Use of Post-Arrest, Pre-Warning Silence is Permissible to Impeach Defendant's Exculpatory Trial Testimony, Fletcher v. Weir, 102 S. Ct. 1309

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USE OF POST-ARREST, PRE-WARNING SILENCE IS PERMISSIBLE TO IMPEACH DEFENDANT'S EXCUSATORY TRIAL TESTIMONY


In _Fletcher v. Weir_¹ the United States Supreme Court limited the procedural protection afforded a criminal defendant,² holding that when no _Miranda_ warnings³ are given, the admission of a defendant's post-arrest silence to impeach⁴ his exculpatory trial testimony⁵ does not violate the due process clause of the fourteenth amendment.⁶

The defendant fatally stabbed his adversary during a fight and was arrested seventeen hours later.⁷ Although the record provided no clear indication whether the arresting officer informed the defendant of his right to remain silent, as required by _Miranda v. Arizona_,⁸ the record

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¹. 455 U.S. 603 (1982) (per curiam).
². See infra text accompanying notes 80-85.
³. See infra note 8 and accompanying text.
⁴. Courts generally prohibit the state's use of post-arrest silence to prove the merits of the case. See infra note 32 and accompanying text.
⁶. U.S. Const. amend. XIV, § 1. The fourteenth amendment states in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law..." _Id_.
⁸. 384 U.S. 436 (1966). _Miranda_ requires that police warn arrestees of their right to remain silent before interrogation. _Id. at 444_. Courts define "interrogation" for _Miranda_ purposes as direct questioning or the functional equivalent. See Rhode Island v. Innis, 446 U.S. 291, 298-302
clearly showed that the defendant did remain silent after his arrest. At his trial for intentional murder, the defendant took the stand voluntarily. On direct examination, he advanced for the first time an exculpatory version of the incident. During cross-examination, the prosecutor questioned the defendant about his failure to present the exculpatory explanation before or after his arrest.

The trial court found the defendant guilty of manslaughter and the Kentucky Supreme Court affirmed. The federal district court for the Western District of Kentucky subsequently granted a writ of habeas corpus and the Sixth Circuit affirmed. On certiorari, the United States Supreme Court reversed and held: Absent Miranda warnings, prosecutorial use of post-arrest silence as prior inconsistent conduct to impeach a defendant's testimony does not violate due process because no state action has assured a defendant that his silence will not be used against him.


9. 455 U.S. at 603-04.
10. Id
11. Id
At common law, a criminal defendant's silence in the face of accusations that a reasonable, innocent person would rebut was admissible under the "tacit admission" exception to the hearsay rule as substantive proof of the state's case and as evidence to impeach the defendant's exculpatory testimony. Contemporary courts frequently displace the common law rule, disallowing the use of a defendant's silence as substantive evidence. These courts offer one or more of three possible rationales. First, some courts employ the self-incrimination provision of the fifth amendment to exclude silence. Second, other courts disallow

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17. Before any evidence is admitted, it must be both logically and legally relevant. Logical relevance exists when evidence is material and has probative value. See Fed. R. Evid. 401.

18. As Wigmore defines the "tacit admission rule," "[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." 3 A. Wigmore, Evidence § 1042 (Chadbourn rev. ed. 1973). See United States v. Moore, 552 F.2d 1068 (9th Cir. 1977); United States v. Coppola, 526 F.2d 764 (10th Cir. 1975); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969). See also C. McCormick, supra note 17, § 270. See generally Brody, Admission Implied from Silence, Evasion, and Equivocation in Massachusetts Criminal Cases, 42 B.U.L. Rev. 46 (1962); Schiller, On the Jurisprudence of the Fifth Amendment Right to Silence, 16 Am. Crim. L. Rev. 197 (1974); Comment, Use of Defendant's Silence, supra note 8, at 443.

19. Until the late 19th century, courts considered participants in criminal trials incompetent to testify. Thus, courts have only recently become concerned with the use of a defendant's silence to impeach. See J. George, Jr., Constitutional Limitations on Evidence in Criminal Cases 233 (1973). For a list of the first state court decisions recognizing the defendant's right to testify, see Ferguson v. Georgia, 365 U.S. 570, 577 n.6 (1960).

20. See Michigan v. Tucker, 417 U.S. 433, 441 (1974) (discussion of Miranda); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (fifth amendment rationale for right to remain silent); Griffin v. California, 380 U.S. 609, 612 (1965) (prosecutor's comment to jury about defendant's failure to testify at former trial impermissibly penalizes exercise of fifth amendment right to remain silent);
the use of silence by presuming that it lacks probative value. Finally, when state action either explicitly or implicitly assures the defendant that his silence is not usable for any purpose at trial, some courts hold that use of that silence against the defendant is fundamentally unfair and violates due process.

In 1926, in *Raffel v. United States*, the United States Supreme Court limited the protection provided by the fifth amendment's self-incrimination provision, holding that the provision only precludes the state's use of a defendant's silence if the defendant chooses not to testify. In *Raffel*, the defendant, accused of conspiring to violate the National Prohibition Act, chose not to testify at his first trial but presented an alibi defense at his second trial. The Supreme Court held that by choosing to take the stand the defendant waived his right to remain silent. Accordingly, he was subject to the same questions under cross-examination as any other witness, including questions

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Stewart v. United States, 366 U.S. 1, 6 (1961) (failure to testify at two former trials inadmissible to impeach the defendant in cross-examination); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (prosecutor may not comment on defendant's silence after court erroneously told defendant he could rely on immunity). See also C. McCORMICK, supra note 17, § 270.

The fifth amendment to the United States Constitution provides in pertinent part: "[No person] shall be compelled in any criminal case to be a witness against himself..." U.S. CONST. amend. V. The Supreme Court first applied the fifth amendment to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). For a discussion of the origins of the privilege against self-incrimination, see C. McCORMICK, supra note 17, § 114.

For criticism of the expansion of the fifth amendment, see L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959); Cross, The Right of Silence and the Presumption of Innocence—Sacred Cows or Safeguards of Liberty?, 11 J. SOC'Y PUB. TCHRS. L. 55 (1966-71); Givens, Reconciling the Fifth Amendment with the Need for More Effective Law Enforcement, 52 A.B.A.J. 443 (1966); Hoffman, The Distortion of the Fifth Amendment, 43 N.Y. St. B.J. 330 (1971); Inban, Should We Abolish the Constitutional Privilege Against Self-Incrimination?, 2 CRIM. L. REV. 28 (1955).

On the other hand, some commentators argue that courts too severely restrict the fifth amendment. See, e.g., Berger, The Unprivileged Status of the Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court, 54 NOTRE DAME L. 26 (1978).

21. See supra note 17 & infra notes 36-42 and accompanying text.
22. See infra notes 43-44 and accompanying text.
23. 271 U.S. 494 (1926).
24. Id. at 497. See supra note 20.
25. Id. at 495 (1926). At the first trial a government agent testified that the defendant had made an incriminating statement before trial. The district court ordered retrial after the first jury deadlocked. At the second trial the defendant testified. On cross-examination the prosecutor questioned him about the reason for his prior silence. The Supreme Court upheld the prosecutor's right to ask such questions.
26. Id. at 499. During cross-examination, the defendant must answer all questions relevant to the scope of his testimony during direct examination. See FED. R. EVID. 611(b); C. McCORMICK, supra note 17, § 21.
about his former silence. 27

Forty years later, in *Miranda v. Arizona*, 28 the Supreme Court held that the self-incrimination provision of the fifth amendment requires police officers to advise suspects of their constitutional rights to remain silent and obtain representation of counsel prior to custodial interrogation. 29 Failure to provide these warnings renders any subsequent exculpatory or inculpatory statement by the defendant while in custody inadmissible as substantive evidence. 30 Such statements, however, are admissible to impeach a defendant’s inconsistent trial testimony. 31

27. Raffel v. United States, 271 U.S. 494, 499 (1926). The Court held that the defendant’s silence was admissible both to impeach and to convict. Courts no longer permit the latter use. *See infra* note 32 and accompanying text.

State courts questioned the continuing authority of *Raffel* in light of subsequent Supreme Court decisions. *See*, e.g., Raithel v. State, 40 Md. App. 107, 117, 388 A.2d 161, 167 (1978); State v. Carmody, 253 N.W.2d 415, 417 (N.D. 1977). *See also infra* notes 28-44 and accompanying text. Nevertheless, the Supreme Court reaffirmed *Raffel* more than fifty years later, in *Jenkins v. Anderson*, 447 U.S. 231, 236-37 (1980). The *Jenkins* Court argued that no case following *Raffel* had undercut its reasoning. *Id.* at 237 n.4. Justice Stevens argued in a concurring opinion that post-*Raffel* cases have eroded its significance in federal courts. *Id.* at 241-42 (1980) (Stevens, J., concurring). For further discussion of *Jenkins*, *see infra* notes 48-50 and accompanying text. *See also* Doyle v. United States, 426 U.S. 610, 623 (1976) (Stevens, J., dissenting).


29. *Id.* at 444. *Miranda* provides a system for the practical enforcement of the right to remain silent, which the Court held is grounded in the self-incrimination provision of the fifth amendment. Prior to *Miranda*, the Court used the due process clause of the fifth and fourteenth amendments to provide some measure of protection against involuntary confessions that were the product of unfair or unreasonable interrogations. *See* Michigan v. Tucker, 417 U.S. 433, 441-43 (1974).


Moreover, if the defendant chooses to remain silent, either before or after arrest, the state may not subsequently use this silence as substantive proof of guilt. 32

The propriety of using the defendant's silence solely for impeachment purposes, on the other hand, poses a more difficult problem. 33 After Miranda, lower courts disagreed about whether to allow the use of post-arrest silence 34 to impeach a defendant's testimony. 35 The

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32. Even prior to Miranda, many courts disallowed the state's use of silence to prove its case. See generally 4 W. Wigmore, supra note 18, § 1072.

Since Miranda, federal courts have uniformly held that silence is inadmissible to prove the defendant's guilt. See, e.g., United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974); United States v. Faulkenberry, 472 F.2d 879 (9th Cir.), cert. denied, 411 U.S. 970 (1973); United States v. Krosclack, 426 F.2d 1129 (7th Cir. 1970); 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); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).


In People v. Conyers, 49 N.Y.2d 174, 178, 400 N.E.2d 342, 347, 424 N.Y.S.2d 402, 407 (1980), vacated and remanded, 101 S. Ct. 56 (1981), in which the defendant was impeached by his post-arrest silence, the New York Court of Appeals explained that "[t]he State's interest in preventing perjury is a great one, and the use of a defendant's silence for impeachment purposes imposes less of a toll upon the exercise of the privilege than does the use of that silence as proof of guilt." Nevertheless, the Conyers court disallowed the use of the defendant's silence. For a discussion of Conyers, see infra notes 55 & 57-59 and accompanying text.

34. Pre-arrest silence is now admissible for impeachment purposes. See Jenkins v. United States, 447 U.S. 231, 234 (1980) (evidence that defendant waited two weeks before reporting stabbing to the police or surrendering admissible to impeach defendant's claim of self-defense). For a discussion of Jenkins, see infra notes 48-50 and accompanying text.

35. The District of Columbia, Second, Sixth, Ninth and Tenth Circuits held that post-arrest silence was inadmissible to impeach the defendant's testimony. See United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974), Deats v. Rodriguez; 477 F.2d 1023 (10th Cir. 1973); Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), cert. denied, 414 U.S. 878 (1973); United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970); United States v. Nolan, 416 F.2d 588 (10th Cir. 1969); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967).

The Third and Fifth Circuits, on the other hand, upheld the admissibility of post-arrest silence for impeachment purposes. See United States ex rel. Burt v. New Jersey, 475 F.2d 234 (3d Cir.),
Supreme Court resolved this dispute in United States v. Hale\textsuperscript{36} when it created a rebuttable presumption against the use of post-arrest silence for impeachment. The Court held that silence following the administration of Miranda warnings is characteristically ambiguous.\textsuperscript{37} Thus, cert. denied, 414 U.S. 938 (1973); United States v. Ramirez, 441 F.2d 950 (5th Cir.), cert. denied, 404 U.S. 869 (1971).

Even before Miranda, some circuit courts refused to allow use of defendant’s post-arrest silence to impeach his trial testimony. See, e.g., Ivey v. United States, 344 F.2d 770 (5th Cir. 1965); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965).

For a general history of the use of post-arrest silence in the federal courts, see Note, supra note 18, at 261; Comment, Accused’s Silence During Custodial Interrogation May Not Be Used to Impeach Credibility, 30 U. MIAMI L. REV. 773, 774-75 (1976) [hereinafter cited as Comment, Accused’s Silence]; Comment, Impeaching a Defendant’s Trial Testimony by Proof of Post-Arrest Silence, 123 U. PA. L. REV. 940, 945 (1975); Comment, Privilege Against Self-Incrimination, the Use During Trial of a Defendant’s Silence at the Time of Arrest, 10 WASHBURN L.J. 105, 105-12 (1970).


37. 422 U.S. at 177. Following a robbery, police approached the defendant who fled and was subsequently captured. The police discovered cash in excess of the stolen amount in his possession. The police arrested the defendant for the robbery and informed him of his right to remain silent. The robbery victim later identified the defendant, who gave no explanation for his flight or possession of the money. During his trial testimony, the defendant asserted for the first time that he had been on his way to purchase narcotics when he was arrested. Id. See also Doyle v. Ohio, 426 U.S. 610, 617-18 (1976).

The Hale Court discussed several factors that could induce a suspect to remain silent after arrest: (1) the suspect’s exercise of his right to remain silent under Miranda; (2) his natural fear and confusion following arrest; and (3) his fear of incriminating another. United States v. Hale, 422 U.S. 171, 176-77 (1975). See also People v. Conyers, 5 N.Y.2d 454, 420 N.E.2d 933, 458 N.Y.S.2d 741 (1981) (silence may result from defendant’s natural distrust of police and belief that alibi would do no good). See generally Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. CHI. L. REV. 657 (1966); Note, Tacit Criminal Admissions, 112 U. PA. L. REV. 210 (1963).

In determining the probative value of silence, the Supreme Court in Hale applied the same test
the Court concluded that trial courts should exclude evidence of post-arrest silence because the probative danger of using such evidence for trial impeachment outweighs its probative value in the truth-seeking process. Because the Supreme Court decided *Hale* on evidentiary rather than constitutional grounds, however, the decision did not bind state courts.

It had used in the landmark evidence case of Grunewald v. United States, 353 U.S. 391, 422-23 (1957). This test employs three factors to determine if silence is inconsistent with subsequent testimony:

1. repeated assertions of innocence before the grand jury;
2. the secretive nature of the tribunal in which the initial questioning occurred; and,
3. the focus on petitioner as potential defendant at the time of the arrest, making it natural for him to fear that he was being asked for the very purpose of providing evidence against himself.


*Hale* created a rebuttable evidentiary presumption against the use of post-arrest silence for impeachment purposes at trial. If the defendant's silence had met the *Grunewald* test of probateness, however, it would have been logically relevant. Because *Hale* did not establish an irrebuttable presumption against the prosecutorial use of a defendant's post-arrest silence for impeachment purposes, the Court was able to distinguish *Raffel* without overturning it.


40. *United States v. Hale*, 422 U.S. 171, 173, 180 (1975). When the probative danger outweighs the probative value of evidence in this manner, the evidence is deprived of legal relevance. *See supra* note 17. For cases in which the Court has held that the need for the truth outweighs the threat of danger to the defendant, see, e.g., *Oregon v. Hass*, 420 U.S. 714, 721-22 (1975) (post-warning statement made prior to presence of attorney usable to impeach defendant's inconsistent trial testimony); *Harris v. New York*, 401 U.S. 222, 226 (1971) (statement obtained without *Miranda* warnings usable to impeach defendant's trial testimony); *Walder v. United States*, 347 U.S. 62, 66 (1954) (fruits of illegal search usable to impeach defendant's trial testimony); *Fitzpatrick v. United States*, 178 U.S. 304, 305 (1900) (to insure complete information, a defendant who testifies is subject to cross-examination). *See generally* *Doyle v. Ohio*, 426 U.S. 610, 628-30 (1976).


42. *See* *Fletcher v. Weir*, 455 U.S. 603, 605 (1982). *See generally* *Cupp v. Naughton*, 414 U.S. 141, 146 (1973) (states may disregard non-constitutionally based Supreme Court decisions); *McNabb v. United States*, 318 U.S. 332, 340-41 (1943) (Court has power to establish rules to govern federal courts which do not bind the states because they lack a constitutional basis).

Of the five state supreme courts to confront the issue between *Hale* and *Doyle v. Ohio*, only Tennessee declined to adopt the *Hale* evidentiary presumption. *See* *Niemeyer v. Commonwealth*, 533 S.W.2d 218 (Ky. 1976); *Vipperman v. State*, 92 Nev. 213, 457 P.2d 682 (1976); *State v. Deatore*, 70 N.J. 100, 358 A.2d 163 (1970); *Braden v. State*, 534 S.W.2d 657 (Tenn. 1976). *See also Gruhl, supra* note 31, at 897-98 (discussion of post-*Hale* state cases).
The following year, the Supreme Court extended the *Hale* rule to the states through the due process clause of the fourteenth amendment in *Doyle v. Ohio*. The Court held that because the administration of *Miranda* warnings implicitly assures a defendant that his subsequent silence will carry no penalty and because such silence is "insolubly ambiguous," the use of such silence for impeachment purposes violates the fundamental fairness requirement of the due process clause.

*Doyle*, however, only partially resolved the controversy over the state's use of a defendant's post-arrest silence to impeach his testimony at trial. The decision identified both the arrest and the administration

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43. 426 U.S. 610, 611, 619 (1976). The defendant in *Doyle* was arrested for selling marijuana. He made no statement until his trial, at which time he testified that he had only attempted to buy the marijuana. *Id.* at 613-14. For a discussion of *Doyle*, see Note, *supra* note 18, at 261; Comment, *Use of Defendant's Silence, supra* note 8, at 443; Comment, *Constitutional Prohibition Against Use of Post-Arrest Silence for Impeachment Purposes, 81* DICK. L. REV. 649 (1977) [hereinafter cited as *Constitutional Prohibition*]; Comment, *Post-Arrest Silence: Use for Impeachment Purposes Prohibited, 22* LOY. L. REV. 1073 (1976) [hereinafter cited as *Post-Arrest Silence*].

The *Doyle* Court also made the *Hale* evidentiary presumption irrebuttable by banning the use of post-arrest silence as "insolubly ambiguous." *Id.* at 617-18. See Note, *supra* note 18, at 261.

44. *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). The Court in *Doyle* stated that:

> While it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

*Id.* at 618.

A similar issue arose in *Johnson v. United States*, 318 U.S. 189 (1943). The prosecutor in *Johnson* commented on the defendant's silence during cross-examination. The Supreme Court reversed the defendant's conviction, noting that even though the trial judge erred in allowing the defendant to remain silent, the defendant had relied on the judge's ruling. To allow the use of the ensuing silence to impeach the defendant would violate due process. *Id.* at 196-97. The *Johnson* Court also held that the authorities must inform the defendant if silence is admissible against him so that he may make an informed decision whether to exercise his privilege against self-incrimination. *Id.* at 198-99. See also *Raley v. Ohio*, 360 U.S. 423, 425 (1959) (defendants relied on decision of chairman of state investigating committee that they could invoke the fifth amendment privilege). See generally *Constitutional Prohibition, supra* note 43, at 651-52 (discussion of *Doyle's* applicability to *Johnson* and *Raley*).

45. By basing its decision on the due process clause and evidentiary grounds, see *supra* notes 43-44, the *Doyle* Court succeeded in avoiding the self-incrimination questions raised by the case. Circuit courts that addressed the problem of post-arrest silence after *Miranda*, on the other hand, frequently based their holdings on the fifth amendment's self-incrimination provision. See *supra* note 35. These courts read broadly *Griffin v. California*, 380 U.S. 609 (1965), in which the Supreme Court held that the fifth amendment prohibits the state's use as evidence of a defendant's exercise of the privilege against self-incrimination. They add to this broadening of *Griffin* the dictum in *Miranda* which purports to prohibit the prosecutor's use at trial of a defendant's silence or claimed privilege against self-incrimination. See *supra* note 33.

The circuit courts advanced two arguments in support of their refusal to permit the use of post-
of Miranda warnings as silence-inducing state action. The Court did not expressly answer the question whether arrest alone, absent Miranda warnings, provides sufficient inducement of silence to prohibit its use on due process grounds.

The Supreme Court indirectly addressed this issue in the dicta of two post-Doyle cases. In Jenkins v. Anderson, the Court sustained the prosecutor's use of the defendant's pre-arrest silence for impeachment purposes. Distinguishing Doyle, the Jenkins Court suggested that the defendant's ability to prevent the impeachment use of his silence on due process grounds depends on the state's administration of Miranda warnings. In Roberts v. United States, the Court affirmed the use of arrest silence. First, admitting evidence of silence penalizes the defendant's exercise of his fifth amendment privilege. Second, jurors often cannot distinguish between evidence introduced for impeachment purposes and evidence used to establish guilt. See Note, supra note 18, at 288-90.


46. Justice Powell, writing for the majority in Doyle stated: "We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." Doyle v. Ohio, 426 U.S. 610, 619 (1975).

While the use of the conjunctive form suggests that both arrest and Miranda warnings are necessary to raise due process concerns, lower courts have not interpreted Doyle in this manner. See infra notes 55-65 and accompanying text.

47. See Jenkins v. Anderson, 447 U.S. 231 (1980); Roberts v. United States, 445 U.S. 552 (1980). Because neither case concerned post-arrest, pre-warning silence, they are useful only as persuasive authority.


49. Id. at 234. The Court reasoned that first, because Raffel is still good law, impeachment based on prior silence is permissible unless such silence was induced by governmental action thereby making it inherently ambiguous or fundamentally unfair; second, the probative value of pre-arrest silence is a state evidentiary question and therefore is not within the Supreme Court's jurisdiction; and third, pre-arrest silence is not induced by any governmental action. Id. at 239-40. Justice Marshall, in a strong dissent, argued that first, Raffel is bad law; second, the probativeness of prearrest silence requires testing to determine if the silence is inconsistent with the defendant's trial testimony; and third, the defendant's exercise of his fifth amendment right to remain silent is impermissibly burdened by the prosecutorial use of silence. Id. at 246-54 (Marshall, J. dissenting).

50. The Court stated that "[i]n this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and

a defendant's post-conviction silence for sentencing purposes and again distinguished Doyle, suggesting that Miranda warnings were essential to the due process rationale employed in Doyle.

Two state courts, however, directly confronted the question of the use of post-arrest, pre-warning silence and concluded that due process demanded its exclusion. In People v. Conyers and Michigan v. Hurd, appellate courts of New York and Michigan respectively, reversed the defendants' convictions because of prosecutorial references during trial to post-arrest, pre-warning silence. The court in Conyers based its decision on both self-incrimination and due process grounds, while the Hurd court relied on self-incrimination alone.


52. Id. at 561.
53. Id. at 552. The Roberts Court stated that, "[h]is conduct bears no resemblance to the insolubly ambiguous post-arrest silence that may be induced by the assurances contained in Miranda warnings." Id. at 561.
54. Id. at 552. See also Anderson v. Charles, 447 U.S. 404 (1980). In Anderson, the Supreme Court held that the prosecution may impeach a defendant's trial testimony with evidence of a prior inconsistent statement. The Court distinguished Doyle in a way that suggested the necessity of Miranda warnings to the Doyle defense:

Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent.

Id. at 408.
57. Id. at 429-30, 301 N.W.2d at 883-84; People v. Conyers, 49 N.Y.2d 174, 176-77, 400 N.E.2d 342, 344, 424 N.Y.S.2d 402, 404, vacated and remanded, 449 U.S. 809 (1980).
58. 49 N.Y.2d at 179, 400 N.E.2d at 346, 424 N.Y.S.2d at 406, vacated and remanded, 449 U.S. 809 (1980). The New York Court of Appeals observed:

[T]he implied promise, contained in the Miranda warnings, that one's silence will not be used against one, is not derived from the words of the Miranda warnings, but from the actual constitutional guarantees which they express. Thus, regardless of whether that promise is repeated by the police in the form of Miranda warnings, each and every citizen has already been made just such a promise by the State. . . . Having made that promise, the State may not, consistent with any concept of fairness and due process, subsequently renge on that promise by utilizing a defendant's silence against him.
Doyle rule to cases involving the use of post-arrest, pre-warning silence for trial impeachment.\(^{60}\) In *Weir v. Fletcher*,\(^{61}\) for example, the Sixth

\(\text{id.}\)

The dissent vigorously disagreed, asserting that in the absence of *Miranda* warnings, the state does not violate the defendant's right to due process by using silence to impeach his trial testimony because there is "no 'state action' upon which to predicate a due process claim." *Id.* at 185, 400 N.E.2d at 350, 427 N.Y.S.2d at 410 (Meyer, J., dissenting). As for the self-incrimination issue, the dissent argued for application of the *Raffel* standard, allowing evidence of the defendant's silence if it is "inconsistent" with his trial testimony. *Id.* at 190, 400 N.E.2d at 352, 427 N.Y.S.2d at 413 (Meyer, J., dissenting).


In two cases decided after *Jenkins*, the record failed to disclose whether the defendant had received *Miranda* warnings. United States v. Curtis, 644 F.2d 263, 270-72 (3d Cir. 1981); United States v. Harrington, 636 F.2d 1182, 1186-87 (9th Cir. 1980). For discussion of *Jenkins*, see *supra* notes 48-50 and accompanying text. In another case, also decided after *Jenkins*, the police issued warnings but this fact did not affect the outcome. *Al v. Olim*, 639 F.2d 466 (9th Cir. 1980). The remaining post-*Doyle* cases support the exclusion of post-arrest, pre-warning silence in dicta. *See* United States v. Nunez-Rios, 622 F.2d 1093, 1099-1101 (2d Cir. 1980) (use of post-arrest, pre-warning silence to impeach held improper because silence ambiguous; right to remain silent exists independently of *Miranda* warnings; police misconduct must be deterred); Bradford v. Stone, 594 F.2d 1294, 1295-96 (9th Cir. 1979) (impeachment use of post-arrest silence improper regardless of whether *Miranda* warnings given); United States ex rel. Allen v. Rowe, 591 F.2d 391, 399 (7th Cir. 1979) (no reason to distinguish between silence before and after *Miranda* warnings); *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978) (use of post-arrest, pre-warning silence in state's case-in-chief impermissible), cert. denied, 439 U.S. 1081 (1979); United States v. Brinson, 411 F.2d 1057, 1060 (6th Cir. 1969) (pre-trial silence not usable as a "tacit admission" to prove state's case-in-chief). *Cf.* Minor v. Black, 527 F.2d 1, 4 (6th Cir. 1975) (impeachment use of post-arrest, pre-warning silence impermissible when silence based on advice of attorney), cert. denied, 427 U.S. 904 (1976).

In *Minor* and *Douglas*, the Supreme Court declined to review decisions prohibiting the use of pre-warning silence. For a detailed discussion of *Minor*, see Steinberg, Minor v. Black: *The Use of Defendant's Pre-Trial Silence for Impeachment Purposes*, 6 MEM. ST. U.L. REV. 421 (1976); Comment, *Silence of Accused Relying Upon His Privilege Against Self-Incrimination Was in This Instance not a Prior Inconsistent Act—Evidence Error of Constitutional Magnitude*; Minor v.
Circuit interpreted *Doyle* expansively. The court held that allowing cross-examination concerning post-arrest silence is "inherently unfair" even if no *Miranda* warnings are issued. The court based its holding on evidentiary, due process, and policy grounds.


62. *Id.* at 1127, 1130. For cases citing the Sixth Circuit's opinion, see People v. Lucas, 88 Ill. 2d 245, 430 N.E.2d 1091, 1095 (1981) (Clark, J., concurring) (comment on defendant's post-arrest, pre-warning statement impermissible); Richter v. State, 642 P.2d 1269, 1274 (Wyo. 1982) (*Doyle* per se rule only applies if error not harmless).


63. Weir v. Fletcher, 658 F.2d 1126, 1130-31 (6th Cir. 1981), rev'd, 455 U.S. 603 (1982). The court stated that post-arrest silence may result from fear and anxiety created by arrest and independent knowledge of the right to remain silent. The court argued that these factors do not
The Supreme Court in *Fletcher v. Weir*\(^\text{66}\) declined to read *Doyle v. Ohio*\(^\text{67}\) as preventing prosecutorial use of post-arrest, pre-warning silence to impeach a defendant’s trial testimony.\(^\text{68}\) After reaffirming *Hale*\(^\text{69}\) and *Doyle*,\(^\text{70}\) the Court held that absent *Miranda* warnings, the state has not provided the arrestee with any assurance\(^\text{71}\) that his silence will not be used against him.\(^\text{72}\) On that assumption, the prosecution’s use of post-arrest, pre-warning silence for impeachment purposes does

necessarily indicate the defendant’s guilt or innocence. *Id.* For other factors capable of inducing silence, see *infra* note 37.

The dissent argued that post-arrest, pre-warning silence may have some probative value, stating that “[i]t is indeed difficult to discern why as a practical matter, the precise moment of arrest must automatically make any silence lose all probity of the truth of a defendant’s exculpatory story.” *Id.* at 1136 (Engel, J., dissenting).

64. *Id.* at 1131. The court declined to apply the *Jenkins* dictum which declared *Miranda* warnings essential to *Doyle*. Instead, the court applied *Doyle* liberally by declaring arrest alone sufficient governmental action upon which to base a due process claim. The court said, “[w]e think that an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent.” *Id.*

65. *Id.* at 1132. The Sixth Circuit offered two policy arguments to bolster its decision. First, the court asserted that admitting post-arrest, pre-warning silence for impeachment purposes penalizes those defendants who are already aware of their right to remain silent. *Id.* The dissent responded that the defendant could eliminate any unfairness at trial because he “may still explain that his silence was premised on the exercise of the right.” *Id.* at 1136 (Engel, J., dissenting).

Second, the court argued that allowing such impeachment would discourage police officers from issuing *Miranda* warnings, at least until after sufficient time elapses to provide prosecutors with material for impeachment use. *Id.* at 1132. The dissent argued that withholding warnings is contrary to the interests of the police because any confession obtained prior to warning the defendant is inadmissible to prove the state’s case-in-chief. See *supra* note 30 and accompanying text. Further, the prosecution can only use silence if the defendant chooses to testify. *Id.* at 1136 (Engel, J., dissenting). For further discussion of this second policy objection, see *infra* notes 80-82 and accompanying text.

68. *Id.* at 605-06.
71. The Court quoted *Doyle* for the proposition that *Miranda* warnings provide the defendant with an implicit assurance that his silence will not be used against him at trial. See *supra* note 44.
72. 455 U.S. 603, 606 (1982).
not violate due process of law. The Court, therefore, made explicit that the issuance of *Miranda* warnings is essential to invoke *Doyle's* protection against impeachment with post-arrest silence.

The Supreme Court's refusal in *Fletcher v. Weir* to apply *Doyle's* due process holding to cases involving pre-warning silence is theoretically sound. The Court correctly declined to hold that the act of arrest alone constitutes an assurance by the state that it will not subsequently use the arrestee's silence against him. As such, prosecutorial use of a defendant's pre-warning silence for impeachment purposes is not fundamentally unfair.

Courts should not interpret the *Fletcher* decision as a blanket approval of prosecutorial use of post-arrest, pre-warning silence for impeachment purposes. While the use of such silence does not violate due process, it may not satisfy evidentiary standards. Because the act of arrest may in fact induce silence, post-arrest silence will frequently lack probative value. Such a showing would require the exclusion of

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73  *Id.* at 607. In addition, the Court pointed out that "[a] State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony." *Id.* This suggests that the evidentiary approach of *Hale* is applicable to post-arrest, pre-warning silence. See supra notes 36-42; infra notes 76-79.

74  *Id.* at 605-07. In reaching its holding the Supreme Court concluded that the Sixth Circuit's decision was inconsistent with post-*Doyle* Court decisions. *Id.* at 606. The Court argued that its decisions in *Jenkins*, *Anderson*, and *Roberts* indicated that the assurances provided by *Miranda* warnings were crucial to *Doyle's* due process holding. *Id.* (citing *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Anderson v. Charles*, 447 U.S. 404 (1980); *Roberts v. United States*, 445 U.S. 552 (1980)). For discussion of these cases, see supra notes 48-54.

Commenting on its *Jenkins* holding, the *Fletcher* Court stated that, "[i]n *Jenkins* we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest." 455 U.S. 603, 606 (1982). With regard to its decision in *Roberts*, the Court noted, "we observed that the post-conviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings.'" *Id.* (quoting *Roberts v. United States*, 445 U.S. 552, 561 (1980)). Finally, the Court cited language from its opinion in *Anderson*: "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence would not be used against him... *Doyle* bars the use against a criminal defendant of silence maintained after the receipt of governmental assurances." *Id.* (quoting *Anderson v. Charles*, 447 U.S. 408, 404, 407-08 (1980)).


76  *See supra* note 73.

77  *See supra* notes 17 & 37 and accompanying text. The *Fletcher* Court emphasized the state's assurance of protection rather than its inducement of silence. 445 U.S. 603, 604-07 (1982).

78  The prosecution must demonstrate the probative value of silence in each case. *See supra* note 17 and accompanying text.
pre-warning silence on evidentiary rather than constitutional grounds.\textsuperscript{79}

Moreover, the \textit{Fletcher} decision will probably have an undesirable effect in practice. \textit{Miranda} requires the state to issue warnings to safeguard the accused's right against self-incrimination.\textsuperscript{80} \textit{Fletcher}, by declining to protect defendants who have not received \textit{Miranda} warnings, encourages police to delay the administration of warnings to create silence for later impeachment use.\textsuperscript{81} This result is contrary to the spirit of \textit{Miranda} and marks another retreat by the Supreme Court from the protection offered by the exclusionary rule.\textsuperscript{82}

The Court's refusal to extend Doyle's due process holding to pre-\textit{Miranda}-warning silence in the face of unanimous lower court decisions\textsuperscript{83} urging the extension exemplifies the relative weight the current Supreme Court gives to the often conflicting goals of protecting defendants' procedural rights and promoting the institutional truth-seeking

\textsuperscript{79} Courts' approaches to the use of defendants' silence have developed hierarchically. See supra text accompanying note 20-22. The due process holding of Doyle provides the highest degree of protection to defendants. In declining to apply this standard to pre-warning silence, the Court in Fletcher left the other historical rationales unaffected. In the absence of the due process rationale, therefore, federal courts will now apply the next most protective standard to pre-warning silence, the rebuttable presumption of logical irrelevance espoused in Hale. See supra notes 36-42 and accompanying text. If this standard applies after Fletcher, a case-by-case evaluation of probativeness and prejudice will replace Doyle's irrebuttable bar to the use of post-arrest, pre-warning silence. Even though the Hale rule does not bind the states, state courts will probably follow the lead of the federal courts as they did between Hale and Doyle. See supra note 43 and accompanying text.


\textsuperscript{81} See supra note 65 for a discussion of this danger by the Sixth Circuit in Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981), rev'd, 455 U.S. 603 (1982). The dissent based its response to this argument on police concern for obtaining a confession. \textit{Id.} at 1136 (Engel, J., dissenting). Given the many ways in which arrest alone may induce silence, however, see notes 37 & 65, the likelihood of a confession is not very great. When police sense that an arrestee will not confess, the Fletcher decision removes all incentive to comply with the requirements of Miranda.

An analogous limitation of defendants' rights which has had deleterious effects is the restriction of the right to counsel at police lineups to lineups occurring after the defendant is formally charged or indicted. See Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967). The failure to extend the right to counsel in this area encourages police to delay charging arrestees until after the police have held lineups. See Note, \textit{The Pretrial Right to Counsel}, 26 STAN. L. REV. 399 (1974).

\textsuperscript{82} See supra note 31 for cases restricting the exclusionary rule in the area of defendant testimony.

\textsuperscript{83} See supra note 60 for post-Doyle cases urging the extension of Doyle's protection to pre-warning silence.
concerns of the state. 84 Fletcher v. Weir 85 heightens the tension between these two goals.

84. See supra note 39 for a discussion of the saliency of the Court's concern with the truth seeking process.
85. 455 U.S. 603 (1982).