Evidence - *Doyle v. Ohio*: Use of Defendant's Silence for Impeachment at Trial

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*Qui tacet non utique fatetur, sed tamen verum est eum non negare.*

The use of a defendant’s silence in the face of accusations as evidence in a criminal trial is a problem that has continually plagued the courts. The common law rule for civil cases provides that if an individual is confronted by allegations of guilt which, if untrue, the party would under all circumstances be expected to deny, his silence is admissible as evidence of his tacit confession. However, when the accusations occur in a court room setting, failure to deny is inadmissible. If the accusation and failure to deny occur before trial but not in connection with a criminal investigation, virtually all jurisdictions admit the evidence. Should this silence occur during the course of a criminal investigation, courts have reached divided results.

In *Miranda v. Arizona*, the Supreme Court held that because of the privilege against self-incrimination, an individual must be afforded the right to remain silent when first subjected to police custodial interrogation. Since that mandate, the evidentiary status of the silent response of an arrestee given his *Miranda* warnings has become less than precise. To examine these evidentiary and constitutional problems, the Court first decided *United States v. Hale*, and most recently *Doyle v. Ohio*.

In *Hale*, Justice Marshall noted the two-fold purpose for granting certiorari: (1) to resolve the conflict in the federal courts on the issue

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1. Annot., 115 A.L.R. 1511 (1938) (He who is silent does not indeed confess, but yet it is true that he does not deny).
3. C. McCormick, Evidence § 161 (2d ed. 1972). Some courts base this denial on the fifth amendment privilege against self-incrimination. Parrot v. State, 125 Tenn. 1, 139 S.W. 1056 (1911). A majority of courts, however, have stated that there is no duty to respond in judicial proceedings because such circumstances do not naturally call for denial. Denial is in the very nature of the proceedings; therefore, failure to deny lacks probative value.
6. Id. at 467-68.
7. See note 53 infra.
of admitting evidence of silence of an arrestee, who had received his Miranda warnings, for the limited purpose of impeaching his credibility; and, (2) to settle a question essential to the proper administration of criminal justice. Although this established a uniform rule for the federal judiciary under the Court's federal supervisory power, the case failed to resolve the problems facing state criminal defendants. This article will analyze the Supreme Court's determination in Doyle of the silence issue in a constitutional context, raise questions not reached by the Court, and discuss future extensions of the Doyle decision.

THE MIRANDA BACKGROUND

Common law doctrines and prior court decisions regarding the evidentiary value of a defendant's silence became subjected to "grave constitutional overtones" in Miranda v. Arizona. The Miranda Court suggested in a footnote the rationale for refusing to admit silence as evidence at trial.

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege [against self-incrimination] 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.

In recognition of this directive, courts have prohibited use of a defendant's silence during the prosecution's case-in-chief. How-

10. 422 U.S. at 173. See note 53 infra regarding the division of the circuits.
14. Id. at 468 n.37. See notes 101 through 104 infra and accompanying text for a discussion of how the term custodial interrogation is construed. There are two views on when the penalty forbidden by the fifth amendment occurs: (1) at the time the jury is permitted to draw adverse inferences from the prior exercise of that right, See, e.g., Johnson v. Patterson, 475 F.2d 1066, 1067-68 (10th Cir.), cert. denied, 414 U.S. 878 (1973); and, (2) when the defendant makes a choice not to testify at all or to testify and risk having his previous silence held against him. See, e.g., United States v. Anderson, 498 F.2d 1038, 1044 (D.C. Cir. 1974).
15. C. McCormick, Evidence § 161 (2d ed. 1972). The decisions following Miranda leave little doubt that silence or a claim of the fifth amendment privilege against self-incrimination made in response to a police accusation during custodial interrogation is inadmissible. See, e.g., United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). Even prior to Miranda some jurisdictions had held that silence in the face of incriminatory accusations while in police custody could not be used as evidence of guilt in the state's case-in-chief. See cases collected in 4A. J. Wigmore, Evidence § 1072 n.56 (Chadbourn rev. ed. 1970).

Prosecutors also have attempted to circumvent this authority by asserting that silence in
ever, prosecutors have attempted to circumvent this *Miranda* language by seeking to admit evidence of silence for the limited purpose of impeaching the defendant’s credibility.

The common law doctrine permitted the evidentiary use of a person’s silence in situations where an individual would naturally speak. This common law rule is no longer permissible after *Miranda’s* guarantee that an individual has the right to remain silent. Once a defendant is informed that anything he says can and will be used against him, the probative value of this silence becomes constitutionally suspect. Following *Miranda*, the scope of footnote 37 and its applicability to the use of silence to impeach credibility has been crucial when dealing with an arrestee, properly advised of his *Miranda* rights, who remains silent during police custodial interrogation. While *Miranda* governed the use of defendant’s silence in the prosecution’s case-in-chief, later Supreme Court pronouncements reduced the impact of the total prohibition of this type of evidence in collateral and impeachment situations.

**PREVENTION OF PERJURY vs. PROTECTION OF SILENCE**

The Supreme Court’s opinion in *Doyle* was brief, to the point, and did not reconcile post-*Miranda* cases. However, pre-*Doyle* case law illuminates the arguments facing the Court—arguments that were to a large extent resolved sub silentio by the *Doyle* opinion. These pre-*Doyle* cases fall into two divisions: (1) decisions placing primary importance on eliminating the potential for perjury and, (2) cases requiring stricter adherence to procedural safeguards. This split provided applicable authority for the impeachment by silence controversy.

*Lessening the Impact of Miranda*

*Harris v. New York*17 diminished the impact of *Miranda* by permitting the use of illegally obtained statements to impeach an arrestee’s credibility. There, the question was whether a statement ob-

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16. 384 U.S. at 469. In *Miranda* the protection of the voluntariness standard for confessions was derived from the fifth amendment privilege against self-incrimination. This fifth amendment privilege was not extended to the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). Before *Miranda*, similar protections were applied under the guise of due process. *See Michigan v. Tucker*, 417 U.S. 433, 441 (1974). The *Miranda* decision altered the focus of the law from voluntariness to knowing and intelligent waiver of one’s fifth amendment rights. *Id.* at 441-43.

tained in violation of Miranda—inadmissible in the state’s case-in-chief—could later be used to impeach the defendant’s credibility at trial.\textsuperscript{18} Defendant was arrested for the sale of heroin to an undercover police officer. At trial, upon direct examination, defendant admitted making a sale to the officer, but claimed that the glassine bag contained only baking powder and that the only crime was his scheme to defraud the purchaser. On cross-examination the defendant was asked whether he made any statements immediately following his arrest that contradicted his testimony on direct examination. Defendant claimed he could not remember, and upon motion by petitioner, a police report containing incriminating evidence was admitted into the record.\textsuperscript{19}

The Court in Harris placed great importance on the value of the impeachment process and stated that the Miranda privilege could not be construed to include the right to commit perjury.\textsuperscript{20} Despite

\begin{footnotes}
\item[18] Id. The prosecution conceded that such evidence in its case-in-chief would be clearly inadmissible under Miranda and consequently made no such efforts to introduce this evidence until the defendant testified and introduced his exculpatory story.
\item[19] Id. at 223. The police report was allowed in for possible use on appeal and was not shown to the jury. The jury was given an instruction limiting the use of such evidence only to determine Harris’ credibility and not his guilt or innocence. See Fed. R. Evid. 105 (1975). Counsel for both the state and Harris argued the substantive value of the impeaching evidence in their summation to the jury.
\item[20] The Court was not persuaded that admitting such evidence in this case would foster impermissible police conduct in the future. The argument was that police would fail to give Miranda warnings because of the heightened possibility of gaining statements that would be admissible as impeachment evidence. The Court felt that police misconduct would be deterred by the desire to gather evidence admissible under Miranda for the state’s case-in-chief.
\end{footnotes}

One issue that has been strongly argued by both sides in the silence-as-evidence controversy has been the adverse effect that admitting evidence of silence will have on police conduct. Some courts feel that the nature of the evidence offered is an open invitation to manufacture evidence. See, e.g., People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953). The Harris majority discounted the danger of police misconduct in balancing this factor against the value of impeachment. “[B]enefits of [the impeachment] process should not be lost because of the speculative possibility that impermissible police conduct will be encouraged thereby.” 401 U.S. at 225.

The Miranda Court specifically held that the privilege against self-incrimination is available outside the courtroom and applies to police interrogation. However, standard procedures in police interrogation which hinder the waiver decision of the arrestee are: (1) assumption of guilt by the interrogating officer; (2) perseverance in questioning; (3) the tendering of a lawful explanation for the suspect’s acts to induce his admissions; (4) change of pace with alternating friendly and unfriendly officers; and, (5) indication that silence will incriminate the arrestee. 19 AM. JUR. PROOF OF FACTS § 5 (1967 Supp.). It was noted in Miranda that a common police technique used to compel testimony was to expressly or implicitly suggest that: “silence in the face of accusation is itself damning and will bode ill when presented to the jury.” 384 U.S. at 468. The Miranda Court cited various police manuals and texts, used by law enforcement agencies as guides to effective interrogation, that described psychological techniques to induce an arrestee into making exculpatory statements. Id. at 448-55.

The fulcrum of the judicial balance had been waver ing between the concerns of liberal construction of constitutional provisions and the desire not to provide insulation for a career
the lack of the *Miranda* procedural safeguards, the Court found that the impeaching evidence was admissible because of its trustworthiness; the defendant never claimed that his statements were coerced or involuntary.\(^{21}\)

The Court suggested the *Miranda* warnings were not an end in themselves, but devices designed to protect fifth amendment rights.\(^{22}\) *Harris* attempted to strike a balance between strict adherence to the *Miranda* protective mandate and the need to guard against perjured testimony. By allowing the prosecution's use of voluntary, uncoerced utterances by the defendant, the Court sought to ensure the credibility of defendant's testimony. However, in so doing, the Court undercut *Miranda*'s protections which had previously been read to bar the use of such statements for *any* purpose.\(^{23}\)

The Court in *Harris* relied on *Walder v. United States*,\(^{24}\) a case that had seemingly been limited by *Miranda*. In that case the defendant had been acquitted on an earlier narcotics charge because of illegally obtained evidence. In a subsequent trial for another narcotics offense, the defendant testified that he had never possessed narcotics. On cross-examination, evidence of the unlawfully seized heroin—inadmissible at a prior trial for a separate offense—was introduced to attack the defendant's credibility. The *Walder* Court recognized the value of impeachment as a tool against perjury. The benefits of the impeachment process were found to outweigh speculation on the possibilities of police misconduct.\(^{25}\)

However, the one factor that distinguished *Walder* from *Harris* was that the illegally obtained evidence was completely unrelated to the present charge and was proffered as impeachment on a collateral matter. The statement challenged was that the defendant had never possessed drugs. The truth or falsity of this fact was irrelevant to the pending charge. The evidence was admitted despite its mere

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\(^{21}\) 401 U.S. at 224.


\(^{23}\) The rule of evidence advocated by the Court in *Harris* was summarized in *Michelson v. United States*, 335 U.S. 469 (1948). The *Doyle* decision advocates the former position and should be construed as a mandate against such interrogation techniques by police because of the absolute protection of silence now afforded the arrestee.


\(^{25}\) *Id.* See note 20 supra discussing the dangers of police misconduct.
collateral relevance to the case because the defendant had "opened the door." Thus, the Court apparently allowed illegal evidence in through the back door of impeachment, when they might have prevented its use altogether. This evidence was irrelevant to the precise issue at trial. But by "opening the door" on this point through direct testimony, the defendant presented the possibility of perjury that could be challenged on cross-examination. The Walder "collateral use doctrine," was not only accepted on its limited facts, but applied in Harris to evidence violative of the defendant's Miranda rights. Thus, the Court held that non-collateral evidence could also be used for impeachment purposes, permitting the use of illegally obtained evidence in violation of the fifth amendment.

In Harris the Court rejected Miranda's prohibition against the impeachment use of illegally obtained statements. The question remained whether the Court would also reject Miranda's dicta concerning impeachment of defendant by his silence under custodial interrogation. In United States v. Ramirez, the Fifth Circuit held that Harris undercut Miranda and admitted evidence of the defendant's post-arrest silence to impeach his exculpatory defense of coercion at trial.

Harris also brought new vitality to a pre-Miranda decision, Raffel v. United States. In Raffel, the Court held that the defendant's silence at a first trial could be used to impeach the credibility of his testimony at a second trial. In light of Harris, prosecutors began

29. See Oregon v. Hass, 420 U.S. 714 (1975), where an incriminating reply by the defendant to interrogation after he had asked to see an attorney, but before an attorney was summoned, was held admissible for impeachment. Contra, Agnello v. United States, 269 U.S. 20 (1925), where evidence obtained in violation of the fourth amendment was held inadmissible for impeachment purposes.
31. The Third Circuit implied the same in United States ex rel. Burt v. New Jersey, 475 F.2d 234 (3d Cir. 1973). In this case the court found the defendant in a murder case was properly impeached by his silence at the police station when at trial he stated the death was accidental. The fact that defendant was arrested for a charge other than homicide did not move the court to discount the value of defendant's silence.
32. 441 F.2d at 950. The court also applied the "opened door" analysis of Walder and Harris. Id. at 954.
33. 271 U.S. 494 (1926).
34. Id. See note 82 infra and accompanying text on the issue of forced testimony or reply. An interesting case, involving the issue of how far a potential defendant's rights to silence extend and the possibility of incurring penalty by impeachment is, Hutcheson v. United
to rely on Raffel when seeking to admit silence for impeachment. Thus, prior to Hale and Doyle, the Court had curtailed the impact of Miranda's procedural safeguards allowing the limited use of illegally obtained evidence. However, earlier decisions, at least in regard to the use of a defendant’s silence as evidence, conflicted with Harris and its progeny.

INADMISSIBILITY OF DEFENDANT'S SILENCE

A considerable body of case law, both pre- and post-Miranda, would suggest that an arrestee's silence is inadmissible for impeachment purposes. That a defendant’s silence at an earlier trial cannot be used against him was established in Griffin v. California and Johnson v. United States. In Griffin, the prosecutor commented upon the defendant’s failure to testify at trial concerning matters which he could reasonably be expected to explain or deny. The Supreme Court found this comment, together with a jury instruction that silence in such circumstances is evidence of guilt, an infringement upon the self-incrimination clause of the fifth amendment. Would these cases be applied to the silence of an arrestee who had been given his Miranda rights, or could the situation of an arrestee be distinguished?

States, 369 U.S. 599 (1962). There, the defendant was convicted of contempt of Congress in violation of 2 U.S.C. § 192 (1970). Hutcheson refused to answer pertinent questions put to him by the Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Comm.). Chief Justice Warren and Justice Douglas dissented from the affirmance. They stated that defendant was denied due process of law by being required to choose between: (1) claiming his privilege against self-incrimination, which could then be used for impeachment during possible state prosecution; (2) answering the question truthfully and aiding state prosecution; (3) committing perjury and risking prosecution; and, (4) refusing to answer and facing prosecution for contempt.

36. 318 U.S. 189 (1943).
37. The Court found that such an inference of guilt unconstitutionally fettered the choice of testifying and explained:

It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.

380 U.S. at 613.

A similar rule was advanced in Johnson. There, the defendant took the stand and was informed by the judge (mistakenly according to the law at that time) that he had a fifth amendment right to refuse to answer certain questions. However, the prosecution commented upon the defendant’s silence in his summation to the jury. The Supreme Court held that the defendant was denied “fundamental fairness” in his trial because he was misled on his fifth amendment privilege. 318 U.S. at 197. See note 76 infra and accompanying text for a discussion of how a “double Miranda warning” would be required to alleviate this problem with respect to an arrestee.
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tional protection suffice?

In Hale, the Court decided the first question strictly on evidentiary grounds, relying on its supervisory powers over the federal courts. Basing its decision on Grunewald v. United States, a pre-Miranda case, the Court avoided the constitutional question of the Government's use of the arrestee's silence for impeachment. In Grunewald, defendant appeared before a grand jury and invoked the fifth amendment during questioning. He was later indicted for conspiracy to defraud the United States. When the defendant testified at trial, the Government attempted to impeach his testimony with his prior fifth amendment claims. The Supreme Court found that the circumstances surrounding the defendant's appearance before the grand jury justified his reliance on the fifth amendment.

The Court announced three requirements to determine whether silence was consistent with a subsequent exculpatory story:

1. Repeated assertions of innocence before the grand jury (or assertions of innocence before defendant came to trial);
2. The secretive nature of the tribunal of initial questioning; and
3. The focus on the individual questioned as a potential defendant at the time of the questioning, making it natural for him to fear that he was being asked questions for the purpose of providing evidence against himself.

Applying these factors to the circumstances the defendant faced, the Court found his refusal to testify wholly consistent with his exculpatory explanation. The lack of impeachment value coupled with the highly prejudicial nature of the evidence, made it inadmissible. The use of a defendant's fifth amendment claim in the absence of a true inconsistency creates the danger that the jury might improperly equate the defendant's exercise of his right against self-incrimination with guilt, instead of confining it to credibility.

38. The issue of whether the fifth amendment privilege against self-incrimination applied to custodial police interrogation could have been viewed as settled in the federal courts by Bram v. United States, 168 U.S. 532 (1897), analysis affirmed, Wan v. United States, 266 U.S. 1 (1924). (Both decisions concluded that the fifth amendment "was but a crystallization of the doctrine as to confessions" and demanded voluntary compliance). Modern courts, however, have avoided the Bram analysis possibly because Miranda engulfed that decision.
41. Defendant alleged innocence in response to the same questions asked by the grand jury.
42. 353 U.S. at 423.
43. Id. at 421, 424. See note 81 infra and accompanying text for comment upon the confusing distinction and resulting danger of prejudice between silence as evidence of guilt and silence limited to impeach testimony.
The *Grunewald* Court, recognized the potential for this test's widespread application and limited its holding to the "special circumstances" of the case.\(^4\) The Court did not ban the impeachment use of prior silence, but required the trial judge to make an evidentiary finding that the defendant's silence was inconsistent and that this inconsistency was of sufficient probative value to outweigh the prejudicial effect.\(^5\) The Court relied upon the special circumstances of *Grunewald* to distinguish *Raffel*.\(^4\) Under *Raffel* the Court allowed silence at the first trial to be used to impeach the defendant at a subsequent trial. *Grunewald*, however, was limited to the situation where the fifth amendment invocation occurred under the special circumstances of a grand jury proceeding. There, the defendant was not represented by counsel, had no right to cross-examine witnesses, and had no right to present his side of the case. In fact, this grand jury proceeding was not aimed at the defendant but at his acquaintance.\(^7\)

The silence in *Raffel* was invoked in a trial where a person's constitutional rights may be adequately protected. However, in *Grunewald* the defendant's silence was invoked during a grand jury proceeding where constitutional rights are not fully protected. The *Grunewald* Court implicitly recognized that silence was subject to ambiguous inferences which may diminish its evidentiary value. It would appear that part three of the test, in some undecided, nebulous way, contained elements of fifth amendment protection within an evidentiary framework. Thus, 10 years before *Miranda*, the Court recognized that some evidentiary concerns have "grave constitutional overtones." The impact of these "constitutional overtones," the issue of the expansion of *Grunewald* to post-arrest silence, and...

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\(^4\) But see id. at 425-26 (Black J., concurring). Justice Black advocated a wider reading of the majority's opinion than "special circumstances" would permit. Lower courts, influenced by *Miranda*'s expanded definition of fifth amendment rights, displayed an increased tendency to apply the reasoning of Justice Black's concurring opinion. See, e.g., United States v. Anderson, 498 F.2d 1038, 1043 (D.C. Cir. 1974); Fowle v. United States, 410 F.2d 48, 52 (9th Cir. 1969); Reid v. Commonwealth, 213 Va. 790, 794, 195 S.E.2d 866, 869 (1973).

\(^5\) 353 U.S. at 419-20. Such determination of inconsistency depended upon the Court's three-pronged analysis. See also FED. R. EVID. 403 (1975).

\(^6\) However, four judges concurred that *Raffel* should have been overruled (Black, J., joined by Warren, C. J. and Douglas and Brennan, J.J.). The majority stated that *Raffel* did not establish as a matter of law that prior silence was always inconsistent with later assertions of innocence. See Agnello v. New Jersey, 493 F.2d 714, 720 (3d Cir. 1974).

\(^7\) There was ... no inconsistency between [defendant's] statement [invocation of fifth amendment when asked whether he knew Grunewald] to the grand jury ... and his subsequent testimony at trial that his acquaintance with Grunewald was free of criminal elements.

353 U.S. at 421-22.
the conflict of Harris, all reached the Supreme Court in Hale or later in Doyle.

HALE: A SEARCH FOR A STANDARD OF REVIEW

On June 1, 1971, Lonnie Arrington was robbed of $96 by a group of men. He immediately notified the police, and shortly after their arrival, spotted two men and shouted, "There go a guy that was in the robbery." After the men were apprehended by the police, Arrington identified Hale as one of the robbers, and the police found $123 in his pocket and $35 in his wallet. Hale was arrested, taken to the police station, advised of his rights, and questioned about the $158 found on his person. Hale made no response to this entire line of questioning.

At trial, Hale testified that during the time of the robbery he was at the Narcotic Treatment Center and left the Center with a friend who subsequently purchased narcotics. He claimed that he ran from the police officers because he feared a drug conviction. Hale said the money was given to him by his estranged wife to purchase money orders. The prosecutor attempted to impeach this exculpatory story by asserting that Hale's post-arrest silence was totally inconsistent with this testimony. The trial court instructed the jury to disregard the prosecutor's question but refused to declare a mistrial. The Court of Appeals for the District of Columbia reversed, holding that inquiry into the defendant's silence impermissibly infringed upon his right to remain silent and prejudiced his defense.

Before the Supreme Court, the prosecution urged that impeach-
ment use of silence should be allowed, relying heavily on *Raffel v. United States.* The Government claimed that silence during police interrogation is as probative as silence following accusation at an earlier trial. The Court, however, distinguished *Raffel,* maintaining that silence in an earlier trial was not analogous to silence during police interrogation. The Court merely held that in this case, *Grunewald* was determinative and applied its three-prong test. The Court found that: (1) the record revealed repeated assertions of innocence by Hale during the proceedings; (2) the questioning of Hale took place in a forum which lacked even the minimal safeguards, such as the presence of public arbiters and a court reporter which were present in *Grunewald*; and, (3) Hale's status as a "po-

denied review by the Ohio Supreme Court and granted certiorari by the Supreme Court. 96 S. Ct. at 2243. Unlike *Hale,* *Doyle* is to be followed in state as well as federal courts. The following is an example of the division of the federal circuits prior to *Hale:*

1. circuits that ruled evidence of silence inadmissible for impeachment purposes, United States v. Hale, 498 F.2d 1038 (D.C. Cir. 1974); Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), cert. denied, 414 U.S. 878 (1973); United States v. Semen-

sohn, 421 F.2d 1206 (2d Cir. 1970); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowl v. United States, 410 F.2d 48 (9th Cir. 1969).


54. 271 U.S. 494 (1926). The Government emphasized that *Miranda* unlike *Hale* involved a "theme of coercion," and that the defendants in *Miranda* did not stand silent as did Hale. They argued that note 37 of *Miranda* contained no direct authority for its sweeping, conclusory prohibition against the use of silence and could not properly be transformed into a constitutional holding in *Hale.* Brief for Petitioner at 25-26, United States v. Hale, 422 U.S. 171 (1975). One could consider *Hale* a victory for the petitioner in that the government won this constitutional argument for the present. It was a hollow victory nonetheless, as the Court ordered a new trial for Hale under its evidentiary analysis. 422 U.S. at 181. The Government's argument was not evaded in *Doyle,* but rather rejected. See note 84 infra and accompanying text.

55. 422 U.S. at 175. Since the Court did not reach the constitutional issue in *Hale,* it was unnecessary to decide whether *Raffel* had survived Johnson v. United States, 318 U.S. 189 (1943), and Griffin v. California, 380 U.S. 609 (1965). *Harris* was not mentioned in *Hale,* but by distinguishing *Raffel* the Court similarly distinguished *Harris.*

56. 422 U.S. at 175-76. *Raffel* was distinguished and *Grunewald* found applicable because under the facts there was no inconsistency. The accusatory statements made by prosecution witnesses in *Raffel* naturally called for a response. The accusatory questions posed by the police in *Hale* did not naturally call for a response. The atmosphere of custodial interrogation is even more intimidating and foreboding than that of a grand jury proceeding and lacks even the limited procedural safeguards for the rights of the individual that a grand jury proceeding provides. There was really no question for the Court in deciding what case to apply. *Hale* did not lie between the circumstances of *Raffel* and *Grunewald* but was on the outside of *Grunewald.* On a continuum of probative worth, the cases range from high to low as *Raffel,* *Grunewald,* and then *Hale.* In the words of the *Hale* Court, "It appears that this case is an even stronger one for the exclusion of the evidence than *Grunewald.*" Id. at 179. See also Hofstra, supra note 11.
tential defendant" was clear because of the eyewitness identification, his suspicious conduct, and his past clashes with the police.57

It is arguable that the three-fold test of Grunewald as adopted in Hale, may be applicable to all criminal defendants, making the determination of the probative value of silence in the circumstances of an arrestee a foregone conclusion.58 In applying the three-prong standard, the Court could make a per se determination of probative value, because every arrestee who challenges the impeachment use of silence can meet the test's minimum requirements: (1) assertion of innocence—this occurs in every case through a plea of not guilty; (2) intimidating circumstances—police investigation never occurs in open court; and, (3) position as a potential defendant—no arrestee can be lawfully arrested and questioned without probable cause.59

The Hale Court, interpreting federal evidentiary law, found that the probative value of the defendant's silence was outweighed by the prejudicial impact of admitting it into evidence.60 Thus, the Court

57. 422 U.S. at 179. A final Government contention that Hale should naturally have responded to police questioning because of the incentive of immediate release was discounted by the Court. No explanation would have fastened Hale's release in light of the evidence against him: his flight, eye-witness identification, $158 in his possession, and his prior police contacts.

58. See Hofstra, supra note 11.

59. But see People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974). This case demonstrates that silence upon arrest and confrontation can have probative value. Rothschild, a police officer, was arrested for grand larceny by extortion. In his trial, Rothschild testified that he had accepted the money to gather evidence for the prosecution of an individual for bribery of a police officer. The state attempted to impeach his testimony by evidence of his silence when he was arrested and confronted by his peers. The court felt that the defendant would naturally inform his fellow officers of his alleged motive for taking the money.

Upon conviction and sentence, Rothschild attacked the use of his silence for impeachment through a habeas corpus action. Rothschild v. New York, 388 F. Supp. 1346 (S.D.N.Y. 1975). The court relied on the Second Circuit precedent, United States v. Semensohn, 421 F.2d 1206, 1209 (2d Cir. 1970), and held that the prosecutor's questions impermissibly penalized the defendant's exercise of his fifth amendment right against self-incrimination. 388 F.Supp. at 1347, 1351. The writ did not issue, however, because the Court held the error to be harmless. Here, silence was probative since the defendant could meet the minimum Grunewald three-fold test evidencing lack of probative value. The correct decision was made, however, when the Southern District of New York recognized the constitutional ramifications of the error. The court came close to embracing the Doyle analysis but failed to hold the error prejudicial.

60. 422 U.S. at 173. Commentators have suggested that the Court relied on federal evidentiary common law. See, e.g., Hofstra, supra note 11. However, it is just as likely that the Court relied on the Federal Rules of Evidence, Rule 403, as a recent codification of common law principles:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
could avoid the broader constitutional issue reached by the appellate court—use of silence to impeach infringes upon a defendant's right to remain silent. The key to the Court's holding was that silence under these circumstances, and under most circumstances where an arrestee is advised of his *Miranda* rights, is too ambiguous to have much probative value.

The arrestee's silence is ambiguous because demonstrable probative value is lacking from the outset. To impeach a defendant's exculpatory story at trial by use of his prior silence, the prosecution must first convince the court that this silence is inconsistent. This determination is a preliminary question of fact for the trial court judge. The *Hale* Court believed that no valid argument could be made to show probative worth of Hale's silence. The ambiguity of silence during police interrogation made it impossible to demonstrate the requisite threshold inconsistency between silence at the police station and exculpatory testimony at trial. The prosecution could not establish that the silence at issue should have been treated as a prior inconsistent statement.

No threshold inconsistency was ever established in *Hale* because of the possible explanations for the defendant's silence. In addition, the possibility that Hale was relying on his *Miranda* rights increased the ambiguity. Fear, timidity, the desire to present one's case to a jury of one's peers rather than to antagonistic police interrogators, and other possible explanations of Hale's silence added

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**Fed. R. Evid. 403 (1975).**

*Hale* was argued on April 14, 1975, and decided June 23, 1975, whereas the effective date of the Federal Rules of Evidence was July 1, 1975. Nonetheless, Rule 403 effectively asserts the principles of evidence relied on in the Court's decision.


62. 422 U.S. at 176, 177.

63. *Hale* had no reason to believe that any explanation he offered would hasten his release. He knew that the police had already developed strong inferences from the factual circumstances—identification by the complainant, flight from the officers, Hale's possession of $158, and his arrest record and prior police contacts.

64. *Id.* at 179, 180. There are a number of reasons in addition to the extreme positions of reliance on *Miranda* rights or tacit acknowledgement of guilt that may explain an arrestee's silence. The arrestee (guilty or innocent) may find the circumstances of arrest and custodial interrogation so intimidating, emotional, confusing, and traumatic that he may not reply. He may prefer to make a statement in more hospitable surroundings (e.g., open court in the presence of an attorney). *Id.* at 177, 179.

[Under such circumstances it is and must be assumed that the maintenance of silence is the best strategic policy of one accused of a crime and in the custody of the law, entirely consistent with innocence, and in accord with the assumption that all attempts will be made in the course of proceedings to resist the state's attempt to establish guilt.]

*Annot.*, 115 A.L.R. 1510, 1517 (1938).

Testimony from United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969), further elucidates
to this ambiguity. After finding that there was little or no probative merit to the admission of Hale's silence, the Court weighed the significant potential for prejudice on a scale that was already heavily tipped toward exclusion of the evidence. Permitting the defendant to explain his reason for silence would not effectively eliminate the danger of the jury drawing a negative inference from his post-arrest silence. Thus, it was prejudicial error for the trial court to permit cross-examination of Hale concerning his silence during the police interrogation. In making this determination, the Court only used Miranda as a factor to decrease the probative value of an arrested's silence.

Under federal evidentiary law, the Court reached a just and well reasoned result. However, the failure of the Court to discuss Miranda and the constitutional issues posed by the appellate court, negated Hale's impact as a final resolution of the impeachment by silence issue. Normally, weighing probative value and prejudicial effect are matters left to the sound discretion of the trial court. However, after Hale such discretion became subject to careful review on appeal because of the "grave constitutional overtones" inherent in this evidentiary issue. Pursuant to the Court's supervisory authority over the federal judiciary, Hale was granted a new trial.

However, since Hale was not decided on constitutional grounds, this limited mandate was not binding on the states.

The shortcomings of the decision include: (1) the limited scope of the opinion—the Court often used specific qualifying language such as "in these circumstances" and "under the facts of this case".

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Q: Did you ever attempt to tell that agent or the agent that arrested you your version of the story? . . .
A: These are the people that I tell my story to [the court and the jury], not the F.B.I. agent. . . .
The Court: Just answer the question. . . .
A: No.
Mr. Hamel: No further questions.

411 F.2d at 1058-59.

65. 422 U.S. at 180. See note 92 infra and accompanying text concerning the prejudicial impact of silence as evidence in closing arguments.

66. Id. at 177.

67. 422 U.S. at 181.

68. Id. at 177. Justice Douglas was displeased with the limited reach of the case and the fact that the opinion did not discuss the underlying constitutional issues:

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 the use of a constitutional privilege [fifth amendment] to discredit or convict a person who asserts it.

Id. at 182 (Douglas, J. concurring).
implying that the Court mandated a narrow reading of \textit{Hale} and a case-by-case analysis in the future; (2) the opinion's limited precedential effect—since the constitutional issues presented by \textit{Miranda} were avoided and the case was decided under the Court's supervisory powers over federal courts, \textit{Hale} has no binding authority upon the states; and, (3) the circuits can decide similar cases according to various tests, including a constitutional approach, so long as upon review, the probative/prejudicial evidentiary determination would satisfy the standards of \textit{Hale}. Meeting the standards of \textit{Hale} may require little more than including some evidence of probative value and prejudicial effect in the record while basing the ultimate decision on other principles of law. The Court failed to rectify the underlying issue concerning \textit{Miranda}'s implications on the impeachment use of evidence held otherwise inadmissible. The mode which the Court chose to escape a constitutional ruling resulted in the adoption of the three-fold \textit{Grunewald} analysis—an analysis of apparent questionable validity.

\textbf{CONSTITUTIONAL REVIEW IN DOYLE}

The case of \textit{Doyle v. Ohio} presented an unusual set of circumstances for Supreme Court review. William Bonnell, a person with a long criminal record, offered to assist the police in exchange for lenient treatment in his own legal dilemmas. Bonnell arranged a "buy" of 10 pounds of marihuana at an agreed price of $1,750. However, the narcotics agents could only supply $1,320 for Bonnell's purchase, and Bonnell took that sum to the rendezvous under the surveillance of the officers. After the "buy" was made, Bonnell left the scene and the two sellers soon discovered the deficiency. While searching for Bonnell, the two men, Doyle and Wood, were stopped by the narcotics agents, arrested, given the \textit{Miranda} warnings, and searched. Upon finding the $1,320 in the possession of the defendants, the agents began their interrogation, receiving no responses from either Doyle or Wood.

69. Note, 13 Am. Crim. L. Rev. 263 (1975). Thus if certiorari were applied for in a hypothetical case similar to the appellate decision in \textit{Hale}, certiorari would be denied since a review of the facts would demonstrate that the evidentiary value of silence in that case was minimal. The fact that this hypothetical case, like the decision of the appellate court in \textit{Hale}, was based on constitutional grounds, would not matter since the probative/prejudicial balance would meet the Court's mandate. The Fifth Circuit moved to a position more closely aligned with the evidentiary analysis of \textit{Hale}, holding that silence in the face of police interrogation was admissible only if it was blatantly inconsistent with the defendant's trial testimony. United States v. Fairchild, 505 F.2d 1378, 1382 (5th Cir. 1975). The Fifth Circuit had previously held such evidence generally admissible. See note 54 \textit{supra}.

70. See note 62 \textit{supra} and accompanying text.

71. 96 S. Ct. at 2242. \textit{Doyle} unlike \textit{Hale} came from a state court (Ohio) and provided no
At trial, the two defendants offered an exculpatory story, claiming Bonnell was the seller of the contraband. They stated that, while the agreed purchase was for 10 pounds of marihuana, they had decided to take only two pounds. The defendants further testified that Bonnell became angry, seized the marihuana, and threw the cash into Doyle's car, whereupon the two followed Bonnell in order to persuade him to consummate the deal.\(^\text{12}\)

Since this exculpatory story was somewhat plausible, and since the prosecution had very little evidence to contradict it,\(^\text{23}\) Doyle and Wood were cross-examined regarding their post-arrest silence. Both convictions were affirmed when the Ohio appellate court found no error in the admission of post-arrest silence, when used for the limited purpose of impeachment.\(^\text{24}\) The United States Supreme Court granted certiorari\(^\text{25}\) to decide whether the impeachment use of a defendant's silence violates any constitutional provisions.

The Court discussed the evidentiary merit of the defendant's silence but instead of balancing probative value and prejudicial effect, reached the constitutional underpinning of the silence issue. In doing so, the Court finally addressed the "grave constitutional overtones" of the use of silence to impeach within the due process context.

*The Fourteenth Amendment as the Basis for a Constitutional Holding*

The *Doyle* Court extended the impact of the *Miranda* warnings by applying a logical constitutional inference rather than the logical common law inference. The common law inference\(^\text{26}\) was that silence and a reaction to confrontation implied the guilt of the silent party, and could be used in the prosecution's case-in-chief. In post-*Miranda* law, this silence could arguably be used to impeach defendant's assertion of innocence. In *Doyle*, a constitutional inference was drawn from the *Miranda* warnings. While it is true that the *Miranda* warnings contain no express assurance that silence will not be used against an arrestee, such assurance is *implicit* in the warning itself. Use at trial of such silence, even for the limited purpose

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\(^{12}\) occasion for the Court to use its supervisory powers. *Doyle*, therefore, is binding on both the state and federal judiciaries. *Id.* at 2244 n.8.

\(^{22}\) *Id.* at 2242.

\(^{23}\) At trial, defense counsel cross-examined the participating officers in an attempt to demonstrate that because of their limited view of the parking lot, they did not actually witness the transaction. *Id.* at 2242 n.2.

\(^{24}\) *Id.* at 2243.

\(^{25}\) *Doyle* v. Ohio, 96 S. Ct. 36 (1975).

\(^{26}\) See notes 2 through 4 *supra* and accompanying text.
of impeachment, violates the guarantee of fundamental fairness. To fail to make such an inference would require a "double-Miranda warning" to the effect that anything an arrestee does not say, as well as what he does say, can be used against him.

Once this constitutional inference is made, the due process requirements naturally follow. The evidentiary worth of silence can be discounted by the Court since such silence may be nothing more than the arrestee's exercise of his fifth amendment rights. Therefore, any silence following the Miranda warnings is insolubly ambiguous. After an arrestee is implicitly assured by the Miranda warnings that silence will carry no penalty, it is a violation of due process to allow subsequent impeachment use of this silence.

In his dissent, Justice Stevens believed that a defendant could be impeached by his silence as long as he has the opportunity to assert on re-direct examination that he was relying on Miranda. The Court expressly rejected this option, perceiving unfairness in the cross-examination of a defendant's silence, thereby demonstrating inconsistency that the jury might construe as evidence of guilt.

The unfairness occurs when the prosecution is allowed to undertake impeachment on the basis of what may be the exercise of that right.

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77. 96 S. Ct. at 2245. See note 78 infra concerning the double Miranda warning that would otherwise be called for. This kind of double warning would reduce the Miranda warning to a nullity. The standard of voluntariness and knowing and intelligent waiver of fifth amendment rights mandated by Miranda would cease to exist with such a requirement. To draw such a derogatory inference from mere silence is to compel testimony and penalize the exercise of one's fifth amendment rights. McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928).

78. To decide this issue any other way would be to weaken the Miranda decision to the point where an arresting officer would be required to give a "double" Miranda warning such as: "You have the right to remain silent. Anything you say can and will be used against you. Anything you do not say can and will be used against you." The Court felt this tempering of the right and the decision to remain silent was violative of the due process clause of the fourteenth amendment. 96 S. Ct. at 2245.

79. Id. at 2246. (Stevens, J. dissenting, joined by Blackman and Rehnquest, J.J.).

80. Id. at 2245 n.10.

81. The jury's assessment of the credibility of defendant's exculpatory story is intimately connected with the ultimate issue of innocence or guilt. Because of the thin line between evidence used to establish guilt and evidence used to impeach, some jurisdictions require close scrutiny in balancing the probative worth against the prejudicial danger that a jury will not understand this fine distinction. See, e.g., Dickerson v. United States, 62 App. D.C. 191, 65 F.2d 824 (1933); State v. Picciotti, 12 N.J. 205, 96 A.2d 406 (1953).

Such distinctions [evidence of guilt or for impeachment] may be meaningful to lawyers and judges, but it is likely to mean little to juries, no matter how well instructed by the courts.

Wall St. Jour., March 2, 1971, at 16, col. 2. The danger of evidence entering through impeachment is a real one. Adopting the viewpoint of the dissent may serve the Government's position; once the state introduces the evidence of silence, the seed is planted in the minds of the jury. A subsequent explanation by the defendant will not rectify the harm done, nor vindicate the defendant's constitutional rights that have been tampered with.
The Doyle majority, therefore, answered a question that was greeted in mixed fashion by the courts—must an arrestee invoke his fifth amendment privilege affirmatively or will mere silence suffice? So far as the issue of impeachment use of silence is concerned, the Court grants the defendant the benefit of the doubt. The key phrase in the Court’s analysis is, what may be an exercise of that right. Realizing that in truth this is not always the case, the Court decided that it must be assumed the defendant was relying on Miranda, and any resulting disadvantage must be borne by the Government.

The Court could not base the decision on the self-incrimination clause of the fifth amendment because this would require a non-ambiguous assertion of that right by the defendant. The invocation of one's privilege against self-incrimination through silence is shrouded with ambiguity. Miranda warnings create doubt as to the inference that may be drawn from the silence, but do not make silence an affirmative assertion of the fifth amendment protections. Thus, to ground the decision on the fifth amendment would be inapposite to the Court’s discussion of the ambiguity of silence. In addition, a fifth amendment holding would have defeated the Court's purpose of establishing a standard applicable to every case since a subjective invocation of the fifth amendment clearly does not occur in all cases. Instead, the Court determined that the due process clause of the fifth and fourteenth amendments best fulfills this objective. The same ambiguity that bars a fifth amendment

82. In Johnson v. Patterson, 475 F.2d 1066, 1068 (10th Cir. 1973), it was reasoned that a defendant who chooses to remain silent has explicitly invoked his fifth amendment rights. But see United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947) (pre-Miranda). The fifth amendment is a “fighting clause” and is valid only when insisted upon by a belligerent claimant in person. Mere silence is not sufficient to invoke the fifth amendment's privilege. See also Bishop v. Bishop, 157 Ga. 408, 121 S.E. 305 (1924) (civil suit silence equated with fifth amendment). In Agnellino v. New Jersey, 493 F.2d 714 (3d Cir. 1974) the court stated:

[W]e must recognize that appellant was validly exercising his fifth amendment privilege when he refrained from volunteering to the police the information suggested by the prosecutor in his summation.

493 F.2d at 717-18.

The dissent in Doyle also suggested that since Doyle and Wood answered some questions posed to them, they had waived their fifth amendment privilege. But Miranda guarantees that the defendant may answer some questions and choose to remain silent on others.

[There is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent. . . .

384 U.S. at 475-76.

83. 96 S. Ct. at 2244.

84. The ambiguity of silence is sufficient to satisfy due process criteria but to rest an opinion on the fifth amendment would require a non-ambiguous invocation of the privilege against self-incrimination.
holding, requires that any use of post-\textit{Miranda} silence is violative of due process.\footnote{85}

In light of this constitutional analysis, it appears inevitable that the common law rules would fall by the wayside. The common law inference which necessitated case-by-case analysis was subordinated to the due process blanket prohibition of impeachment use of an arrestee's silence under \textit{any} circumstances. \textit{Doyle} could have been analyzed according to the evidentiary approach of \textit{Hale} with the same result.

\textit{Rejection of the Probative Analysis of Hale}

The three-prong analysis of \textit{Grunewald} was not discussed in the \textit{Doyle} opinion. It was a weak test in the pre-\textit{Doyle} era\footnote{86} and has minimal utility since constitutional safeguards have been adopted. Moreover, it must be determined whether \textit{Doyle} totally erased the evidentiary analysis of \textit{Hale}. The Court recognized the "insolubly ambiguous" nature of post-arrest silence. The ambiguity did not arise from the facts of a particular situation as in \textit{Hale} and \textit{Grunewald}, it came from the presumption that the defendant relied on his \textit{Miranda} rights. The possible reasons for the silence of an arrestee\footnote{87} can always cloud its probative worth, yet the Court based its constitutional holding on one assumption: the defendant's reliance on the \textit{Miranda} warnings.\footnote{88} Whether this is the true reason for silence is not important because the aim of the Court was to avoid tempering the expressed right to silence. Thus, \textit{Doyle}'s definition of the ambiguity of silence was quite distinct from that of \textit{Hale}, and the Court found it unnecessary to determine the ambiguous nature of silence and whether it affected probative value.\footnote{89}

\footnote{85. \textit{This distinction can be best illustrated as follows: the \textit{Doyle} decision differs from that reached by the appellate court in \textit{Hale} on the fifth amendment analysis. Petitioners in both cases alleged that impeachment use of their silence was a denial of due process and of their right against self-incrimination. The appellate court in \textit{Hale} accepted both of the petitioners' arguments. However, in \textit{Doyle} the Court ruled that silence after \textit{Miranda} warnings is ambiguous and thus evidentiary use of silence violates due process.}}

\footnote{86. \textit{See text accompanying note 59 supra.}}

\footnote{87. \textit{See note 64 and accompanying text supra for a discussion of the possible reasons for the silence of an arrestee.}}

\footnote{88. \textit{Prior to the \textit{Doyle} decision, the issue had been whether silence meant tacit agreement with an accusation or whether it could logically be construed to mean anything else (including but not limited to the silent invocation of one's \textit{Miranda} rights). In \textit{Doyle}, the Court restructured the issue to pertain solely to the question: was silence in response to an accusation sufficiently identified with reliance on one's \textit{Miranda} rights to invoke \textit{Miranda}'s protections in all cases? The Court answered this question in the affirmative and thus properly reasserted focus on \textit{Miranda}'s impact on this area of evidentiary law.}}

\footnote{89. \textit{Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioner's silence. We note only}}
It had been suggested that the evidentiary holding of Hale was broad enough to mandate the exclusion of the silence evidence with a certainty approaching that of a constitutional prohibition. If the Court had intended to confine their holding to the limited circumstances of the case, they could have stressed the prejudicial impact of the evidence in light of the general weakness of the case against Hale. Instead, the probative value of the evidence was attacked by underscoring Hale's position that as a suspect, in custody, who had just been given the Miranda warnings, Hale could have been read to suggest that the silence of an accused, after Miranda warnings, will seldom be probative of a defendant's credibility at trial. However, Doyle completely closed the gap left by Hale by establishing that under no circumstances can an arrestee given Miranda warnings have his silence used to impeach his testimony.

By declining to rule on the probative worth of silence, it appears that the Doyle Court did not embrace the broader reading of Hale. The Court had the opportunity to include the probative/prejudicial analysis of Hale and to elevate this analysis to a constitutional level under its fundamental fairness rationale. This would have resulted in a two-fold due process consideration:

1. ambiguity of silence of an arrestee because of the varying meanings attributable to silence (including reliance on Miranda warnings as one of those meanings); and
2. ambiguity of silence because arrestee may or may not have been relying on Miranda.

The failure of the Court to adopt such a two-fold due process analysis may have been because of a belief that the ambiguity rationale of Hale did not fully embrace the constitutional underpinning of Miranda to evaluate this probative/prejudicial analysis to a constitutional level. This line of reasoning was demonstrated in Agnellino v. New Jersey. There, the court recognized that the de-
fendant was validly exercising his fifth amendment privilege when he refrained from volunteering information to the police concerning alleged stolen goods. It was not inconsistent to tell police that the goods had been purchased but to wait until trial to identify the seller.

In holding the evidence inadmissible, the court in Agnellino spoke of fifth amendment rights and of the low probative value of the silence. The decision contains a possible link to the analysis adopted in Doyle. Agnellino held that the evidence under these circumstances was inadmissible, but that impeachment evidence could become constitutionally impermissible only when it is so lacking in probative value as to violate due process of law. 

Thus, the Court was (1) unwilling to adopt the broad reading of Hale; (2) unwilling to assume that Hale's holding approached constitutional scrutiny; and, (3) desired to set a precedent that would apply to every arrestee warned in accordance with Miranda. The Doyle Court chose not to elevate the probative value analysis of Hale to the level of the Constitution's due process guarantee. To do so was neither required for setting an evenly applicable precedent nor necessary in deciding the case on constitutional principles. The Court chose simply to mention that silence was ambiguous and that Hale minimized its probative worth. An unwillingness to become mired in case-by-case analysis may have led the Court to go no further than this in its due process analysis of silence.

FUTURE QUESTIONS AND POSSIBLE EXTENSIONS OF DOYLE

The Supreme Court did a masterful job of resolving the conflict on the issue of the admissibility of silence. The two-fold purpose of Hale was satisfied and the integrity and utility of Miranda upheld by elevating its dicta to law. The "grave constitutional overtones"

objections was that the defendant was being penalized for taking shelter in his fifth amendment Miranda rights. Notice how the limited purpose of impeachment loses its validity and is in fact intended to convince the jury of defendant's guilt in excerpts from the closing arguments of the state.

So I was saying in assessing Mr. Agnellino, I think you have a right to say that to yourself. Well, what would a normal human being do when the police are there? There's a raid going on and the property apparently has been stolen and it just doesn't ring true, this man if he didn't have some guilty knowledge, wouldn't have done that. [I know what you would do and I know what I would do. We would say let's find X and Y from whom the goods were allegedly bought]. And that's what you're looking for in this case.

493 F.2d at 716 (emphasis added).

93. Id. at 722.

94. This was apparently due partly to the limited precedential effect of Hale as a supervisory powers case.
of this subject were finally analyzed in perhaps a more logical and more valid approach than that attempted in the Hale appellate decision. Nonetheless, questions remain unresolved that may well reach the Court at a later date.

**Harmless Error?**

Perhaps, the most unusual question posed by Doyle is the meaning of the ambiguous reference to "harmless error." Courts that have faced similar factual circumstances have ruled that the error was prejudicial because of the effect of allowing the jury to hear any evidence of silence. Furthermore, the likelihood that this type of evidence will be alluded to in summation increases the danger of an improper guilt determination by the jury and diminishes the value of the court's limiting instruction. It was quite possible for the Court in Doyle to rely on this precedent rather than allude to the possibility of harmless error. This unnecessary discussion counters the Court's attempt to avoid a case-by-case analysis. It may still be necessary to determine whether error is prejudicial. Those who oppose Doyle's mandate will have yet another back door entry, and those protected by Doyle may, in some cases, find paper rights with no remedies.

**Police Custodial Interrogation**

The meaning of "police custodial interrogation" was first considered in Miranda. The major post-Miranda cases have not dealt with this problem, largely because under the factual situations encountered any opinion would be dicta. In future cases as defendants try to invoke the protections of Doyle, this definition of custodial interrogation will surely become essential.

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95. See note 84 supra.
96. 96 S. Ct. at 2245-46.
98. See note 92 supra.
99. 422 U.S. at 175 n.3. The court of appeals held that the error was not harmless beyond a reasonable doubt even with the judge's limiting instruction. The state did not renew its contention of harmless error before the Supreme Court.
100. 96 S.Ct. at 2245-2246.
101. 384 U.S. at 439.
102. The Miranda court defined custodial investigation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. 384 U.S. at 444. The issue at hand is the application of this definition to hypothetical cases likely to arise. Miranda's companion cases limit the Miranda holding almost exclusively to the station house. However, the language utilized by the Court does not necessitate this limitation. See Note, 80 Harv. L. Rev. 201, 206 (1966).
Hale and Doyle were cases where the defendant was questioned in the station house. Will the Court's extension of the Miranda dicta apply to field interrogation as well? The key to this question is interpreting what is meant by "otherwise substantially deprived of his freedom." It appears likely that the protections offered by Doyle will be extended to arrestees given their Miranda rights and questioned in the field. But this determination must be made on a case-by-case basis. No one can argue that an arrestee taken to a station house has not been deprived of his freedom to a substantial extent, but when one considers the variety of street contact made by the police, one discovers that no hard and fast rule can be applied to this continuum of field contacts.

See also N. Sobel, The New Confession Standards—Miranda v. Arizona 58 (1966). (The author indicates that the definition of custodial interrogation includes field interrogation.)


104. Consider, for example, the following types of street contact and resulting interrogation made daily by police:

1. Accused Stopped on Street
   a. Stopped by oral command of police officer who asks accused for ID card, draft card, address, place of business, occupation, where coming from, destination, etc. and other questions often categorized by law enforcement authorities as "routine in the investigation of suspicious circumstances."
   b. Stopped by oral command of police officer and psychological restraint of two or more officers surrounding the accused.
   c. Stopped by physical restraint of police officers cornering accused in hallway, doorway, alley, etc.
   d. Initially stopped by oral command, and stopped second time by oral command when an attempt is made to walk away from the officer.
   e. Stopped by oral command of police officer and psychological restraint of drawn weapon.
   f. Stopped by physical restraint of actual bodily contact.

2. Accused Stopped While Driving Automobile
   a. Officer in police car or motorcycle following.
   b. Officer in police car or motorcycle following with siren on.
   c. Officer in police car or motorcycle following, pulls alongside, and commands accused to "pull over."
   d. Officer in police car or motorcycle following, pulls alongside and commands accused to "pull over," and finally commands accused to relinquish possession of his ignition key.
   e. Officer in police car or motorcycle following, and cuts accused off, forcing him to pull over.
   f. Officer in police car or motorcycle following, cuts accused off, approaches car and commands accused to "get out" of car.
   g. Officer in police car or motorcycle following, cuts accused off, and approaches car with drawn weapon.

3. Accused Stopped and Then Frisked
   a. Accused commanded to give police officer ID information, frisked, and physically forced to leave public place with officer.

4. Accused Commanded to Enter Police Car
Prior Inconsistent Silence

Possible Extentions of Doyle

Doyle may be read to apply only to arrestees who, like Doyle and Wood, were interrogated in a police station and properly advised of their Miranda rights. However, future cases will present different facts for determination in light of Doyle. Some future areas of consideration are: (1) the rights of an arrestee who gives an equivocal response rather than remains silent;\(^\text{105}\) (2) the evidentiary value of silence when there is custody without interrogation; and (3) the effect of police conduct which is unrelated to an official criminal investigation.

There are circumstances beyond the scope of Doyle where its protections can feasibly be applied since the individual is under no duty or natural impulse to speak. This assertion is a restatement of common law principles—principles that are believed to be limited by Doyle.\(^\text{105}\) Yet to the extent that these factual circumstances are beyond the immediate range of Doyle, common law principles concerning the “natural” impulse of the reasonable man to speak or remain silent may still be effective.

Paradoxically, this could occur because of the impact of the Miranda opinion among the populace. The knowledge of one’s Miranda rights oftentimes precedes an official warning. Thus, an individual, not necessarily an arrestee, may choose to invoke his right to remain silent. Many individuals may assume that they have these rights whenever they come into contact with police and are not limited to an arrestee situation. Where an individual views his position as perilous in the eyes of the law, he may opt to remain silent before a formal arrest. Under these circumstances, it is arguable that the ambiguity surrounding the individual’s silent invocation of his fifth amendment privilege against self-incrimination is similar

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\(^\text{105}\) The general rule is that an equivocal reply does not invoke the same dangers to the fifth amendment privilege as does silence. See, e.g., Commonwealth v. Jefferson, 430 Pa. 532, 243 A.2d 412 (1968) (Hughes' statement implicated Jefferson; Jefferson said he was glad it was over); People v. Tolbert, 70 Cal. 2d 790, 76 Cal. Rptr. 445, 452 P.2d 661 (1969) (cousin asked defendant whether the gun found in the bathroom was his and the defendant replied, "Forget about it"). Such statements are ruled to be tacit confessions or party admissions which are well established exceptions to the hearsay rule. It seems likely that this general rule will still apply after Doyle. Where the defendant has made an incriminating, equivocal reply rather than remain silent, Doyle can be distinguished. This is especially true when the equivocal reply is before an arrest and Miranda warning as in Jefferson and Tolbert above.
to that of the arrestee in Doyle. The same policy considerations voiced in Doyle should prevent the use of silence in any manner as evidence under these circumstances as well. 107

The dissent in Doyle argued that not all arrestees rely on Miranda in remaining silent. This assertion presupposes that Doyle’s silence would have been admissible were it not for his receiving the Miranda warnings. However, the majority did not rule on what value silence would have in the absence of Miranda warnings. Since these warnings are merely an embodiment of the rights that the individual possesses, such a determination of the admissibility of silence awaits a further case. The Doyle majority merely ruled on the facts before the Court and held that the Miranda warnings mandated that silence not be used to impeach an arrestee’s credibility. The Court did not rule on the issue of what value such silence would have if an arrestee had not received his Miranda warnings, or if the individual had not been under arrest at the time of the accusatory statement.

An argument can be proffered that Harris and its progeny, cases that admit evidence obtained in violation of Miranda and/or the Constitution for the limited purpose of impeachment, should be applied to evidence of silence obtained when Miranda warnings were wrongfully withheld. 108 A determination of the effect of Hale and Doyle on Harris would then be at issue. Based on the fact that the Hale Court distinguished Harris, 109 one could presume that the Court will be hostile toward applying any of the concepts of Harris to this area of constitutional scrutiny.

One final consideration remains: the evidentiary value of silence of an individual who is neither given the Miranda warnings, nor at the time of questioning, arrested by the police. For example, in an

106. See Notes 2 and 3 supra and accompanying text.
107. There is authority against this analysis. See McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928) (there may be a duty or impulse to speak in the early stages of police confrontation, but certainly not after arrest); Ryan v. State, 451 P.2d 383 (Okla. App. 1969) (defendant’s companion made a statement after a police officer entered the room but before defendant was arrested. Defendant’s silence was held admissible). When an accusation and resultant failure to deny occur during a criminal investigation, courts have come to divided conclusions and will generally only receive such evidence with caution and with certain safeguards. See note 5 supra. Courts may be less willing to accept such evidence or be even stricter in demanding guarantees of the probative worth of such evidence in light of Doyle.
108. Oregon v. Hass, 420 U.S. 714 (1975) indicates that the Harris doctrine is still alive. Here, inculpatory information gathered by police was used to impeach the defendant after he was denied his request to call a lawyer. To reiterate, Harris and its progeny hold that evidence inadmissible under Miranda, or other constitutionally inadmissible evidence, can be admitted for the limited purpose of impeachment.
109. See note 56 supra.
Indiana case,\textsuperscript{110} a railroad crossing collision resulted in the death of two men whose automobile had been hit by a fast-approaching train. During the police investigation immediately after the accident, a statement was taken from the engineer concerning the circumstances of the accident and the speed of the train.\textsuperscript{111} In this case there was little questioning of other railroad personnel. The subsequent civil trial showed there was no real issue of criminal liability of the train's crew. Under these circumstances, evidence of a silent response by the engineer would properly be admissible at trial, because he is under no criminal scrutiny and has a duty to cooperate with the police.

On the other hand, consider the following hypothetical: a tractor trailer crosses the median strip on a dark night, collides with an auto, and kills a family of four. The driver of the truck suffers only minor injuries requiring no hospitalization, but appears traumatized. The police arrive and question the driver at great length concerning the incident. One line of questioning is particularly offensive, accusatory, and incriminating. For the most part the driver cooperates with the police but refuses to answer the offensive questions. The driver is not arrested and no \textit{Miranda} warnings are given. Under these circumstances, a silent response of the driver could be ambiguous and may have "grave constitutional overtones." After all, the driver has been involved with the death of a family and is shaken by the trauma of his situation. The investigating officer may be gathering data that will lead to his arrest. This places him in an inherently ambiguous position. He does not know whether he may subsequently be charged with civil or criminal liability.\textsuperscript{112} His right to remain silent must be balanced with the necessity of the police to gather accident data. Nonetheless, it is conceivable that such a case may, in the near future, exist where the courts are called on to weigh the probative value of such silence. It could be argued that probative worth of such silence is so lacking that admission of the

\textsuperscript{110} A. Morrill, \textit{Trial Diplomacy} (2d ed. 1974) (cumulations of depositions and evidence presented at trial).

\textsuperscript{111} Id. at 706. The engineer, L. D. Gross, stated that he was heading west on the north tracks at about 68 m.p.h. and saw a vehicle headed north on Long Street. He claimed that the train whistle was blowing and that the flashers were working but that the auto failed to stop. The fireman, Elmer Tutt, gave only his name to police and stated on deposition that he was in an "agitated" condition at the time. Id. at 688.

\textsuperscript{112} To combat the alarming toll of highway deaths, new legislation is being enacted, courts are applying existing vehicle laws more stringently and with greater frequency than in previous years, and \textit{criminal charges} are brought in an increasing number of automobile deaths.

\textsuperscript{13} AM. JUR. TRIALS 298 (1967) (emphasis added).
evidence will be a denial of due process—even the possibility of a criminal sanction creates "grave constitutional overtones."

CONCLUSION

_Doyle_ ruled that due process requires the defendant to make an intelligent decision whether to compromise his fifth amendment rights. The _Miranda_ warnings include an inference that subsequent silence can in no way be used to fetter the defendant's fifth amendment privilege even when there is some question as to his invocation of this right. In _Doyle_ the Supreme Court reached a workable constitutional format that served to bridle the developing tendency to limit the scope of the _Miranda_ opinion. In addition, the decision provided a clear mandate for the case of an arrestee given his _Miranda_ warnings. The Court avoided limited evidentiary, probative worth analyses and adopted a more rational fifth amendment approach to the nature of an arrestee's silence. This view consisted of accepting the fact that the "constitutional ambiguity" of silence encompasses the likely probability that an arrestee's silence may be based on his _Miranda_ warning. Rather than partially base its ruling on this underlying fifth amendment consideration, the _Doyle_ Court analyzed the problem in terms of the due process protections.

This workable, constitutional mandate advanced in _Doyle_ is an appropriate response to what had been a troubled area of law—the impeachment use of silence of an arrestee warned in accordance to _Miranda_. Although it would appear this particular area of the law may now be well settled, the Court's analysis poses further questions regarding circumstances that do not fit these neat and exact criteria. Further analysis awaits a case-by-case approach to the extended fifth amendment rights of the individual pursuant to _Doyle_. If emphasis is placed on the unique criteria of _Doyle_, the future may witness a constriction of its constitutional provisions. But more properly, those who need _Doyle_'s constitutional protections, but who are not technically arrestees, will be afforded these new protections.

BRUCE M. LANE
The Loyola University of Chicago Law Journal proudly dedicates this issue to Professor William F. Lemke, Jr. upon his retirement from the School of Law.
Professor William F. Lemke, Jr.