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The fifth amendment right against self-incrimination has a long and checkered history. In this article the author traces the development of the right to be free of compelled incrimination, the current state of the law is summarized and the Wyoming trend is examined.

SILENCE IS NO LONGER GOLDEN: DESTRUCTION OF THE RIGHT TO REMAIN SILENT

*Sylvia Lee Hackl**

> No person shall . . . be compelled in any criminal case to be a witness against himself. . . .[1]

For many years, the fifth amendment to the United States Constitution was held to guarantee "the right of a person to remain silent unless he [chose] to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[2] The practical effect of this interpretation was to prohibit prosecutorial comment on a defendant's pre-trial silence.

> After all, the privilege against self-incrimination reflects an essential theme of our accusatorial system: the state cannot force the accused to participate in his own self-condemnation by compelling him to disclose incriminating testimonial evidence. How else can a criminal suspect exercise this right except by remaining silent?[3]

In recent years, however, many decisions at both the federal and state level have eroded the once sacrosanct protections of the fifth amendment, to the extent that silence is no longer golden. This article will summarize the history of the right and outline the current trend diluting that right.

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1. U.S. CONST. amend. V.
2. Malloy v. Hogan, 378 U.S. 1, 8 (1964).
3. Arnella, *"Right" to Silence Diluted by Burger Court*, NAT'L. L. J., Aug. 1, 1983, at 30, col. 1.

A. THE RIGHT TO REMAIN SILENT: ESTABLISHMENT AND DESTRUCTION BY THE FEDERAL COURTS

In 1957, the United States Supreme Court, in a unanimous decision, overturned a defendant's conviction because he had been questioned about his exercise of his right to remain silent when appearing before a grand jury.[4] Four years later, a majority of the Court again reversed a conviction because of improper prosecutorial comment on an accused's assertion of his fifth amendment right against self-incrimination.[5] In *Stewart v. United States,* the defendant had been tried three times for murder. He first took the stand in his own defense during the third trial, at which time the prosecutor asked: " 'This is the first time you have gone on the stand, isn't it, Willie?' "[6] The Supreme Court held that any comment or argument about the exercise of the fifth amendment privilege was prohibited and constituted prejudicial error which could not be cured by cautionary instructions.[7]

A similar situation faced the Court in *Griffin v. California.*[8] The Court again barred comment on an accused's exercise of rights guaranteed by the fifth amendment. Speaking for the Court, Justice Douglas noted that such comment was a "remnant of the 'inquisitorial system of criminal justice,' "[9] and constituted a "penalty imposed by courts for exercising a constitutional privilege."[10]

Another important step in the establishment of the right was the landmark case of *Miranda v. Arizona,*[11] in which the United States Supreme Court held that the fifth amendment created an affirmative duty to warn suspects of their "right to remain silent" prior to custodial interrogation. The Court also issued a stern warning to prosecutors: "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."[12]

The probative value of evidence of an accused's silence at the time of his arrest was discussed at length in *United States v. Hale.*[13] When the defendant took the stand in that case, the prosecutor cross-examined him about his failure to offer exculpatory information to the police at the time of his arrest. On appeal, the District of Columbia Circuit Court of Appeals held that the impermissible comment on the defendant's pre-trial silence irreparably prejudiced his defense and infringed on his constitutional right to remain silent.[14] In affirming the circuit court's reversal of the defendant's

4. Grunewald v. United States, 353 U.S. 391 (1957).
5. Stewart v. United States, 366 U.S. 1 (1961).
6. *Id.* at 4. In fact, the prosecutor asked the question twice. *Id.* at 4 n.7.
7. *Id.* at 2, 9.
8. 380 U.S. 609 (1965), *reh'g denied,* 381 U.S. 957 (1965).
9. *Id.* at 614 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).
10. *Id.* at 614.
11. 384 U.S. 436 (1966).
12. *Id.* at 468 n.37.
13. 422 U.S. 171 (1975).
14. United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974).

conviction, the Supreme Court commented on the ambiguous and therefore non-probative nature of silence, and noted the particularly difficult situation in which an arrestee was placed.

> [H]e is under no duty to speak and . . . has ordinarily been advised by government authorities only moments earlier that he had a right to remain silent, and that anything he does say can and will be used against him in court.
>
> At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation. . . compound the difficulty of identifying the reason for silence.[15]

The Court concluded its opinion with a discussion of the dangers of using evidence of pre-trial silence. The Court noted that such silence was not probative and also carried with it a significant potential for prejudice. The prejudice arose from the danger that a jury would misinterpret such silence and give it far more credence than appropriate.[16]

The Court decided the case on evidentiary grounds, ruling that the probative value of the pre-trial silence was outweighed by its prejudicial impact. By deciding the case in this manner, the Court avoided a discussion of the constitutional issue upon which the circuit court had partially based its decision, that being the question of whether the use of such silence violated the defendant's right to remain silent. A year later, however, the constitutional question was squarely before the Court in *Doyle v. Ohio*.[17] The issue was whether a prosecutor could "impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest."[18] The Court held that such use of a defendant's post-arrest silence violated the due process clause of the fourteenth amendment.[19]

The Court's holding in *Doyle* appeared to settle the issue of comment on a defendant's exercise of his right to remain silent. In fact, however, the Court's ruling did not constitute an absolute ban on the in-court use of such silence. First of all, in its holding, the Court focused on the use of silence which had occurred after *both* arrest and the giving of Miranda warnings. Second, the Court recognized at least one exception to the ban in the form

15. United States v. Hale, 422 U.S. 171, 176-77 (1975) (citations omitted).
16. *Id.* at 180.
17. 426 U.S. 610 (1976).
18. *Id.* at 611.
19. *Id.* at 619.

of impeachment of a defendant who gave exculpatory testimony at trial and claimed to have told the same version to the arresting officers.[20] Finally, the Court left open the question of whether such an error could ever be harmless.[21]

Some of the ambiguities remaining after *Doyle* were clarified four years later by the Court's decision in *Jenkins v. Anderson.*[22] The Court held that neither the fifth nor the fourteenth amendment was violated by the use of an accused's prearrest silence to impeach his credibility.[23]

In deciding that no basic constitutional principles were prejudiced by such use of prearrest silence, the Court engaged in a rather tortured analysis of its previous decisions concerning prearrest silence. The Court construed its decisions in *Grunewald v. United States,*[24] *Stewart v. United States,*[25] and *United States v. Hale*[26] as mere exercises of its supervisory power over federal courts in evidentiary matters.[27] The Court interpreted those decisions as nothing more than evidentiary rulings that a defendant's prior silence could not be used for impeachment where its probative value was outweighed by its prejudicial effect.[28] The majority decision emphasized the need for impeachment of a defendant, including the use of his prearrest silence, to enhance the reliability of the criminal process, and characterized the defendant's decision to take the stand as a voluntary waiver of "his cloak of silence."[29]

Only one earlier case was distinguished from the factual situation in *Jenkins,* that being the 1976 case of *Doyle v. Ohio.*[30] The *Jenkins* Court distinguished *Doyle* on the ground that the defendant in that case had been induced to remain silent by the giving of Miranda warnings. The *Jenkins* Court deemed it fundamentally unfair for the government to assure the accused that he had a right to remain silent and then to use that silence against him.[31] Absent such governmental inducement to remain silent, however, it was neither unfair nor violative of basic constitutional rights to impeach a defendant by use of his prearrest silence.[32]

The majority's holding, as well as the analysis it employed in reaching that decision, met with severe criticism, not the least of which stemmed from within the Court itself. Justices Marshall and Brennan dissented from the Court's holding, and found three major flaws in the Court's reasoning:

> Today the Court holds that a criminal defendant's testimony in his own behalf may be impeached by the fact that he did not go to

20. *Id.* at 619 n.11.
21. *Id.* at 619-20.
22. 447 U.S. 231 (1980).
23. *Id.* at 232, 238, 240-241.
24. 353 U.S. 391 (1957).
25. 366 U.S. 1 (1961).
26. 422 U.S. 171 (1975).
27. Jenkins v. Anderson, 447 U.S. 231, 239 (1980).
28. *Id.*
29. *Id.* at 238.
30. 426 U.S. 610 (1976).
31. Jenkins v. Anderson, 447 U.S. 231, 239-240.
32. *Id.* at 240.

> the authorities before his arrest and confess his part in the offense. The decision thus strikes a blow at two of the foundation stones of our constitutional system: the privilege against self-incrimination and the right to present a defense.
>
> * * *
>
> The Court's holding that a criminal defendant's testimony may be impeached by his prearrest silence has three patent—and, in my view, fatal—defects. First, the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment. Second, the drawing of an adverse inference from the failure to volunteer incriminating statements impermissibly infringes the privilege against self-incrimination. Third, the availability of the inference for impeachment purposes impermissibly burdens the decision to exercise the constitutional right to testify in one's own defense.[33]

As noted by the dissent, the major analytical flaw in the majority's reasoning was its failure to recognize that its ruling compelled an individual who had not yet been arrested to incriminate himself by coming forward and admitting his knowledge of or participation in an offense, in order to avoid being impeached by his failure to do so. In effect, this aspect of the *Jenkins* decision irreparably prejudices the principal policy inherent in the fifth amendment: an accused cannot be compelled to incriminate himself.[34]

Another problem with the *Jenkins* decision was the Court's undue emphasis on governmental inducement of the right to remain silent—that is, that the giving of the Miranda warnings was a necessary prerequisite to the successful invocation of the right.[35] This emphasis "elevated the warning from a prophylactic means of protecting the fifth amendment to an independent source of the right."[36]

Six days after the decision in *Jenkins,* the Court elaborated on yet another of the ambiguities in the *Doyle* case, that dealing with the use of prior inconsistent statements for purposes of impeachment.[37] In *Anderson v. Charles,*[38] the Court, in a per curiam opinion, held that it did not violate due process to cross-examine the defendant about inconsistencies between his post-arrest statements to the police and his in-court testimony. The objectionable question in *Anderson* was: "Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got the car?"[39] The Sixth Circuit Court

33. *Id.* at 245-46.
34. Note, *Impeachment of a Criminal Defendant by Reference to His Prearrest Silence Violates Neither His Fifth Amendment Right Against Self-Incrimination Nor His Fourteenth Amendment Guarantee of Due Process,* 49 U. CINN. L. REV. 857, 863-66 (1980); *See also* Arnella, *supra* note 3.
35. 447 U.S. at 240-41.
36. Note, *supra* note 34, at 866. This emphasis was foreshadowed by dicta in the Court's decision two months before *Jenkins, in* Roberts v. United States, 445 U.S. 552 (1980).
37. *See supra* text accompanying note 20.
38. 447 U.S. 404 (1980), *reh'g denied,* 448 U.S. 912 (1980).
39. *Id.* at 406.

of Appeals had held that this line of questioning violated due process under the principles enunciated in *Doyle v. Ohio.*[40] The Supreme Court disagreed with the circuit court's reasoning,[41] and distinguished the *Doyle* case on the ground that decision only barred the in-court use of a defendant's post-arrest silence, and did 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."[42]

While the brief decision in *Anderson v. Charles* initially seemed to be no more than a reassertion of the basic principles underlying impeachment by prior inconsistent statements, in fact it drew still finer distinctions between permissible and impermissible comment on a defendant's exercise of his right to remain silent; in *Anderson v. Charles,* this distinction was between complete and partial post-arrest silence.[43] Such distinctions, coupled with the Court's insistence that Miranda warnings must be given before a defendant may successfully assert his right to remain silent,[44] ignore the very spirit of the protections embodied in the fifth and fourteenth amendments. Those constitutional provisions guarantee that a defendant cannot be compelled to incriminate himself, and the policy underlying that guarantee is that the government will not use unfair methods in obtaining a conviction. Yet the fine-line distinctions drawn by the Court in *Jenkins* and *Anderson v. Charles* impinge on these constitutional concepts by requiring a defendant to have technical knowledge of developing distinctions in the law in order to know precisely when and under what circumstances he can safely assert his right to remain silent.

The Court again reiterated its reliance in the formality of Miranda warnings as a prerequisite to protecting constitutional rights in *Fletcher v. Weir.*[45] In yet another per curiam decision, the Court held that, absent "the sort of affirmative assurances embodied in the *Miranda* warnings," due process was not violated by cross-examining a defendant concerning his post-arrest silence.[46] The Court's reliance on the Miranda warnings as a necessary prerequisite to activating the right to remain silent not only places undue emphasis on those warnings as an independent source of the right,[47] but also ignores the Court's own analysis as expressed in *United States v. Hale* concerning the many reasons underlying post-arrest silence,[48] which reasons are equally applicable whether or not Miranda warnings have been given.[49] An arrestee—whether guilty or innocent—may remain silent because of fear, misunderstanding, intimidation, confusion or a multitude of other emotional responses to an unfamiliar and potentially hostile situation.[50] The formality of Miranda warnings

40. Charles v. Anderson, 610 F.2d 417, 422 (6th Cir. 1979).
41. Anderson v. Charles, 447 U.S. 404, 407.
42. *Id.* at 408.
43. Note, *Protecting Doyle Rights after Anderson v. Charles: The Problem of Partial Silence,* 69 VA. L. REV. 155 (1983).
44. *See supra* text at note 36.
45. 455 U.S. 603 (1982). (Per curiam).
46. *Id.* at 607.
47. *See supra* text accompanying note 36.
48. 422 U.S. 171, 176-177 (1975).
49. *Cf.* Jenkins v. Anderson, 447 U.S. 231, 242-43 (1980) (Stevens, J., concurring).
50. 422 U.S. at 177.

would have little effect in exacerbating or ameliorating these emotions; if anything, those emotions are stronger before the warnings are given, thus making pre-Miranda silence even less probative than post-Miranda silence.

The Court's decision in *Fletcher* perpetuated the need for a sophisticated knowledge of the law on an arrestee's part, and also encouraged law enforcement officers to delay giving the required warnings[51] in direct contravention of the very principles underlying the prophylactic rule of *Miranda* itself.

The final emasculation of the principles enunciated in *Doyle v. Ohio* occurred in the federal system at the circuit court level. As mentioned earlier, in *Doyle v. Ohio,* the Supreme Court did not address the question of whether impermissible comment on the right to remain silent could constitute harmless error.[52] Although the Court has not resolved this question itself,[53] various circuit courts have held that such error can in fact be harmless. The Fifth Circuit Court of Appeals was one of the first to discuss this issue. In *Chapman v. United States,*[54] the court established three categories for analyzing whether an improper comment on a defendant's silence constituted reversible or harmless error:

> [1] When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.
>
> [2] When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.,* when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.
>
> [3] When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.[55]

Even while holding that such error could, under the proper circumstances, be deemed harmless, the Fifth Circuit nevertheless indicated an extreme reluctance to permit such improper comment. In *Chapman v. United States,* the Fifth Circuit issued a strong admonition against wholesale adoption of the harmless error rule: "The infusion of 'harmlessness' into error

51. Arnella, *supra* note 3.
52. 426 U.S. at 619-20.
53. *But see* Chapman v. California, 386 U.S. 18 (1967), *reh'g denied,* 286 U.S. 987 (1967).
54. 547 F.2d 1240 (5th Cir. 1977), *cert. denied,* 431 U.S. 908 (1977).
55. United States v. Ylda, 643 F.2d 348, 350 (5th Cir. 1981) (quoting Chapman v. United States, 547 F.2d 1240, 1249-50 (5th Cir. 1977)).

must be the exception, and the doctrine must be sparingly employed. A miniscule error must coalesce with gargantuan guilt, even where the accused displays an imagination of Pantagruelian dimensions."[56] And in *United States v. Edwards,* the same court again noted that "comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete."[57]

Recently, the categories established in *Chapman v. United States* for analyzing the harmlessness of the error have fallen into disuse, and a case-by-case analysis has emerged.[58] The focus is on such factors as whether the reference was made or elicited by the prosecution,[59] whether the prosecution unduly emphasized the reference,[60] whether the comment went to the heart of the defense,[61] and whether there was substantial evidence of guilt.[62] This type of analysis is equally unsatisfactory, since it dilutes the previous emphasis on the improper nature of the comments themselves and encourages such comments in the hope that the error will be shrugged off as harmless, and the conviction upheld.

The lower federal courts have also followed the United States Supreme Court's lead in drawing fine-line distinctions between permissible and improper comment on an accused's pre-trial silence. Some courts have required Miranda warnings as a necessary prerequisite to protecting a defendant's exercise of his right to remain silent,[63] and others have used a "partial silence" rationale in line with *Anderson v. Charles.*[64]

Doyle v. Ohio represented the apex in the history of protections offered to an individual when exercising his constitutional right to remain silent. Since then, those protections have been continually eroded. There are now four divisions of the "right," depending upon when the accused remains silent and in what context the comment thereon occurs. The first division is that of prearrest silence; comment upon such silence is permissible.[65] The next category is post-arrest, pre-Miranda silence; once again, comment upon silence during this period of time has been deemed acceptable.[66] Post-arrest, post-Miranda silence is the third division. If a defendant remains silent after he has been arrested and after he has been read his rights, his silence may not be used against him, unless the fourth category—that of

56. 547 F.2d at 1250. *See also* United States v. Ylda, 643 F.2d at 351.
57. 576 F.2d 1152, 1155 (5th Cir. 1978).
58. United States v. Shaw, 701 F.2d 367, 383 (5th Cir. 1983).
59. United States v. Sklaroff, 552 F.2d 1156, 1162 (5th Cir. 1977), *cert. denied,* 434 U.S. 1009 (1978); United States v. Smith, 635 F.2d 411, 413 (5th Cir. 1981); United States v. Whitaker, 592 F.2d 826, 830 (5th Cir. 1979), *cert. denied,* 444 U.S. 950 (1979).
60. United States v. Sklaroff, 552 F.2d 1156, 1162 (5th Cir. 1977), *cert. denied,* 434 U.S. 1009 (1978); United States v. Davis, 546 F.2d 583, 595 (5th Cir. 1977), *cert. denied,* 431 U.S. 906 (1977); United States v. Dixon, 593 F.2d 626, 630 (5th Cir. 1979), *cert. denied,* 444 U.S. 861 (1979).
61. United States v. Smith, 635 F.2d 411, 414 (5th Cir. 1981).
62. Sullivan v. Alabama, 666 F.2d 478, 485 (11th Cir. 1982).
63. United States v. Massey, 687 F.2d 1348 (10th Cir. 1982).
64. United States v. Ochoa - Sanchez, 676 F.2d 1283 (9th Cir. 1982); United States *ex rel.* Saulsbury v. Greer, 702 F.2d 651 (7th Cir. 1983), *cert. denied,* ___ U.S. ___, 103 S.Ct. 2104 (1983).
65. Jenkins v. Anderson, 447 U.S. 231, 240 (1980).
66. Fletcher v. Weir, 455 U.S. 603 (1982).

harmless error—comes into play. Obviously, today's defendant must have a thorough understanding of the law and split-second timing in order to clothe himself with the protections once thought to be automatically provided by the Constitution.

B. FOLLOWING THE FEDERAL COURTS: DILUTION OF THE RIGHT TO REMAIN SILENT IN STATE COURTS

1. In general

Many state courts have followed the Supreme Court's lead in analyzing when and how a defendant remains silent, with the result that the right to remain silent has been diluted at the state court level as well. For example, many state courts have either adopted or explicitly acknowledged the United States Supreme Court's decision in *Jenkins v. Anderson* permitting comment upon an accused's pre-arrest silence.[67] Similarly, many courts now permit comment upon an accused's post-arrest silence which precedes the giving of Miranda warnings;[68] the rationale expressed in the concurring opinion in *Jenkins v. Anderson* has struck a responsive chord in some state appellate courts.[69] In these state court cases, as with their federal court predecessors, the insistence that a formal warning be given before a defendant may assert his right to silence with impunity has a major analytical flaw. The reasoning underlying these decisions indicates that a defendant has a right to rely only on *Miranda* warnings given by an arresting officer and not upon any other source, be it the advice of counsel, the comments of a presiding judge, or his own knowledge of the existence of that constitutional guarantee. Some judges have in fact disagreed with their courts' approval of the *Jenkins* rationale. In *State v. Nott*[70] for example, Judge Prager stated:

> In my judgment, the opinion of the majority has charted a course for the courts of Kansas which not only violates constitutional principles but is contrary to express provisions of the Kansas statutes. The effect of the majority opinion will be to seriously impair, if not to destroy, the constitutional privilege against self-incrimination as provided for in the federal and Kansas Constitutions.[71]

* * *

67. Bloomstrand v. State, 656 P.2d 584, 587 (Alaska App. 1982); State v. Villarreal, 126 Ariz. 589, 617 P.2d 541, 542 (1980); Hill v. State, 295 S.E.2d 518, 523 (Ga. 1982); State v. Urquhart, 105 Idaho 92, 665 P.2d 1102, 1104 (1983); People v. Eliason, 453 N.E.2d 908, 917 (Ill. App. 1983); Abdullah v. State, 49 Md. App. 141, 430 A.2d 119, 121 (1981); Commonwealth v. Nicherson, 386 Mass. 54, 434 N.E.2d 992, 995 (1982); State v. Callahan, 310 N.W.2d 550, 551-52 (Minn. 1981); State v. Helgeson, 303 N.W.2d 342, 347-48 (N.D. 1981); State v. Sims, 3 Ohio App. 3d 331, 445 N.E.2d 245, 248 n.6 (1982); Smith v. State, 656 P.2d 277, 282-83 (Okla. Crim. App. 1982).

68. People v. Quintana, 665 P.2d 605, 610-11 (Colo. 1983); Phillips v. State, 164 Ga. App. 235, 299 S.E.2d 138, 140 (1983); Hill v. State, 295 S.E.2d 518, 523 (Ga. 1982); State v. Urquhart, 105 Idaho 92, 665 P.2d 1104 (1983); People v. Eliason, 453 N.E. 2d 908, 917 (Ill. App. 1983); Sanchez v. State, 655 S.W.2d 214, 215 (Tx. App. 1982).

69. State v. Callahan, 310 N.W.2d 550, 551-52 (Minn. 1981); State v. Helgeson, 303 N.W.2d 342, 347-48 (N.D. 1981).

70. 669 P.2d 660 (Kan. 1983).

71. *Id.* at 676.

> The majority opinion, if followed by the courts of Kansas, will have the effect of bringing about the depreciation, if not destruction, of a basic constitutional right. If a person's assertion of his Fifth Amendment right to remain silent at the direction of his court-appointed attorney, or as a result of the admonition of a trial judge, can later be used by the prosecutor for impeachment during cross-examination at his trial, that assertion has become "costly," and the State has penalized that person for his exercise of a fundamental constitutional right. The effect of the majority decision is essentially this: A person charged with a crime has a constitutional and statutory right to remain silent, *but,* if he exercises that right and remains silent, his silence can later be used to impeach his credibility if he ever takes the stand in his defense thereafter. Does not such a rule impose a sanction or penalty on the exercise of a constitutional right? As stated by Justice Black in his concurring opinion in Grunewald:
>
> > "It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."[72]

The issue of the use of post-arrest, post-Miranda silence has not been the subject of great debate at the state court level, except insofar as the question of harmless error is involved. The harmless error concept has been embraced by state courts, and, judging by the cases on appeal, the standard seems to favor application of the rule.[73]

Despite the apparent diminution of the right to remain silent at the state court level, several appellate courts continue to adhere to strict constitutional principles. The Florida and Pennsylvania courts, for example, have refused to permit distinctions between silence which precedes the giving of Miranda warnings and that which follows it. In *Lee v. State*[74] the Florida appellate court held that it was "impermissible to comment on a defendant's post-arrest silence whether or not the silence [was] induced by Miranda warnings."[75] The court reasoned that while the giving of Miranda warnings made it particularly unfair to use a person's silence against him, there was no valid reason to distinguish between pre- and post-Miranda silence:

> [W]hile Miranda warnings make it even more offensive to use a person's silence upon arrest against him, the absence of such warnings does not add to nor detract from an individual's Fifth Amendment right to remain silent. If one has a right upon arrest not to speak for fear of self-incrimination, then the mere fact that the

72. *Id.* at 684 (quoting Grunewald v. United States, 353 U.S. 391, 425-426 (Black, J., concurring)). (Emphasis in original).
73. People v. Quintana, 665 P.2d 605, 610-11 (Coo. 1983); Hill v. State, 295 S.E.2d 518, 523 (Ga. 1982); State v. Urquhart, 105 Idaho 92, 665 P.2d 1102, 1104 (1983); State v. Callahan, 310 N.W.2d 550, 551-52 (Minn. 1981); State v. Borotz, 654 S.W.2d 111, 114 (Mo. App. 1983); State v. Mosher, 465 A.2d 261, 267-68 (Vt. 1983).
74. 442 So.2d 928 (Fla. App. 1982).
75. *Id.* at 931.

> police call his attention to that right does not elevate it to any higher level. If it were otherwise, an ignorant defendant who was advised of his right to remain silent would be protected against use of his silence to impeach him at trial; but an educated, sophisticated defendant familiar with his right to remain silent who was not apprised of that right by the police would be subject to impeachment for the exercise of a known constitutionally protected right.[76]

The Supreme Court of Pennsylvania used a similar analysis in *Commonwealth v. Turner*.[77] The court recognized the "strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt,"[78] regardless of when or how that privilege was asserted. The court then noted that it was inappropriate to protect an accused's right to remain silent only when that silence was preceded by the giving of Miranda warnings—in other words, "where there is a governmental inducement of the exercise of the right."[79]

The Oklahoma Court of Criminal Appeals continues to reject attempts to distinguish between pre- and post-arrest silence, and simply forbids comment on an accused's pretrial silence.[80] In a similar vein, the Supreme Court of Utah still deems comment on a defendant's post-arrest, post-Miranda silence to be fundamental error.[81] The Massachusetts court, in contrast, has considered the harmless error rule, but deems *Doyle* error to be "so egregious that reversal is the norm, not the exception."[82]

2. The Trend in Wyoming

The Wyoming Constitution guarantees that "[n]o person shall be compelled to testify against himself in any criminal case."[83] The right against self-incrimination has long been recognized and guarded by the courts of this state. Even before the United States Supreme Court handed down its decision in *Doyle*, the Wyoming Supreme Court noted, in reversing an aggravated assault conviction, that "[no] constitutional right of an accused person is more sacred than his right not to make a statement or testify against himself, and it [is] highly improper for any comment or question to be made or asked pertaining thereto."[84] The concurring opinion in that same case referred to the "chilling effect" of such comment, and noted that "[a] constitutional guaranty indeed becomes barren and valueless if by the assertion thereof it can be utilized to [an accused's] detriment."[85] In yet another case, *Jerskey v. State*,[86] the Wyoming court went to great lengths to examine the philosophies underlying the fifth amendment and correlative state constitutional provisions, and to underscore the need to protect the precious rights afforded thereby.[87]

76. *Id.* at 930 (quoting Webb v. State, 347 So.2d 1054, 1056 (Fla. App. 1977)).
77. 454 A.2d 537 (Pa. 1982).
78. *Id.* at 539.
79. *Id.* at 540.
80. Dungan v. State, 651 P.2d 1064 (Okla. Crim. App. 1982); Harris v. State, 645 P.2d 1036 (Okla. Crim. App. 1982).
81. State v. Wiswell, 639 P.2d 146 (Utah 1981).
82. Commonwealth v. Mahdi, 388 Mass. 679, 448 N.E.2d 704, 715 (1983).
83. WYO. CONST. art. 1, § 11.
84. Gabrielson v. State, 510 P.2d 534, 538 (Wyo. 1973).
85. *Id.* at 539-40 (Guthrie, J., concurring).
86. 546 P.2d 173 (Wyo. 1976).
87. *Id.* at 174-78.

In *Jerskey,* a package mailed to the appellant containing seven kilos of marijuana had been intercepted by the police, who removed some of the marijuana before delivering the package. The appellant was then charged with possession of a controlled substance with intent to deliver and attempted possession.[88] At trial, the two officers who had interrogated the appellant after his arrest were asked to relate the substance of their conversation. Both testified that the appellant had not responded to questions concerning the package of marijuana. Officer Roylance indicated, in response to the prosecutor's question, "We asked something to the effect of if he had expected more or if he had noticed anything missing and his reply to this was *no comment.*"[89] The other officer, Vincent Valdez, testified that "I asked him, 'You weren't planning to smoke it all by yourself?' I said, 'You would have to be a pretty heavy smoker to do that.' *And he offered no reply to this question.*"[90]

In deciding that this line of questioning violated the appellant's privilege against self-incrimination, the Wyoming Supreme Court reviewed the numerous cases which had discussed the fifth amendment and its Wyoming counterpart.[91] The court noted the importance of the privilege in preserving "the very most basic of the individual's rights in a democratic society,"[92] and said that comment upon an accused's silence would not be permitted absent a showing by the state that the accused had knowingly and understandingly waived the privilege.[93] The court then held that the error required reversal of the conviction since the officers' testimony had been elicited to create an inference that an honest response by the appellant to the questions would have incriminated him.[94]

Eleven months after the decision in *Jerskey,* the Wyoming Supreme Court had an opportunity to consider the principles enunciated by the United States Supreme Court in *Doyle v. Ohio.*[95] In *Irvin v. State,*[96] the appellant had chosen to remain silent following his arrest. He presented an alibi defense during his trial. During cross-examination, the prosecutor asked the appellant why he had not told the police about his alibi. The prosecutor than commented at length on this failure during closing argument, implying fabrication.[97] The Wyoming Supreme Court held that such comment violated the Due Process Clause of the Fourteenth Amendment, pursuant to the principles enunciated in *Doyle.*[98]

A year later yet another case came before the Wyoming Supreme Court with the same issue. In *Clenin v. State,* the appellant was charged with delivery of a controlled substance.[99] He turned himself in to the police, but—acting on his lawyer's advice—did not talk with anyone. He then

88. *Id.* at 174.
89. *Id.* at 178.
90. *Id.* at 179.
91. *Id.* at 175-78.
92. *Id.* at 175.
93. *Id.* at 179.
94. *Id.* at 183.
95. 426 U.S. 610 (1976).
96. 560 P.2d 372 (Wyo. 1977).
97. *Id.* at 373.
98. *Id.*
99. 573 P.2d 844 (Wyo. 1978).

raised an alibi defense at trial. During cross-examination, the prosecutor questioned the appellant at length regarding his failure to tell either the officers or the county attorney about his alibi:

Q. Now after you were arrested, of course then you told the—were you questioned at that time?
A. No, sir, I was not.
Q. And what police officers did you tell that you weren't there, that you were at this party?
A. I did not tell the police officers a thing, sir.
Q. You didn't tell anyone?
A. On my lawyer's advice, I told no one, sir.
Q. You mean this is the first time that you have told this to anyone besides your lawyer?
A. No, sir, this isn't the first time. When I turned myself in, sir, I did not communicate with nobody, sir, except the lawyer who was present when I turned myself in.
Q. Well, when you were arrested though, didn't you say, look it, this couldn't be me, I was at a party?
A. No, sir, I didn't.
Q. You didn't say that?
A. No, sir, upon my lawyer's advice.
Q. Did you ever notify my office and tell me that you were—
A. No, sir. If [sic] left that up to my lawyer, sir.
Q. Did any of your witnesses, so far as you know, ever tell the police or tell my office that you had an alibi, that you weren't there and couldn't have done this thing that you are accused of?[100]

The Wyoming Supreme Court held that this cross-examination violated the appellant's right to remain silent under the applicable sections of the United States and Wyoming Constitutions.[101] The court also announced a rule that the violation of an accused's right to remain silent was prejudicial per se.[102] In *Clenin,* the state asked the court to find such error to be harmless, a suggestion the court rejected. The court held that the determination of the matter was not limited to a consideration of the fifth amendment of the United States Constitution, but required consideration of the Wyoming Constitution and pertinent caselaw as well:

> Historically, our Court has jealously guarded the right provided in Art. 1, § 11 of the Constitution of the State of Wyoming against any infringement. We hold that under this section of our state constitution any comment upon an accused's exercise of his right of silence, whether by interrogation of the accused himself, or by interrogation of others inherently is prejudicial, and will entitle an accused to reversal of his conviction. Such a breach of the

100. *Id.* at 845.
101. *Id.* at 846.
102. *Id.*

> accused's constitutional protections is plain error and prejudicial per se.[103]

The *Clenin* rule lasted for less than four years. In 1982, the Wyoming Supreme Court decided the case of *Richter v. State,*[104] and overruled the prejudicial per se rule, adopting a harmless error analysis instead. In *Richter,* the appellant Ronald Richter and his nephew Alvin Richter had each been charged with and convicted of first degree sexual assault, stemming from an incident alleged to have occurred near Cheyenne, Wyoming, on July 19, 1980.[105] The appellants were said to have taken a young woman several miles south of Cheyenne where they sexually assaulted her. After said events, Ronald Richter went to sleep alongside the road where they had stopped, while Alvin Richter and the woman sat in the pickup truck. A patrol car came by, and the woman called for help. Alvin Richter apparently fled the scene, but Ronald Richter was arrested when he walked up behind the truck and was ordered to freeze. He was immediately handcuffed, searched, and taken into custody.[106]

At trial, Ronald Richter took the stand and testified in his own behalf. He indicated that he and his nephew had met the woman at the Mayflower Bar and she had voluntarily left with them. He also testified that the subsequent events—including the sexual relations—had been consensual.[107] During cross-examination, the prosecutor grilled Ronald Richter on his story. At one point, the prosecutor asked, "Did you volunteer this version to the deputies at that time when you walked behind the truck?" Appellant's counsel immediately moved for a mistrial on the ground that the question constituted an impermissible comment on Ronald Richter's right to remain silent. Although the trial court acknowledged the improper nature of the inquiry and reprimanded the prosecutor, it denied the motion.[108]

On appeal, the Wyoming Supreme Court reviewed the many cases which had discussed the issue of comment on the right to remain silent and acknowledged the impropriety of such comments in general.[109] The court then focused on the propriety of the trial court's refusal to grant the mistrial, rather than on the nature of the improper comment itself, and concluded that the *Clenin* prejudicial-per-se rule was too broad.[110]

> The prejudicial-per-se approach should not be allowed to prohibit an affirmance of a criminal conviction in cases where the error was clearly harmless. Such a rule exacts too high a toll of the legal system to be sustainable. . . .

* * *

103. *Id.*
104. 642 P.2d 1269 (Wyo. 1982). The appellants in this case were represented by the office of the Wyoming Public Defender throughout trial and on appeal. The author of this article prepared the brief and argued the case on appeal to the Wyoming Supreme Court.
105. *Id.* at 1270.
106. *Id.* at 1271-72.
107. *Id.* at 1272.
108. *Id.*
109. *Id.* at 1273-74.
110. *Id.* at 1274.

> . . . Where there was but one comment at trial to the fact of defendant's silence, even though the comment was ambiguous and the evidence of guilt overwhelming, it makes no sense to reverse a conviction. The expense to the State is substantial, not only in monetary terms, but also on terms of the amount of confidence members of society possess in the system's ability to dole out justice and protect the law-abiding citizenry. The constitutional right to silence must and should be jealously guarded; but, it is self-defeating to refuse to recognize error as harmless when it is.[111]

The court affirmed Ronald Richter's conviction, and overruled the *Clenin* rule, adopting a harmless error analysis.[112]

The court's sudden overruling of its own precedent did not pass without comment from within the court itself. Justice Thomas concurred in the result, but thought the abandonment of the prejudicial per se rule to be unwise.[113] He suggested that the matter would have been better decided under a *Jenkins v. Anderson* analysis focusing on the pre-arrest nature of the silence.[114] Chief Justice Rose also dissented from the majority's ruling regarding the harmless error doctrine, finding it contrary to the development under Wyoming law of the right to remain silent.[115] He thought the adoption of the harmless error rule would tempt prosecutors to test the limits of the court's tolerance for what was truly harmless—a concern shared by Justice Thomas.[116]

The Wyoming Supreme Court's decision in *Richter* is troublesome not only because the court so readily overruled its own recent decision, but also because the basis upon which it adopted the harmless error rule and its application of that rule to the facts of the case were questionable. In its opinion, the court indicated that the harmless error rule had been adopted by the overwhelming majority of jurisdictions,[117] a statement with which the appellant took exception in the petition for rehearing filed shortly after the court handed down its decision. The court also expressed concern that to do other than adopt the harmless error rule would undermine public faith in our system of justice.[118] Yet "the system's ability to dole out justice and protect the law-abiding citizenry"[119] depends upon consistency in enforcing those basic constitutional guarantees which extend to all citizens and provide the underpinnings for our democratic society.[120]

In addition, in *Richter* the court did not wed the harmless error exception to the facts of the case.[121] Despite the majority's characterization of the improper comment as ambiguous and the evidence of guilt as over-

111. *Id.* at 1274, 1275.
112. *Id.* at 1275-76.
113. *Id.* at 1278-79 (Thomas, J., concurring).
114. *Id.* at 1277 (Thomas, J., concurring).
115. *Id.* at 1281-85 (Rose, C.J., dissenting).
116. *Id.* at 1279, 1286.
117. *Id.* at 1274-75.
118. *Id.* at 1275.
119. *Id.*
120. *See, e.g.*, Jerskey v. State, 546 P.2d 173, 175 (Wyo. 1976).
121. 642 P.2d at 1279 (Thomas, J., concurring).

whelming,[122] in fact the appellant's story was plausible and the evidence controverted.[123] Given the nature of the accused's story, the error should not have been deemed harmless.[124] Certainly a minor error did not "coalesce with gargantuan guilt"[125] so as to justify application of the harmless error doctrine.

The Wyoming Supreme Court's decision in *Richter v. State* raises several questions. The first is whether comment on pre-arrest silence will be permitted. Justice Thomas' concurring opinion in *Richter* seems to indicate an affirmative answer to this inquiry.[126] It would be a mistake for the court to permit such inquiry, however, since pre-arrest silence is not probative and comment upon such silence penalizes an individual for not stepping forward and incriminating himself.[127]

The second question remaining after *Richter* is whether the Wyoming Supreme Court will require formal Miranda warnings as a prerequisite to protection of the right to remain silent. Although the issue was not discussed in *Richter,* dicta in *Clenin v. State*[128] indicates that the court may not require formal warnings. In *Clenin,* Justice Thomas commented that the right to remain silent, guaranteed by article 1, section 2 of the Wyoming Constitution,

> does not depend upon [an accused] being advised of that right, but exists by virtue of the constitutional language. Advice as to that right . . . is only for the purpose of expanding its protection by assuring that the accused person is aware of it.[129]

Since this aspect of the *Clenin* case was not overruled by the subsequent decision in *Richter,*[130] it remains valid, and the court would be well-advised to adhere to that concept.

The final question left unanswered by *Richter* concerns the limits of the harmless error rule adopted by the court. The standard enunciated in *Richter* was vague; the court referred to an "ambiguous" comment and "overwhelming" evidence of guilt in deciding that it made "no sense to reverse [the] conviction."[131] This is at best a subjective guideline, one which will too easily tempt the prosecution to test its limits in hopes of securing a conviction.[132] To avoid this problem, the court should define the scope of

122. *Id.* at 1275.
123. *See supra* text accompanying notes 106-107.
124. Chapman v. United States, 547 F.2d 1240, 1279 (5th Cir. 1977):
> When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.*, when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.

125. *Id.* at 1250.
126. 642 P.2d at 1278 (Thomas, J., concurring).
127. *See supra* text accompanying note 33.
128. 573 P.2d 844 (Wyo. 1978).
129. *Id.* at 846.
130. *See* 642 P.2d at 1273, 1274, 1276 (Wyo. 1982).
131. *Id.* at 1275.
132. *Id.* at 1286 (Rose, C.J., dissenting).

harmless error in this context and if it is serious about protecting the right to silence, should clearly announce that impermissible comment on the right to remain silent is "so egregious that *reversal is the norm,* not the exception."[133]

In many respects, the *Richter* case is a turning point for the Wyoming Supreme Court. The next case which raises a right to silence issue will determine whether and to what extent our court will follow the example of the United States Supreme Court and other federal and state courts in diluting the right to remain silent.

C. CONCLUSION

The fifth amendment to the United States Constitution and correlative sections of state constitutions guarantee to an accused a right against self-incrimination. The interpretation of this right has come to include a right to remain silent. For many years, it was deemed improper for the prosecution to use against an accused the fact that he exercised that right. A series of cases established this rule and discussed the reasons underlying it. In recent years, however, courts throughout the federal and state systems have begun chipping away at the right to remain silent, first by permitting comment upon an individual's silence prior to arrest, then by allowing the use of silence which follows arrest but precedes the giving of formal Miranda warnings, and finally, by deeming some comment upon post-arrest, post-Miranda silence to be harmless. This steady erosion of the right to remain silent has rendered the right a mere pebble compared to the solid rock of a constitutional shield that it once was. No longer does "[t]he constitutional right to remain silent . . . compel the State to remain silent about such silence."[134]

133. Commonwealth v. Mahdi, 388 Mass. 679, 448 N.E.2d 704, 715 (1983) (emphasis supplied).
134. State v. Boyd, 233 S.E.2d 710, 716 (W. Va. App. 1977).