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Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination

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"testimonial compulsion" and "physical or real evidence," holding that blood tests taken against a suspect's will belong in the latter class and are not subject to fifth amendment protections.

However, even given this absence of a right to have evidence resulting from a sobriety test excluded, *Schmerber* also indicates that a defendant's refusal to submit to a test cannot be introduced at trial as evidence of guilt, creating a situation which is likely to cause already-harried police and prosecutors even more difficulties. When the test results are admissible, but refusals inadmissible, police are more likely to resort to force to obtain the admissible evidence.

James R. Sweeny

TACIT CRIMINAL ADMISSIONS IN LIGHT OF THE EXPANDING PRIVILEGE AGAINST SELF-INCRIMINATION

A recent one-sentence statement by Chief Justice Warren, buried in a footnote to the extensive opinion of the majority in *Miranda v. Arizona*,[1] may effect a limitation upon the tacit-admissions rule more profound than all those announced in previous state and federal court decisions. For the first time, the Supreme Court has indicated that the constitutional right to remain silent will, in certain circumstances, serve to bar evidence formerly introduced under the established rule of tacit admissions.

The Rule of Tacit Admissions and Its Pre-Miranda Limits

The Rule. The doctrine of tacit admissions, also known as "adoptive admissions," is firmly established in both state[2] and federal[3] criminal prosecutions.[4] An exception to the prohibition against hearsay evidence,[5] the rule declares that an accusatory statement made in the presence and hearing of the accused, to which he does not respond although he has an opportunity to do so, is admissible as evidence together with the fact of the accused's silence.[6]

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[1] 384 U.S. 436 (1966).

[2] People v. Yeager, 194 Cal. 452, 485-86, 229 Pac. 40, 54 (1924); Gayer v. State, — Ind. —, —, 210 N.E.2d 852, 855 (1965); Lovvorn v. State, 192 Tenn. 336, 241 S.W.2d 419 (1951); see generally 2 Wharton, Criminal Evidence § 405, at 153-57 (12th ed. 1955); Annots., 80 A.L.R. 1235 (1932), 115 A.L.R. 1510 (1938); 20 Am. Jur. "Evidence" § 570 (1939).

[3] Sparf v. United States, 156 U.S. 51, 56 (1895); Sandez v. United States, 239 F.2d 239, 246 (9th Cir. 1956); Egan v. United States, 137 F.2d 369, 380-81 (8th Cir. 1943); Graham v. United States, 15 F.2d 740, 743 (8th Cir. 1926); see Ivey v. United States, 344 F.2d 770, 772-73 (5th Cir. 1965); Hauger v. United States, 173 Fed. 54, 59 (4th Cir. 1909); Annots., 115 A.L.R. 1510 (1938); 80 A.L.R. 1235 (1932); 20 Am. Jur. "Evidence" § 570 (1939).

[4] The doctrine is also applied in civil cases, though much less frequently. E.g., Ruth v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947); see McCoy v. McCoy, 360 Mo. 199, 207-08, 227 S.W.2d 698, 705 (1950).

[5] Anderson v. State, 171 Miss. 41, 47-48, 156 So. 645, 646 (1934); State v. Worley, 178 Neb. 232, 237, 132 N.W.2d 764, 767 (1965); Model Code of Evidence rule 507(b) (1942); Uniform Rule of Evidence 63(8), 9A U.L.A. 636 (1965).

[6] See cases cited in notes 2 and 3 supra.

While the evidence is not admitted to establish the truth of the accusation, it is an indication of the accused's "consciousness of guilt."[7]

The rule is premised on the belief that there is a fundamental characteristic of human behavior which prompts an innocent man to deny a false accusation.[8] Consequently, the failure to deny the particular accusation casts serious doubt upon his innocence.[9] In an effort to discourage abuse of the rule, various refinements have been developed. While nearly all jurisdictions require that the accused at least have heard and understood the statement,[10] a substantial number have added further requirements effecting greater degrees of limitation.[11]

Breadth of Application. Essentially there are three distinct fact situations which might bring the rule into play. When an accusation has been made during a judicial proceeding, it is universally agreed that the accused's silence may in no way be considered an admission.[12] Although occasionally this conclusion is reached on fifth amendment grounds,[13] more often it is simply reasoned that a statement made at a judicial hearing clearly does not call for a reply, and consequently no admission may be inferred.[14] The second situation involves accusations made before trial but not in relation to a criminal investigation. Here all jurisdictions employ the tacit-admissions rule, varying only in the degree of limitation.[15] The final possibility is that the accusation was made during a criminal investigation. In this case the jurisdictions vary considerably in their application of the rule.[16] While a substantial number of them hold that the fact of arrest alone is sufficient to render the evidence inadmissible,[17] a

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[7] The silence indicates the "consciousness of guilt on the part of the accused by allowing an imputation opposed to the presumption of innocence to pass unchallenged." People v. Yeager, supra note 2, at 486, 229 Pac. at 54.

[8] People v. Simmons, 28 Cal. 2d 699, 712, 172 P.2d 18, 25 (1946); State v. Brown, 16 Utah 2d 57, 60, 395 P.2d 727, 729 (1964).

[9] Ibid.

[10] E.g., Commonwealth v. Burke, 339 Mass. 521, 532, 159 N.E.2d 856, 863 (1959).

[11] The more common limitations require (1) that the accusation naturally call for a reply. Ibid.; Baughan v. Commonwealth, 206 Va. 28, —, 141 S.E.2d 750, 753 (1965) and (2) that the accused not have been under arrest (Commonwealth v. Burke, supra note 10) or (3) in pain (People v. Chaten, 32 Ill. 2d 416, 419, 206 N.E.2d 697, 698 (1965)) or (4) under duress (People v. McFarland, 58 Cal. 2d 748, 756-57, 376 P.2d 449, 453 (1962)). The jurisdictions vary to a large extent in their acceptance and application of these and other limitations. While People v. Countryman, 201 App. Div. 805, 808, 195 N.Y. Supp. 728, 731 (4th Dep't 1922), held that a husband-wife relationship between the accuser and the accused renders the rule of tacit admissions inapplicable, Hoover v. State, 91 Ohio St. 41, 48-49, 109 N.E. 626, 628 (1914) reached the opposite conclusion.

[12] "[H]is silence cannot be regarded as any, not even the slightest evidence of his guilt," Commonwealth v. Zorambo, 205 Pa. 109, 112, 54 Atl. 716, 717 (1903). Such evidence "is not admissible for any purpose," Jones v. State, 184 Tenn. 128, 130, 196 S.W.2d 491, 492 (1946). In addition to statements made at trial, this rule has been applied to hearings before a magistrate, Pickens v. State, 111 Ga. App. 574, 575, 142 S.E.2d 427, 428 (1965), extradition proceedings, People v. Daily, 178 Mich. 354, 366, 144 N.W. 890, 895 (1914), and election investigations, State v. Jackson, 150 N.C. 831, 64 S.E. 376 (1909).

[13] Parrott v. State, 125 Tenn. 1, 139 S.W. 1056 (1911); see Jones v. State, supra note 12.

[14] Some courts have felt that a judicial proceeding removes any duty to deny the accusation. Pickens v. State, supra note 12. Others have reasoned that at such a proceeding the accused could not speak out with propriety. Diamond v. State, 195 Ind. 285, 291, 144 N.E. 466, 468 (1924) (dictum).

[15] E.g., Smith v. State, 241 Ind. 665, 668-69, 175 N.E.2d 27, 29 (1961); State v. Hawkins, 214 N.C. 326, 330, 199 S.E. 284, 287 (1938).

[16] See notes 19-24 infra and accompanying text.

[17] See notes 19-21 infra and accompanying text.

larger number view arrest as merely one of the many factors to be weighed in determining the admissibility of the evidence.[18]

The "Per Se" Rule. The proposition that the fact of arrest alone is sufficient to render the evidence inadmissible, popularly described as the "per se" rule,[19] has been accorded growing acceptance in recent years, and is firmly established in at least seventeen jurisdictions.[20] The rationale for this exclusionary rule is an outgrowth of the rationale for the tacit-admissions rule itself. It is argued that the average person who is confronted with an accusation while under arrest will feel that silence is the best policy and consequently will remain silent regardless of whether he is guilty or innocent of the charge.[21] Logically the "per se" exception seems as firmly based as the tacit-admissions rule itself, and its apparent simplicity is certainly attractive. That this simplicity is only apparent, however, is demonstrated by the difficnlty courts have encountered in determining the time of arrest.[22] Many jurisdictions have declined to adopt the "per se" rule,[23] in part because of the illusive nature of this term. Rather than be bound by a rule of thumb this group prefers a more flexible approach with a case-by-case determination of the importance to be accorded the fact of arrest or custody.[24]

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[18] See notes 23-24 infra and accompanying text.

[19] This proposition has also been known as the Massachusetts Rule because of extensive authority supporting it in that jurisdiction. While Commonwealth v. Kenney, 53 Mass. (12 Met.) 235 (1847) has long been cited as the basis for this exclusionary rule (e.g., Commonwealth v. McDermott, 123 Mass. 440, 25 Am. Dec. 120 (1877); Commonwealth v. Reynolds, 338 Mass. 130, 135, 154 N.E.2d 130, 134 (1958)), a careful reading of the Kenney court's opinion shows that such an interpretation is questionable at best. In any event, many jurisdictions have relied, correctly or incorrectly, on the Kenney case as the basis of their exclusionary rules. E.g., People v. Amaya, 134 Cal. 531, 536-38, 66 Pac. 794, 796 (1901).

[20] See, e.g., Sandez v. United States, 239 F.2d 239, 246-47 (9th Cir. 1956); United States v. LoBiondo, 135 F.2d 130, 131 (2d Cir. 1943); State v. Bates, 140 Conn. 326, 329-30, 99 A.2d 133, 134-35 (1953); People v. Rutigliano, 261 N.Y. 103, 106, 184 N.E. 689, 690 (1933); see Falknor, "Evidence," 32 N.Y.U.L. Rev. 512, 517 (1957); Note, "Tacit Criminal Admissions," 112 U. Pa. L. Rev. 210, 253-56 (1963).

[21] "[I]t is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent." State v. Bates, supra note 20, at 329, 99 A.2d at 134. The basic reasons for this belief are fear of the authorities, and the popular conception that there is a right to remain silent. State v. Hester, 137 S.C. 145, 182-85, 134 S.E. 885, 898-99 (1926).

[22] There is often a dispute as to when arrest actually occurred. See Commonwealth v. Gangi, 243 Mass. 341, 345, 137 N.E. 643, 643-44 (1923); De Lira v. State, 164 Tex. Crim. 194, 196, 297 S.W.2d 953, 955 (1956); see State v. Rush, 286 S.W.2d 767, 771-72 (Mo. 1956). There may also be a question whether or not the accused is under arrest when he is not deprived of his liberty (e.g., free on bail). See State v. Bates, supra note 20. For these reasons the "rule of thumb" approach—the per se rule—has been criticized by Wigmore as artificial. 4 Wigmore, Evidence § 1072, at 81 (3d ed. 1940). Making the application of the per se rule hinge on "custody" rather than "arrest" would hardly solve these definitional problems.

[23] Dickerson v. United States, 65 F.2d 824, 826-27 (D.C. Cir. 1933); State v. Picciotti, 12 N.J. 205, 209-10, 96 A.2d 406, 408-09 (1953); see Annot., 115 A.L.R. 1510, 1517 (1938); Note, "Tacit Criminal Admissions," 112 U. Pa. L. Rev. 210, 256 (1963).

[24] Ibid. Some of these jurisdictions, recognizing the high potential for abuse in applying the tacit admissions rule to statements made during criminal investigations, have imposed special restrictions on the use of the doctrine. California is especially wary of long accusatory statements prepared by the police. People v. Simnions, 28 Cal. 2d 699, 716-20, 172 P.2d 18, 27-29 (1946). North Carolina requires that an accusation made after arrest must have been made by someone other than the arresting officer if an inference of a tacit admission is to be drawn. State v. Moore, 262 N.C. 431, 437, 137 S.E.2d 812, 816 (1964).

The recent Supreme Court decision in *Miranda v. Arizona*[25] has supplied the proponents of the "per se" rule with a very compelling constitutional argument—one which may require the rule's implementation in every jurisdiction. Thus the doctrine of tacit admissions must be re-examined in light of this constitutional mandate.

Miranda and Tacit Admission of Accusations Made During "Custodial Interrogation"

In recent years the doctrine of tacit admissions has come under increased attack. While some opinions have marshalled a host of criticisms,[26] others have been more selective and have suggested that the rule should at least be limited by constitutional principles.[27] This latter group has seen its arguments transformed into law by *Miranda*. In discussing the ramifications of the expansion of the privilege against self-incrimination, the Court briefly mentioned in a footnote to its opinion that:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact *that he stood mute or claimed his privilege in the face of accusation.*[28]

Miranda requires that the constitutional rights of the accused be safeguarded whenever the questioning develops into "custodial interrogation,"[29] *i.e.*, after the accused has been taken into custody or otherwise significantly deprived of his "freedom of action."[30] This new test replaces the "accusatory" standard of *Escobedo v. Illinois*.[31] Thus the decision has sounded the death knell of the use of the doctrine of tacit admissions when the proceeding has reached this stage of "custodial interrogation." Although a crucial question yet remains to be answered,[32] this "lesser holding"[33] of *Miranda* may prove to have nearly as

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25 384 U.S. 436 (1966).

26 See, e.g., Commonwealth ex rel. Staino v. Cavell, 207 Pa. Super. 274, —, 217 A.2d 824, 825-33 (1966) (dissenting opinion analyzing both constitutionality and probative value of tacit admissions).

27 Ivey v. United States, 344 F.2d 770, 772 (5th Cir. 1965); State v. Sullivan, 2 Conn. Cir. 412, —, 199 A.2d 709, 714 (1964); State v. Ripa, 45 N.J. 199, 204, 212 A.2d 22, 24 (1965); cf. Crabb v. State, 86 Okla. Crim. 323, 327-29, 192 P.2d 1018, 1021-22 (1948).

28 Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). [Emphasis added.] It must be noted that since the statement appears in a footnote and not in the text of the opinion, there may be some question as to its legal significance. In addition, this excursion into the area of tacit admissions is clearly dictum since none of the four cases reviewed in Miranda involved a tacit admission. But since the Court evidently intended to "legislate" explicit guidelines, it seems logical to assume that it intended this rule to be as binding as those laid down in the holding itself. The rule's appearance in a footnote is probably explained by the fact that it was not precisely relevant to the confession cases discussed in the text.

29 Id. at 460-61.

30 "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444.

31 378 U.S. 478 (1964); see Miranda v. Arizona, supra note 28, at 444 n.4.

32 For example, a situation might arise in which a defendant has been arrested, arraigned, and extensively interrogated. In such a case the "custodial interrogation" stage clearly would have been reached. However, if the defendant is thereafter released on bail, he might subsequently be accused of having committed a crime by a person totally unconnected with the police. It could be argued that Miranda is to be read so narrowly as to refer only to confessions and admissions obtained *during* custodial interrogation and that a

profound an effect on the administration of the criminal law as the better known aspects of the decision.

It is important, then, that the full impact of the decision upon the rule of tacit admissions be explored. The present section will examine the rationale for the decision, and the following section will be devoted to a discussion of what, if anything, remains of the doctrine of tacit admissions, *i.e.*, what applications of the rule are not directly affected by the holding of *Miranda*.

The "Rule" of Miranda. Miranda has made it exceedingly clear that the privilege against self-incrimination arises when the proceedings have developed into "custodial interrogation."[34] In an effort to protect this privilege the Court requires that once this stage has been reached the following procedural safeguards (or their equivalent) must be implemented: the accused must be apprised of his right to remain silent, cautioned that anything he says might be used against him, and informed that he has a right to counsel.[35] While the decision is primarily concerned with confession cases, it is clear that the privilege is equally applicable to any admission,[36] including a tacit admission.[37]

The Probable Rationale. Although the Court did not elaborate upon its reasons for extending its holding to tacit admissions, there appear to be several compelling arguments for doing so. The recent Pennsylvania case of *Commonwealth*

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defendant accused under the circumstances just outlined would not be protected by the fifth amendment. This position is supported by the fact that the opinion frequently refers to "the compelling atmosphere inherent in the process of in-custody interrogation. . . ." Id. at 478. In addition, each of the four cases decided in Miranda involved a confession obtained while defendant was under actual police restraint. But the better view seems to be that the right to remain silent arises when the process reaches the "custodial interrogation" stage, and is guaranteed from that point on. The Court's purpose in formulating this standard was to define more precisely the "accusatorial" test of Escobedo. See note 31 supra and accompanying text. The language of Escobedo seems to indicate that the rights of the accused must be safeguarded from the time the process assumes an adversarial nature. Since the process, once adversarial, does not cease to be so by the release of the accused on bail, it would seem that Miranda, read in light of Escobedo, would command a broad application of the fifth-amendment privilege. Indeed, the Court feels that the right to remain silent "serves to protect persons in all settings in which their freedom of action is curtailed. . . ." Miranda v. Arizona, supra note 28, at 467. An accused free on bail, while not under total police confinement, certainly has been restricted as to his freedom of action.

Probably the most compelling reason for a broad reading of the opinion in Miranda is that such a reading seems to reflect the spirit of the development of the constitutional right to remain silent. Recent years have seen a great expansion in the constitutional rights of the accused. E.g., Malloy v. Hogan, 378 U.S. 1 (1964) (applying fifth amendment protection to state proceedings); Massiah v. United States, 377 U.S. 201 (1964) (extending protection to time of indictment); Escobedo v. Illinois, 378 U.S. 478 (1964) (extending protection to "accusatorial" stage). Consequently, a broad interpretation of Miranda seems to be the next logical step.

States adhering to the "per se" rule have held that the silence of an accused free on bail is not admissible at trial. E.g., State v. Bates, 140 Conn. 326, 330-31, 99 A.2d 133, 135 (1953). It seems that, while a narrow reading of Miranda might permit admission into evidence of a tacit admission in this situation, such a reading would violate the spirit, if not the letter, of the decision.

[33] 35 U.S.L. Week 1055 (Oct. 18, 1966).

[34] See notes 29-30 supra and accompanying text.

[35] Miranda v. Arizona, 348 U.S. 436, 444 (1966)

[36] No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or of all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself *in any manner;* it does not distinguish degrees of incrimination. Id. at 476. [Emphasis added.]

[37] Id. at 468 n.37.

ex rel. Staino v. Cavell[38] presents an example of the precise situation with which the Court was apparently concerned. In *Cavell* the defendant was arrested, held in custody for some twenty hours, and confronted with both oral and written accusations. Prior to each accusation he was advised of his right to remain silent and informed that anything he would say might be used against him. At trial both the statements and the defendant's silence were admitted in evidence under the Pennsylvania rule of tacit admissions.[39] There can be no doubt that the proceedings in *Cavell* had reached the stage of "custodial interrogation" as subsequently defined by *Miranda*.[40] But if *Miranda* had not explicitly referred to tacit admissions, it could have been argued in subsequent cases similar to *Cavell* that, since the police followed the requisite procedural safeguards, the requirements of *Miranda* had been fulfilled. Consequently an inference of a tacit admission might have been constitutionally permissible in such a situation. Apparently the Supreme Court feared that to permit the use of the rule in this situation would be to sanction the very real possibility of trapping the defendant by his silence.[41]

It certainly is not difficult to imagine a situation in which an individual who would normally have denied an accusation decides to rely on the warning of the police and remain silent, thus unknowingly admitting the accusation. Even if the accused were informed of the existence of the rule, he would not necessarily be better off. The police would place him in the following dilemma: "If you do say anything, it will be used against you; if you do not say anything, that will be used against you."[42] To allow an inference prejudicial to the accused to be drawn from his silence is to compel him to testify; to compel the accused to testify is to destroy the basic privilege against self-incrimination.

Another possible explanation of the Court's application of the *Miranda* rule to tacit admissions is suggested by its reference to *Griffin v. California*.[43] There the Court struck down a provision in California's constitution which permitted comment by the prosecution on the accused's failure to testify at trial. The Court reasoned that to allow such comment would amount to an imposition of a penalty for the exercise of a constitutional privilege.[44] Since *Miranda* makes it clear that this constitutional right arises before trial, it seems that

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[38] 207 Pa. Super. 274, 217 A.2d 824 (1966).

[39] Miranda has been held to be not retroactive, at least as it applies to confessions. Johnson v. New Jersey, 384 U.S. 719 (1966). Recently the Pennsylvania Supreme Court held that the reasoning of Johnson applied equally to tacit admissions cases. Shadd v. Myers, —— Pa. ——, 223 A.2d 296 (1966). However the dissent in Shadd argued that improper introduction of a tacit admission is so prejudicial to the defendant that it deprives him of a fair trial as a matter of constitutional law, and, consequently, the decision in Miranda, insofar as it applies to tacit admissions, should be retroactive. Nevertheless, unless the Supreme Court of the United States overrules the Shadd decision, Miranda will not be applied retroactively to cases such as Cavell.

[40] This stage had more obviously been reached in Cavell than in Miranda where the defendant had been arrested, taken to a police station, and detained for only two hours.

[41] The possibility was apparent to some courts even prior to Miranda. They have held that if the defendant is apprised of his right to remain silent no inference of a tacit admission may be drawn from his subsequent silence. Barber v. State, 191 Md. 555, 565-66, 62 A.2d 616, 620-21 (1948); People v. Young, 72 App. Div. 9, 76 N.Y. Supp. 275 (1st Dep't 1902).

[42] McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928).

[43] 380 U.S. 609 (1965).

[44] Griffin v. California, 380 U.S. 609, 614 (1965).

any use of the doctrine of tacit admissions at this stage would constitute a similar imposition of a penalty.[45] Indeed, it seems that this reasoning is particularly applicable to the tacit-admission cases, such as *Cavell*, where the jury is instructed that if they find the necessary prerequisites for application of the rule, they *must* consider the defendant's silence as evidence tending to show an admission of guilt. In the *Griffin* case the jury was merely instructed that the defendant's silence *might* be considered as evidence tending to constitute an admission.

The Possibility of Waiver. The fifth-amendment proscription of the use of tacit admissions during "custodial interrogation" is less than absolute; still remaining is the question of waiver of the constitutional right. *Miranda* recognizes that waiver is possible, but it places a heavy burden on the prosecution to prove that the right was "knowingly and intelligently waived."[46] While it could once be argued that silence constituted a presumption of waiver,[47] *Miranda* indicates that reliance upon the right to remain silent need not be affirmatively asserted.[48] Consequently a valid waiver may not be presumed from the mere silence of the accused after warnings are given.[49]

The Vestige of the Rule: Tacit Admission of Statements Made Prior to "Custodial Interrogation"

Beyond the Limits of Miranda. The constitutional arguments of *Miranda*, persuasive as they may be, do not totally destroy the doctrine of tacit admissions. The Supreme Court indicated that there is a particular point of time at which the constitutional privileges arise.[50] Although determination of the exact point at which these rights accrue will undoubtedly be the subject of future litigation, it is clear that the present decision does not apply to "general on-the-scene" questioning by police.[51] Consequently there is an area in which the wisdom of tacit admissions is not subject to the constitutional criticism advanced above.

But this surely does not mean that the constitutional limitations are to be the only limitations upon the use of the rule. While *Miranda* defines the constitutional standard, there are jurisdictions which have already gone beyond this limit and formulated an even stricter exclusionary rule.[52] In these jurisdictions following the "per se" rule, the facts of arrest or of custody in themselves determine the point at which the doctrine of tacit admissions can no longer be

[45] See People v. Cockrell, 63 Cal. 2d 659, 669-70, 408 P.2d 116, 123 (1965).

[46] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[47] Cf. State v. Toscano, 13 N.J. 418, 423, 100 A.2d 170, 172 (1953); See Note, "Tacit Criminal Admissions," 112 U. Pa. L. Rev. 210, 249-50 (1963).

[48] Miranda v. Arizona, supra note 46, at 474-75.

[49] "[A] valid waiver will not be presumed simply from the silence of the accused. . . ." Id. at 475.

[50] Id. at 460-61.

[51] "[G]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." Id. at 477. While it may be argued that this type of cut-off is arbitrary, the Court realized that "the privilege has never been given the full scope which the values it helps to protect suggest." Schmerber v. California, 384 U.S. 757, 762 (1966). With this in mind the Court has traditionally adhered to another distinction between "communications" or "testimony," which are protected by the fifth amendment, and "real or physical" evidence, which is not. Id. at 763-65.

[52] See notes 19-21 supra and accompanying text.

applied.[53] While a great number of decisions have reached this conclusion, only a few have done so on the basis of constitutional considerations.[54] Thus it is obvious that other limiting factors have been and should be considered in a re-evaluation of the rule of tacit admissions.

Surviving Possibilities. Although the bulk of past tacit-admissions cases have involved charges made after "custodial interrogation," there are actual cases and certainly many conceivable situations which would involve the use of the rule as applied to defendant's silence in the face of accusations made prior to custodial interrogation.[55] The accusation might be made prior to the crime,[56] as where *A* accuses *B* in *C*'s presence of intending to commit a crime, and *B* fails to deny the accusation. Similarly the accusation might be made during the crime itself, as where *A*, coming upon *B*, accuses him of the act and *B* fails to deny the charge.[57] The most common situation, though, would involve an accusation made after the crime but prior to custodial interrogation. Indeed the accusation might even be made by the police themselves in the course of general questioning in connection with a crime.[58]

Basic Policy Questioned. Should the Supreme Court decisions provide the basis for a broad re-evaluation of the entire concept of tacit admissions? Is there any merit in the argument by analogy that the entire doctrine should be severely curtailed? It has often been urged that the rule is built upon sand and will not withstand a thorough examination. The lack of empirical data of human behavior in the face of accusation makes it impossible to either prove or disprove the basic premise upon which the rule is founded.[59] The result is somewhat less than sound legal theory: "The versatile conventionalities of human emotions and impulses constitute an erratic and unstable pedestal upon which to perpetuate a rule of law."[60] Another difficulty lies in the fact that the further removed from trial the time of making the statement is, the less likely the possibility that it will bear the characteristics of an accusation. It seems anomalous that an individual openly accused while in custody may remain

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[53] Ibid. In the normal course of events the exclusionary rule of the "per se" jurisdictions will impose stricter limitation than the constitutional minimum because ordinarily "arrest" or "custody" will occur prior to "custodial interrogation." However it is conceivable that in an unusual situation custodial interrogation will take place without arrest or custody. In this situation the constitutional standard would come into play before the state standard.

[54] See Annots., 80 A.L.R. 1235, 1262-67 (1932), 115 A.L.R. 1510, 1517-19 (1938); 20 Am. Jur. "Evidence" § 574 (1939); Note, "Tacit Criminal Admissions," 112 U. Pa. L. Rev. 210, 253-56 (1963).

[55] See generally Note, "Tacit Criminal Admission," 112 U. Pa. L. Rev. 210, 225 (1963).

[56] Cf. Manna v. State, 179 Wis. 384, 401, 192 N.W. 160, 166-67 (1923).

[57] E.g., Commonwealth v. Simpson, 300 Mass. 45, 50-51, 13 N.E.2d 939, 942, cert. denied, 304 U.S. 565 (1938). Many of these cases are treated under the familiar "res gestae" doctrine.

[58] See note 51 supra and accompanying text.

[59] "Any person familiar with human history or human nature, ought to know that this premise is completely unsound." Commonwealth v. Vallone, 347 Pa. 419, 425, 32 A.2d 889, 892 (1943) (dissenting opinion), cited with approval in State v. Kobylarz, 44 N.J. Super. 250, 258, 130 A.2d 80, 84, cert. denied, 24 N.J. 548, 133 A.2d 395 (1957). The rule "at its best brings about the weakest assumption known to the law," and is a holdover from the "dark ages" of law. People v. Todaro, 256 Mich. 427, 435, 240 N.W. 90, 93 (1932) (dissenting opinion). One of the historic justifications of the rule—that its premise was analogous to the concept that flight is evidence of guilt—has been seriously questioned by the Supreme Court. Wong Sun v. United States, 371 U.S. 471, 482-83 (1963).

[60] State v. Kobylarz, supra note 59, at 258-59, 130 A.2d at 85.

silent, while the same person is bound to deny neighborhood gossip at the risk of furnishing evidence against himself by his silence.[61] Recognizing these basic weaknesses, many courts urge that the rule be applied with great caution and circumspection.[62]

Furthermore, the doctrine of tacit admissions seems to discriminate against the first offender (or indeed the non-offender) and favor the habitual criminal who knows enough to deny all accusations.[63] While it may not always be the case, it is highly probable that the often-accused suspect will have knowledge of the broad use of the tacit-admissions rule and consequently will be able to avoid the pitfalls into which the inexperienced may stumble.

Fifth-Amendment Analogy. In addition to these shortcomings, widespread application of the rule of tacit admissions presents very real possibilities of violating constitutional rights. While it is quite clear that the principles of *Miranda* do not control in cases involving tacit admissions prior to "custodial interrogation,"[64] a strong constitutional argument by analogy may be constructed. One of the basic justifications for the extension of the constitutional privilege in *Miranda* was that a contrary decision would, in effect, debase the fifth-amendment guarantee;[65] no matter what precautions may be taken in protecting the rights of the accused at trial, these are rendered virtually meaningless if prior to that trial he is denied counsel and tricked into a confession or admission.[66] Consequently these rights must be safeguarded during that period which begins with custodial interrogation.

But it is not patently obvious that this is the logical limit for protection of the right to remain silent as applied to tacit admissions.[67] The logic of the argument applies, though admittedly with less force, to tacit admissions occurring prior to custodial interrogation. A situation might easily arise in which a person is confronted by a neighbor and accused of having committed a crime. Shortly thereafter the accused is taken to a police station where the same neighbor repeats the same accusation. According to the present state of the law, the accused's silence as to the first accusation constitutes an admission, but his silence as to the second does not. The introduction of his "admission" at trial seems in effect to compel the defendant to testify against himself. While it might be argued that technically the right against self-incrimination is limited to adversary proceedings, it cannot be denied that the practical effect of the introduction of the evidence at trial is to produce at least a type of self-

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[61] See People v. Page, 162 N.Y. 272, 276, 56 N.E. 750, 752 (1900).

[62] People v. Nitti, 312 Ill. 73, 90-92, 143 N.E. 448, 454-55 (1924). The evidence is dangerous "and should be received with caution:" People v. Kennedy, 164 N.Y. 449, 456-57, 58 N.E. 652, 654 (1900). It "must be used with caution and only when the trial judge is satisfied preliminarily that all conditions for its application have been established:" Greenberg v. Stanley, 30 N.J. 485, 498, 153 A.2d 833, 839 (1959). The Report of the New Jersey Supreme Court Committee on Evidence (1963) calls for the very strong limitation that if the silence can be construed in any other way than as an admission of guilt, there should be no presumption. Id. at 164. See also Boulton v. State, 214 Tenn. 94, 101, 377 S.W.2d 936, 939 (1964).

[63] Commonwealth v. Cavell, 207 Pa. Super. 274, ——, 217 A.2d 824, 829 (1966) (dissenting opinion).

[64] See notes 30-32 supra and accompanying text.

[65] Miranda v. Arizona, 384 U.S. 436, 458-65 (1966).

[66] Ibid.

[67] Cf. Id. at 526 (White, J., dissenting).

incrimination. Consequently it is arguable that some form of the privilege against self-incrimination should be applied even prior to the stage of custodial interrogation.

One of the basic limitations on the use of the rule of tacit admissions is that the silence of the accused will not be taken as an admission if there is another equally consistent explanation for his conduct.[68] It is obvious that if there is a right against self-incrimination prior to the time of custodial interrogation, it is *at least* as consistent to assume that the accused's silence was based on a reliance upon that right as it is to assume that his silence is indicative of guilt. But even if no such right does in fact exist, it is entirely possible that an accused, exposed to the abundant publicity on constitutional rights, might believe that the right does exist. Consequently his silence would be based upon this honest, though erroneous, belief. If a substantial number of persons hold such a belief, and it is quite possible that they do,[69] this provides another conclusion (as plausible as a presumption of guilt) which may be drawn from the accused's silence.

Tacit Admissions and the Hearsay Rule. In light of the practical effect of the application of the rule of tacit admissions, it is extremely difficult to attempt to reconcile the doctrine with the rule against hearsay evidence. Theoretically the doctrine is an exception to the hearsay rule, admitting the accusation not as evidence of the truth of the assertion but merely for the purpose of giving meaning to the accused's silence.[70] Practically speaking, there is a very real possibility that the doctrine will often be severely abused, since the jury might misunderstand and misapply it.[71] The probability of abuse is increased by the procedure of submitting both the accusation and the other facts determinative of a tacit admission to the jury.[72] While the jury may be instructed to ignore the

[68] It is generally accepted that "if a failure to deny is more naturally explainable on some inference other than that of belief in the truth of the statement, the testimony . . . should not be received." Ewell v. State, 228 Md. 615, 618, 180 A.2d 857, 859 (1961). "The rule is not applicable . . . where silence is equally consistent with a state of mind other than acquiescence in the truth of what was said." Watson v. State, 387 P.2d 289, 291 (Alaska 1963). See also United States v. Gross, 276 F.2d 816, 820-21 (2d Cir. 1960).

[69] Cf. note 21 supra.

[70] See note 5 supra.

[71] The danger is that the jury, having heard the accusation, will infer both that the statement was made and that it is true. Cf. Douglas v. Alabama, 380 U.S. 415, 418-20 (1965). For this reason the rule has been criticized as a pretense for admitting "the most damaging kind of hearsay testimony, to wit: that someone *said* the defendant *committed* the crime." Commonwealth v. Markwich, 178 Pa. Super. 169, 175, 113 A.2d 323, 326 (1955) (Woodside, J., dissenting). Mr. Justice Cardozo, commenting upon this distinction between the truth of the statement and the accused's belief therein, stated:

> Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Shepard v. United States, 290 U.S. 96, 104 (1933). "[T]here is a danger that the jury may give independent credit to the statement itself, and this is a danger that needs to be taken in account." McCormick, Evidence § 247, at 529 (1954).

[72] It is generally held that the jury is to decide the questions of fact such as whether there was an accusation, and whether it was made in the presence and hearing of the defendant. Cf. Donker v. Powers, 230 Mich. 237, 241, 202 N.W. 989, 990 (1925); see also State v. Lambertino, 13 N.J. Misc. 687, 689-90, 180 Atl. 426, 427 (1935). The possibility of prejudice to the accused has been recognized by recent decisions which call for a thorough preliminary finding by the trial judge. Cf. State v. Killmon, 239 Ore. 560, 398 P.2d 743 (1965). The Model Code of Evidence rule 11 (1942) recommends a similar pro-

accusation until it has determined that the facts support an inference of a tacit admission, the damage has already been done.[73] Since it is quite possible that all jurors will not properly distinguish between the accusation and the evidence establishing the existence of the prerequisites for application of the rule, their decision may very well be prejudiced by improper considerations.[74]

Tacit Admissions and the Right of Confrontation. If the jury does behave as suggested above, a strong constitutional argument for severe limitation of any use of the rule of tacit admissions may be based upon the sixth-amendment right of confrontation. As have the fifth-amendment principles discussed above, this right has been declared binding upon the states.[75] It could be argued that since the right of confrontation by its very nature is absolute, it extends to any use of the rule of tacit admissions regardless of when the accusation is made. The right seems to be inherently bound up with the judicial process insofar as it requires that an opportunity for confrontation be afforded at a judicial proceeding.[76] The "right" itself comes into play whenever the judicial stage has been reached and must be safeguarded at any judicial proceeding. Thus consideration of when the accusation was made becomes irrelevant, and there need be no question of when the right "arises." If this be the case, there is no reason to claim that the right does not extend to *all* cases in which an accusation is introduced into evidence. The basic ingredient of the right to confrontation is the ability to test the accuser's veracity through cross-examination at a judicial proceeding.[77] While it might be argued that the rationale does not apply where the truth of the accusation is not in question, reliance upon this technicality ignores reality and the practical effect upon the jury.[78] It seems that this constitutional consideration requires that the use of the doctrine, even prior to "custodial interrogation," be restricted to those cases in which the accused is afforded a right of cross-examination and confrontation.

CONCLUSION

Constitutional considerations, based on the fifth amendment, lead to at least one inescapable conclusion: unless the privilege against self-incrimination is knowingly and intelligently waived, the doctrine of tacit admissions must be

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cedure, and encourages a return of the trial judge "to his historic role as master of the trial." Morgan, Foreword to Model Code of Evidence, supra at 13.

[73] Once the statement is heard the impact is felt, regardless of subsequent instructions to the jury. People v. Conrow, 200 N.Y. 356, 368-69, 93 N.E. 943, 948 (1911); see People v. Simmons, 28 Cal. 2d 699, 717, 172 P.2d 18, 28 (1946).

[74] This procedure may be subject to constitutional attack in that it is similar to a New York procedure for determining the voluntariness of confessions which was held to violate the constitutional right to a fair hearing. The procedure, which prescribed the submission of the confession and the evidence going to the voluntariness thereof to the jury, allowed the fact of confession to become so implanted in the jury's minds that it became "difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict . . . ." Jackson v. Denno, 378 U.S. 368, 389 (1964).

[75] Pointer v. Texas, 380 U.S. 400 (1965).

[76] It has been referred to as "an essential and fundamental requirement for . . . fair trial . . . ." United States, ex rel. Gerchman v. Maroney, 355 F.2d 302, 308 (3d Cir. 1966). See Pointer v. Texas, supra note 75 at 404. The conviction in Pointer was reversed because an opportunity to confront and cross-examine the accuser at a judicial proceeding was not afforded. The implication, then, may well be that the actual violation of the right is possible only at trial or at a judicial hearing.

[77] Pointer v. Texas, supra note 75, at 404.

[78] See notes 70-74 supra and accompanying text.

abandoned in all cases in which the accusation was made during the "custodial interrogation" stage. Future litigation will undoubtedly define more precisely the exact moment at which this stage is reached. Beyond this point it becomes increasingly more difficult to delineate the limits of the rule. The wisdom of its application in any situation is seriously questioned upon a realization that any such application may still involve potential violation of the rights which *Miranda* sought to protect, and may also infringe upon the sixth amendment right to confrontation. If so, the rule of tacit admissions must be totally abandoned. Even if this result is not constitutionally compelled, it may be suggested by practical problems. For, in addition to the risk that the basic premise of the rule may be unsound, there is the very real possibility that the subleties of application of the rule may escape the comprehension of the jury and result, for all practical purposes, in a violation of the rule against hearsay. But even if it is not conceded that either of these two practical considerations is sufficient to warrant abandonment of the rule, future use of the doctrine should at least be severely curtailed by increasing the role and discretion of the trial judge and minimizing the function of the jury. Hopefully the more critical and legally sophisticated eye of the judge would consider the evidence and withhold it in those cases in which he felt the probability of abuse was great. This procedure, coupled with a general wariness of the probative value of tacit admissions, would at least begin to relegate the doctrine to the position it rationally deserves.

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