a criminal defendant during the prosecution's case-in-chief as substantive evidence of guilt.[74]

The *Salinas* plurality noted that the Fifth Amendment privilege against self-incrimination is "not an unqualified right."[75] Nor is it "self-executing."[76] A witness who seeks its protection "must claim it."[77] Therefore, during noncustodial police interviews—where *Miranda* warnings typically are not given—one must "assert the privilege in order to benefit from it."[78]

Salinas dealt exclusively with pre-arrest silence.[79] There is no definitive Supreme Court decision on the government's use of post-arrest, pre-*Miranda* silence. Currently, there exists both state and circuit splits on the issue of whether the government's substantive use of post-arrest, pre-*Miranda* silence violates the Fifth Amendment. For example, in the Ninth Circuit case *United States v. Velarde-Gomez*,[80] Ramon Velarde-Gomez was arrested for importing

67. 133 S. Ct. 2174 (2013).
68. *Id.*
69. *Id.* at 2177.
70. *Id.*
71. *Id.*
72. *Id.* at 2178.
73. *Id.* at 2177–78.
74. *Id.* at 2184.
75. *Id.* at 2182–83.
76. *Id.* at 2178.
77. *Id.*
78. *Id.*
79. *Id.*
80. 269 F.3d 1023 (9th Cir. 2001).

and possessing marijuana with the intent to distribute.[81] At trial, the government elicited testimony about Velarde-Gomez's post-arrest, pre-*Miranda* silence in response to questions from border agents.[82] This silence was characterized as "demeanor" evidence.[83] The Ninth Circuit Court of Appeals, sitting en banc, held that "the government may not burden [the] right [to remain silent] by commenting on the defendant's post-arrest silence at trial."[84] This was because "once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given."[85]

Conversely, in the Eighth Circuit case *United States v. Frazier*,[86] the defendant, Frazier, was arrested with large quantities of pseudoephedrine, a drug used in the manufacture of methamphetamine.[87] At trial, the arresting officer 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."[88] During closing argument, the prosecutor commented that Frazier's silence was not indicative of an innocent person, who likely would become "combative, angry, emotional, [or] demanding."[89]

The Eighth Circuit stressed that the relevant inquiry should focus on when an individual would feel an "official compulsion to speak."[90] The *Frazier* court noted, "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."[91] Accordingly, the court held "the use of Frazier's silence in the government's case-in-chief as evidence of guilt did not violate his Fifth Amendment rights."[92]

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81. *Id.* at 1025.
82. *Id.*
83. *Id.*
84. *Id.* at 1029.
85. *Id.*; *accord* State v. Mainaaupo, 178 P.3d 1, 18 (Haw. 2008).
86. 408 F.3d 1102 (8th Cir. 2005).
87. *Id.* at 1105.
88. *Id.* at 1107.
89. *Id.* at 1109.
90. *Id.* at 1110.
91. *Id.* at 1111.
92. *Id.*; *accord* People v. Schollaert, 486 N.W.2d 312, 317 (Mich. Ct. App. 1992).

IV. REASONING OF THE COURT IN *TOM*

In *Tom*, the California Supreme Court faced an issue of first impression for California state law.[93] That issue was whether the Fifth Amendment is violated when the government uses a defendant's post-arrest, pre-*Miranda* silence in its case-in-chief as evidence of the defendant's guilt.[94] To resolve the issue, the *Tom* court first noted the split amongst state courts and federal circuits on the issue.[95] The court then briefly traced the origins of the objective invocation rule to illustrate one of the rule's rationales: to "provide . . . guidance to officers on how to proceed in the face of ambiguity."[96] Next, the court analyzed *Salinas*, which applied the objective invocation rule outside the context of custodial interrogation.[97]

The *Tom* court noted the *Salinas* plurality's emphasis that the privilege against self-incrimination is an exception to the general rule "that the Government has the right to everyone's testimony" such that if one "desires the protection of the privilege . . . [one] must claim it."[98] The *Tom* court focused on the "need to avoid difficulties of proof and the need to provide guidance to law enforcement officers."[99] The court found no distinction between the invocation requirements before and after custody. As such, the court concluded that the objective invocation rule applies to post-arrest, pre-*Miranda* silence just as it does to pre-arrest situations.[100] Accordingly, because Tom did not invoke his privilege against self-incrimination at the time of his de facto arrest, the government did not violate his Fifth Amendment rights by using his silence as substantive evidence of guilt.[101]

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93. *Tom II*, 331 P.3d 303, 305 (2014).

94. *Id.*

95. *See id.* at 311–12 (Minnesota, Vermont, Michigan, Kentucky, and the Eighth and Eleventh Circuits hold that the government's substantive use of a defendant's post-arrest, pre-*Miranda* silence does not violate the Fifth Amendment. Hawaii and the Ninth, Tenth, and D.C. Circuits hold that the government's use of a defendant's post-arrest, pre-Miranda silence as substantive evidence of guilt violates the Fifth Amendment.).

96. *Id.* at 312 (quoting Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (quoting another source).

97. *Id.* at 312–13.

98. *Id.* at 313 (quoting Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013)).

99. *Id.* (quoting Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013)).

100. *Id.* at 314.

101. *Id.* at 314–15.

V. ANALYSIS

"At this point in our history virtually every schoolboy is familiar with the concept, if not the language," of the *Miranda* warnings.[102] These warnings "have become part of our national culture."[103] Yet, few people likely know how to adequately assert their privilege against self-incrimination or even that there is a right to remain silent when merely being questioned by the police.[104] The rule requiring individuals under pre-*Miranda* custody to objectively and unambiguously invoke their right to remain silent is counterintuitive, and may produce results that run counter to "commonsense expectations."[105] Simply put, it is against common sense that one must first speak in order to invoke the privilege of silence.[106]

This Part first addresses the impracticability of the objective invocation rule for pre-*Miranda* custody. Next, this Part discusses the evidentiary implications of the *Tom* ruling. Finally, this Part addresses the potential for abuse that might result from the holding in *Tom*.

*A. Impracticability of the Express Invocation Rule for Pre-*Miranda *Custody*

Prior to a *Miranda* warning, an individual might be aware of a privilege protecting oneself against self-incrimination. Following recent U.S. Supreme Court decisions, however, one might not know that in order to invoke that privilege, paradoxically, one must speak up.[107] Rather than simply remaining silent, prior to custodial interrogation, an individual must objectively inform the police that the Fifth Amendment is being invoked.[108] While the U.S. Supreme Court has held that "no ritualistic formula is required,"[109] demanding an objective and unambiguous expression of one's desire to remain silent appears to have the effect of a formalistic requirement.

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102. Michigan v. Tucker, 417 U.S. 433, 439 (1974).

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

104. Erwin Chemerinsky, *Chemerinsky: Silence Is Not Golden, Supreme Court Says*, ABA J. (June 25, 2013, 6:15 PM), http://www.abajournal.com/news/article/chemerinsky_silence_is_not_golden_supreme_court_says/.

105. *Tom II*, 331 P.3d at 323 (Liu, J., dissenting).

106. Chemerinsky, *supra* note 104.

107. Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013).

108. *See id.* at 2180–81.

109. Quinn v. United States, 349 U.S. 155, 164 (1955); *Salinas*, 133 S. Ct. at 2178.

While the plurality opinion of *Salinas* is controversial to some,[110] *Salinas* dealt exclusively with pre-custodial situations. Prior to custody, an individual is generally free to leave at any time.[111] The *Salinas* Court took notice of this difference in determining that there was a lack of government coercion.[112]

In *Tom*, Tom's silence occurred during de facto arrest.[113] "After a person has been arrested, . . . the context is different," and a suspect's silence in this context "gives rise to a much stronger inference of reliance on the Fifth Amendment privilege than a witness's noncustodial silence."[114] This is because once arrest occurs, "'official suspicions' have ripened into probable cause for arrest [and] a suspect's silence correspondingly becomes more suggestive of fear of self-incrimination."[115]

Justice Goodwin Liu's dissent in *Tom* recognized that had Tom received a *Miranda* warning, the prosecutor would have been forbidden to use his silence in its case-in-chief.[116] As the majority in *Tom* stated, "[t]he line between custody and custodial interrogation is a significant one."[117] Undeniably, custodial interrogation requires a *Miranda* warning whereas mere custody does not.[118] However, a *Miranda* warning is often given when a person is first arrested.[119] Indeed, *Miranda* "require[s] that a person taken into custody be advised immediately" of one's rights.[120]

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110. *See* Neal Davis & Dick Deguerin, *Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of* Salinas v. Texas, THE CHAMPION, Jan.–Feb. 2014, at 16.

111. *See, e.g.*, *Salinas*, 133 S. Ct. at 2181 (noting Salinas agreed to accompany officers and was free to leave at any time during the interview). There are circumstances, however, where an individual is neither free to leave nor in police custody. For example, *Terry* stops are considered non-custodial for *Miranda* purposes. *See* Maryland v. Shatzer, 559 U.S. 98, 113 (2010) ("[T]he temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody.") (citations omitted).

112. *Salinas*, 133 S. Ct. at 2181–82.

113. *Tom II*, 331 P.3d 303, 310 (Cal. 2014).

114. *Id.* at 331 (Liu, J., dissenting).

115. *Id.*

116. *Id.* at 323.

117. *Id.* at 315 (majority opinion).

118. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

119. *When Must the Police Read Me My Miranda Rights?*, LAWINFO, http://resources.lawinfo.com/criminal-law/when-must-the-police-read-me-my-miranda-right.html (last visited Jan. 18, 2016); *see also* McClure v. Indiana, 803 N.E.2d 210, 214 n.3 (Ind. Ct. App. 2004) ("We would be remiss if we did not point out that the best practice in a situation such as this one would be to advise the defendant of the *Miranda* warnings when he is initially placed in custody.").

120. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

The likely reason why Tom was not given any *Miranda* warnings during the period of silence used by the prosecution was because the police did not believe that Tom had been placed into "custody."[121] Indeed, the paramedic would not draw Tom's blood at the police station because Tom had not been "placed under arrest."[122] It was the determination of the appellate court—not the police—that Tom was under de facto arrest while he was being driven to the station.[123] Therefore, because the police mistakenly believed Tom "was not in 'custody,'" he did not receive a *Miranda* warning until after he was formally arrested. This mistake by the police determined the admissibility of Tom's silence during his trial. At issue, then, is whether the *Miranda* warnings are rights activated by their formal recitation, or whether the warnings merely restate a pre-existing right.

The *Miranda* warnings serve as "a prophylactic means of safeguarding Fifth Amendment rights."[124] "[The] warnings are not [themselves] the source of the rights stated in the warnings."[125] The holding of *Tom*, however, turns the *Miranda* warnings from a safeguard of the Fifth Amendment rights into the rights themselves. Unless a suspect objectively invokes the Fifth Amendment preemptively, one's post-arrest silence is only protected by and through the police's decision to read that suspect his rights. Yet, if a person does not know his or her rights, how can he or she invoke them prior to being informed? Moreover, if an individual must wait for the police to read him his rights in order to benefit from their protection, then the Fifth Amendment no longer exists as a right belonging to the individual. Rather, it becomes a privilege granted at the discretion of the police.

Additionally, without a *Miranda* warning, an individual in custody may fear that unilaterally invoking the Fifth Amendment may signal to the arresting officers a consciousness of guilt.

121. *Tom II*, 331 P.3d at 308.
122. *Id.*
123. *Tom I*, 139 Cal. Rptr. 3d 71, 90 (Cal. App. Ct. 2012), *rev'd*, 331 P.3d 303 (2014).
124. *Doyle*, 426 U.S. at 617.
125. *Tom II*, 331 P.3d at 325 (Liu, J., dissenting).

Counterintuitively, this is the inference that can only be drawn if the individual does not invoke his or her rights.[126]

Even if a suspect knows he or she must objectively invoke the privilege against self-incrimination, pre-*Miranda* custody may not lend itself to easy invocation. As noted in Justice Liu's dissent, because *Miranda* warnings must be given prior to custodial interrogation, it is likely that police are not directly interacting with a suspect in custody prior to interrogation.[127] To whom and how should one invoke the Fifth Amendment privilege?[128] Is one required to approach an officer on one's own initiative and publicly announce that one does not wish to speak?[129] Is telling one officer, telling all, or must one invoke the Fifth Amendment each time one interacts with an officer?

Unlike with noncustodial situations where an individual is generally free to leave, after arrest, a criminal suspect's mobility is severely restricted. Objectively asserting the Fifth Amendment may prove difficult in these circumstances.[130] All the while, the suspect's silence would still be available to the prosecution.

While warnings are required before police seek to elicit a statement from a suspect, no warnings are required before interrogation commences.[131] Yet, where pre-*Miranda* silence may be used as substantive evidence of guilt, that silence is effectively treated as a "statement." Warnings, therefore, should be given earlier, at the moment of police custody, and they should include an additional clause explaining the affect one's silence may have in court.[132] Precluding pre-*Miranda* custodial silence as substantive evidence of guilt, however, would create a simpler solution by eliminating this need.

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126. *See id.* at 311 (majority opinion) (holding that one must objectively invoke the right to remain silent in order to prevent prosecutorial use of pre-*Miranda* silence as evidence showing consciousness of guilt).

127. *Id.* at 324 (Liu, J., dissenting).

128. *Id.*

129. *Id.*

130. *See id.* at 332.

131. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966).

132. *See* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 144 (2001) ("If the government and courts want to include evidence of silence, then presumably all they need to do is add a sentence to the Miranda warnings: And if you do stay silent, this can be introduced if you take the stand in a subsequent trial.").

B. Evidentiary Implications

"Every post-arrest silence in insolubly ambiguous."[133] Therefore, when a prosecutor comments on a defendant's silence, broad inferences can be drawn—inferences that might not accurately reflect the thoughts of the defendant. Inferring meaning from the words a defendant never spoke enables that prosecutor to speak on behalf of the defendant. This kind of prosecutorial ventriloquism effectively places the defendant on a virtual stand. Presented with these circumstances, a criminal defendant is faced with the "cruel trilemma of incriminating himself, lying, or demonstrating his guilt by silence."[134]

Choosing to testify at one's own trial is a strategic choice, which can open the door to impeachment possibilities otherwise impermissible against a criminal defendant.[135] Notably, Tom never testified at his trial.[136] In a similar case involving post-arrest, pre-*Miranda* silence, the D.C. Circuit noted, "[A] prosecutor's comment on a defendant's post-custodial silence unduly burdens that defendant's Fifth Amendment right to remain silent at trial, as it calls a jury's further attention to the fact that he has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread."[137] Consequently, the D.C. Circuit held that a prosecutor's use of a defendant's post-custodial silence is an inadmissible violation of the Fifth Amendment.[138]

In *Tom*, Justice Liu's dissent further illuminated the ideas espoused by the D.C. Circuit. Justice Liu argued that such prosecutorial comment evokes the kind of governmental coercion against which *Miranda* sought to protect.[139] "The element of compulsion arises from the fact that allowing adverse comment on silence puts pressure on the defendant to take the witness stand, thereby undermining 'the central purpose of the privilege—to protect a defendant from being the unwilling instrument of his or her own condemnation.'"[140]

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133. Doyle v. Ohio, 426 U.S. 610, 617 (1976) (citation omitted).
134. *Tom II*, 331 P.3d at 328 (Liu, J., dissenting).
135. *See* FED. R. EVID. 607–09; CAL. EVID. CODE §§ 785–88 (West 2015).
136. *Tom I*, 139 Cal. Rptr. 3d 71, 88 (Cal. Ct. App. 2012), *rev'd*, 331 P.3d 303 (Cal. 2014).
137. United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997).
138. *Id.* at 389.
139. *Tom II*, 331 P.3d at 327 (Liu, J., dissenting).
140. *Id.* (quoting Mitchell v. United States, 526 U.S. 314, 329 (1999)).

The pressure created from a prosecutor's comment on a defendant's post-arrest, pre-*Miranda* silence may result in shifting the burden onto the defendant, forcing him to take the stand in order to refute the meaning of his silence.[141] If the defendant then takes the stand, he would be opening the door to witness and character impeachment otherwise impermissible under the applicable rules of evidence.[142] The adversarial nature of criminal proceedings, coupled with the potential for loss of life and liberty, should forbid such inferences to be drawn based solely on the technical differences between whether or not a *Miranda* warning was given. The holding of *Tom* not only allows for prosecutorial comment on pre-*Miranda* silence, but also places the defendant in the difficult position of either testifying on his behalf in order to explicate the meaning of his silence or face the inference that he tacitly approves of the prosecutor's interpretation of his silence.

C. Potential for Abuse

Even with a lawyer's understanding of the objective invocation rule, ambiguity still exists during pre-*Miranda* custody in California. In the Ninth Circuit, which encompasses California, prosecutorial comment on post-arrest, pre-*Miranda* silence is impermissible.[143] Because the use of post-custodial, pre-*Miranda* silence is jurisdictionally different at the state and federal levels, the law "causes confusion for anyone arrested in California on a question that is always important: If I remain silent, can my silence be used against me or not?"[144]

Justice Liu's dissent argued that this disparity in the law invites forum shopping by prosecutors.[145] For example, nearly fifty percent of the inmates in federal prisons have been incarcerated on drug charges.[146] Depending on the circumstances, a California suspect

141. *Id.* at 328.

142. *E.g.*, CAL. EVID. CODE §§ 785–88 (West 2015).

143. *See, e.g.*, United States v. Velarde-Gomez, 269 F.3d 1023, 1030 (9th Cir. 2001) ("[T]he government may not comment on a defendant's post-arrest, pre-*Miranda* silence in its case-in-chief because such comments would 'act . . . as an impermissible penalty on the exercise of the . . . right to remain silent.'") (quoting United States v. Whitehead, 200 F.3d 634, 636–38 (9th Cir. 2000)).

144. *Tom II*, 331 P.3d at 324 (Liu, J., dissenting).

145. *Id.*

146. *Offenses*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Dec. 26, 2015).

arrested on a drug offense may be tried by either the state or federal government. If the defendant's pre-*Miranda* silence is believed to be a potentially dispositive factor at trial—as may have been the situation in *Tom*[147]—then the defendant's case may be brought in state court so that his silence may be used against him. This disparity in the law transforms the right to remain silent into a privilege revocable by law enforcement.

There are two reasons why this is true. First, officers may delay the reading of *Miranda* warnings in order to keep a defendant's silence in play.[148] Second, the government may elect to bring the case to state court, rather than federal court, in order to use the defendant's silence as substantive evidence of guilt. Both of these potential scenarios highlight the now transient nature of the privilege against self-incrimination in California. While "no constitutional rule is immutable,"[149] predictability of the law ensures fairness of adjudication by ensuring that each criminal defendant is treated equally. Absent this predictability, the outcome of a criminal case may be determined on procedural rather than substantive grounds. Accordingly, the California Supreme Court's decision to rule against the law governing the Ninth Circuit diminishes the Fifth Amendment right to remain silent by undermining safeguards created by the *Miranda* Court.

VI. CONCLUSION

Predictability of the law ensures fairness of adjudication by ensuring that each criminal defendant is treated equally. Bolstered by that rationale, *Tom* was incorrectly decided because the Court's holding has the potential to lead to unfair results that are not in concert with the spirit of the Fifth Amendment privilege against self-incrimination. The rule requiring individuals under pre-*Miranda* custody to objectively and unambiguously invoke their right to remain silent is counterintuitive, and may produce results that run

147. *Tom II*, 331 P.3d at 332 (Liu, J., dissenting) ("Given th[e] conflicting expert testimony [as to Tom's speed] the prosecutor's emphasis on Tom's failure to ask about the crash victims was a significant aspect of her claim that Tom 'was driving down that night . . . without a care of what was going to happen. I don't care is the attitude that he had.'").

148. *See id.* at 324 ("It simply 'create[s] an incentive for arresting officers to delay interrogation in order to create an intervening "silence" that could then be used against the defendant.'" (quoting United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997)).

149. Dickerson v. United States, 530 U.S. 428, 441 (2000).

counter to commonsense expectations. Moreover, if an individual must wait for the police to read him his rights in order to benefit from the protection of the Fifth Amendment, then the Fifth Amendment no longer exists as an automatic individual right. Rather, it becomes a privilege granted at the discretion of the police. Commonsense dictates that post-arrest, pre-*Miranda* silence should be inadmissible as substantive evidence of guilt.

The risk of inferring meaning from words a defendant never spoke enables a prosecutor to speak on behalf of the accused. This kind of prosecutorial ventriloquism effectively places the accused on a virtual stand and forces a criminal defendant to face the "cruel trilemma of incriminating himself, lying, or demonstrating guilt by silence."[150] Accordingly, *People v. Tom* chips away fairness and predictability from the Fifth Amendment privilege against self-incrimination.

150. *See supra* Section V.B.