its assertion costly."[215] Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[216] Nor may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[217] But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.[218]

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, because use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.[219] The Court also proscribed the introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree," and had been "coerced" from the defendant through use of the confession.[220] Potentially most far-

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[215] Although the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. United States v. Robinson, 485 U.S. 25, 32 (1988).

[216] Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1983).

[217] Doyle v. Ohio, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the *Miranda* warning told the defendant he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in United States v. Hale, 422 U.S. 171 (1975). The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal *habeas corpus* relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993). *See also* Fry v. Pliler, 551 U.S. 112, 114 (2007) (the "substantial and injurious effect" standard is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman v. California").

[218] Jenkins v. Anderson, 447 U.S. 231 (1980). *Cf.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

[219] Simmons v. United States, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in McGautha v. California, 402 U.S. 183, 210–13 (1971).

[220] Harrison v. United States, 392 U.S. 219 (1968).