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Constitutional Law-Due Process-Prosecution's Use of Accused's Silence for Impeachment Purposes Violates Fourteenth Amendment's Due Process Claus

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RECENT DECISION

Constitutional Law—Due Process— PROSECUTION'S USE OF ACCUSED'S SILENCE FOR IMPEACHMENT PURPOSES VIOLATES FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE. *Doyle v. Ohio*, 96 S. Ct. 2240 (1976).

Fundamental to our adversary system of justice is the right to impeach the testimony of an opposition witness.[1] This right extends to a criminal defendant who chooses to take the stand,[2] for his veracity and credibility are in issue.[3] Admission of prior silence as a means of impeaching the testimony of a witness was favored by a broad rule of evidence at common law.[4] However, the existence of an inconsistency between the silence and later testimony was a necessary condition for the admission of the defendant's prior silence.[5] While the courts have not defined the degree of inconsistency required to allow a prior statement to be used for impeachment purposes,[6] the establishment of an inconsistency is a question of fact, dependent "on the individual circumstances, and in all of them the underlying test is, would it have been natural for the person to make the assertion in question?"[7] Frequently, application of this common law rule resulted in

1. 3A J. WIGMORE, EVIDENCE § 874 (Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE].

2. *Id.* §§ 890-91. A defendant is subject to cross examination and to some extent waives his fifth amendment right against self-incrimination when he takes the witness stand. The question is how extensive is such waiver. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 132 (E. Cleary ed. 2d ed. 1972) [hereinafter cited as MCCORMICK]. It was once thought to be well-settled that a prosecutor could not cross-examine the accused regarding his silence at the time of arrest or his request for the assistance of counsel. Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965); People v. Williams, 26 Mich. App. 218, 182 N.W.2d 347 (1970). Some courts hold that when a defendant presents a detailed exculpatory explanation or alibi at trial, it is a proper test of the story's credibility to question whether the story had ever been previously offered. United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869, *reh. denied*, 404 U.S. 987 (1971) (explanation); United States v. White, 377 F.2d 908 (4th Cir.), *cert. denied*, 389 U.S. 884 (1967) (alibi).

3. WIGMORE §§ 889-90. *See also* 81 AM. JUR. 2d *Witnesses* § 524 (1976).

4. WIGMORE § 1042(2), at 1057 & n.2. However, it has been held violative of the fifth amendment to question a defendant regarding his silence at an earlier trial, at the trial of a co-defendant, in a preliminary hearing or before a grand jury. Stewart v. United States, 366 U.S. 1 (1961) (earlier trial); Grunewald v. United States, 353 U.S. 391 (1957) (grand jury); People v. Jordan, 7 Mich. App. 28, 151 N.W.2d 242 (1967) (preliminary hearing); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1969) (trial of a co-defendant).

5. WIGMORE § 1040(1).

6. *Id.* § 1040 (setting forth varying standards defining the degree of inconsistency required at common law to permit impeachment of a witness by prior statement).

7. *Id.* § 1042(3). Often rather than explaining why prior silence was or was not inconsistent with defendant's trial testimony, courts on both sides of the issue simply have asserted a

the admission of the defendant's prior silence.[8]

There have developed two modes of analysis which the courts use to determine the permissibility of impeachment by evidence of prior silence. "Evidentiary" analysis,[9] relied upon by the Supreme Court in *Raffel v. United States*[10] and in *Grunewald v. United States*,[11] determines whether the prior silence has sufficient probative value to outweigh the prejudicial harm to be done to the defendant. The "penalty" theory,[12] which was applied by the Court in *Griffin v. California*[13] based upon a concurring opinion in *Grunewald*,[14] attempts to determine whether a penalty has been imposed upon a defendant who has exercised a constitutional right.[15] *Hale*

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position, virtually *a priori*, based upon the facts of a particular case. *See, e.g.*, United States *ex rel.* Burt v. New Jersey, 475 F.2d 234, 238 (3d Cir.) (Rosenn, J., concurring), *cert. denied*, 414 U.S. 938 (1973) ("inconsistent with his testimony at trial that the shooting was accidental"); Johnson v. Patterson, 475 F.2d 1066, 1068 n.3 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); United States v. Ramirez, 441 F.2d 950, 954 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971) ("a prior inconsistent act").

8. McCormick § 161, at 353.

9. *See* Grunewald v. United States, 353 U.S. 391 (1957); Raffel v. United States, 271 U.S. 494 (1926).

10. 271 U.S. 494 (1926).

11. 353 U.S. 391 (1957).

12. *See* Griffin v. California, 380 U.S. 609 (1965). *See also* Grunewald v. United States, 353 U.S. 391, 425 (1957) (Black, J., concurring). Generally, the impeachment right has been recognized in several contexts when countervailing constitutional issues were raised, in spite of the potential prejudice to a defendant's fair trial. *See* Harris v. New York, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* may be shown to impeach credibility); Spencer v. Texas, 385 U.S. 554, 560-62 (1967) (prior valid convictions); *cf.* Loper v. Beto, 405 U.S. 473 (1972); Walder v. United States, 347 U.S. 62 (1954) (evidence obtained in violation of the fourth amendment may be used to impeach). *See also* Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. Pa. L. Rev. 940 (1975).

These cases in the constitutional area are indicative that when the Court has the opportunity to weigh the impeachment of defendant's testimony (the judicial system's interest in getting at the truth) against the penalty theory (penalizing a defendant for exerting a constitutional privilege and right), often the impeachment of the defendant will be permitted. *See* Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

13. 380 U.S. 609 (1965).

14. 353 U.S. at 425 (Black, J., concurring).

15. *See* Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966):

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he [the defendant] stood mute or claimed his privilege in the face of accusation.

This statement is dictum, however, since none of the cases involved a confession by silence (tacit confession). Since *Miranda*, some cases have interpreted this to mean that silence or a claim of the privilege made in response to a police accusation during custodial interrogation is inadmissible. United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United

v. United States,[16] decided by the Court in 1975 under its supervisory powers,[17] applied evidentiary analysis with two concurring opinions being based upon the penalty theory.[18] *Hale*, however, left unanswered the constitutional objections to impeachment by evidence of post-arrest silence.

In the recent case of *Doyle v. Ohio*,[19] the Supreme Court was faced with the issue of "whether a state prosecutor may seek to impeach a defendant's exculpatory testimony, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest."[20]

Doyle and another defendant, Wood, were convicted of selling marijuana to a narcotics bureau informant in separate trials stemming from the same incident. The state's witness offered testimony sketching a routine marijuana transaction involving the informant's purchase of ten pounds of marijuana from the defendants.[21] After the transaction, the defendants were stopped within minutes and arrested. Upon arrest they were given the *Miranda* warnings by the arresting agent. In their respective trials, each defendant took the stand and admitted practically everything about the state's case except who was selling the marijuana to whom. At trial each defendant offered exculpatory testimony which indicated they were not the sellers, but rather the buyers of the marijuana.[22]

States, 410 F.2d 48 (9th Cir. 1969); State v. Galasso, 217 So. 2d 326 (Fla. 1968); State v. Rice, 37 Wisc. 2d 392, 155 N.W.2d 116 (1967), *cert. denied*, 393 U.S. 878 (1968).

Even prior to *Miranda*, some authorities supported the view that an accused being under arrest was sufficient to render inadmissible the fact of his failure to deny accusatory statements made in his hearing and presence. This view was based upon the common knowledge of men in general that silence while under arrest is most conducive to the welfare of an accused, whether he is guilty or innocent. Ivey v. United States, 344 F.2d 770 (5th Cir. 1965); Cooper v. State, 231 Md. 248, 189 A.2d 620 (1963); Ellis v. State, 8 Okla. Crim. 522, 128 P. 1095 (1913).

16. 422 U.S. 171 (1975).

17. *Id.* at 173. The supervisory power was first clearly articulated in what is still the leading case of McNabb v. United States, 318 U.S. 332, 340-41 (1943), in which the supervisory power was characterized as the Court's exercise of "its traditional power over the admission of evidence to achieve what it considers a desirable practice in *federal* law enforcement and one which was intended by Congress." (Emphasis added). *See also* Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved*, 61 IOWA L. REV. 641, 654 n.134 (1975).

18. 422 U.S. at 182 (Douglas and White, JJ., concurring).

19. 96 S. Ct. 2240 (1976).

20. *Id.* at 2241.

21. *Id.* at 2242. The narcotics informant offered to assist the local narcotics investigation unit in setting up drug "pushers" in return for support in his efforts to receive lenient treatment in his latest legal problems.

22. *Id.* There was some confusion about whether there was an actual eyewitness to the transaction (*i.e.*, the actual transfer of the marijuana from the defendant to the informant).

In essence, the defendants testified to being framed by the informant. Since their testimony was not entirely implausible and there was little direct evidence to contradict it,[23] the prosecutor engaged in an effort to impeach the defendants' testimony on cross-examination by asking them why they had not told their "frame-up" story to the arresting agent.[24] Defense counsel's objections were overruled and the defendants were convicted. The decision was affirmed on appeal, and the Ohio Supreme Court denied further review.[25]

The United States Supreme Court concluded that the use of the defendants' silence at the time of arrest and after receiving the *Miranda* warnings, for impeachment purposes, violated the fourteenth amendment's due process clause.[26] *Doyle* was the first Supreme Court case to address the issue of using silence to impeach on constitutional grounds.[27]

Doyle is significant in that it provides precedent for federal and state courts with respect to the constitutional issue raised by the prosecution's use of the defendants' post-arrest silence to impeach exculpatory trial testimony.[28] Prior to this decision there had been a considerable split in

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The defendants testified that when they told the informant of their change of mind (*i.e.*, to purchase one or two pounds of marijuana instead of the agreed upon ten) that he became angry and threw the money into their car. The defendants maintained that they were stopped while they were pursuing the informant to find out what the $1320 was all about.

23. *Id.*

24. *Id.* at 2243.

25. *Id.* notes 4-5 (citing lower court transcripts).

26. *Id.* at 2245. *See* Malloy v. Hogan, 378 U.S. 1 (1964). The Supreme Court held that the fifth amendment privilege against self-incrimination is binding upon the states through the fourteenth amendment and that the same fifth amendment standards apply in state as in federal proceedings. *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973).

The privilege against self-incrimination was aimed at a far-reaching evil, preventing a recurrence of the Inquisition and the Star Chamber, if not in their stark brutality at least in their effect. *See* Michigan v. Tucker, 417 U.S. 433 (1974).

27. The *Hale* decision, since it was decided upon supervisory powers, did not reach the constitutional issue involved. Therefore, until *Doyle*, there remained a split between the states deciding the issue. *See* note 29 *infra* and accompanying text.

28. In recent years, the Supreme Court has rejected other opportunities to consider the issue. *See* United States *ex rel.* Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied*, 414 U.S. 938 (1973); Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908 (1969).

Hale v. United States, 422 U.S. 171 (1975), failed to decide the issue along constitutional lines. In *Hale*, the Court applied an evidentiary analysis approach to the issue of impeachment by evidence of post-arrest silence. *But see id.* at 182 (Douglas and White, JJ., concurring). Justice Douglas based his concurrence upon the penalty theory and relied upon the defendant's right to remain silent. Justice White, also using the penalty theory, relied upon due process.

authority both within the federal circuits and state courts.[29] The Supreme Court's decision in *Hale* did not help to resolve these splits in authority. Since *Hale* was decided under supervisory powers,[30] rather than on constitutional grounds, proponents of both the prosecution and the defense have used the decision as justification for bolstering their respective argu-

29. Prior to *Hale*, a majority of the federal circuits considering the issue held that impeachment by evidence of post-arrest silence was impermissible on constitutional grounds. The prevailing rationale was that such impeachment was an impermissible penalty on the exercise of a constitutional right. *See* Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965).

A minority of the federal circuits relied upon Harris v. United States, 401 U.S. 222 (1971), which permitted the prosecution to question a defendant about the inconsistency of his trial testimony with statements made earlier, even though the prior statements were taken without the giving of *Miranda* warnings. The Court held that on cross-examination, a statement obtained by police in admitted violation of *Miranda* could be used for impeachment purposes. The Court seemed to have fashioned an exception to the *Miranda* rule in holding that although unconstitutionally obtained evidence is inadmissible against the accused as part of the prosecution's case-in-chief, it is admissible for impeachment purposes. On the basis of *Harris*, the constitutional arguments were rejected, thus permitting a defendant to be impeached by cross-examination as to his earlier silence. *See* Agnellino v. New Jersey, 493 F.2d 714 (3d Cir. 1974); United States v. Quintana-Gomez, 488 F.2d 1246 (5th Cir. 1974); United States *ex rel.* Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied*, 414 U.S. 938 (1973); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).

The state courts deciding the issue mirrored the federal circuit courts' split in authority with the majority of state courts deciding against use of evidence for impeachment purposes on constitutional grounds. *See* State v. Greer, 17 Ariz. App. 162, 496 P.2d 152 (1972); Sutton v. State, 25 Md. App. 309, 334 A.2d 126 (1975); People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973); Reid v. Commonwealth, 213 Va. 790, 195 S.E.2d 866 (1973). *See also* Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved*, 61 IOWA L. REV. 640, 642 n.12 (1975).

A significant minority of the states, however, rejected the constitutional arguments and allowed such impeachment. *See* State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908 (1969); People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974); State v. Mink, 23 N.C. App. 203, 208 S.E.2d 522 (1974).

A number of state courts rejected or failed to consider the majority approach adopted in Grunewald v. United States, 353 U.S. 391 (1957). In *Grunewald*, the Court held by expressing the evidentiary analysis test that the defendant's trial testimony could not be impeached by the prosecution through reference to the defendant's silence before the grand jury. *Grunewald* placed a heavy burden on the prosecution to demonstrate inconsistency between silence and later testimony. These state courts adopted evidentiary standards which allowed more frequent use of silence for impeachment purposes. *See* People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974). *See also* Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved*, 61 IOWA L. REV. 640, 655 n.143 (1975).

30. *See* note 17 *supra*.

ments.[31] The *Doyle* decision has resolved the continuing conflict over this issue.

Prior to *Doyle* most of the decisions which held impeachment by evidence of silence unconstitutional based their decisions on the fifth amendment's[32] right to remain silent (privilege against self-incrimination).[33] While there were some lower court decisions that suggested such impeachment might violate due process,[34] Mr. Justice White's concurring opinion

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31. One federal circuit, the fifth, had started to waver prior to *Hale*, stating in dicta that use for impeachment purposes of prior silence could be limited to "the rare and exceptional case," United States v. Harp, 513 F.2d 786, 790 (5th Cir. 1975), or to "extreme cases," United States v. Fairchild, 505 F.2d 1378, 1382 (5th Cir. 1975).

Subsequent to *Hale*, the Supreme Court held that in prison disciplinary hearings silence in the face of accusation could be a relevant factor for consideration not barred from evidence by the due process clause. Baxter v. Palmigiano, 96 S. Ct. 1551 (1976).

Federal circuit decisions holding that evidence of post-arrest silence is inadmissible for impeachment since *Hale* include: United States v. Impson, 531 F.2d 274 (5th Cir. 1976); Minor v. Black, 527 F.2d 1 (6th Cir. 1975). *Contra*, United States v. Rose, 525 F.2d 1026 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1432 (1976).

State court cases holding that evidence of post-arrest silence is inadmissible for impeachment since *Hale* include: Bennett v. State, 316 So. 2d 41 (Fla. 1975); Lowe v. State, 136 Ga. App. 631, 222 S.E.2d 50 (1975); People v. Wright, 32 Ill. App. 3d 736, 336 N.E.2d 18 (1975); Vipperman v. State, 547 P.2d 682 (Nev. 1976); State v. Lara, 88 N.M. 233, 539 P.2d 623 (1975); Commonwealth v. Boyer, 237 Pa. Super. 341, 352 A.2d 431, 438 (1975) (Hoffman, J., concurring and dissenting) (dissenting as to alleged ineffectiveness of trial counsel as a result of his failure to object to prosecution's reference to accused's silence during the cross-examination); Braden v. State, 534 S.W.2d 657 (Tenn. 1976); Jerskey v. State, 546 P.2d 173 (Wyo. 1976). *But see* Farmer v. State, 326 So. 2d 32 (Fla. App. 1976); Shy v. State, 234 Ga. 816, 218 S.E.2d 599, 606 (1975) ("The Supreme Court of the United States has not given definitive guidance on the precise question. . . ."); Niemeyer v. Commonwealth, 533 S.W.2d 218 (Ky. 1976); Commonwealth v. Morgan, 339 N.E.2d 723 (Mass. 1975); State v. Jones, 532 S.W.2d 772 (Mo. Ct. App. 1975); State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

32. U.S. CONST. amend. V.

33. *See* Hale v. United States, 422 U.S. 171, 182 (1975) (Douglas, J., concurring); Griffin v. California, 380 U.S. 609, 614 (1965); Grunewald v. United States, 353 U.S. 391, 425 (1957) (Black, J., concurring).

The Supreme Court has consistently offered considerable protection for fifth amendment rights. *See, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951). *But cf.* California v. Byers, 402 U.S. 424, 459 (1971) (Black, J., dissenting) (suggesting that the recent line of cases represents a weakening of fifth amendment rights).

Lower courts have also based their decisions on fifth amendment grounds: Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); State v. Greer, 17 Ariz. App. 162, 496 P.2d 152 (1972); Sutton v. State, 25 Md. App. 309, 334 A.2d 126 (1975).

34. *See* Hale v. United States, 422 U.S. 171, 182 (1975) (White, J., concurring). Justice White held that the defendant's silence in reliance on *Miranda* warnings may not be used for impeachment purposes because taking advantage of the defendant's reliance violates due process. *See also* United States v. Anderson, 498 F.2d 1038, 1044 (D.C. Cir. 1974); State v.

in *Hale*[35] was most instrumental in aiding the Court to reach its ultimate decision in *Doyle*[36] based upon due process[37] (elementary fairness)[38] analysis.

The *Doyle* decision relied upon the penalty theory, holding it impermissible to penalize a defendant for the invocation of his fifth amendment privilege.[39] While acknowledging that "the *Miranda* warnings carry no express assurance that silence will carry no penalty . . . ," Mr. Justice Powell, writing for the majority, stated that "such assurance is implicit to any person who receives the warnings."[40] This approach is in contrast to *Hale* which adopted a strict evidentiary analysis approach reminiscent of the *Grunewald* majority.[41]

The Court noted that "every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested."[42] There is an implication that an anomaly arises when this ambiguous silence is later used to impeach the person's testimony.[43] The anomaly arises in reminding an accused that he has a constitutional privilege—the right to remain silent[44]—but using the exercise of that privilege against him later.

Greer, 17 Ariz. App. 162, 163-64, 496 P.2d 152, 153-54 (1972); State v. Griffin, 120 N.J. Super. Ct. 3, 17, 293 A.2d 217, 219 (1972).

35. 422 U.S. at 182-83 (White, J., concurring).

36. 96 S. Ct. at 2245.

37. U.S. CONST. amend. XIV.

The *Doyle* Court held:

> In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

96 S. Ct. at 2245.

38. The Court's conclusion was based upon the necessity for elementary fairness as indicated in previous opinions of the Court. *See* Johnson v. United States, 318 U.S. 189, 197 (1943). In *Johnson*, it was held that it would be unfair to a defendant, who had been informed of his right to remain silent at trial by the court and who had availed himself of that right, to allow his silence to be used against him. *Cf.* Raley v. Ohio, 360 U.S. 423, 437-40 (1959).

39. *See* note 12 *supra* and accompanying text.

40. 96 S. Ct. at 2245.

41. 422 U.S. at 177-80.

42. 96 S. Ct. at 2244. In a footnote, the Court acknowledged that in *Hale* they had recognized the inherently ambiguous nature of silence at arrest even apart from the *Miranda* warnings. The Court also noted that because the basis of the *Doyle* decision was due process it was not necessary to express an opinion on the probative value for impeachment purposes of the defendant's silence. *Id.* at 2244 n.8. *See also* Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973) ("[S]ilence at the time of arrest is not an inconsistent or contradictory statement. Silence at the time of arrest is simply the exercise of a constitutional right. . . ."); MCCORMICK § 270.

43. 96 S. Ct. at 2245, *citing Hale*, 422 U.S. at 182-83.

44. Miranda v. Arizona, 384 U.S. 436 (1966).

The effect of this is especially biting since the accused has not been warned that the exercise of his constitutional right to remain silent can be used against him at some future time.[45]

The Court points out that the error it perceives lies in the cross-examination of the defendant's silence, "thereby implying an inconsistency that the jury might construe as evidence of guilt."[46] It has been consistently held that use of an accused's post-arrest silence as evidence of guilt violates the fifth amendment privilege against self-incrimination.[47] The Court recognizes that the anomalous situation involving the defendant's silence gives rise to an impermissible inference of guilt, as well as an inference of incredibility. Thus the defendant is penalized for exercising a constitutional privilege. *Doyle* provides that no longer should an accused's arrest place him in the position of having to choose whether to talk or whether to remain silent, not knowing that the latter could be just as harmful to his cause as the former. The decision is consistent with and supportive of both an accused's rights to remain silent and to take the stand in his own defense. It is a sound reaffirmance of an individual's right to due process as guaranteed by the fifth and fourteenth amendments.

The clear direction of *Griffin*[48] and *Miranda*[49] has been toward protecting an accused's right to remain silent. To attain that end, they prohibit the placing of any penalty on the right of the accused to remain silent. Where the accused has exercised the constitutional privilege to remain silent, no penalty should be imposed on the exercise of that right.[50] *Doyle* goes be-

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45. *See* Johnson v. Patterson, 475 F.2d 1066, 1068 (10th Cir. 1973). *See also* 87 HARV. L. REV. 882, 887 (1974).

46. 96 S. Ct. at 2245 n.10. As pointed out in Fowle v. United States, 410 F.2d 48, 54 (9th Cir. 1969), it may be psychologically impossible for the jury to restrict its consideration of the examination and the comment to impeachment only.

47. *See*, Comment, *Impeaching a Defendant's Trial Testimony By Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 943 n.16 (1975).

48. 380 U.S. at 614. *Griffin* held that comment by a state prosecutor or court on the failure of the defendant to testify constituted a constitutional violation. The Court stated that the federal constitutional privilege was violated by a prosecutor's argument which urged and a jury instruction which authorized the jury to draw an inference of guilt from the defendant's failure to testify when the testimony could have reasonably been expected to deny or explain matters proved by the prosecutor. This, the Court concluded, was a penalty for exercising the privilege and a remnant of the "inquisitorial system of criminal justice" which the privilege prohibits. *See also Grunewald*, 353 U.S. at 425-26 (Black, J., concurring):

> The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.

49. 384 U.S. at 468 n.37. *See also* note 15 *supra*.

50. *Cf.* Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

yond these cases and asserts that no penalty should be attached and no inference, either of incredibility or guilt, should be drawn from a defendant's post-arrest silence because of the fundamental unfairness inherent in such a situation.[51] Due process provides a sound grounding upon which to base the decision since it is not subject to an inference of waiver as is silence or self-incrimination.

The majority in *Doyle* seems to have given preference to the *Miranda* analysis[52] over *Raffel*;[53] while the dissent relies upon *Raffel* instead of *Miranda*. *Raffel* provides that once a defendant takes the stand he waives his fifth amendment privilege against self-incrimination. The question is whether the waiver is retroactive to the time of arrest or only applicable to the defendant's statements while on the stand. The majority in *Doyle* implies that the waiver applies solely to what the defendant says upon the stand,[54] while the dissent thinks the waiver is retroactive, and therefore

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In *Walder*, it was held that a defendant who takes the stand and in his testimony goes beyond a mere denial of complicity in the crime charged, making a "sweeping claim" concerning collateral matters, may be impeached by evidence inadmissible under the fourth amendment. In essence, the Court was saying that prior inconsistent facts, illegally obtained, were admissible for determining the defendant's credibility but not his guilt.

See note 29 *supra* and accompanying text for discussion of *Harris*.

Oregon v. Hass provided the Court with another opportunity to pen an exception to the general rule as had been done in *Walder* and *Harris*. In *Hass*, after receiving the *Miranda* warnings and being told he would have to wait until he arrived at the police station to call an attorney, the defendant provided inculpatory information. This information was admissible in evidence solely for impeachment purposes where the defendant had taken the stand and testified contrary to the inculpatory information, knowing that the information had been ruled inadmissible for the prosecution's case-in-chief. Whereas *Harris* provided police with an incentive not to give the *Miranda* warnings, *Hass* provides an incentive to press the accused for incriminating statements even after he has indicated that he wants to exercise his right to counsel or to remain silent. These expansions of *Walder* seem inconsistent with an accused's constitutional rights under the fifth and fourteenth amendments.

51. 96 S. Ct. at 2245 n.10. The Court points out that after an arrested person has been given the *Miranda* warnings, the unfairness occurs when the prosecutor, in the presence of the jury, undertakes to impeach the accused on the basis of what may be the exercise of the rights enumerated by *Miranda*.

52. 384 U.S. 436 (1966). *See also* notes 15 and 49 *supra* and accompanying text.

53. 271 U.S. at 496-97:

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. . . . He may be examined for the purpose of impeaching his credibility. . . . His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference, and the jury may be so instructed. . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrasing.

54. 96 S. Ct. at 2245.

silence upon arrest can be used to impeach the defendant's trial testimony.[55]

Mr. Justice Stevens, writing for the dissent, argues that the defendants' failure to mention at the time of arrest that they had been framed is "tantamount to a prior inconsistent statement and admissible for purposes of impeachment."[56] He further argues that the defendants' failure to state that they based their silence upon the *Miranda* warnings is determinative that they should be subject to impeachment because it negates the majority's presumption that their silence was induced by reliance upon "deceptive advice."[57]

It must be remembered, however, that the defendants have a constitutional right to remain silent irrespective of the *Miranda* warnings, and their failure to state such a reliance upon *Miranda* should not negate that privilege. *Miranda* mandates merely an advising or a reminder of one's constitutional right. The majority stated that an accused by invoking a constitutional right, not a *Miranda* warning, should not be penalized for it. The defendants were not penalized for relying on the *Miranda* warnings; they were penalized for exercising a constitutional privilege—the right to remain silent—and such a penalty violates due process.

Through *Doyle* the Court has precluded the eventual necessity of adding a fifth warning to *Miranda*—that anything the accused does not say (his silence) can also be held against him. This warning, quite naturally, would in turn make all statements involuntary and therefore inadmissible since it would be nothing more than a threat. The undesirable effect of such a warning would be in preventing the admission into evidence of confessions and statements made after receiving the fifth warning because they would have been coerced.

As a result of *Doyle*, courts no longer will be faced with deciding on a case-by-case basis the evidentiary question of whether a defendant's post-

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55. *Id.* at 2248.

56. *Id.* at 2246 (Stevens, J., dissenting). See the majority's discussion of silence as inherently ambiguous.

57. *Id.* at 2246-47.

The dissent, while recognizing the limitation placed upon using the defendants' silence as evidence of guilt, relies upon *Raffel*'s allowance of the defendant's silence to be used for impeachment purposes. The dissent further argues that *Walder* permits such impeachment. Even though there is a valid constitutional objection to the admissibility of evidence as proof of guilt, this does not bar the use of that evidence to impeach the defendant's trial testimony. The dissent feels that unless the majority is willing to openly overrule *Raffel* the evidence of the defendants' silence should be admissible because, by taking the stand at trial, the defendants waived their objection to the use of their prior silence. However, the majority did not overrule *Raffel* nor did it reach these issues raised by the dissent. *See id.* at 2244 n.6.

arrest silence is sufficiently inconsistent with his trial testimony to be relevant on the issue of his credibility. Neither will they have to decide whether its probative value outweighs its prejudicial impact, no matter what its theoretical or practical probative value.

The *Doyle* decision settles this area of the law which has remained open to varying interpretations since *Miranda* was decided; its permanence is all but guaranteed.[58]

Doyle guarantees that the accused is not deprived of the ability to make an intelligent decision concerning his right to remain silent or later take the stand in his own defense. The Court has eliminated the accused's potential dilemma of exercising his right to remain silent and later jeopardizing his position by taking the stand and having to answer for that silence. It is violative of due process to use a defendant's post-arrest silence for purposes of impeaching his trial testimony; any other holding would be fundamentally unfair.

Calvin W. Colyer

58. The Court's six-to-three decision in the area of individual rights is all the stronger given the fact of the conservative composition of the present Court, especially when considering its concern for "law and order."