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Impeaching a Defendant's Testimony by Proof of Post-Arrest Silence: Doyle v. Ohio

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IMPEACHING A DEFENDANT'S TESTIMONY BY PROOF OF POST-ARREST SILENCE: *DOYLE V. OHIO*

IN *Doyle v. Ohio*,[1] THE SUPREME COURT HELD THAT THE DUE PROCESS CLAUSE of the fourteenth amendment was violated by the attempt of the prosecutor to impeach the trial testimony of the defendant by introducing evidence of his silence after he had been arrested and given the *Miranda* warnings.[2] The Court declared that it is fundamentally unfair to allow post-arrest silence to be used to discredit a defendant's testimony, and reasoned that since the state is required to advise the arrestee that he has the right to remain silent, silence which follows the warning may be an exercise of that right.[3] The Court also found that the warning contains an implicit assurance that silence will carry no penalty.[4]

The *Doyle* opinion decisively eliminates the controversy which surrounded impeachment by post-arrest silence. This controversy stemmed from conflict between two considerations regarding silence at the time of arrest. (1) An arrestee's silence may have some evidentiary value when he later elects to exculpate himself at trial, and inquiry regarding his silence may be deemed the proper subject of cross-examination. (2) On the other hand, an arrestee has a constitutional right to remain silent,[5] and the subsequent use of the exercise of this right to create an inference of guilt at trial may be deemed constitutionally reprehensible.

In *Doyle*, the majority did not undertake an exhaustive analysis of the considerations puzzled over at length by other courts which considered this issue; indeed, the statement in *Doyle* that impeachment by post-arrest silence violates due process concludes a process of deliberation begun by the Court in *United States v. Hale*.[6] The Court in *Hale* had addressed the same issue before the Court in *Doyle*, with the significant difference that the *Hale* trial had taken place in a federal court.[7]

The Court in *Hale* was faced with two options. The first of these was to discuss the issue in terms of its constitutional significance, and hold the questioned impeachment procedure permissible or impermis-

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[1] 96 S. Ct. 2240 (1976).

[2] *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

[3] 96 S. Ct. at 2244-45.

[4] *Id.*

[5] *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

[6] 422 U.S. 171 (1975).

[7] Justice Marshall, writing for the *Hale* majority, noted that:

> [Hale] was tried in Federal District Court prior to the effective date for the transfer of jurisdiction over the D.C. Code offenses under the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473.

Id. at 172 n.1. *See* Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of Conventional Wisdom and a Dash of Innovation*, 20 AM. U. L. REV. 237, 240-42 (1971).

sible on constitutional grounds.[8] The second option was to resolve the issue on the basis of the Court's supervisory powers over the lower federal courts.[9] This approach would enable the Court to deal with the impeachment issue as an exercise of the Court's authority to supervise the procedures within the federal court system, and thus avoid the constitutional issue inherent in impeachment by post-arrest silence.

The *Hale* Court adopted the latter approach, and it proved deficient. Though the Court in *Hale* undertook a scholarly and extensive analysis of the problems surrounding impeachment by post-arrest silence, the holding of the Court was based only on evidentiary considerations and did not address the constitutional issue which was at the heart of the controversy in the lower courts.

Doyle presents the Court's definitive resolution of the controversy. The primary service of the *Doyle* Court was to address the issue which the *Hale* Court avoided; that is, to set a strong precedent based on the *Hale* majority analysis and the due process rationale advanced by Justice White in his *Hale* concurrence.[10] *Doyle* is the precedent which controls state and federal court proceedings.

This Note will attempt to outline the genesis of the issue of impeachment by post-arrest silence by first discussing the various inquiries into the probative value of silence which had been undertaken by courts on the federal level before *Hale*. The focus will then shift to the *Hale* Court's treatment of this issue. The constitutional aspects of the issue will then be discussed, and the pronouncement of the *Doyle* Court will be analyzed with an emphasis on the continuity between the *Hale* and *Doyle* decisions.

I. *United States v. Hale*: The Evidentiary Aspects of Impeachment by Silence

William Hale was arrested after having been identified by a man who had been robbed of $96. He was taken to a police station, advised of his right to remain silent, and searched. The search revealed that he had $158 in his possession. When the police asked how he had obtained the money, Hale made no response.[11] Eventually he was indicted, and tried for robbery.

At his trial in the Federal District Court for the District of Columbia,[12] Hale took the stand and asserted his innocence. He testified that his estranged wife had just received her welfare check the day of the robbery and, as she had done on several prior occasions, had given him about $150 to purchase money orders for her.[13] On cross-examina-

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[8] 422 U.S. at 173.

[9] *Id.* at 181.

[10] *Id.* at 182-83.

[11] *Id.* at 174.

[12] *See* note 7 *supra*.

[13] 422 U.S. at 174. Hale's estranged wife corroborated this testimony. United States v. Anderson, 498 F.2d 1038, 1040 (D.C. Cir. 1974), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975).

tion the prosecutor attempted to impeach Hale's testimony regarding his possession of the money by eliciting from him the admission that he had not offered this exculpatory information to the police when he was arrested and had responded to police questioning about the money by remaining silent.[14] After Hale's admission, his attorney moved for a mistrial, but it was denied.[15] Instead, the trial judge instructed the jury that the questioning was improper and told them to disregard the question and Hale's answer.[16] Hale was subsequently convicted, given a suspended sentence, and placed on three years probation.[17] Shortly thereafter, Hale appealed to the Court of Appeals for the District of Columbia Circuit, contending that the use of his pre-trial silence against him at trial constituted reversible error.[18] The court of appeals reversed his conviction,[19] finding support in *Miranda v. Arizona*,[20] *Griffin v. California*,[21] and *Grunewald v. United States*[22] for its conclusion that the use of the defendant's pre-trial silence to impeach his testimony was, under the fifth amendment, constitutionally impermissible.[23] In so holding, the District of Columbia Circuit acknowledged that it was merely following a trend set by other federal courts of appeals[24] prohibiting the use of silence at trial by relying on a dictum in the Supreme Court's *Miranda* decision:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when

[14] The colloquy between the prosecutor and Hale included the following exchange:

Q. Did you in any way indicate [to the police] where that money came from?
A. No, I didn't.
Q. Why not?
A. I didn't feel that it was necessary at the time.

422 U.S. at 174.

[15] *Id.* at 172-73.

[16] The court of appeals found that the instruction of the trial judge regarding the use of the defendant's silence to impeach him was not effectively curative in this case, but rather, the prejudicial effect of re-emphasizing the fact of the defendant's silence to the jury actually aggravated the harm to the defendant. 498 F.2d at 1045.

[17] *Id.* at 1039.

[18] *Id.* at 1040.

[19] *Id.* at 1039.

[20] 384 U.S. 436 (1966).

[21] 380 U.S. 609 (1965).

[22] 353 U.S. 391 (1957).

[23] 498 F.2d at 1040-44. The court cited *Grunewald* as one authority for its decision favoring Hale. *Grunewald* was not decided on constitutional grounds, but was decided as an exercise of the Supreme Court's supervisory authority over the lower federal courts. Therefore, although the four concurring Justices in *Grunewald* urged that the issue be decided on constitutional grounds, *Grunewald* cannot technically be used as authority to support a constitutional holding.

[24] Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969).

The First Circuit held before *Miranda* that such impeachment by use of prior silence was not proper. Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965). The Seventh and Eighth Circuits have not yet dealt with this issue, and the Fourth Circuit has not directly considered the issue. *See* United States v. White, 377 F.2d 908, 910-11 (4th Cir. 1967). *But cf.* United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974). *See* notes 32-51 *infra* and accompanying text for the position of the Third and Fifth Circuits.

> he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[25]

When *Hale* reached the Supreme Court on certiorari many expected the Court's final determination to be constitutionally significant. To their surprise, the Court's opinion in *Hale* skirted the constitutional issue that the circuit court had focused upon. Instead, the *Hale* Court's opinion developed along traditional pre-*Miranda* guidelines for the use of an accused's silence to impeach his credibility at trial. Chief Justice Burger, who concurred in the unanimous decision of the Court, stated that a potential "tempest in a saucer"[26] was rightly avoided by the Court's decision not to investigate the constitutional aspects of using an arrestee's silence to impeach his testimony at trial.[27] The Court in *Hale* found that Hale's silence could be attributed to a number of factors, and was not necessarily inconsistent with his trial testimony.[28] The Court concluded that Hale's silence was not probative of his credibility, and therefore, impeachment by reference to his post-arrest silence was not permissible.[29] By deciding the case for the defendant on such narrow evidentiary grounds, and emphasizing the uniqueness of the particular fact situation, the Court did not set a strong precedent in *Hale*. In fact, the Court only postponed until *Doyle v. Ohio* the inevitable confrontation with the constitutional considerations surrounding the use of an arrestee's silence to impeach his trial testimony.[30]

A. *Pre-*Hale *Inquiries into the Probative Value of Silence*

The majority of federal courts of appeals confronted with the use of an arrestee's post-arrest silence for impeachment purposes before *United States v. Hale* had, like the District of Columbia Circuit Court, disallowed such use on constitutional grounds.[31] Two circuit courts, the Fifth and Third, had determined, however, that a constitutional resolution of the issue was not mandatory, and had initiated the type of inquiry into the evidentiary value of the arrestee's silence that was eventually undertaken by the Supreme Court in *United States v. Hale*.

1. *Fifth Circuit*

The Fifth Circuit held in *United States v. Ramirez* that a defendant's silence upon arrest could appear so inconsistent with his later exculpa-

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[25] 384 U.S. at 468 n.37. Since none of the four cases joined before the Court in *Miranda* involved the use of the defendant's silence under police interrogation as part of the government's case against him, the Court's statement in this footnote is clearly dictum, and will be referred to hereinafter as the "*Miranda* dictum."

[26] 422 U.S. at 181 (Burger, C.J., concurring).

[27] *Id.* at 175 n.4.

[28] *Id.* at 177-80.

[29] *Id.* at 180.

[30] *See* notes 98-196 *infra* and accompanying text for full treatment of the Court's approach to the constitutional issues in *Doyle*.

[31] *See* note 24 *supra*.

tory explanation at trial that prosecutorial questioning on his silence would constitute valid impeachment of the defendant's credibility.[32] Ramirez was arrested for the sale of heroin, and did not offer any explanation to the police at the time of his arrest. Ramirez took the stand at his trial and testified that he had been forced to sell heroin by strangers from Mexico who had threatened to harm him and his family if he did not co-operate. Ramirez further testified that he actually wanted to be apprehended so that he would no longer be compelled to sell heroin. When he was cross-examined, the prosecutor elicited from him that he had not offered this "Mexican-coercion" explanation to the police when he was arrested.[33] Subsequently, Ramirez was convicted and appealed to the Fifth Circuit Court of Appeals.

The circuit court was apparently cognizant of the constitutional issues raised, but the court held that the *Miranda* dictum was not applicable.[34] Instead, the *Ramirez* court seized upon *United States v. Harris*[35] as authority for its allowance of the prosecution's use of Ramirez' post-arrest silence as a prior inconsistent statement because Ramirez had attested to his innocence at trial. The *Ramirez* court's reliance on *Harris*, however, was misplaced. The statement used to

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[32] 411 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).

[33] The following colloquy occurred in the trial court between the prosecutor and Ramirez:

> Q. All right and you didn't tell a single one of those [police officers] this story that you have told from the witness stand this morning, did you?
> A. *At that moment I didn't think so.*
> Q. In fact you never have told that story to any officer, that you told on the stand today?
> A. No.

Id. at 953.

[34] *Id.* at 954. The existence of this constitutional dimension had not been recognized by the Fifth Circuit prior to *Ramirez*. *See* Sharp v. United States, 410 F.2d 969 (5th Cir. 1969); United States v. Pledger, 409 F.2d 1335 (5th Cir. 1969). And the fact that *Ramirez* did not recognize the applicability of the policies voiced in Griffin v. California, 380 U.S. 609 (1965), regarding the fifth amendment privilege against self-incrimination creates some doubt whether the *Ramirez* court appreciated all the constitutional aspects of the issue before it. *See* notes 138-60 *infra* and accompanying discussion in text.

[35] 401 U.S. 222, 226 (1971). In *Harris*, the defendant was arrested and charged with the sale of heroin, was not informed of his *Miranda* rights, and gave incriminating answers to certain questions asked by police immediately after his arrest. At trial he claimed he did in fact sell a glassine bag to an undercover agent, but that he believed it contained baking powder and was part of a scheme to defraud the purchaser. The Court in *Harris* held that even though statements made by an arrestee before he was informed of his *Miranda* rights were not admissible against him in the government's case-in-chief, he could be impeached by such statements during cross-examination if the statements were determined to be inconsistent with his testimony at trial. Chief Justice Burger, writing for the majority in *Harris*, had reasoned that the safeguards provided by *Miranda* could not be used by a defendant to enable him to commit perjury in shaping a defense.

The Court in *Harris* relied heavily on Walder v. United States, 347 U.S. 62 (1954), in which the Court permitted physical evidence, inadmissible in the prosecution's case-in-chief, to be used for impeachment purposes. The Court saw no difference in principle from the fact that Walder was impeached on collateral matters included in his direct examination, whereas the defendant in *Harris* was impeached on testimony bearing directly on the crimes with which he had been charged. 401 U.S. at 225.

For a critical appraisal of the Court's reasoning in *Harris*, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971).

impeach the defendant's credibility in *Harris* was prima facie inconsistent with his trial testimony and tended to show that the defendant was perjuring himself.[36] The silence of an arrestee, however, cannot be deemed inconsistent per se because of the acknowledged ambiguity of silence in the arrest situation.[37] In addition, the Supreme Court's use of the words "utterance" and "statement" interchangeably in *Harris* indicated that their holding would not be directly applicable to a situation in which it is the defendant's silence, rather than an utterance, that comprises the evidence sought to be admitted for impeachment purposes.[38] Furthermore, the Court in *Harris* allowed the prosecution to make limited use of statements made by the defendant before he had been apprised of his *Miranda* rights. By contrast, in *Ramirez*, the silence in question was due to the defendant's failure to explain his situation to the police, and it is irrelevant to the court's inquiry whether Ramirez had been apprised of his *Miranda* rights or not.[39] Thus the applicability of the Court's limited holding in *Harris* to the situation of a defendant subjected to impeachment by his silence at the time of arrest is questionable without at least a determination that the accused's silence was an inconsistent statement or utterance within the meaning of *Harris* and that the silence occurred before the defendant had been apprised of his *Miranda* rights.

The most serious omission of the *Ramirez* court, however, was its lack of discussion of the factors which could have influenced the decision of the accused to remain silent when arrested. The court's abrupt conclusion, unsupported by any reasoning, that a defendant who offers a defense of coercion subjects himself to impeachment at trial by his pretrial silence,[40] was too hasty. The *Ramirez* court did not even inquire into the possible motivations for keeping silent, but rather seemed to have been totally won over by the prosecutor's argument to the jury at trial that Ramirez must have been lying "since a man actually under duress and fearful for his family's safety would have informed the police of such a dangerous situation upon being apprehended."[41] In short, Ramirez' testimony that he desired to get caught seemed to ignite the spark of incredulity which fired the *Ramirez* court's fervor to apply *Harris* in order that Ramirez not be allowed to get away with an apparent perjury.

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[36] 401 U.S. at 223.

[37] *See* United States v. Hale, 422 U.S. 171, 177 (1975).

[38] If somehow it is determined that an arrestee's silence is an "inconsistent statement" for purposes of *Harris*-type impeachment, there is an important policy reason for not finding *Harris* analogous to the situation presented in *Hale*, *Doyle*, or *Ramirez*. The exclusionary rule was not applied to the defendant's statements in *Harris* because the use of this evidence to impeach would not have the effect of significantly increasing police infringement on the constitutional rights of arrestees. 401 U.S. at 225. Allowing an arrestee's silence into evidence by means of impeachment, however, would enable the police to badger a defendant in a way already deplored by the Warren Court in *Miranda*. 384 U.S. at 468. *See* notes 113-16 *infra* and accompanying text for a discussion of the *Doyle* Court's treatment of *Harris*.

[39] 441 F.2d at 953.

[40] *Id.* at 954.

[41] *Id.*

The Fifth Circuit later qualified the position it took in *Ramirez*, when in *United States v. Fairchild*[42] it set out the "blatant inconsistency" test:

> [T]o be admissible, keeping silence must be much more than ambiguous. It must appear to be an act blatantly inconsistent with the defendant's trial testimony . . . . [which testimony must be] of such a character that reasonable men would be left with the distinct impression that had it been true it would have been related to law enforcement authorities *even though* the defendant was specifically informed that he need not speak.[43]

By raising the standard of permissible impeachment by silence from that of "inconsistency" to "blatant inconsistency," the Fifth Circuit impliedly called for a more stringent investigation into the reasonableness of the accused's silence at the time of arrest than it had undertaken in *Ramirez*. In *Fairchild*, the court undertook an inquiry into possible explanations for the defendant's silence, concluding that, under the circumstances, Fairchild "did what a reasonable man could be expected to do — he remained silent."[44]

2. *Third Circuit*

The only other circuit court of appeals to allow impeachment of a defendant's testimony by use of silence was the Third Circuit in *United States ex rel. Burt v. New Jersey*.[45] The silence about which the defendant in *Burt* was cross-examined occurred when he had been arrested for breaking and entering. He was ultimately tried for and convicted of second degree murder.[46] The *Burt* court stated that even

[42] 505 F.2d 1378 (5th Cir. 1975).

[43] *Id.* at 1382 (emphasis in original). Although the impeachment by post-arrest silence was found to be improper, the *Fairchild* court determined that, since no objection was raised, the trial court did not commit plain error in failing to give a sua sponte corrective instruction. Thus the court of appeals affirmed the defendant's conviction.

[44] *Id.* at 1382. Undoubtedly a large factor in the defendant's favor was that, immediately prior to his arrest, he had offered a police detective and an FBI agent the same story which he later told in an expanded form from the witness stand at his trial. Thus, the danger of fabrication of testimony which might militate for impeachment by the defendant's silence at the time of arrest was not present in this situation, and this seems to have dictated the court's conclusion that the impeachment by silence was impermissible. *See* United States v. Harp, 513 F.2d 786 (5th Cir. 1975), decided shortly before *Hale*. In *Harp*, the Fifth Circuit found that it was proper to impeach the testimony of convicts who had been apprehended while allegedly trying to escape and who claimed at trial that they were kidnapped by another convict and acted according to his escape plan while under duress. The *Harp* court found "no possible rational explanation" for the defendants' failure to explain these peculiar circumstances when apprehended. *Id.* at 790 n.7. Though the *Harp* court's method of inquiry seems aligned with the subsequent *Hale* opinion, the defendants in *Harp* were already convicts, and thus the policies voiced in *Hale* regarding the plight of an arrestee and the chance for immediate release by volunteering exculpatory explanations are not applicable. *See* notes 67-71 *supra* and accompanying text. The peculiarity of the fact situation in *Harp* limits its precedential value.

[45] 475 F.2d 234 (3rd Cir.), *cert. denied*, 414 U.S. 938 (1973).

[46] The defendant Burt had been found sleeping in a store by police who had been alerted to the presence of an intruder by a broken window. He was arrested and detained solely

though the defendant was not questioned regarding his involvement in the murder at the time of his arrest, "there was no reason for him not to comment on the allegedly accidental shooting."[47] The *Burt* court found the defendant's silence inconsistent with his later testimony about the accidental nature of the shooting, and relied on *Ramirez* to support its holding that the prosecution had a right to impeach the defendant's testimony by referring to his prior inconsistent act of remaining silent.[48] There was some confusion in the *Burt* holding, however, over whether a defendant could actually be impeached by his silence per se at the time of arrest, or whether he could be impeached by his silence insofar as it was indicative of his "failure to check on or in some way aid the person whom he had just shot . . . ,"[49] a kind of silence which suggests an inconsistency between the defendant's actions after the shooting and his later testimony.[50] When the defendant's silence is viewed in the light of the fact that he had not been formally accused of murder, the applicability of the *Burt* case to the issue presented in *Hale*, *Ramirez*, and like cases becomes questionable. In a subsequent district court case which the Third Circuit Court of Appeals affirmed, the holding in *Burt* was interpreted to apply only to situations in which the police interrogation did not concern the crime for which the defendant was later indicted.[51]

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on the charge of breaking and entering. A revolver was found on his person. Later, police were contacted about a murder in the vicinity, and pieced together the defendant's involvement, for which he was subsequently indicted while in custody. At trial, the defendant testified that he had indeed shot the victim, "Shorty," but maintained that the killing had been accidental, and was the result of a fight which the victim had initiated. *Id.* at 234-36.

On cross-examination, the following colloquy occurred between the prosecutor and the defendant:

> Q. And you didn't tell — up to the time you got to the Camden jail — you didn't tell anybody about Shorty, did you?
> A. No Sir.
> Q. Did you tell anybody about Shorty after you got to the Camden jail?
> A. No, Sir.

Id. at 237.

[47] *Id.* at 236.

[48] *Id.*

[49] *Id.*

[50] Judge Rosenn stated in his concurring opinion in *Burt* that:

> [t]he cross-examination was not directed at appellee's failure to speak in the face of self-incrimination. It was aimed at his failure to act in the face of alleged innocent conduct.

Id. at 238 (Rosenn, J., concurring).

[51] United States v. Holland, 360 F. Supp. 908 (E.D. Pa.), *aff'd* 487 F.2d 1395 (3d Cir. 1973). The *Holland* court remarked that:

> [u]nlike Burt, the defendant in this case was exercising his privilege in the face of police interrogation concerning the charges lodged against him.

360 F. Supp. at 912. *See also* Agnellino v. New Jersey, 493 F.2d 714 (3d Cir. 1974), in which Chief Judge Seitz, in his concurring opinion, distinguished the situation in *Burt* from the situation of an arrestee who remains silent as in *Hale*:

> There are, of course, peculiar circumstances such as found in *Burt* where we are concerned not with a defendant's failure to offer an exculpatory statement to rebut an accusation but with his failure to act, to summon help in that case.

Id. at 729. There was considerable doubt in *Agnellino* over the precise nature of the issue before the court. The lead opinion held that the prosecution could comment on the

It is evident from the above discussion that those federal courts of appeals that had not chosen to disallow impeachment by use of post-arrest silence on constitutional grounds were still struggling to develop criteria for such use of silence. The *Hale* Court addressed itself to the evidentiary problems encountered in determining the factors which govern the admissibility of silence for impeachment purposes.

B. *The* Hale *Majority Opinion*

1. *The Evidentiary Issue*

The Supreme Court granted certiorari in *United States v. Hale* to clear up the conflict among the federal courts of appeals regarding the propriety of impeachment by post-arrest silence.[52] The *Hale* Court attempted to resolve this dispute by formulating the issue before it as a purely evidentiary one, even though it acknowledged that the "grave constitutional overtones" of the issue contributed to its importance.[53] In pursuing its evidentiary analysis, however, the Court made several omissions that enervated its holding in *Hale* and effectively left the lower courts without any clear guidance on the use of post-arrest silence.

The first of these omissions occurred in the Court's treatment of silence as an inconsistent statement. The Court grounded its discussion of the probative value of silence in a "basic rule of evidence"[54] found in Wigmore:

> [p]rior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent.[55]

The *Hale* Court's ready acceptance of Wigmore's classification of silence as a "statement" for purposes of impeachment is troubling. In fact, there seems to be some authority for not classifying post-arrest silence as a statement. The framers of the Federal Rules of Evidence, for example, recognized the difficulties inherent in classifying certain types of nonverbal behavior as statements for purposes of the hearsay rules.[56] Rule 801(a) defines "statement" as: "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an

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defendant's failure when arrested to assert the alibi he later offered at trial. The other two judges concurred, but expressed the view that the prosecutor had commented on the difference between the defendant's statements after arrest and the explanation he offered at trial, rather than on the defendant's silence at the time of arrest. Due to this confusion in the *Agnellino* court, the bearing of *Agnellino* on the present discussion is questionable.

[52] 422 U.S. 171, 173 (1975).

[53] *Id.* at 180 n.7.

[54] *Id.* at 176.

[55] *Id.* citing to 3A J. WIGMORE, EVIDENCE § 1040 (J. Chadbourn rev. ed. 1970). Wigmore's definition of "inconsistent statement" includes behavior, and thus clearly includes silence. Also listed are utterances under oath, admissions, confessions, and joint writings.

[56] FED. R. EVID. 801. The Federal Rules of Evidence went into effect July 1, 1975. The *Hale* opinion was handed down June 23, 1975.

assertion."[57] The rule focuses on the intent of the hearsay declarant to determine whether an instance of nonverbal behavior qualifies as a statement by that person. Under this definition, silence at the time of arrest, which has been widely considered not to be an admission in criminal cases because of the fifth amendment right to remain silent,[58] could not seem to qualify as a statement for hearsay purposes either. The ever-present possibility that the arrestee is relying on his *Miranda* right to remain silent effectively blocks any inquiry regarding his intent to assert something by his silence unless the defendant voluntarily waived his *Miranda* rights.[59] The Court in *Hale* was not concerned with a hearsay problem, and thus need not have been concerned with Rule 801. Nevertheless, the Court's opinion might have been more convincing and authoritative had it explicity set out its reasons for determining that the admittedly ambiguous silence was a "statement" at all.

The second of the Court's omissions was its selective use of Wigmore's pronouncements to form the foundation of its evidentiary analysis. The Court cited Wigmore throughout its discussion of what probative weight can be attached to silence, and concurred with Wigmore's observations that silence per se is a poor index of a person's agreement or disagreement with statements or accusations made in his presence.[60] The Court also agreed that the accused's failure to deny an incriminating accusation is considered probative of acquiescence only if an objection would have been "natural" under the circumstances.[61]

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[57] FED. R. EVID. 801(a).

[58] *See* note 65 *infra*. *See also* the Advisory Committee's Note to Rule 801(d)(2)(B), FED. R. EVID., in which the Committee discusses some reasons why tacit criminal admissions lack significant probative value:

> In criminal cases . . . 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 may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved.

Id. The Committee's Note further proposed that *Miranda* and other due process decisions by the Supreme Court, *see* note 77 *infra*, have resolved this problem, and thus they found no need to specifically provide for tacit criminal admissions in the rule. *Id.*

[59] *Miranda* clearly specified that a valid waiver of these rights could not be presumed simply from silence; rather, the accused must expressly state that he is willing to make a statement. 384 U.S. at 475.

[60] 422 U.S. at 176. In his discussion of the relevancy of adoptive or tacit admissions, Wigmore explained that:

> [T]he inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation — namely, ignorance, or dissent — unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct.

4 J. WIGMORE, EVIDENCE § 1071 (J. Chadbourn rev. ed. 1972).

[61] 422 U.S. at 176. In his discussion of when silence can be an "inconsistent statement" for purposes of impeachment, Wigmore stated:

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

3A J. WIGMORE, EVIDENCE § 1042 (J. Chadbourn rev. ed. 1970) (emphasis in original).

Wigmore, however, has indicated that this observation about the probative value of post-arrest silence may have been made obsolete by *Miranda*.[62] This section of Wigmore, which seems indispensible to a full understanding of the issue, was not cited by the Court. Presumably, the reason for this omission was the *Hale* Court's expressed avoidance of the constitutional issue regarding the use of *Miranda* induced silence.[63] The fact that Wigmore acknowledged that *Miranda* may have superseded some of the evidentiary principles regarding use of an accused's silence in a criminal case, however, is an indication from an established authority that a thorough discussion of the evidentiary weight of silence is not possible without serious consideration of the impact of the *Miranda* dictum.[64]

The *Hale* Court's final omission was its failure to draw the vital distinction between use of silence as an impeachment device and use of silence as an admission of the defendant in the prosecution's case-in-chief. Most federal courts after *Miranda*, when faced with the issue of whether a prosecutor could use evidence of post-arrest silence in his case-in-chief against the defendant, had not undertaken an analysis of the probative value of such silence but had uniformly prohibited its use on fifth amendment grounds.[65] The *Hale* Court, however, did not

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[62] In his discussion of admissions by silence, Wigmore noted that:

> [c]ertain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party was at the time *under arrest* creates such a situation has been the subject of opposing opinions. . . .

4 J. WIGMORE, EVIDENCE § 1072(4) (J. Chadbourn rev. ed. 1972) (emphasis in original). This section refers to the impact of the *Miranda* dictum. As noted in Wigmore's discussion of the latest developments in confessions and admissions:

> *Miranda* has altered certain pre-existing doctrines predicated on passive behavior, such as silence. That this pronouncement [the *Miranda* dictum] may require a state to modify its pre-existing doctrines of "tacit admissions" is becoming increasingly evident.

3 J. WIGMORE, EVIDENCE § 821 n.3 (J. Chadbourn rev. ed. 1970). Even before *Miranda*, silence in the face of accusation was generally considered not sufficiently probative to be an "admission" unless certain stringent criteria were met. *See* Comment, *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 1036-44 (1966); Note, *Tacit Criminal Admissions* 112 U. PA. L. REV. 210 (1963); 31 U. CHI. L. REV. 556 (1964).

[63] 422 U.S. at 175 n.4.

[64] 3 J. WIGMORE, *supra* note 62, at § 821 n.3. *See also* C. MCCORMICK, LAW OF EVIDENCE § 161 (2d ed. 1972), in which McCormick asserted that the Court's pronouncement in the *Miranda* dictum

> leaves little doubt that silence or a claim of the privilege made in response to a police accusation during custodial interrogation is inadmissible. . . .

For a discussion of the effect of *Miranda* on tacit criminal admissions, see 52 CORNELL L.Q. 335 (1967); 36 TENN. L. REV. 566 (1969); Note, *The Miranda Decision and its Effects on the Tacit Admissions Rule in Pennsylvania*, 28 U. PITT. L. REV. 77 (1966). See 3 J. WIGMORE, EVIDENCE § 821 n.3. (J. Chadbourn rev. ed. 1970) for a listing of recent state cases which have considered the effect of *Miranda* on tacit admissions.

[65] Though this issue has never been before the Supreme Court, lower federal courts have uniformly held that a defendant's silence during police custody and interrogation cannot be admitted on the question of guilt. *See, e.g.*, United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974); United States v. Faulkenbery, 472 F.2d 879 (9th Cir.), *cert. denied*, 411 U.S. 970 (1973); United States v. Kroslack, 426 F.2d 1129 (7th Cir. 1970); United States v. Arnold, 425 F.2d 204 (10th Cir. 1970); United States v. Nolan, 411 F.2d 588 (10th Cir.), *cert. denied*, 396 U.S. 912 (1969); United States *ex rel.* Smith v. Brierly, 384 F.2d 992 (3d Cir. 1967); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); Helton v.

demonstrate an awareness of the bearing which this uniform disallowance of silence in the case-in-chief had on the impeachment issue. Rather, the *Hale* Court relied on Wigmore's dated doctrines regarding silence to advance the web-encrusted theory that "in most circumstances, silence is so ambiguous that it is of little probative force."[66] The Court's failure to relate this vague pronouncement to the narrow parameters of impeachment use of silence indicates a further inadequacy in its approach to the issue in *Hale*. By picking and choosing convenient passages from Wigmore, reiterated without further reflection or analysis, the Court obscured the issue before it and foreclosed the possibility of undertaking a treatment which would have proved instructive to the lower courts.

2. *The Plight of the Arrestee*

Though the Court failed to entirely treat the issue before it in *Hale*, the majority opinion demonstrated its sensitivity to the various factors which may well influence a particular arrestee to remain silent.[67] The Court adopted Judge Traynor's observation that arrest and interrogation may be so intimidating whether the accused is innocent or guilty, that his silence may be motivated more by fear than anything else.[68] For example, the Court noted that a suspect may not comprehend the questions asked him; may not be aware that certain questions require an answer;[69] may remain silent out of fear of incriminating others; or may be so disoriented by the hostile and unfamiliar circumstances in which he finds himself that he becomes averse to volunteering any information, or answering any questions.[70] In short, the Court recognized that a truly accurate inquiry into the actual motive for silence at arrest may be fraught with speculation of the most subjective nature in which the peculiarities of the individual defendant must be acknowledged as having direct bearing on his decision to speak out or to remain silent.[71]

United States, 221 F.2d 338 (5th Cir. 1955); United States v. LoBiondo, 135 F.2d 130 (2d Cir. 1943). The courts which confronted this issue after 1965 relied specifically on Griffin v. California, 380 U.S. 609 (1965). *See* notes 138-160 *infra* and accompanying discussion in text.

[66] 422 U.S. at 176.

[67] *Id.* at 176-77.

[68] Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 676 (1966). Published just before the Court's opinion in *Miranda* was handed down, Traynor's remarks heralded *Miranda*'s footnoted prohibition against prosecutorial use of pre-trial silence at trial:

> [The defendant] could be readily protected at the trial from such inferences by a rule precluding the prosecution from interpreting silence in the face of police accusation as an adoptive admission . . . . I would hence welcome a rule that would protect silence at the pretrial stage from invidious interpretation at the trial.

Id.

[69] 422 U.S. at 177.

[70] *Id.*

[71] Relevant to these observations about the possible motives of an accused for remaining silent, other than feelings of guilt, are the comments of Judge Musmanno:

> Who determines whether a statement is one which "naturally" calls for a denial? What is natural for one person may not be natural for another. There

Consideration of the factors that may influence an accused to remain silent when arrested led the *Hale* Court to draw a distinction between the situation of an arrestee who remained silent and that of a defendant who declined to testify at his first trial and later took the stand at a second trial for the same offense and offered exculpatory testimony. The decision of the Court in *Raffel v. United States*[72] contained various pronouncements concerning a defendant's waiver of his prior immunity once he takes the stand,[73] and would seem to indicate that *Hale*-type impeachment is permissible.[74] The *Hale* Court was quick to declare however, that *Raffel* did not control the instant case.[75] *Raffel* dealt with a choice not to testify at a prior trial, and the prior silence in *Raffel* resulted from a decision made with the aid of counsel; in contrast, the arrestee's silence in *Hale* might have been due to any number of subjective factors, many of which involve an element of compulsion.[76] The *Hale* Court's finding that *Raffel* was not control-

> are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?

Commonwealth v. Dravecz, 424 Pa. 582, 585, 227 A.2d 904, 906 (1967). In *Dravecz*, the Pennsylvania Supreme Court explicitly overruled the precedent contained in Commonwealth v. Vallone, 347 Pa. 419, 32 A.2d 889 (1943), which held as admissible evidence that the accused remained silent in the face of accusation after arrest.

[72] 271 U.S. 494 (1926). The defendant was indicted and tried twice on charges of conspiring to violate the National Prohibition Act. At the first trial, a government agent testified that after he had searched the premises of a drinking place, Raffel had admitted that he owned it. Raffel did not take the stand in his own behalf, and the jury failed to reach a verdict. At the second trial, the agent offered the same testimony, and Raffel took the stand to deny that he made such a statement. The presiding judge, over the objection of defense counsel, then elicited by questioning Raffel the fact that he had not testified at his first trial:

> Q. Did you go on the stand and contradict anything that was said?
> A. I did not.
> Q. Why didn't you?
> A. I did not see enough evidence to convict me.

The second trial resulted in Raffel's conviction. On certification of whether it was error to compel Raffel to disclose why he had not taken the stand in the first trial, the Supreme Court decided it was not error.

[73] 271 U.S. at 497:

> 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 embarrassing.

Id. For an application of this argument to the situation of a defendant who takes the stand and is sought to be impeached by his prior silence, see United States v. Anderson, 498 F.2d 1038, 1048 (D.C. Cir. 1974) (Wilkey, J., dissenting), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975); Johnson v. Patterson, 475 F.2d 1066, 1069 (10th Cir.) (Breitenstein, J., dissenting), *cert. denied*, 414 U.S. 878 (1973).

[74] 271 U.S. at 499. The *Raffel* Court concluded:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do . . . . We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, other than that in which the defendant preserves it by refusing to testify.

Id.

[75] 422 U.S. at 175.

[76] The *Hale* Court further asserted that

> the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence.

ling seems sensible, especially in light of the due process considerations regarding the arrest situation which have been put forth in other decisions of the Supreme Court since *Raffel* was decided in 1926.[77]

3. Grunewald v. United States *Followed: From the Grand Jury to the Stationhouse*

The Court in *Hale* found a viable parallel between the circumstances of the instant case and the situation which had been before the Court in *Grunewald v. United States*.[78] In *Grunewald*, Halperin, a witness before a grand jury, declined to answer a series of questions on the ground that the answers might tend to incriminate him. He was later indicted, and took the stand at his trial in a federal court, responding to the same questions formerly put to him by the grand jury in a manner consistent with innocence. On cross-examination, the prosecutor attempted to impeach Halperin by eliciting testimony from him concerning his earlier invocation of the fifth amendment privilege on the same subject matter.[79] The trial court allowed this method of impeachment, Halperin was convicted, and his subsequent appeal reached the Supreme Court. The Court perceived the use of the defendant's prior silence as an evidentiary question and concluded that he had good reasons, other than culpability, for not speaking.[80] The Court ruled that the defendant's prior silence was not inconsistent with his later

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422 U.S. at 177. Presumably the pressures of trial are also exceeded by the pressures of in-custody interrogation, a fact which is borne out by the *Hale* Court's discussion of Grunewald v. United States, 353 U.S. 191 (1957). *See* notes 84-92 *infra* and accompanying discussion in text.

[77] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[78] 353 U.S. 391 (1957).

[79] *Id.* at 391.

[80] *Id.* at 422. The *Grunewald* Court extensively investigated the particular circumstances of the defendant before finally determining that the use of his prior silence to impeach him was impermissible. The Court reasoned that, in order for the defendant Halperin's silence to be used to impeach him, the silence itself must be determined to be inconsistent with the defendant's later trial testimony. The *Grunewald* Court cautioned against reading *Raffel* to mean that such a preliminary inquiry on the inconsistency of silence was unnecessary, since the Court in *Raffel* was concerned with a rather narrow issue which did not apply to the situation before the Court in *Grunewald*. The question certified to the Supreme Court in *Raffel* follows:

> Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.

271 U.S. at 496.

The defendant Halperin exercised his privilege before the grand jury, to avoid answering whether he knew Grunewald. The Court noted that a lack of response was in fact consistent with his later testimony at trial that his association with Grunewald was in no way tainted by criminal activity. 353 U.S. at 422. The Court reasoned that, if Halperin had divulged the fact that he knew Grunewald, he would have proffered information which could conceivably have been used to link him to a criminal conspiracy even though his friendship with Grunewald, as he later testified at trial, was devoid of such contacts. This statement by the Court indicated the liberal spirit with which the Court had traditionally interpreted fifth amendment protection.

testimony to a degree which would justify its admission into evidence as a prior inconsistent statement.[81]

The *Grunewald* Court examined three factors relating to Halperin's claim of privilege before determining that there was no inconsistency between his silence before the grand jury and his trial testimony. Briefly, these factors were: (1) repeated insistence of innocence before the grand jury, (2) the invocation of the privilege in a tribunal in which the procedural safeguards available to the claimant were less than those ensured by a hearing in court,[82] and (3) the degree to which the witness was being considered a potential defendant at the time of the questioning during which the privilege was invoked. The Court found each of these factors present in Halperin's situation, and concluded that his silence before the grand jury could not be used to impeach his later exculpatory testimony because it lacked probative value on the issue of his credibility.[83]

These considerations were adopted by the *Hale* Court as the basis of its analysis of the evidentiary value of Hale's silence.[84] An application of the *Grunewald* test to the facts of *Hale* indicates that there were even more reasons to exclude evidence of Hale's silence under the policies voiced in *Grunewald*, than there were to exclude the evidence of Halperin's silence. First, the defendant Halperin insisted he was innocent before a grand jury, and pleaded his fifth amendment privilege on the advice of counsel.[85] The defendant in *Hale* did not have counsel present when he chose to remain silent, and invoked the privilege in the stationhouse immediately after being apprehended by police.

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[81] 353 U.S. at 423. Justices Black, Douglas, Brennan, and Warren, who concurred jointly in the judgment in *Grunewald*, did not agree that the *Grunewald* holding should be limited to the facts of the case, but instead expressed a strong conviction that the constitutional issue should be directly approached, and any comment which would penalize the privilege, including that allowed in *Raffel*, should be prohibited:

> I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. 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.

Id. at 425-26 (Black, J., concurring). The juxtaposition of a concurrence urging decision on constitutional grounds against a majority opinion that treats the issue on a purely evidentiary basis is identical to the tension between the *Hale* majority opinion and Justices Douglas and Black's separate concurrences that stress the crucial constitutional issues bypassed by the majority. *See* notes 123-25 *infra* and accompanying text. *See also* note 152 *infra*.

[82] The *Grunewald* Court referred to E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955), to support some of its observations about the fifth amendment privilege. Griswold's following remarks heralded the reasoning of the Court in *Grunewald*:

> At the very least I suggest to you again that (1) the nature of the question asked, and (2) the nature of the tribunal, are matters which merit very careful consideration in evaluating a claim of privilege.

Id. at 68.

[83] 353 U.S. at 424.

[84] 422 U.S. at 178-79.

[85] 353 U.S. at 422.

Second, Halperin was a compelled and not a voluntary witness. He could summon no witnesses himself, could not cross-examine those witnesses testifying against him, and was not represented by counsel during the actual grand jury questioning.[86] These factors indicate that a person questioned by a grand jury does not have the procedural safeguards and opportunity available to a defendant at trial, and thus has a better reason to invoke the privilege in response to questioning. The *Hale* Court pointed out that an arrestee is in an even less advantageous position than a witness before a grand jury, since *Hale* "in addition lacked such minimal safeguards as the presence of public arbiters and a reporter which were present in *Grunewald*."[87]

The third point, and the one deemed most significant by the *Grunewald* Court, regarded the focus on Halperin during the grand jury questioning as a possible future defendant. The *Grunewald* Court considered that, in this regard, Halperin's silence could not rightly be regarded as inconsistent with his later testimony at trial because "it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself."[88] The *Hale* Court stated that Hale at the time of arrest was even more clearly a potential defendant than Halperin, since he "had been the subject of eyewitness identification and had been arrested on suspicion of having committed the offense."[89]

The logical conclusion that can be drawn from the Court's reasoning in *Hale* and *Grunewald* is that a finding of these three factors will indicate conclusively to the Court that the defendant's silence was motivated by considerations other than concealment of guilt or tacit assent to the accusations made against him.[90] Conversely, the Court implied in both opinions that, if these three factors could not be established, there may be greater reason to believe that the defendant's prior silence had probative value. Both the *Hale* Court and the *Grunewald* Court agreed, however, that the dangers of allowing cross-examination to elicit the fact of the defendant's silence were so great, that the cross-examination should not be allowed unless its probative value outweighed the prejudicial impact it would have on the defendant's case.[91] Neither Court had to undertake such a balancing of

[86] *Id.*

[87] 422 U.S. at 179. Chief Justice Burger, however did not believe that the nature of the tribunal and the presence or absence of the procedural safeguards available to one who invoked the privilege should have any bearing on the probative value to be assigned to silence, and in fact considered this aspect of the *Grunewald* opinion a "fallacy." *Id.* at 181 (Burger, C.J., concurring).

[88] 353 U.S. at 423.

[89] 422 U.S. at 179.

[90] The consideration voiced by the *Grunewald* test would seem to clearly preclude *Raffel* from controlling in the situations of silence during grand jury questioning or post-arrest custodial interrogation. Raffel asserted his privilege during an open trial, presumably on the advice of counsel, with the truth-testing procedures of summoning witnesses and cross-examination available to him.

[91] 422 U.S. at 180; 353 U.S. at 420. *See* FED. R. EVID. 403, which provides in relevant part:

Although relevant, evidence may be excluded if its probative value is substantially

the probative value and the potential prejudice, since both Courts found that the silence was not inconsistent with the trial testimony and thus not at all probative on the issue of the defendant's credibility.[92]

4. *The* "Hale *Test*"

The above discussion of the *Hale* and *Grunewald* cases focused on their similarities. The reasoning of the *Hale* Court, however, was somewhat less lucid than the reasoning contained in the *Grunewald* majority opinion. A close reading of *Hale* produces some doubt about the precise function of the tripartite "*Grunewald* test" in the *Hale* majority opinion. A look at the record reveals that the defendant Hale (1) made no assertion inconsistent with innocence in the proceeding against him, (2) remained silent when questioned at the police station without the assistance of counsel, and (3) had good reason to believe, since he was given the *Miranda* warnings, that he was being questioned for the purpose of incriminating himself. If the issue of impeachment by use of the arrestee's silence was indeed so thoroughly and obviously controlled by the dictates of *Grunewald*, there would seem to have been little need for the Court to write an opinion simply to demonstrate the applicability of *Grunewald*. There is some indication, therefore, that the Court in *Hale* undertook to do more than merely echo *Grunewald*.

In *Hale*, the government argued that Hale's silence at the time of his arrest was probative of the falsity of the explanation he later offered at trial. The government contended Hale's silence was probative because an innocent man, finding himself in Hale's situation, would have been prompted to explain away the incriminating circumstances by the incentive of immediate release and the opportunity for independent corroboration.[93] Faced with the government's argument, the *Hale* Court examined the circumstances of Hale's arrest and found three factors, in addition to those already enumerated in *Grunewald*, which indicated Hale had good reason to remain silent when arrested: (1) he was aware

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> outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

This rule provides two grounds — unfair prejudice and misleading the jury — for the exclusion of the silence at issue in *Hale*. This rule was heralded in the Court's statement in Shepard v. United States, 290 U.S. 96 (1933): "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.* at 104, *quoted in* 422 U.S. at 180.

[92] The *Hale* Court further dismissed any notion that the determination of the probative value of the defendant's silence may be properly within the province of the jury as finders of fact:

> [p]ermitting 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.

422 U.S. at 180. *See also* Grunewald v. United States, 353 U.S. 391, 424 (1957). *But cf.* Brief for Petitioner at 12-26, United States v. Hale, 422 U.S. 171 (1975), in which the government contended that the defendant could offset any negative inferences drawn by the jury from evidence of his prior silence by being allowed to explain them away. This position has found little, if any, support since Griffin v. California, 380 U.S. 609 (1965). *See* notes 138-60 *infra* and accompanying discussion in text.

[93] 422 U.S. at 179. Hale's explanation was corroborated by his estranged wife at trial. 498 F.2d at 1040.

that there was strong evidence against him (a positive eyewitness identification, his flight from police, and his possession of $158 in cash), (2) he had prior contacts with the police, and (3) he was participating, at the time of his arrest, in a narcotics rehabilitation program.[94]

The consideration of these three additional facts formed the basis for the *Hale* Court's response to the government's argument:

> In these circumstances [Hale] could not have expected the police to release him merely on the strength of his explanation. . . . [i]n light of the many *alternative explanations* for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof.[95]

This alternative explanation requirement — the "*Hale* test" — demands an inquiry into the motive for the accused's silence in order to fully examine the probability that a defendant had good reasons to remain silent.[96] The adequacy of such a test, however, is highly questionable. In setting this type of precedent, the *Hale* Court may have been encouraging trial judges in federal courts to undertake an inquiry into the motives of the accused on a case by case basis. On the other hand, the *Grunewald* test may have been the only inquiry mandated by the Court in *Hale*, with the buttressing of that test with further inquiry into possible alternative explanations left to the discretion of the trial judge. In addition, *Hale* may have implied that first offenders have less of a reason for remaining silent than those with a prior police record.

The possible interpretations of the Court's reasoning in *Hale* have been rendered inconsequential by the Court's decision in *Doyle v. Ohio*. But, had courts been forced to look only to *Hale* for guidance, it is probable that they would have allowed a prosecutor to impeach a defendant by his prior silence in certain situations, even though the defendant met the requisites of the *Grunewald* test.[97]

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[94] *Id.*

[95] 422 U.S. at 179-80 (emphasis added).

[96] 422 U.S. at 177. One authoritative commentator has suggested that "inquiry into the motive of silence . . . is so difficult that no accurate results can be expected." C. McCORMICK, LAW OF EVIDENCE § 161 (2d ed. 1972).

Compare the rationale of Justice Warren in *Miranda* regarding the importance of avoiding speculation about an accused's state of mind at the time of arrest:

> [The Court] will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contacts with authorities, can never be more than speculation; a warning is a clearcut fact.

384 U.S. at 468-69 (citation omitted).

[97] The language of *Hale* may be interpreted as expressing the desire of the Court to limit its holding to the facts of *Hale*. 422 U.S. at 179. *See* Grunewald v. United States, 353 U.S. 391, 424 (1957) for a similar utterance by the Court which evidently has not restricted its precedential value. *But see, e.g.*, United States v. Anderson, 498 F.2d 1038, 1050 (D.C. Cir. 1974), (Wilkey, J., dissenting) *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975).

See 13 AM. CRIM. L. REV. 263, 269 (1975) for a prognostication of the practical

II. The Constitutional Limitations on Impeachment by Silence

The Supreme Court proved to be its own worst critic regarding the inadequacy of its holding in *Hale*. The Court concluded that *Hale* did not adequately resolve the judicial controversy concerning the use of silence for impeachment purposes[98] and, therefore, granted certiorari to the joined cases of *Doyle v. Ohio* and *Wood v. Ohio*[99] to determine the constitutional parameters of impeachment by silence.

The crucial facts of *Doyle*, unlike those of *Hale*, were disputed. The State claimed that narcotic agents observed defendants Doyle and Wood sell ten pounds of marijuana to a police informant.[100] In contrast, the defendants contended that the informant had proposed that they sell him the marijuana; the defendants claimed that when this endeavor was frustrated by their indecision over the volume to be purchased, the informant attempted to "frame" them by throwing a packet of $1,320 in marked bills into their car and driving away with the marijuana.[101] The defendants neither offered this explanation to the narcotic agents upon their arrest, which shortly followed the disputed transaction, nor did they advance this story during the preliminary hearing.[102]

The defendants' version of the transaction presented a formidable obstacle for the prosecution. The defense counsel's cross-examination of the narcotic agents who had observed the transaction revealed that the agents had a restricted view of the site of the alleged sale and that it was questionable whether the defendants had actually passed the package of marijuana to the informant.[103] The prosecution attempted to discredit the "frame-up" explanation by trying to impeach the defendants' testimony through extensive cross-examination. This cross-examination included interrogation regarding the defendant's failure to tell the frame-up story to the narcotic agents at the time of arrest.[104]

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impact of *Hale* on the federal courts prior to the holding of the Court in Doyle v. Ohio, 96 S. Ct. 2240 (1976).

[98] Doyle v. Ohio, 96 S. Ct. 2240, 2244 (1976).

[99] The defendants Doyle and Wood were tried separately and convicted of the sale of marijuana in Common Pleas Court, Tuscawaras County, Ohio. State v. Doyle, Case No. 10656 (Oct. 16, 1973); State v. Wood, Case No. 10657 (Oct. 29, 1973). Each was a witness at the other's trial, and each was impeached as a witness by his silence at the time of the other's arrest. The Supreme Court had granted certiorari to the subsidiary question of whether or not such impeachment of a witness was permissible, 96 S. Ct. 36 (1975), but did not find the resolution of this question necessary to decide *Doyle*. 96 S. Ct. at 2244 n.6.

[100] 96 S. Ct. at 2242.

[101] *Id.*

[102] The cross-examination of the defendants in both trials included questioning by the prosecutor concerning their failure to tell the "frame-up" story in the preliminary hearing. Although the Court granted certiorari to this question, 96 S. Ct. 36 (1975), it did not reach consideration of this issue in the *Doyle* case. 96 S. Ct. at 2244 n.6.

[103] 96 S. Ct. at 2242.

[104] In the first trial, that of defendant Wood, the following exchange occurred between prosecutor and defendant:

Q. [prosecutor] Mr. Beamer [arresting narcotics agent] did arrive on the scene?

Moreover, the trial judge allowed the prosecutor to emphasize the fact of the defendants' post-arrest silence in his closing argument to the jury.[105] Defense counsel made timely objections to the prosecution's references to the defendants' post-arrest silence, but these objections were overruled,[106] and the defendants were convicted.

The defendants appealed their convictions, alleging reversible error in allowing the use of post-arrest silence to impeach their testimony. The court of appeals found no error in the proceedings below and, in separate unreported opinions, affirmed the convictions.[107] The court of appeals did not consider constitutional error in their treatment of the petition for appeal, and concluded that the cross-examination was appropriate.[108]

A. *The* Doyle *Majority Opinion*

Careful examination of the Supreme Court's majority opinion in *Doyle* reveals a heavy reliance on the *Hale* Court's observations on the impropriety of impeachment by silence. The *Hale* holding was of limited effect, binding only on the federal courts,[109] and could, ar-

A. [Wood] Yes, he did.
Q. And I assume you told him all about what happened to you?
. . . .
A. No.
Q. You didn't tell Mr. Beamer?
. . . .
A. No.
Q. You didn't tell Mr. Beamer this guy put $1,300 in your car?
. . . .
A. No sir.
Q. And we can't understand any reason why anyone would put money in your car and you were chasing him around town and trying to give it back?
. . . .
A. I didn't understand that.
Q. You mean you didn't tell him that?
. . . .
A. Tell him what?
. . . .
Q. But in any event you didn't bother to tell Mr. Beamer anything about this?
A. No sir.

Transcript of Wood Trial 465-70, *quoted in* 96 S. Ct. at 2243. This exchange was substantially duplicated in Doyle's trial. Transcript of Doyle Trial 504-07, *quoted in* 96 S. Ct. at 2243 n.5.

[105] *See* Supplemental Transcript of Wood Trial 11, 13, *quoted in* 96 S. Ct. at 2252 n. 12; Transcript of Doyle Trial 515, 526, *quoted in* 96 S. Ct. at 2252 n.12.

[106] 96 S. Ct. at 2243.

[107] State v. Doyle, Case No. 1108 (Ohio App., 5th Dist., Jan. 6, 1975); State v. Wood, Case No. 1109 (Ohio App., 5th Dist., Jan. 6, 1975).

[108] The court of appeals succinctly stated its reasoning:

> This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross-examination of a witness as to why he had not told the same story earlier at his first opportunity.
>
> We find no error in this. It goes to credibility of the witness.

Memorandum of the Court of Appeals, Fifth District, Tuscarawas County, *quoted in* 96 S. Ct. at 2243. Defendants were denied leave to appeal from the Ohio Court of Appeals judgment by the Ohio Supreme Court. State v. Doyle, Case No. 75-177 (May 9, 1975); State v. Wood, Case No. 75-177 (April 25, 1975).

[109] Doyle v. Ohio, 96 S. Ct. 2240, 2244 n.8 (1976); United States v. Hale, 422 U.S. 171, 181 (1975).

guably, be further restricted in its application to the facts of that particular case.[110] The primary significance of the *Doyle* opinion is that it effectively imposed a per se exclusionary rule on the use of an arrestee's silence to impeach his testimony, a rule which does not depend upon the particular circumstances of the case.[111] Because the *Doyle* holding sought to eliminate potential due process violations, it is binding on federal courts through the fifth amendment due process clause, and on state courts through the due process clause of the fourteenth amendment.[112]

Those federal and state courts which previously permitted impeachment by the use of prior silence uniformly buttressed their holdings with the dictates of *Harris v. New York*.[113] In *Harris*, the Court held that when statements were obtained from a defendant in contravention of *Miranda* warnings, those statements could be used to impeach his testimony although inadmissible in the prosecution's case-in-chief. In contrast to the *Hale* Court's failure to address the *Harris* decision,[114] the *Doyle* Court specifically limited the applicability of that decision to its facts through a declaration that *Miranda* imposed an insurmountable barrier to allowing impeachment by silence.[115] Thus, instead of following *Harris*, the *Doyle* Court accepted the *Hale* findings concerning the ambiguities inherent in post-arrest silence and held that the use of such silence constituted a per se violation of the due process clause of the fourteenth amendment.[116]

1. Doyle *and the* Hale *Evaluation of Silence*

The Court in *Hale* attempted to determine the probative value of post-arrest silence when used to impeach a defendant's testimony. While the *Hale* Court recognized that the administration of the *Miranda* warnings to a defendant could affect his decision to remain silent, it did not conclude that, in all cases, post-arrest silence was necessarily

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[110] *See* note 97 *supra*.

[111] 96 S. Ct. at 2245. The only exception to the per se rule, which prohibits impeachment by post-arrest silence as violative of due process, was noted by the majority and by Justice Stevens in his dissenting opinion:

> The fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.

96 S. Ct. at 2245 n.11, *quoted at* 96 S. Ct. at 2246 n.1 (Stevens, J., dissenting). However, the majority made a crucial distinction regarding this situation which was overlooked by Justice Stevens: the silence here would not be used specifically to impeach the defendant's credibility regarding his exculpatory version of events; rather, it would be used to refute the defendant's explanation of his conduct after he was arrested. *Id.* at 2245 n.11.

[112] Since the due process constitutionality of a state court proceeding was at issue in *Doyle*, the relevant section of the Constitution would be the due process clause of the fourteenth amendment, which contains language identical to the fifth amendment due process clause.

[113] 401 U.S. 222 (1971). *See* note 35 *supra*.

[114] This refusal constituted a major failing of the *Hale* decision. *See* note 38 *supra*.

[115] 96 S. Ct. at 2245.

[116] *Id.*

or directly attributable to a defendant's knowledge of his right to remain silent. Justice Marshall, writing the majority opinion, observed that in the situation where the *Miranda* warnings preceded the silence in question, the defendant's

> failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.[117]

Thus, the *Hale* Court alluded to the inherent ambiguities of post-arrest silence but failed to follow the implications of this finding to their logical conclusion: that these ambiguities prevent the use of such silence to impeach a defendant's testimony.

The Court in *Doyle* reached its conclusion by integrating the *Miranda* and *Hale* decisions. The *Doyle* Court felt that because the compulsory *Miranda* warnings inform a person that he has the constitutional right to remain silent, and the silence which follows those warnings may constitute no more than an exercise of defendant's rights, all post-arrest silence is insolubly ambiguous.[118] The *Doyle* Court thus depicted the silence following *Miranda* warnings as both "insolubly ambiguous" and "inherently ambiguous" as a result of those warnings.[119] The *Doyle* majority utilized this depiction to support its holding that the use of post-arrest silence to impeach is "fundamentally unfair and a deprivation of due process."[120] The *Doyle* Court's lack of analysis in reaching this conclusion did not ostensibly undermine its holding, since the Court had supplied the groundwork requisite for this conclusion in *Hale*. In *Hale* the Court simply failed, for whatever reason, to make this constitutional determination.[121]

2. *Justice White's* Hale *Concurrence: "Basic Fairness"*

A close reading of the language of *Doyle* reveals that two considerations mandated the holding of the Court. The first consideration, previously discussed, was the insoluble ambiguity of post-arrest silence.[122] The second consideration entailed an evaluation of what a reasonable

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[117] 422 U.S. at 177. It is interesting to note that the First Circuit in Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965), when faced with the issue before the *Hale* Court, used the same language to indicate the ambiguity of silence at arrest:

> Fagundes' words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his alibi was an afterthought. There is nothing to indicate which interpretation is more probable.

Id. at 677. However, the *Fagundes* court concluded from this statement that impeachment by use of prior silence is a fortiori not justifiable, whereas the *Hale* Court uses the same rationale as an introduction to its analysis of the probative value of silence.

[118] 96 S. Ct. at 2244.

[119] *Id.*

[120] *Id.* at 2245.

[121] The *Hale* Court acknowledged its avoidance of the constitutional question underlying the issue in that case. 422 U.S. at 173.

[122] *See* notes 118-21 *supra* and accompanying text.

person would infer if given *Miranda* warnings in an arrest situation; more specifically, the *Miranda* warnings inform a reasonable person of his right to remain silent and, therefore, implicitly assure that person his silence will not be used to incriminate him.[123] The *Doyle* majority deferred to Justice White's *Hale* concurrence in which he stated that due process precluded the use of post-arrest silence to impeach a defendant who has been told that he may remain silent at the time of arrest.[124] The fact that Justice White's concurrence was reprinted in *Doyle* in its substantial entirety indicates not only the conciseness of that Justice's style but also his effective disposition of the issue before the *Hale* Court.

Justice White's finding that the *Miranda* warning implicitly assures a defendant that his silence will not be used against him is convincing.[125] Though Justice White is not a strong supporter of *Miranda* and, in fact, dissented from the majority opinion in that case, his attempt to parallel the administration of justice with the inferences drawn from the warning demonstrates a laudable exercise of judicial dispassion.

3. *The Return to the* Miranda *Dictum: A Decade of Wandering*

> We shall not cease from exploration
> and the end of all our exploring
> will be to arrive where we started
> and know the place for the first time.[126]

The "insolubly ambiguous" theory and the "implicit assurance" doctrine — the legal methods employed by the *Doyle* Court to resolve the issue before it — are not explicitly derived from statutory law, common law, or developing case law, but have their roots in basic common sense. Such derivation may account for the brevity of the Court's statement in *Doyle*: given the *Miranda* decision and the *Hale*

[123] 96 S. Ct. at 2245.

[124] *Id.*, *quoting in part* 422 U.S. at 182-83:

> Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.

[125] Justice White's approach is backed by the reasoning of the Court in Johnson v. United States, 318 U.S. 189 (1943). *Johnson* contained some potent language regarding the importance of informing an accused of the consequences of exercising the fifth amendment privilege. One of the issues before the Court in *Johnson* was whether it was proper for the prosecutor to comment on the defendant's exercise of his fifth amendment privilege during cross-examination in order to avoid responding to certain questions. Justice Douglas, writing for the Court, noted that one problem with this type of comment was that in order for an accused to make an intelligent choice whether he should exercise the privilege, he should know beforehand whether evidence of his failure to testify would be submitted to the jury. *Id.* at 198. The Court suggested that "[i]f the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense." *Id.* at 198-99. This reasoning clearly applies to the exercise of the privilege to remain silent at the time of arrest. The *Hale* Court acknowledged its applicability in the same breath in which it disclaimed the constitutional issue. 422 U.S. at 175 n.4. The Court in *Doyle* found the situation in *Johnson* analogous to the facts before it. 96 S. Ct. at 2245 n.8.

[126] T. S. ELIOT, THE COMPLETE POEMS AND PLAYS 1909-1950, at 145 (1952).

analysis of the probative value of silence, the conclusions advanced in *Doyle* appear inescapable. In effect, *Doyle* afforded the force of law to the *Miranda* dictum, which had anticipated the problems correspondent to the use of silence after *Miranda*:

> 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 prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[127]

Arguably, the entire *Hale — Doyle* controversy could have been avoided had the *Miranda* Court emphatically stated that the use at trial of a defendant's post-arrest silence to imply guilt would not comport with the constitutional right to due process under the law. Instead, the Court had merely deemed such usage impermissible.[128] Perhaps the reason the due process implications were not emphasized by the *Miranda* Court was that the Court viewed them as obvious.

B. *The Paths Not Taken*

1. *Alternatives to the Exclusion of Silence*

The *Doyle* Court, in finding that impeachment use of post-arrest silence was a violation of due process, did not endeavor to suggest ways in which an accused could be advised that although he has the right to remain silent, a negative inference may be drawn from his silence at trial. If an accused were so informed, it would seem that the "implicit assurance" rationale would no longer be germane to the impeachment issue since the accused would be given notice that his silence could be used to his detriment.

Two alternatives to the present method of informing an accused of his fifth amendment rights have been proposed. The first of these suggested procedures is to bring an accused before a magistrate immediately after arrest and inform him that he has the right to speak or remain silent, but if he remains silent and is subsequently charged, his refusal to speak will be disclosed at trial.[129] The advantage of this plan is that it eliminates police interrogation and the concomitant coercive techniques, giving the accused an impartial forum in which to explain the circumstances of his arrest. The disadvantage is that there may exist some compulsion on the defendant to incriminate himself due to the "threat" of the magistrate to disclose the defendant's refusal

[127] 384 U.S. at 468 n.37.

[128] While the mere substitution of these words would not have given the *Miranda* dictum the force of law, they would have helped to remove the ambiguity that fostered varying interpretations of that decision, and which aggravated conflicts in the courts of appeals concerning the use of silence for impeachment. *See* Doyle v. Ohio, 96 S. Ct. 2240, 2244 (1976); United States v. Hale, 422 U.S. 171, 173 n.2 (1975).

[129] *See* W. SCHAEFER, THE SUSPECT AND SOCIETY 60, 63-71, 80 (1967); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 712-16 (1968); Kauper, *Judicial Examination of the Accused — Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

to answer at a subsequent trial. The fact that one of the main drawbacks to such an extensive reform of the criminal justice system is the possibility of disclosure of silence at trial demonstrates the crucial nature of the issue in *Hale* and *Doyle*.[130]

The second of these proposals involves a rewriting of the *Miranda* warning. If a defendant is to be subjected to impeachment by evidence of his post-arrest silence, due process would seem to dictate that the *Miranda* warnings be revised to express this possibility.[131] The revised portion of the *Miranda* warning might read as follows: "You have the right to remain silent, and anything you say could be used against you. If you choose to remain silent, and testify in your own defense at trial, you may be discredited by the fact that you remained silent." There would be many difficulties inherent in such a revised warning. It has been suggested by at least one commentator that due to the haphazard way in which the *Miranda* warnings are presently administered by the police, such a revision would only increase the confusion of an arrestee.[132] To fully grasp its implications, he would have to be charged with knowledge of the function of impeachment in a jury trial. He would also be compelled to make "one of the most important decisions of his defense"[133] in this state of confusion without the advice of counsel. At the police station, the most urgent thought running through the accused's mind is likely to be, "How do I get out of this mess and avoid looking guilty?"[134] Police officers are well aware of this, and may try to use this desire of the accused to their advantage by reading the revised warning in such a way that the accused interprets it to mean, "You might as well confess, because you

[130] For a full discussion of the Kauper—Schaefer—Friendly plan, see Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974). This article was cited by the *Hale* Court in their discussion of the plight of the arrestee. 422 U.S. at 177 n.5.

[131] The need for such a revised warning in these circumstances was voiced half a century ago in McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928). The court declared that if the accused's silence was to be used against him, he should be warned: "If you say anything, it will be used against you; if you do not say anything, that will be used against you." *Id.* at 299. Several federal courts of appeals suggested that such a revised warning was necessary if the accused's silence was to be used to impeach him at trial. *See* United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975); Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). *See also* Kamisar, *supra* note 130, at 34 n.70.

[132] Kamisar, *supra* note 130, at 34 n.70. Kamisar refers to various studies of the actual implementation of the *Miranda* warnings which indicate that

> a large number of police officers do not give the silence or counsel warnings at all, and many who do, do not give them in a meaningful way; moreover, a significant percentage of suspects either misunderstand the existing warnings or fail to appreciate their significance. . . . In this light, how can anyone seriously suggest that we make the Miranda warnings significantly more complicated, yet continue to rely on the uncorroborated oral testimony of the police officer to establish the legality of the questioning?

Id.

[133] 318 U.S. at 199.

[134] Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 654 (1967).

are going to look really bad if you don't." In this instance, the exercise of the right to remain silent at the time of arrest would become so burdened by fear of recrimination that remaining silent might lose whatever effectiveness it had as a check to the pressures inherent in the police investigative process so thoroughly delineated in *Miranda*.[135] In fact this type of badgering is exactly the type of evil sought to be eliminated by the *Miranda* decision.[136] It is thus evident that the administration of a revised warning would do little to insure due process of the law to an arrestee, and could in fact lead to a resurgence of pre-*Miranda* violations of an accused's fifth amendment rights.

2. *The Fifth Amendment Issue*

The Court in *Doyle* could have approached the issue before it on grounds other than due process. Those courts of appeals that disallowed impeachment by use of an arrestee's silence on constitutional grounds had found support for their prohibitions in the fifth amendment's guarantee of a defendant's right to remain silent.[137] This avenue was open to the *Doyle* Court, but it was not taken. If the Court had addressed the fifth amendment implications, however, it would have presumably framed the issue in the following terms: Whether the fifth amendment right to remain silent guarantees an arrestee that his post-arrest silence will not be used to impeach his testimony at trial.

In attempting to formulate such a guarantee, several federal appellate courts sought guidance from the Supreme Court's decision in *Griffin v. California*.[138] In *Griffin*, the Court held that the defendant's fifth amendment right to remain silent was fundamental to insuring that a defendant received a fair trial. The Court reversed the defendant's conviction for first-degree murder solely on the ground that the prosecutor had commented on the defendant's failure to take the witness stand and testify on his own behalf,[139] even though the jury had previously been carefully instructed on the limited inferences they were permitted to draw from the defendant's silence.[140] Justice Doug-

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[135] 384 U.S. 436 (1966).

[136] *See* 384 U.S. at 453-55 for an interesting illustration of how police, through certain practiced strategies, may psychologically manipulate an accused to forego his right to remain silent and his right to counsel.

[137] *See* note 24 *supra*.

[138] 380 U.S. 609 (1965).

[139] *Id.* at 610-11. The following comments were offered by the prosecutor to the jury in his closing argument:

> These things he had not seen fit to take the stand and deny or explain.
>
> . . . .
>
> And in the whole world, if anybody would know, this defendant would know.
>
> . . . .
>
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Id. at 611.

[140] The decision in *Griffin* was made possible by the action of the Court in Malloy v. Hogan, 378 U.S. 1 (1964). In *Malloy*, the Court declared that "the same standards must determine whether an accused's silence in either a federal or a state proceeding is justified," *id.* at 11, and held that the states were prohibited by the fifth amendment from compelling testimony from an accused. The *Malloy* Court accomplished this by applying

las, writing for the *Griffin* majority, deplored any comment on the defendant's failure to testify as a "remnant of the 'inquisitorial system of justice' which the fifth amendment outlaws,"[141] implying that the right not to incriminate oneself is fundamental to a system which presumes innocence until guilt is proven.[142] Justice Douglas further decried penalizing the exercise of a constitutionally guaranteed privilege by in any way attaching to it a presumption of guilt. Such a comment penalizes a defendant for exercising a constitutional right and, therefore, "cuts down on the privilege by making its assertion costly."[143] Thus, *Griffin* stands for the proposition that a defendant's fifth amendment right has been abridged if the exercise of that right is allowed to be used as evidence of the defendant's guilt.

The Court implicitly expanded the scope of *Griffin* to encompass the police custodial interrogation situation in *Miranda v. Arizona*.[144] *Miranda* held that confessions gained from suspects who had not adequately been warned of the consequences of confessing and who had not been protected from coercive investigative techniques were inadmissible.[145] The cornerstone of the *Miranda* warnings is the requirement that a suspect who is held for interrogation "must be first informed in clear and unequivocal terms that he has the right to remain silent."[146] One of the reasons for this is that the defendant may need to exercise the right to combat the inherent pressures of insistent questioning by the police.

One of the coercive techniques outlined by the Court, is the suggestion, overtly or subtly, to the accused that "silence in the face of accusation is itself damning and will bode ill when presented to a jury."[147] The *Miranda* Court responded to this suggestion in footnoted dictum, specifically curtailing the uses which can be made of an arrestee's silence at trial:

> 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 prosecution may

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the fifth amendment to the states through the due process clause of the fourteenth amendment. The refinement of the scope of the fifth amendment privilege to preclude comment on the fact that the defendant did not take the stand at his trial, enunciated by the Court in *Griffin*, was already provided for by a federal statute, 18 U.S.C. § 3481 (1970). The *Malloy* decision made it possible to apply this same prohibition to the states through *Griffin*.

[141] 380 U.S. at 611, *quoting in part* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). In the judicial history of fifth amendment interpretation, the Court has found that certain kinds of treatment of individuals who declined to testify in their own behalf are impermissible because of their effect in "compelling" a defendant to testify.

[142] *See* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 9 (1955).

[143] 380 U.S. at 611. This position was voiced in Justice Black's concurring opinion in Grunewald v. United States, 353 U.S. 391, 425 (1957). *See* note 81 *supra*.

[144] 384 U.S. 436 (1966).

[145] *Id.*

[146] *Id.* at 467-68.

[147] *Id.* at 468. This statement was echoed by the *Hale* Court as part of its rationale for excluding evidence of an arrestee's silence. 422 U.S. at 180.

> not, therefore, use at trial the fact that he stood mute and claimed his privilege in the face of accusation.[148]

In this context, the purpose of the *Miranda* dictum was to notify law enforcement officials and courts that the holding of *Miranda* mandated that trial procedures and evidentiary rules meet a certain standard to insure that the right to silence at the time of arrest will not be undercut later at trial.

Some federal courts of appeals have interpreted the *Miranda* dictum as directly applicable to the impeachment situation of the type found in *Hale*.[149] The Tenth Circuit, in *Johnson v. Patterson*,[150] dealt with a defendant who took the stand to offer an explanation of his acts and was asked by the prosecution why he remained silent at the time of arrest. The Tenth Circuit, relying on *Griffin* and the *Miranda* dictum, affirmed the district court's reversal of Johnson's conviction even though the defense did not object to the questioning at trial, holding that:

> Silence at the time of arrest is simply the exercise of a constitutional right that all persons must enjoy without qualification, and that violation of this right by using the defendant's silence to his detriment at trial warranted a reversal of his conviction.[151]

The Tenth Circuit cannot be faulted for readily perceiving the *Miranda* dictum as applicable to the situation of a defendant who has been impeached by his silence at the time of arrest.[152] In order to

[148] 384 U.S. at 468 n.37.

[149] *See* note 24 *supra*.

[150] 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973).

[151] *Id.* at 1068. The *Johnson* court was not unanimous in its decision to reverse the conviction gained in the lower court and to grant a writ of habeas corpus to the petitioner. Judge Breitenstein in his dissent took a different view of the working of the fifth amendment in this situation, asserting that the defendant waived his fifth amendment privilege against self-incrimination when he took the stand to testify as Hale did, and that this waiver somehow triggered a retroactive revocation of his *Miranda* right not to have his silence at the time of arrest used against him at trial. This proposition overlooked the fundamental consideration which motivated the Court to formulate the *Miranda* safeguards — the fact that the two situations, arrest and trial, are distinctly different and each merits a separate and independent safeguard of the individual's rights. In the situation of arrest and police interrogation, the accused, without the assistance of counsel, could be browbeaten and harangued into making some kind of a confession by the elaborate police tactics so succinctly enumerated in *Miranda* by the Court. The fifth amendment right at the time of arrest is, in effect, the accused's "lone sure rock in a time of storm." *See* E. GRISWOLD, *supra* note 142, at 73. At trial, however, the defendant is in a forum of justice and represented by counsel. The *Hale* Court noted that the defendant in this situation may be more amenable to aiding the court in the search for justice by supplying his testimony. 422 U.S. at 178 n.6. Nonetheless, his fifth amendment right not to take the stand at trial is firmly established. *See* notes 128-33 *supra* and accompanying discussion in text.

The dissenting opinion of Judge Breitenstein in *Johnson* relied on the *Raffel* idea of waiver which was expressly rejected by the *Hale* Court. *See* notes 72-77 *supra*, and accompanying text.

[152] Justice Douglas, in his concurring opinion in *Hale* took an approach similar to that espoused by the *Johnson* majority. Justice Douglas argued that the cross-examination concerning silence be disallowed, and suggested that the Court not limit the holding in this

correctly formulate the self-incrimination issue latent in *Hale*-type impeachment, however, it becomes imperative to follow the lead of *Griffin* in this area and determine the specific burdens imposed on the defendant's exercise of his fifth amendment privilege by allowing him to be impeached by his post-arrest silence.

There seem to be two types of burdens which could result from allowing such impeachment. The first is a burden on the defendant's choice to exercise his privilege, which would have the effect of making the exercise of the privilege less desirable in the eyes of the defendant. This "choice burden" on the exercise of the privilege would seem to be great; an accused might very well feel compelled to waive his privilege and incriminate himself if he knew his silence would be used against him at trial.[153]

The second burden on the fifth amendment privilege is the type of burden pinpointed in *Griffin*.[154] This burden occurs when the exercise of the privilege becomes evidence of guilt when brought to the attention of the jury. This resulting burden seems potentially greater in the *Hale* situation than it was in *Griffin*. The jury would doubtless be aware that the defendant did not testify even if that fact were not directly brought to their attention by the prosecutor, and would draw an inference of guilt from their awareness of the accused's silence even if they were instructed not to do so by the trial judge. A jury would not be able, however, to ascertain for themselves whether the defendant was silent when he was arrested, and thus would not be afforded the opportunity to draw the negative inference, unless the

case to the special circumstances presented. Justice Douglas quoted approvingly from Justice Black's similar reservations in *Grunewald*:

> . . . I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it.

353 U.S. at 425, *quoted in* 422 U.S. at 182. Justice Douglas saw no reason why the *Miranda* dictum was not applicable to the instant case: "I do not accept the idea that *Miranda* loses its force in the context of impeaching the testimony of a witness." 422 U.S. at 182.

In a previous opinion, in which he dissented along with Justices Marshall and Brennan from a denial of certiorari to United States *ex rel.* Burt v. New Jersey, 475 F.2d 234 (3d Cir.), *cert. denied*, 414 U.S. 938 (1973), Justice Douglas stated his opposition to impeachment by use of prior silence in stronger language:

> We thus seem to have come to the point where the exercise of one's constitutional rights can be offered to the jury as evidence of guilt.

414 U.S. at 940.

[153] *See* notes 129-36 *supra* and accompanying text for a discussion of proposed procedures which would notify an arrestee of the possibility that the exercise of his right to remain silent could be used against him. Realistic appraisal of the burden placed on the defendant's choice whether to exercise his privilege is possible only if it can be assumed that an arrestee knows at the time he makes the choice that silence may be used to his detriment. *But see* C. McCormick, Law of Evidence § 161 (2d ed. 1972), in which it is suggested that

> if the subject's silence is admissible against him and he is aware of this, the rule of admissibility itself arguably constitutes *compulsion* to respond in a potentially self-incriminating manner.

Id. (emphasis added); *cf.* United States *ex rel.* Macon v. Yeager, 476 F.2d 613 (3d Cir. 1973). *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42 (1968).

[154] 380 U.S. 609 (1965).

prosecutor was allowed to bring this fact to their attention through his cross-examination of the defendant. In this regard, it would be entirely possible for an accused who was impeached by evidence of his prior silence to suffer the same penalty that would occur if evidence of silence was presented as part of the government's case-in-chief;[155] the effectiveness of instructions to the jury limiting the use of the evidence for impeachment purposes is questionable.[156]

The foregoing discussion reveals several points concerning the fifth amendment issue. There seems to be a basis in *Griffin* and *Miranda* from which to construe an arrestee's right to be free from detrimental use of his post-arrest silence. Furthermore, the impeachment considered in *Hale* and *Doyle* would burden the exercise of the fifth amendment right to be free from self-incrimination. Had the Court in *Doyle* undertaken a fifth amendment analysis of the issue before it, it would no doubt have proceeded cautiously in light of the Court's recent declaration in *Michigan v. Tucker*[157] that the *Miranda* prophylactic warnings currently in use to insure protection of the defendant's fifth amendment rights are subject to alteration[158] and are outside the actual scope of the procedural rights protected by the fifth amendment.[159] By opting for a due process resolution of the issue rather than deciding the issue on fifth amendment grounds, the Court may have purposely avoided aggravating the controversy engendered by the much-criticized *Tucker* decision.[160]

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[155] Such direct use of silence as evidence of guilt is impermissible. *See* note 65 *supra*.

[156] In this context, the Ninth Circuit has poignantly observed the drawbacks in relying on evidentiary distinctions when presenting the fact of the defendant's silence to the jury:

> It is not likely that all jurors would find it psychologically possible to restrict the application of such proof to the narrow purpose of its admission — impeachment — notwithstanding the adequacy of jury instructions given by a careful trial judge.

Fowle v. United States, 410 F.2d 48, 54 (9th Cir. 1969) (impeachment by silence at time of arrest deemed not permissible, conviction for sale of heroin reversed).

[157] 417 U.S. 433 (1974).

[158] 384 U.S. at 467.

[159] In *Tucker*, the Court allowed testimony of a witness whose identity was learned solely on the basis of a statement obtained from the defendant in violation of the guidelines set forth in *Miranda*. The *Tucker* Court quoted *Miranda* in support of its holding:

> [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

417 U.S. at 444, *quoting* 384 U.S. at 467. The reasoning of the *Tucker* Court is somewhat obscure on this point, and its use of *Miranda* here seems questionable in light of the policy considerations voiced throughout the section of *Miranda* from which the above phrase was quoted. A close reading of this section of *Miranda* reveals that the *Miranda* warnings must be given to protect the accused's privilege of not having to incriminate himself until better methods can be devised by Congress or the states. Thus, though the *Miranda* Court did not require that the warning contain specific words or be given in a particular form, it did mandate that some warning be given to guarantee an accused an opportunity to exercise his fifth amendment rights. 384 U.S. at 467. The *Tucker* Court ultimately concluded that it is possible for the police to violate the prophylactic rules developed to protect the right against self-incrimination while not directly infringing upon a defendant's fifth amendment rights. 417 U.S. at 444.

[160] *See, e.g.*, Comment, *The Effects of* Tucker *on the "Fruits" of Illegally Obtained Statements*, 24 CLEV. ST. L. REV. 689 (1975).

C. *The Stevens Dissent*

Justice Stevens, who did not participate in the Court's deliberations of *Hale*, authored the dissenting opinion in *Doyle*. He was joined in his dissent by Justices Rehnquist and Blackmun.[161] The extensive analysis contained in Justice Stevens' dissenting opinion provided a fitting counterpoint to the terse majority statement, in which the Court relied heavily on *Hale* in lieu of an enunciated rationale for its decision.

Justice Stevens' substantive analysis of the due process implications of the use of post-arrest silence for impeachment, however, is flawed from the outset by an error which had previously plagued the Fifth Circuit:[162] the substitution of presumption for proof. His analysis commenced with a conclusion, "the defendants' silence at the time of their arrest was graphically inconsistent with their trial testimony . . . ."[163] His observation was based on the presumption, unsupported by a demonstrated rationale, that persons who have actually been "framed" will invariably protest their situation to the arresting officers, notwithstanding the fact that they have been advised that they need not speak.[164]

Stevens concluded from this presumption that post-arrest silence constituted an "inconsistent statement and is admissible for purposes of impeachment."[165] Two inaccurate bases of this assertion taken together, tend to diminish its authoritative value; first, the construction of ambiguous silence as a "statement" is questionable;[166] second, the Wigmore statement to which Justice Stevens referred has been qualified in light of the *Miranda* dictum.[167]

Justice Stevens particularly emphasized the variety of responses made by the defendants to the prosecutor's questioning at trial. In an extensive footnote, he cited their testimony in this regard to illustrate that both defendants tendered numerous reasons at trial for their failure to initially proffer the "frame" defense.[168] Justice Stevens assumed that if the defendants remained silent in response to the *Miranda* warnings, they would have indicated this during cross-examination. The cited sections of the transcript, however, reveal that the defendants were never specifically asked by the prosecutor why

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[161] 96 S. Ct. at 2246-53 (Stevens, J., dissenting). Justice Stevens succeeded to the Court seat formerly occupied by Justice Douglas, who authored a concurring opinion in *Hale*. 422 U.S. at 182.

[162] The Fifth Circuit error was most notably exemplified in Ramirez v. United States, 441 F.2d 950 (5th Cir. 1971). *See* text at notes 32-41 *supra*.

[163] 96 S. Ct. at 2246.

[164] *See* text at notes 40-41 *supra* for a discussion of the Fifth Circuit's presumption regarding a defendant's silence at arrest advanced in *Ramirez*. *See also* text at notes 42-44 *supra* for an analysis of United States v. Fairchild, 505 F.2d 1378 (5th Cir. 1975), in which the Fifth Circuit implicitly rejected the *Ramirez* approach, instead adopting a "blatant inconsistency" test to determine the probative value of such silence.

[165] 96 S. Ct. at 2246.

[166] *See* text at notes 54-59 *supra*.

[167] *See* text at notes 60-64 *supra*.

[168] 96 S. Ct. at 2246 n.4.

they had remained silent.[169] Justice Stevens did not analyze the defendants' actual statements; rather, he asserted, on the basis of his presumptions, that the fact that the defendants did not claim that they had relied on the *Miranda* warnings but tendered "a different jumble of responses" in explanation of their silence, "negate[s] the Court's presumption that their silence was induced by reliance on deceptive advice."[170]

This assertion heightens two misinterpretations of the majority opinion which are evident throughout Justice Stevens' opinion. First, the majority did not perceive the *Miranda* warnings to be per se defective. Close examination of the majority opinion reveals that its complaint regarding deceptiveness was not with the content of the *Miranda* warnings, but with the subsequent use of a defendant's silence following the administration of the warning.[171] Secondly, the majority did not contend, as Justice Stevens asserted, that the silence of the defendants was induced by the *Miranda* warnings. The Court construed the silence as "insolubly ambiguous,"[172] attributable to any one of a number of factors — including the administration of *Miranda* warnings. The majority, therefore, concluded that an examination of the arrestee's motives for silence could not yield an accurate finding regarding the particular influence of the warnings on such silence.[173] In finding a deprivation of due process in the use of ambiguous post-arrest silence to impeach a defendant at trial, the majority impliedly determined that the potential constitutional violations resulting from impeachment by silence outweighed any benefits to be derived from allowing the impeachment because of its probative value, and that this factor justified the adoption of a per se exclusionary rule against the prosecutorial use of such silence.[174]

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[169] *Id.*

[170] *Id.* at 2246-47. Justice Stevens might have strengthened his argument had he analyzed the statements made by defendants during cross-examination solely in terms of defendant Doyle's initial willingness to speak to arresting officers and later refusal to answer questions. This defendant's inconsistency in answering police questions tended to indicate that Doyle's silence could be attributed to more than a reliance on the *Miranda* warnings and thus, arguably, that his silence was of some probative value. Although the possible probative value of such conduct was not specifically discussed in *Hale*, it would seem that this factor might be relevant to the quest to determine the reasons for a defendant's silence. As previously discussed, the *Hale* Court posited factors which might demonstrate good reason for a defendant's failure to answer police interrogation. Upon a finding of any of these factors, the defendant would, according to *Hale*, be free from prosecutorial cross-examination concerning his silence at the police station. *See* text at notes 94-96 *supra*.

[171] 96 S. Ct. at 2244-45.

[172] *Id.* at 2244.

[173] The *Doyle* Court noted that it was not concerned with a determination of the probative value of post-arrest silence, for it had undertaken such an inquiry in *Hale*. 96 S. Ct. at 2244 n.8. The *Doyle* majority suggested that its inquiry in *Hale* had provided additional explanations, apart from the effect of the *Miranda* warnings, for the ambiguities inherent in post-arrest silence. *Id.* Justice Stevens failed to consider these other explanations in his analysis; he seemed to regard the effect of the *Miranda* warnings as the only factor in the arrest situation which would tend to make such silence ambiguous. 96 S. Ct. at 2246-47.

[174] *See* 96 S. Ct. at 2244.

Furthermore, assuming arguendo that the Court did presume that the defendants' silence was induced by reliance on *Miranda* warnings, Justice Stevens failed to demonstrate how the defendants' responses served to "negate" this presumption. Justice Stevens merely characterized the responses as "jumble."[175] This observation is not instructive regarding the probative value of the post-arrest silence, and merely suggests that Justice Stevens deplored the defendants' inability to articulate their defense at trial. Justice Stevens did not undertake the type of extensive analysis of these remarks which his pointed conclusion would appear to warrant, a factor which deprived his argument of the substantive analysis necessary to be convincing.[176]

The crowning blow in Stevens' attack on the majority's "due process" rationale came in the form of another dubious proposition. Justice Stevens suggested that defendants' "jumble" of responses at trial rebutted the presumption that their silence was attributable to reliance on the *Miranda* warnings and that the majority's due process argument, based on that presumption, correspondingly collapsed.[177] More specifically, he contended that the demise of the reliance presumption made the *Doyle* case analogous to a case where no warning is given and, moreover, that nothing in the Court's opinion alluded to unfairness in using defendants' prior inconsistent silence for impeachment in situations in which no warning was proffered. In effect Stevens asserted: If the police didn't say the words, then the silence of the defendants is not protected. The Court in *Miranda* anticipated this type of argument and explicitly provided that:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.[178]

Thus, if the warnings had not been afforded in the *Doyle* case, the prosecution still would have been unable to establish that fact to form a basis

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[175] *Id.* at 2246.

[176] The primary thrust of the *Miranda* warnings in the arrest situation is that the defendant be notified that he is under no compulsion to speak. Thus, in light of *Miranda*, the significant instance of behavior in the *Doyle* case was the defendant's refusal to respond to police questioning. The fact that Doyle made some tangential remarks to the police in the few hours following his custody did not necessarily emasculate his exercise of the right to remain silent. In fact, if the remarks made were consistent with his trial testimony, they would tend to strengthen the defendant's case. An examination of the sections of the transcripts of the *Wood* and *Doyle* trials cited in Justice Stevens' opinion reveals only that defendant Doyle actually spoke when arrested and that his utterances consisted primarily of variations on the theme of "I don't know what you are talking about" when the arresting officer accused him of selling marijuana. Transcript of Doyle Trial 506-07, *quoted in* 96 S. Ct. at 2247. These remarks were ostensibly consistent with defendants' trial testimony. Justice Stevens, by his reference to the "jumble" of defendants' post-arrest responses, merely introduced a red herring into the legal inquiry.

[177] 96 S. Ct. at 2247-48.

[178] 384 U.S. at 468.

for admission of defendant's silence for impeachment purposes.[179] Moreover, prior to the requirement of *Miranda* warnings, courts widely recognized that evidence of post-arrest silence should have been excluded in almost all criminal cases since the admission of this evidence dangerously burdened the defendant's exercise of his fifth amendment privilege by penalizing him for such exercise.[180]

Justice Stevens concluded his dissent by proposing that the defendant's silence at the time of arrest is a proper subject of inquiry during cross-examination and that, therefore, the defendant should be subjected to such questioning whether or not that silence seemed "inconsistent" with his trial testimony.[181] He further suggested that a defendant, who attested that he had remained silent in reliance on the *Miranda* warnings, could actually have his credibility reinforced by such testimony, if that testimony was not contradicted by his conduct at the time of arrest. In effect, Justice Stevens would have the trial proceed on the assumption that all silence at the time of arrest is per se probative and thus admissible on the issue of the defendant's credibility. He would propose that the defendant be given the opportunity to try to explain away any negative inferences which could be drawn from that silence. This approach is antithetical to the conclusion of the Court in *Hale*: the danger that a jury will infer guilt from the circumstance of silence at arrest is so manifestly great as to militate against the use of silence for impeachment purposes in almost every case.[182]

Justice Stevens' treatment of the fifth amendment issue, presented by the defendants but not addressed in the majority opinion, does not bear extensive scrutiny. He attempted to resurrect the pronouncement of the Court in *Raffel v. United States* permitting the use of silence at a prior trial to impeach the defendant's testimony at a later trial.[183] *Raffel* was found inapplicable to the situation of impeachment by post-arrest silence by the Court in *Hale*,[184] and was all but overruled by the Court in *Grunewald v. United States*.[185] Justice Stevens acknowledged this fact in a footnote; but nevertheless, he persisted in suggesting that *Raffel* might yet have bearing on the *Doyle* case.[186]

Justice Stevens reserved the commentary most favorable to the defendants until the closing lines of his dissent, where he concluded that the defendants' silence at the preliminary hearing and during the pretrial period was not a proper subject for comment because this silence was probably induced at the behest of counsel.[187] Therefore, Justice

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[179] Presumably, due to their cognizance of this fundamental procedural obstacle, no court has proposed that post-arrest silence would be made admissible by the fact that the *Miranda* warnings had not been given.

[180] *See, e.g.*, Note, *Tacit Criminal Admissions*, 112 U. PA. L. REV. 210 (1963).

[181] 96 S. Ct. at 2248.

[182] 422 U.S. at 180.

[183] 271 U.S. 494 (1926).

[184] 422 U.S. at 175-76. *See* text at notes 72-77 *supra*.

[185] 353 U.S. 391, 418-24 (1957). *See* text at note 92 *supra*.

[186] 96 S. Ct. at 2251 n.11.

[187] *Id.* at 2250-52. The *Doyle* majority did not consider these issues, for they based

Stevens seems to suggest that the defendant may be expected to spontaneously inform the arresting officers of his trial defense only until his attorney arrives; at that point, the expectation ceases, since the presentment of the defense is then in the hands of counsel. This proposition posits the anomaly of conditioning the defendant's full enjoyment of his right to remain silent upon the prompt appearance of his attorney. It not only implies a myriad of potential due process and sixth amendment violations[188] but, together with the constitutional obstacles which militate against impeachment by use of silence discussed in the majority opinion, threatens the constitutional and equitable administration of criminal justice. These arguably unconstitutional implications of Justice Stevens' approach may serve to explain why Chief Justice Burger, who gave every indication in *Hale* that he would strenuously resist a constitutional prohibition against impeachment by silence,[189] joined the *Doyle* majority opinion.[190] The problems engendered by permitted impeachment by silence, amply illustrated by the tenuous reasoning in the Stevens dissent, are so overwhelming that a per se prohibitive rule against such silence seems to be the only sensible means to resolve this controversy.

CONCLUSION

It is not difficult to predict the effect of *Doyle* on the federal court system as well as on the courts of the various states. *Doyle* effectively imposes a per se exclusionary rule on the use of post-arrest silence against a defendant at trial, thus giving the force of law to the *Miranda* dictum.[191] Based upon the doctrine of "elementary fairness" implicit in the fourteenth amendment due process clause,[192] the greatest accomplishment of *Doyle* is that it provides a precedent which should have a benign effect on the administration of justice. The *Hale* decision entailed a judicial investigation of the evidentiary value of silence; it avoided the due process questions presented by the use of post-arrest silence for impeachment purposes. Although the findings in *Hale* were expressly relied on by the *Doyle* Court,[193] those findings had failed to achieve the stated end of that decision — to resolve court conflict over impeach-

their holding entirely upon consideration of the propriety of comment on defendants' silence immediately following arrest. *Id.* at 2244 n.6.

[188] *Cf.* Oregon v. Haas, 420 U.S. 714 (1975) (statements of defendant, made after *Miranda* warnings and a request for counsel, but before counsel arrived, held admissible for impeachment purposes).

[189] 422 U.S. at 181.

[190] It is somewhat ironic that Justice Stevens sought to discredit the majority viewpoint by his observation that Chief Justice Warren, author of the *Miranda* majority opinion, joined the majority in Walder v. United States, 347 U.S. 62 (1954) (evidence deemed inadmissible as part of the prosecution's case-in-chief was not thereby made inadmissible for purposes of impeachment). His observation might have been persuasive had Chief Justice Burger, author of the majority opinion in Harris v. New York, 401 U.S. 222 (1971) (evidence excluded because of *Miranda* violation admissible for impeachment purposes), not joined the majority in *Doyle*.

[191] *See* 3A J. WIGMORE, EVIDENCE § 1042 n.1. (J. Chadbourne rev. ed. 1970) for a listing of state court cases which have considered the issue of impeachment by prior silence.

[192] 96 S. Ct. at 2245.

[193] *Id.* at 2244-45.

ment by silence.[194] This conflict could only be concluded with a constitutional decision concerning the use of post-arrest silence to impeach a defendant's trial testimony. The Court avoided such a decision until the *Doyle* case.

By adopting a per se exclusionary rule which prohibits the prosecutorial use of post-arrest silence to impeach a defendant's testimony at trial, the *Doyle* Court removed the determination of a constitutionally sensitive issue from the purview of trial court discretion. The Court thus eliminated a potential source of injustice by obviating the arbitrary speculation inherent in any investigation seeking to determine the probative value of a defendant's post-arrest silence.[195] Moreover, the *Doyle* decision ensures a defendant in a criminal prosecution against conviction on the basis of his silence at the time of arrest, when he was expressly told that he need not speak. To those who have witnessed the steady erosion of the foundations of *Miranda*,[196] the Court's decision in *Doyle* provides somewhat comforting assurance that judicial balance is not always achieved by a shifting to the opposite extreme.

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[194] *Id.* at 2244; United States v. Hale, 422 U.S. 171, 173 (1975).

[195] *See* text at notes 94-96 *supra*.

[196] *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971).