

February 1988

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Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 Wm. & Mary L. Rev. 285 (1988), <https://scholarship.law.wm.edu/wmlr/vol29/iss2/3>

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A DUE PROCESS ANALYSIS OF THE IMPEACHMENT USE OF SILENCE IN CRIMINAL TRIALS

BARBARA ROOK SNYDER*

The constitutional and evidentiary problems presented by any use of a defendant's silence in a criminal prosecution have plagued the United States Supreme Court since 1926, when the Court held in *Raffel v. United States*¹ that a prosecutor could impeach a defendant who testified at his second trial with his failure to testify at his first trial.² Fifty years later, in *Doyle v. Ohio*,³ the Court considered the constitutionality of the impeachment use of a defendant's silence after he had received *Miranda* warnings⁴ and concluded that the use of such silence was a deprivation of due process.⁵ Then, in *Jenkins v. Anderson*,⁶ the Court held that pre-arrest silence could be used to impeach a defendant's exculpatory testimony.⁷ Most recently, the Court decided in *Fletcher v. Weir*⁸ that post-arrest silence could be used for impeachment purposes when it did not appear from the record that *Miranda* warnings had been given.⁹

In these cases, the Supreme Court has failed to consider the major constitutional impediment to the use of silence to impeach a

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1. 271 U.S. 494 (1926).

2. *Id.* at 499.

3. 426 U.S. 610 (1976).

4. *Id.* at 611.

5. *Id.* at 618.

6. 447 U.S. 231 (1980).

7. *Id.* at 238-40.

8. 455 U.S. 603 (1982).

9. *Id.* at 607.

criminal defendant's testimony, and consequently it has not developed a theoretical approach properly adapted to the problem. The absence of an appropriate analytical model creates difficulties for defense lawyers advising defendants and planning pretrial and trial strategy. As Justice Marshall noted in his dissenting opinion in *Jenkins*,

[A] person who thinks he may have done something wrong must immediately decide, most likely without the assistance of counsel, whether, if he is ever charged with an offense and brought to trial, he may wish to take the stand. For if he may later want to take the stand, he had better go to the police station right away to preserve his exculpatory explanation of the events—even though in so doing he must incriminate himself and provide evidence which may be crucial to his eventual conviction. But if he decides not to incriminate himself, he may anticipate that his right to testify in his own defense will be undermined by the argument that his story is probably untrue because he did not volunteer it to the police at the earliest opportunity. All these strategic decisions must be made before the individual even knows if he will be charged and of what offense he will be accused.¹⁰

In addition, the Court in *Jenkins* and *Weir* left the state courts free to decide, as an evidentiary matter, whether silence in a particular case is sufficiently inconsistent with trial testimony to have probative value.¹¹ The state courts are also free, of course, to decide whether the use of a criminal defendant's silence violates their state constitutions.¹²

This Article critically examines the varied analyses used by the Supreme Court and state courts to determine the constitutionality of the impeachment use of silence in criminal prosecutions. It then presents an approach to the issue based on the due process analysis first used by the Court in *Doyle* and improperly limited by the decisions in *Jenkins* and *Weir*. This Article suggests that the use of a defendant's pretrial silence to impeach his exculpatory testi-

10. *Jenkins v. Anderson*, 447 U.S. 231, 253-54 (1980) (Marshall, J., dissenting).

11. See *infra* notes 94-95 and accompanying text.

12. *Fletcher v. Weir*, 455 U.S. 603, 609 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980).

mony at trial is "fundamentally unfair and a deprivation of due process"¹³ without regard to whether the defendant received *Miranda* warnings. Finally, the Article demonstrates how a due process approach would resolve the cases in a principled, more consistent, and straightforward manner.

I. THE PRIOR ANALYTICAL APPROACHES

A. *Waiver Analysis*

The Supreme Court first addressed the issue of the use of silence to impeach a criminal defendant's testimony in *Raffel v. United States*.¹⁴ The defendant was charged with conspiracy to violate the Prohibition Act. He did not take the stand at his first trial, which ended with a hung jury. At his first and second trials, a government agent testified that, after a search of the premises, the defendant admitted that the establishment belonged to him.¹⁵ The defendant took the stand at his second trial and denied making the statement. The judge questioned him about his failure to testify at his first trial to rebut the agent's testimony. The defendant responded that he had not testified because he had not thought the prosecution had presented enough evidence to convict him.¹⁶

The defendant contended before the Supreme Court that the questioning by the judge concerning his silence at his first trial violated his fifth amendment privilege against self-incrimination.¹⁷ The Court disagreed, reasoning that, once the defendant waived the privilege by taking the stand, he could not reassert the privilege as to his silence in the past.¹⁸ The Court assumed that if the defendant had not testified at his second trial, evidence of his failure to testify at his first trial would have been inadmissible.¹⁹ Nevertheless, the Court stated:

13. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

14. 271 U.S. 494 (1926).

15. *Id.* at 495.

16. *Id.* In response to questions from his own lawyer, the defendant subsequently stated that his decision not to testify at his first trial had been on the advice of counsel. *Id.* at 495 n.1.

17. The fifth amendment provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

18. *Raffel*, 271 U.S. at 496-97.

19. *Id.* at 497.

When [the defendant] takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. He may be examined for the purpose of impeaching his credibility. His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.²⁰

The Court concluded that allowing a defendant to be impeached by his prior silence did not unconstitutionally burden the exercise of his fifth amendment privilege because the decision to testify would have been difficult in any event, and allowing impeachment by prior silence did not create any significant additional pressure.²¹

The waiver analysis used in *Raffel* was reaffirmed fifty-four years later in *Jenkins v. Anderson*.²² In *Jenkins*, the defendant, on trial for first-degree murder, testified that the killing had been in self-defense. During cross-examination, the prosecutor questioned the defendant about his actions following the killing, including the fact that the defendant had waited two weeks to turn himself in to the police. During closing argument, the prosecutor again referred to the defendant's failure to report the incident.²³ The defendant argued before the Supreme Court that the use of his pre-arrest silence to impeach his trial testimony violated both his right to remain silent and the fundamental fairness guarantee implicit in due process.²⁴

In rejecting the defendant's argument based on the privilege against self-incrimination, the Court relied on *Raffel*.²⁵ Noting that, as in *Raffel*, the defendant in *Jenkins* took the stand and thus waived his right to remain silent,²⁶ the Court reiterated that "[t]he *Raffel* Court explicitly rejected the contention that the pos-

20. *Id.* at 497 (citations omitted).

21. *Id.* at 499.

22. 447 U.S. 231 (1980).

23. *Id.* at 232-34.

24. *Id.* at 235-38.

25. *Id.* at 235-37.

26. *Id.* at 236 n.2.

sibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights."²⁷

The Court in *Raffel* did not base its "total waiver" theory on any language in the fifth amendment, and none of the prior cases cited by the Court compels or indeed even supports such a conclusion. In *Reagan v. United States*,²⁸ the defendant objected to the trial court's instruction to the jury to consider carefully the weight to be accorded to his testimony given his "deep personal interest" in the outcome of the trial.²⁹ The Court held that the instruction was proper because, if a defendant chose to testify, "his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness."³⁰ In *Fitzpatrick v. United States*,³¹ the defendant challenged the prosecutor's questions on cross-examination concerning the details of his alibi. The Court held that

[w]here an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness.³²

The Court was not confronted, in either of these cases, with an attempt by the prosecution to impeach a defendant's exculpatory

27. *Id.* at 236-37. The Court noted that "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." *Id.* at 238. The Court then concluded that allowing impeachment of a defendant by his silence "advances the truth-finding function of the criminal trial" by allowing the prosecutor to test the credibility of the defendant's testimony, as is done with any witness. *Id.*

28. 157 U.S. 301 (1895), cited in *Raffel*, 271 U.S. at 496-97.

29. The challenged instruction read:

You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold [sic] the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

Id. at 304 (quoting the jury instructions).

30. *Id.* at 305.

31. 178 U.S. 304 (1900), cited in *Raffel*, 271 U.S. at 496-97.

32. *Id.* at 315.

trial testimony with his prior assertion of the privilege against self-incrimination. Indeed, the Court in *Fitzpatrick* explicitly recognized that "no inference of guilt can be drawn from [a defendant's] refusal to avail himself of the privilege of testifying."³³ To hold that a defendant who takes the stand thereby opens the door for full cross-examination, which may include testing his credibility with evidence of prior inconsistent statements, is quite different from suggesting that a defendant who chooses to testify may be impeached by his earlier assertion of a right guaranteed by the Constitution.

Of the cases cited in *Raffel*,³⁴ *Caminetti v. United States*³⁵ was most on point. Referring to the defendant's testimony about details leading up to the incident in question and his subsequent failure to testify further, the trial judge in *Caminetti* instructed the jury:

[T]his was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant . . . cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or

33. *Id.* The Court in *Reagan* made a similar statement based on a federal statute that provided that the defendant's failure to testify "shall not create any presumption[s] against him." *Reagan v. United States*, 157 U.S. 301, 305 (1895) (quoting 20 Stat. 30, ch. 37 (1878)). This protection has since been held to be one of constitutional dimension. See *Griffin v. California*, 380 U.S. 609, 615 (1965); see also *infra* notes 96-100 and accompanying text.

34. 271 U.S. at 496-97.

35. 242 U.S. 470 (1917).

explained the incriminating evidence against him, he would have done so.³⁶

The Court concluded that the instruction did not violate the privilege against self-incrimination. The Court reasoned that "[w]hen [the defendant] took the witness stand in his own behalf he voluntarily relinquished his privilege of silence," and therefore "he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it."³⁷

The facts of *Caminetti* are clearly distinguishable from those in *Raffel*. In *Caminetti*, the defendant's silence at trial was only partial, and the jury was permitted to draw a negative inference from the defendant's testimony as to selected parts of the incident in question.³⁸ One could easily conclude that a defendant who chooses to testify waives his privilege against self-incrimination as to that stage of the criminal process. That proposition, however, does not support the position taken by the Court in *Raffel* that a defendant's waiver of the privilege *at trial* operates retroactively as a waiver of the privilege as to earlier stages.³⁹

Further, the waiver analysis of *Raffel* and *Jenkins* is a flawed approach to the problem. In both cases, the Court failed to explain why a waiver of the defendant's privilege at the time of trial also acted as a waiver of his prior assertions of the privilege.⁴⁰ As Professor Saltzburg recognized,

36. *Id.* at 493 (quoting the jury instruction).

37. *Id.* at 494.

38. *Cf. Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam) (distinguishing between the defendant who does not speak at all, as in *Doyle*, and the defendant who speaks but does not "tell all").

39. *Raffel*, 271 U.S. at 499.

40. The Court in *Doyle* noted, however:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Doyle v. Ohio, 426 U.S. 610, 619 n.11 (1976).

A holding that allows the Government to use a person's invocation of the privilege at a subsequent stage [of the criminal process] invites prosecutors to call defendants at preliminary hearings and before grand juries in order to ask questions that the suspect either must answer and risk incrimination or refuse to answer and risk incrimination by impeachment.⁴¹

He concluded that *Jenkins* (and presumably *Raffel*) was incorrectly decided because "the *Jenkins* holding permits the government to compel incrimination at several different stages of a criminal case."⁴²

Finally, the fifth amendment itself seems inconsistent with the waiver analysis used by the Court in *Raffel* and *Jenkins*. "At every stage of the investigative or accusatory process, a person must decide what, if anything, to say to the government."⁴³ In many cases, a defendant will have little incentive to make any statement to the government until he knows something about the government's case against him, which would be after indictment and discovery. Indeed, the privilege against self-incrimination permits a defendant to remain silent both before and during trial.⁴⁴ In *Murphy v. Waterfront Commission*,⁴⁵ the Court explicitly recognized that one of the values underlying the privilege against self-incrimination is "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.'"⁴⁶ The Court reiterated that policy in *Miranda v. Ari-*

41. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 204 (1980). See also Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 234 (1984) (reaching the same conclusion, although without reference to Saltzburg's article); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 422 (1977) (asserting that "a defendant who testifies at trial does not retroactively waive his prior reliance on the privilege").

42. Saltzburg, *supra* note 41, at 205.

43. *Id.* at 204.

44. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *Griffin v. California*, 380 U.S. 609, 614-15 (1965).

45. 378 U.S. 52 (1964).

46. *Id.* at 55 (quoting 8 J. WIGMORE, WIGMORE ON EVIDENCE § 317 (McNaughton rev. 1961)).

*zona*⁴⁷ and went on to state that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors."⁴⁸ The privilege against self-incrimination thus contemplates an adversarial system in which a defendant need make no statement to the government before trial. How incongruous, then, to suggest that, in such a system, a defendant who testifies at his trial waives his prior assertions of the privilege and leaves himself open to questions and comment about his pre-trial silence. The waiver analysis thus is not supported either by precedent or by the fifth amendment itself.

B. *Evidentiary Analysis*

The Supreme Court first used an evidentiary approach in *Grunewald v. United States*,⁴⁹ in which the defendant was charged with conspiracy to defraud the United States by using bribes to "fix" tax cases and attempting to influence grand jury witnesses.⁵⁰ When the defendant testified before the grand jury, he refused to answer any questions on the ground that the answers might tend to incriminate him; he insisted that he was innocent and asserted his privilege on the advice of counsel. When the defendant testified at his trial, the district court, relying on *Raffel*, allowed the prosecution to question him about his assertion of the privilege against self-incrimination before the grand jury.⁵¹ The trial court did, however, instruct the jury that the claim of privilege was not evidence of guilt or innocence but could be used only as an indication of the defendant's credibility.⁵²

The Court held that the defendant's assertion of his constitutional privilege before the grand jury was inadmissible for impeachment purposes because it was not inconsistent with his testimony at trial.⁵³ The Court explained:

47. 384 U.S. 436, 460 (1966).

48. *Id.*

49. 353 U.S. 391 (1957).

50. *Id.* at 393.

51. *Id.* at 416-17.

52. *Id.* at 417 & n.28.

53. *Id.* at 422. The Court considered three factors in determining that the defendant's assertion of the privilege was not inconsistent with his exculpatory testimony at trial. First,

We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used.⁵⁴

Relying on its supervisory power over the federal courts, the Court held that the trial court had erred in allowing the prosecutor to cross-examine the defendant regarding his prior assertion of the privilege against self-incrimination.⁵⁵

The Court's treatment of *Raffel* in *Grunewald* is interesting. The Court explicitly refused to re-examine its decision in *Raffel*,⁵⁶ yet attempted to distinguish it on the ground that "[t]he Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility."⁵⁷ But the Court in *Raffel* purported to do just that, stating that "we do not think the questions (about his earlier failure to testify) asked of [the defendant] were irrelevant or incompetent."⁵⁸

the defendant maintained his innocence before the grand jury and said that he claimed his privilege only on advice of counsel. Second, the defendant was compelled to testify before the grand jury and could not be represented by counsel, call witnesses, or cross-examine witnesses. Third, in this case the defendant knew he was the likely target of the impending indictment and might naturally have refused to provide any evidence that could later be used to connect him with the other defendants.

For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.

Id. at 422-23.

54. *Id.* at 423-24. The Court noted that "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible." *Id.* at 424.

55. *Id.* at 424.

56. *Id.* at 421.

57. *Id.* at 420.

58. 271 U.S. at 497-98.

Although the Court did not resolve the constitutionality of the questioning in *Grunewald*, it characterized the issue as having "grave constitutional overtones."⁵⁹ Four justices, however, in a separate concurring opinion written by Justice Black, would have dealt with both questions. Those justices concluded that it was unconstitutional to use the assertion of the fifth amendment privilege against a defendant in any case and therefore that *Raffel* should have been overruled.⁶⁰

The second case in which the Court used the evidentiary approach to prohibit the use of a criminal defendant's silence to impeach his trial testimony was *United States v. Hale*.⁶¹ The police arrested the defendant for robbery and advised him of his *Miranda* rights. He then remained silent when questioned by the police. At trial, the defendant testified that his wife had given him the money the police found in his possession, and that he was somewhere else at the time of the robbery.⁶² On cross-examination, the prosecutor asked the defendant why he had not told the police about his alibi at the time of his arrest. The defendant responded that he "'didn't feel that it was necessary at the time.'"⁶³

The Government argued that according to *Raffel*, the questioning was appropriate because the defendant took the stand and thereby waived his privilege against self-incrimination. The Court disagreed, concluding that this case was more like *Grunewald* than *Raffel* and that, under *Grunewald*, the defendant's silence could

For if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.

Id. at 498.

59. 353 U.S. at 423.

60. *Id.* at 425-26 (Black, J., concurring). Justice Black stated,

[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. 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.

Id.

61. 422 U.S. 171 (1975).

62. *Id.* at 174.

63. *Id.*

not be used to impeach his trial testimony.⁶⁴ The Court noted that, in most situations, evidence of silence has very little probative value.⁶⁵ After conceding that silence has more probative value when it is natural under the circumstances to respond to a statement, question, or accusation,⁶⁶ the Court stated:

[T]he situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent and that anything he does say can and will be used against him in court.⁶⁷

The failure of an arrestee to speak after he has been given *Miranda* warnings "can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication."⁶⁸ The Court concluded:

Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.⁶⁹

As in *Grunewald*, the Court relied on its supervisory power over federal courts rather than deciding the constitutional issue, but again the Court noted that the question presented had "'grave constitutional overtones.'"⁷⁰

In both *Grunewald* and *Hale*, the Court held that the use of a defendant's prior silence to impeach his exculpatory trial testi-

64. *Id.* at 175-76.

65. *Id.* at 176.

66. In fact, the Court in *Hale* characterized *Raffel* as such a case, noting that "[t]he *Raffel* Court found that the circumstances of the earlier confrontation naturally called for a reply" and therefore "held that evidence of the prior silence of the accused was admissible." *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 180.

70. *Id.* at 180 n.7 (quoting *Grunewald*, 353 U.S. at 423).

mony was error⁷¹ and in both cases based its conclusion on principles of evidence law. The Court in both cases explicitly recognized that, for reasons consistent with a defendant's innocence, he might choose to say nothing.

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.⁷²

In both cases, the Court concluded that the probative value of the defendant's silence was outweighed by its prejudicial effect.⁷³

The Supreme Court's analysis of the evidentiary value of silence is inconsistent with principles of evidence law. That a defendant's pre-trial silence could be explained as indicating consciousness of guilt, fear of the criminal justice system, or reliance on the privilege against self-incrimination does not mean that such silence should be held inadmissible. As McCormick has noted, circumstantial evidence

may look both ways, but it is for the adversary to argue its contrary bearing to the jury. All that is required for admission is that the item offered, taken alone or in conjunction with other evidence in the case, might suggest the inference proposed to a

71. *Hale*, 422 U.S. at 179-80; *Grunewald*, 353 U.S. at 423.

72. *Hale*, 422 U.S. at 177 (citations omitted). See *Grunewald*, 353 U.S. at 422-23. The Court has long recognized that a defendant's silence might lead to different inferences. In the context of a defendant's failure to testify at trial, the Court in 1893 stated:

It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.

Wilson v. United States, 149 U.S. 60, 66 (1893).

73. *Hale*, 422 U.S. at 173, 180; *Grunewald*, 353 U.S. at 424.

reasonable man, not that the judge must believe that the inference is more probable than not.⁷⁴

The federal courts have consistently followed the principle that evidence that may support either of two contrary inferences is admissible. For example, the United States Court of Appeals for the Fourth Circuit has concluded:

The old notion that a jury should not be allowed to draw any inference from circumstantial evidence, if the one [inference] is as probable as the other, has fallen into discard and has been replaced by the more sensible rule that it is the province of the jury to resolve conflicting inferences from circumstantial evidence.⁷⁵

This view of relevance is codified in the Federal Rules of Evidence.⁷⁶ Even where there is concern about the potential for prejudice as a result of the evidence, "it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge."⁷⁷

A useful analogy can be made to cases involving the admissibility of evidence of the defendant's flight. As the courts have recognized, "conflicting motives . . . may lead an innocent man to flight."⁷⁸ The Supreme Court has stated that "it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses."⁷⁹ Evidence of a defendant's flight, then, is similar to evidence of a defendant's pre-trial silence in that varied and conflicting inferences, consistent with the defendant's guilt or inno-

74. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 458 (1938).

75. *Wratchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061, 1066 (4th Cir. 1969) (quoting *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958)).

76. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

77. 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 403[01], at 403-10 (1986).

78. *United States v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973).

79. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) (quoting *Alberty v. United States*, 162 U.S. 499, 511 (1896)).

cence, could reasonably be drawn from the evidence. Because both types of evidence have been characterized as entailing "the danger of prejudice,"⁸⁰ the courts have used limiting instructions in an attempt to alleviate any prejudice.⁸¹

In the cases involving flight, however, "the universally accepted rule [is] that evidence of flight is admissible to prove a consciousness of guilt."⁸² The defendant may, of course, attempt to rebut the negative inference that might be drawn by presenting other evidence tending to show a reason for his flight that is consistent with his innocence.⁸³ The separate question about "[t]he probative value, if any, of the evidence of flight will depend upon all the facts and circumstances in evidence in the case and is a question of fact for the jury."⁸⁴

80. *United States v. Myers*, 550 F.2d 1036, 1050 (5th Cir. 1977), *appeal after remand*, 572 F.2d 506 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978). See *United States v. Hale*, 422 U.S. 171, 180 (1975); *Grunewald v. United States*, 353 U.S. 391, 424 (1957).

81. The trial court in *Grunewald* instructed the jury that the evidence of the defendant's prior silence could be considered "only for the purpose of ascertaining the weight you choose to give to his present testimony" and not as "a determination of the [defendant's] guilt or innocence." 353 U.S. at 417-18 n.28. In *Hale*, the trial court told the jury immediately after the defendant had been questioned about his silence that they should disregard the exchange, but the court of appeals "held that the error was not cured by this instruction." The issue was not raised before the Supreme Court. 422 U.S. at 175 n.3. In cases involving flight, the trial judges in their charges to the jury generally "explain[] the conflicting motives that may lead an innocent man to flight, and highlight[] the danger of drawing an adverse inference from such evidence." *United States v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973). Accord *United States v. Stewart*, 579 F.2d 356, 359 (5th Cir.) ("the limiting instruction [on flight] given by the trial judge [was] proper"), *cert. denied*, 439 U.S. 936 (1978); *United States v. Rowan*, 518 F.2d 685, 691 (6th Cir.) ("the District Court's instruction served to explain the pitfalls of placing excessive reliance on flight as evidence of guilt"), *cert. denied*, 423 U.S. 949 (1975).

82. *United States v. Ballard*, 423 F.2d 127, 133 (5th Cir. 1970). Accord *Allen v. United States*, 164 U.S. 492, 499 (1896) ("the law is entirely well settled that the flight of the accused is competent evidence against him"); *United States v. Rowan*, 518 F.2d 685, 691 (6th Cir.) (flight evidence "was relevant and admissible"), *cert. denied*, 423 U.S. 949 (1975); *United States v. Greiser*, 502 F.2d 1295, 1299 (9th Cir. 1974); *Shorter v. United States*, 412 F.2d 428, 430 (9th Cir.) ("evidence of flight . . . is admissible"), *cert. denied*, 396 U.S. 970 (1969); 2 J. WIGMORE, WIGMORE ON EVIDENCE § 276, at 122 (Chadbourn rev. 1979) ("It is universally conceded today that the fact of an accused's flight . . . [is] admissible as evidence of consciousness of guilt").

83. 2 J. WIGMORE, *supra* note 82, § 276, at 130.

84. *Shorter*, 412 F.2d at 430. Accord *Rowan*, 518 F.2d at 691 ("it was for the jury to decide what weight should be attached" to the defendant's flight).

Application of this analysis to the facts of *Grunewald* and *Hale* would lead to a conclusion contrary to the one reached by the Supreme Court. Because conflicting inferences could reasonably be drawn from the defendant's pre-trial silence, the evidence properly could have been admitted. The defendant would then have had an opportunity to explain his silence as reliance on the *Miranda* warnings, reliance on the advice of counsel, the result of fear or intimidation, or other reasons consistent with his exculpatory trial testimony.

Further, the general principle followed by appellate courts reviewing a trial court's ruling on admissibility is that great deference is accorded to the trial judge, whose decision will not be overturned absent an abuse of discretion.⁸⁵ The Court in *Hale* recognized "that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court."⁸⁶ The Court nevertheless overrode the trial judge's discretion on the ground that, in this case, the "evidentiary matter has grave constitutional overtones."⁸⁷

This concern for constitutional implications exposes the most important flaw in the evidentiary approach to the propriety of the impeachment use of silence in criminal trials. The Court in *Grunewald* and *Hale* concluded that evidence of silence was inadmissible not, as the Court stated, because of principles of evidence law, but on constitutional grounds. As noted previously, the Court in both cases held that the probative value of the evidence of silence was outweighed by its prejudicial effect.⁸⁸ What was the "intolerably prejudicial impact"⁸⁹ that the Court feared would result from the prosecutor's questions about the defendant's pre-trial silence? The Court in *Hale* said only, "The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted."⁹⁰ The Court in *Grunewald* was more explicit: "Too many, even those who should be better advised, view this privilege

85. This was true before as well as after the adoption of the Federal Rules of Evidence. See 1 J. WEINSTEIN & M. BERGER, *supra* note 77, ¶ 403[02], at 403-22 to 403-24.

86. 422 U.S. at 180 n.7.

87. *Id.*

88. See *supra* text accompanying notes 54, 69, 73.

89. *Hale*, 422 U.S. at 180.

90. *Id.*

[against self-incrimination] as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."⁹¹ According to the Supreme Court, then, "the jury is likely to draw [a] "strong negative inference . . . from the fact that the defendant remained silent."⁹² The evidentiary analysis is thus a constitutional analysis in disguise.⁹³

The inevitable result of an evidentiary approach to the impeachment use of silence in criminal trials is that state courts apply their own rules of evidence; some admit the defendant's pre-trial silence and others do not.⁹⁴ If, however, the results in *Grunewald* and *Hale* were in reality based on the Constitution, then despite the Supreme Court's assertions to the contrary,⁹⁵ states should not be free to choose whether to admit evidence of a defendant's pre-trial silence under their own rules of evidence.

C. Penalty for the Exercise of the Privilege Against Self-Incrimination

In *Griffin v. California*,⁹⁶ the defendant, who was charged with first degree murder, did not testify at his trial.⁹⁷ The prosecutor

91. 353 U.S. at 421 (quoting *Ullmann v. United States*, 350 U.S. 422, 426 (1956)).

92. *Hale*, 422 U.S. at 180.

93. The Supreme Court explicitly recognized the close relationship between evidentiary and constitutional analyses in *Griffin v. California*, 380 U.S. 609 (1965), see *infra* text accompanying notes 96-100. In that case, the Court held that prosecutorial comment on the defendant's failure to take the witness stand was unconstitutional. The state practice of allowing such comment was, according to the Court,

in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

Griffin, 380 U.S. at 613.

94. See, e.g., *North Carolina v. Foddrell*, 291 N.C. 546, 559, 231 S.E.2d 618, 626-27 (1977) ("the evidence of defendant's silence . . . at the scene of the crime was properly admitted in evidence for the purpose of impeaching defendant").

95. See *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) ("[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial").

96. 380 U.S. 609 (1965).

97. The defendant did, however, testify at his separate trial on the question of sentencing. *Id.* at 609.

commented on the defendant's failure to testify, stating that the defendant "has not seen fit to take the stand and deny or explain," and that the victim "is dead, she can't tell you her side of the story [and] [t]he defendant won't."⁹⁸ In addition, the trial judge instructed the jury:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or . . . fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence.⁹⁹

The Court in *Griffin* held that such comments violated the self-incrimination clause of the fifth amendment because they constituted "a penalty imposed by courts for exercising a constitutional privilege. [They] cut[] down on the privilege by making its assertion costly."¹⁰⁰

Professor Stone has argued persuasively that the *Griffin* approach should apply to cases involving impeachment use of a defendant's pre-trial silence.¹⁰¹ Under his analysis, "this [impeachment] use of the defendant's silence constitutes an impermissible penalty on the exercise of the privilege against self-incrimination."¹⁰² The New York Court of Appeals used similar reasoning as an alternative ground for reversing a conviction in *People v. Conyers*.¹⁰³ Indeed, the defendants in *Doyle* made this penalty argument and cited *Griffin* in their petition for certiorari¹⁰⁴ and their brief before the Supreme Court.¹⁰⁵ Nevertheless, the Court did not

98. *Id.* at 611.

99. *Id.* at 610 (quoting the trial judge's instruction to the jury).

100. *Id.* at 614.

101. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 146 n.241. Accord Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 944 n.16 (1975).

102. Stone, *supra* note 101, at 146.

103. 49 N.Y.2d 174, 181 n.2, 400 N.E.2d 342, 347 n.2, 424 N.Y.S.2d 402, 407 n.2, *vacated*, 449 U.S. 809 (1980).

104. Petition for Writ of Certiorari at 18, *Doyle v. Ohio*, 426 U.S. 610 (1976) (Nos. 75-5014 & 75-5015).

105. Brief for the Petitioners at 26, *Doyle v. Ohio*, 426 U.S. 610 (1976) (Nos. 75-5014 & 75-5015) ("the prosecution may not impermissibly burden, or otherwise penalize, one for having exercised either [the right to counsel or the right to remain silent]").

even mention *Griffin* in its opinion in *Doyle*,¹⁰⁶ although the Court did state that "the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt."¹⁰⁷ This may be the prejudicial effect that the Court feared in *Grunewald* and *Hale*.¹⁰⁸

As Professor Stone acknowledged, however, "the Court in recent years has taken an increasingly dim view of the penalty doctrine."¹⁰⁹ Since that statement in 1977, the Court has explicitly rejected the application of the penalty approach of *Griffin*, at least in the context of a case involving the impeachment use of pre-arrest silence. In *Jenkins v. Anderson*,¹¹⁰ the Court reaffirmed its rejection in *Raffel* of "the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights."¹¹¹ The Court in *Jenkins* noted that impeaching a defendant's testimony with his pre-trial silence would serve the truth-seeking function of the courts because it "allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts."¹¹²

Justice Marshall, joined by Justice Brennan, dissented in *Jenkins*, contending that the use of Jenkins's silence to impeach his trial testimony violated his privilege against self-incrimination by penalizing him for exercising that right.¹¹³ Attacking the Court's reliance on *Raffel*, Justice Marshall asserted that *Raffel* in practical effect had been overruled by *Griffin v. California*.¹¹⁴ Justice Marshall's major objection was that admitting silence into evidence for impeachment purposes in a case like *Jenkins* in effect created a duty for a person to report his own crime before being

106. Justice Stevens, in his dissenting opinion, noted the defendants' reliance on *Griffin* but stated that "as long ago as *Raffel v. United States*, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes." *Doyle*, 426 U.S. at 628 (Stevens, J., dissenting) (citation omitted). See *infra* notes 119-20 and accompanying text.

107. 426 U.S. at 619 n.10.

108. See *supra* text accompanying notes 54, 69.

109. Stone, *supra* note 101, at 146-47.

110. 447 U.S. 231 (1980); see *supra* notes 22-27 and accompanying text.

111. 447 U.S. at 237.

112. *Id.* at 238.

113. *Id.* at 250 (Marshall, J., dissenting).

114. 380 U.S. 609 (1965).

charged or even questioned by the police. Such a duty would be tantamount to compelling that person to incriminate himself.¹¹⁵

In *Harris v. New York*,¹¹⁶ the Court used reasoning similar to that in *Jenkins* to conclude that the impeachment use of a defendant's statement taken by the police in violation of *Miranda* did not violate the Constitution.¹¹⁷ The Court stated that, although the defendant could decide not to testify, "[h]aving voluntarily taken the stand, [he] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."¹¹⁸

Another problem with application of the *Griffin* approach to impeachment use of a defendant's pre-trial silence is that in *Griffin*, the defendant's silence was used in the state's case in chief, whereas in the situation under consideration, the evidence of silence is used only to impeach the defendant's trial testimony.¹¹⁹ Limiting the use of the defendant's pre-trial silence to impeachment arguably imposes a lesser burden on the exercise of the privi-

115. 447 U.S. at 250 n.4 (Marshall, J., dissenting).

116. 401 U.S. 222 (1971).

117. The prosecutor conceded that the defendant's statement was inadmissible in its case in chief because of *Miranda*. *Id.* at 223-24.

118. *Id.* at 225. The New York Court of Appeals in *Conyers* believed that the *Harris* rationale did not apply to silence for several reasons.

First, an inconsistent statement is much more probative than is silence. Moreover, a defendant's decision to remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The *Miranda* warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionally protected right. Since the use for impeachment purposes of a statement made in the absence of *Miranda* warnings does not penalize an accused for the assertion of a constitutional right, whereas the use of a defendant's silence even for impeachment purposes only would burden the exercise of the defendant's privilege against self incrimination, it is appropriate to allow the use of such statements for impeachment purposes while precluding similar use of a defendant's silence.

People v. Conyers, 49 N.Y.2d 174, 182-83, 400 N.E.2d 342, 348, 424 N.Y.S.2d 402, 408, *vacated*, 449 U.S. 809 (1980).

119. *See Conyers*, 49 N.Y.2d at 181, 400 N.E.2d at 347, 424 N.Y.S.2d at 407.

lege against self-incrimination than does the use of the defendant's silence as evidence of guilt in the government's case.¹²⁰

Moreover, the defendant in situations such as those presented in *Raffel*, *Hale*, or *Jenkins* can avoid the penalty simply by declining to testify; the evidence of prior silence will not be admissible because the defendants will have offered no testimony to impeach.¹²¹ The real penalty, then, is not on the exercise of the privilege against self-incrimination but instead on the defendant's decision to testify.¹²²

The Supreme Court recently made explicit¹²³ that a criminal defendant has a constitutional right to testify in his own behalf.¹²⁴ The Court has not concluded, however, that burdens imposed by state procedures on the right to testify are unconstitutional. In *Harris v. New York*,¹²⁵ the Court allowed a prosecutor to impeach a defendant with a prior inconsistent statement taken in violation of *Miranda*.¹²⁶ The practice upheld in *Harris* certainly burdens the exercise of the right to testify, because if the defendant does decide to testify, his prior statement, which otherwise would be inadmissible, may be used to impeach him. And in *Crampton v. Ohio*,¹²⁷ the Court upheld a state law requiring one trial, even in capital cases, for determination of guilt and punishment. The defendant in *Crampton* wanted to testify on issues related to punishment without having that testimony used to determine the issues

120. See *id.* But see Stone, *supra* note 101, at 147 n.241 (arguing that the "penalty" for the exercise of the privilege in the *Doyle* situation is greater than the penalty found by the Court in *Griffin* because "the jury will always be aware of defendant's silence at trial, even if no instruction is given" or comment made, whereas "[i]n the *Doyle* situation, . . . the jury will know nothing of the defendant's prior decision to remain silent unless it is expressly brought to its attention").

121. See Stone, *supra* note 101, at 146 n.241.

122. See Poulin, *supra* note 41, at 213.

123. Previously, the Court had assumed without deciding that such a right existed. See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Harris v. New York*, 401 U.S. 222, 225 (1971).

124. *Rock v. Arkansas*, 107 S. Ct. 2704, 2708 (1987). The Court found that the right to testify is rooted in three constitutional provisions: the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment, and the privilege against self-incrimination of the fifth amendment. *Id.* at 2709-10.

125. 401 U.S. 222 (1971); see *supra* text accompanying notes 116-18.

126. 401 U.S. at 226.

127. 402 U.S. 183 (1971) (decided with *McGautha v. California*), *vacated*, 408 U.S. 941 (1972).

related to guilt. Although the Court acknowledged that "[i]t is undeniably hard to require a defendant on trial for his life and desirous of testifying on the issue of punishment to make nice calculations of the effect of his testimony on the jury's determination of guilt,"¹²⁸ it did not find that the defendant's right to testify had been unconstitutionally burdened. The Court stated that "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."¹²⁹ The Court in *Chaffin v. Stynchcombe*¹³⁰ stated that "the Constitution [does not] forbid[] every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."¹³¹

The penalty imposed on the defendant's "right" to testify by the impeachment use of his pre-trial silence seems no more severe than those upheld in prior cases. In fact, the burden on the right to testify in a case like *Jenkins* or *Doyle* may be less severe than the one involved in *Harris* because impeachment by a prior inconsistent statement could be more damaging to a defendant's case than impeachment by silence,¹³² which could be easier to explain away.¹³³

The Court's narrow construction of the penalty doctrine as applied to the fifth amendment's privilege against self-incrimination may be explained in significant part by two factors: the historical basis for the privilege and the vague policy justifications offered by courts and legal scholars to justify the privilege. The "right" against self-incrimination, as Professor Levy called it,¹³⁴ developed

128. *Id.* at 214.

129. *Id.* at 215. The defendant, in deciding "whether to waive the privilege [is expected to] take into account the matters which may be brought out on cross-examination." *Id.*

130. 412 U.S. 17 (1973).

131. *Id.* at 30. The defendant in *Chaffin* had received a more severe sentence after his second trial than after his first trial. He argued that upholding this result would discourage defendants from exercising their rights to appeal or collaterally attack convictions. *Id.* at 29.

132. *Cf.* *People v. Conyers*, 49 N.Y.2d 174, 182, 400 N.E.2d 342, 348, 424 N.Y.S.2d 402, 408 ("an inconsistent statement is much more probative than is silence"), *vacated*, 449 U.S. 809 (1980).

133. *See supra* text accompanying note 72; *infra* text accompanying note 182; *infra* note 284.

134. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT viii (1968). Professor Levy explains:

Although the legal profession customarily refers to the right against self-incrimination as a "privilege," I call it a "right" because it is one. Privileges are concessions granted by the government to its subjects and may be revoked. "In

in England as part of the common law.¹³⁵ Some of the American colonies enacted limited protection against self-incrimination.¹³⁶ According to Professor Levy,

As the seventeenth century closed, . . . [t]here were several colonies . . . in which [the privilege] appears to have been unknown or, to be more accurate, nothing about its existence can be determined from legislative or judicial records. In other colonies, . . . the right was known by some defendants but received unequal respect from the authorities. . . . Elsewhere the laws or

the United States," however, as James Madison observed, "the people, not the government, possess the absolute sovereignty. . . . Hence the great and essential rights of the people are secured . . . not by laws paramount to prerogative, but by constitutions paramount to laws."

Id. at vii.

135. *Id.* It was known by the Latin maxim *Nemo tenetur prodere se ipsum*, which meant that "[n]o one should be required to accuse himself." E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 2 (1955).

136. For example, Liberty 45 in the Body of Liberties adopted in 1641 in Massachusetts provided:

"No man shall be forced by Torture to confesse any Crime against himselfe nor any other unless it be in some Capitall case where he is first fullie convicted by cleare and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane."

L. LEVY, *supra* note 134, at 345 (quoting WHITMORE, *COL. LAWS OF MASS.* 32-61). Professor Levy states,

Clearly Liberty 45 was intended to restrict the use of torture, but just as clearly the purpose of the restriction was to establish, at least partially, a right against self-incrimination, for it completely abolished torture to force a confession of one's guilt. . . . Yet it most certainly did not recognize a right to remain silent before an incriminating question in a public trial, when the defendant had been duly accused.

Id.

In 1650, Connecticut adopted the following provision: "It is ordered by the authority of this court that no man shall be forced by torture to confess any crime against himself." *LAWS OF CONN. COLONY* 65 (1665 ed.), *quoted in* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 *VA. L. REV.* 763, 779 (1935). *See also* L. LEVY, *supra* note 134, at 355 ("Although no one could be physically forced to testify against himself, . . . Connecticut did not prohibit incriminating questions nor bullying the prisoner"). Virginia enacted a similar protection in 1677: "[N]oe law can compell a man to sweare against himself in any matter wherein he is lyable to corporal punishment." II W. HENNING, *THE STATUTES AT LARGE BEING A COLLECTION OF ALL LAWS OF VIRGINIA* 442 (1809-23), *quoted in* Pittman, *supra*, at 781 and L. LEVY, *supra* note 134, at 358.

courts recognized the right but it was inconsistently observed [and] sometimes grossly breached. . . .¹³⁷

Around the time of the Declaration of Independence, some states incorporated a privilege against self-incrimination in their constitutions.¹³⁸ For example, the Virginia Declaration of Rights, adopted on June 22, 1776, stated that no man "can . . . be compelled to give evidence against himself."¹³⁹ Professor Levy observes that "[r]ead literally and in context, it seemed to apply only to a criminal defendant . . . at trial."¹⁴⁰ This provision "became a model for other states and for the United States Bill of Rights."¹⁴¹

The privilege against self-incrimination was proposed in Congress by James Madison. In its original form, it read: "No person . . . shall be compelled to be a witness against himself."¹⁴² The provision was amended on the floor of the House to apply only to criminal cases,¹⁴³ and the amended version was approved by the Senate.¹⁴⁴

Scholars examining the historical development of the privilege do not agree about its significance. Professor McCormick states that "[t]he . . . privilege goes far beyond the evils from which the privilege sprang."¹⁴⁵ Dean Pound thought that "the *raison d'être*

137. L. LEVY, *supra* note 134, at 367. The scholars do not agree about the degree of recognition accorded to the privilege in the colonies. See 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2250 n.1, at 269 (McNaughton Rev. 1961); Pittman, *supra* note 136, at 775.

138. L. Levy, *supra* note 134, at 405.

139. VII F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3813 (1909), *quoted in* L. LEVY, *supra* note 134, at 406.

140. L. LEVY, *supra* note 134, at 407.

141. *Id.* at 409. According to Levy, "the Virginia Declaration of Rights became one of the most influential constitutional documents in our history. . . . [E]ight [states] protected the right against self-incrimination . . . in essentially the language of Virginia's Section 8." *Id.*

142. Speech of James Madison to Congress (June 8, 1789), I ANNALS OF CONGRESS 434 (1789), *quoted in* L. LEVY, *supra* note 134, at 422.

143. *Id.* at 424-25.

144. *Id.* at 426.

145. McCormick, *Law and the Future: Evidence*, 51 NW. U.L. REV. 218, 222 (1956). He described the historical reasons that led to the development of the privilege:

The evils which accompanied the particular process of interrogation of suspects practiced by the Courts of High Commission and Star Chamber, the targets of attack, were the evils of the fishing expedition, the inquisition of the suspect about all of his past life without any previous charge being laid against him, and the barbarous evil of torture. The old maxim, no man shall be compelled to accuse himself, which the antagonists of the Star Chamber and High

of [the immunity of a defendant from comment on his failure to testify] ceased to have any basis in the seventeenth century."¹⁴⁶ On the other hand, Professor Levy concludes that "[t]he previous history of the right, both in England and America, proves that it was not bound by rigid definition."¹⁴⁷ Justice Frankfurter asserted that "the history of the privilege establishes . . . that it is not to be interpreted literally."¹⁴⁸ Others believe that even if history supports a narrow construction of the privilege, a broad construction is justified on the ground that "the 'noble principle' of the privilege 'transcends its origins.'"¹⁴⁹

The disagreements concerning the historical development of the privilege are minor compared to the disagreements concerning the policies underlying the privilege. Professor McNaughton's revision of Wigmore's treatise on evidence identified twelve policies advanced by various courts and commentators.¹⁵⁰ Several scholars have noted the lack of consensus regarding the policies underlying

Commission seized upon, meant to them merely that no man should be compelled to be his *first* accuser, that is, to answer without a charge.

Id. at 421.

146. Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1015 (1934).

147. L. LEVY, *supra* note 134, at 428. According to Professor Levy,

The framers of the Bill of Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty.

Id. at 432.

148. *Ullmann v. United States*, 350 U.S. 422, 438 (1956).

149. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 195 (quoting *United States v. Grunewald*, 233 F.2d 556, 581 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

150. 8 J. WIGMORE, *supra* note 137, § 2251, at 297-317. The twelve on his list were:

(1) It protects the innocent defendant from convicting himself by a bad performance on the witness stand.

(2) It avoids burdening the courts with false testimony.

(3) It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves.

(4) The privilege is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try.

the privilege.¹⁵¹ As Dean McKay put it, "[d]espite much talk, mostly slack-jawed, about the values enshrined in the privilege against self-incrimination, it remains difficult even today (perhaps especially today) to state the central policy that underlies the privilege."¹⁵² Even the Supreme Court noted, in *Murphy v. Waterfront Commission*,¹⁵³ that "the law and the lawyers . . . have never made up their minds just what [the privilege] is supposed to do or just whom it is intended to protect."¹⁵⁴

(5) The privilege prevents procedures of the kinds used by the infamous courts of Star Chamber, High Commission and Inquisition.

(6) It is justified by history, whose tests it has stood; the tradition which it has created is a satisfactory one.

(7) The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes.

(8) It spurs the prosecutor to do a complete and competent independent investigation.

(9) The privilege aids in the frustration of "bad laws" and "bad procedures," especially in the area of political and religious belief.

[(10)] The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.

(11) The privilege prevents torture and other inhumane treatment of a human being.

(12) The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.

Id.

151. See, e.g., 8 J. WIGMORE, *supra* note 137, § 2251, at 296 ("There is no agreement as to the policy of the privilege against self-incrimination"); Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191, 194 (1978) ("the policy functions of the privilege have never been fully delineated or explained"); Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 507 (1966) (analysis of policy justifications for the privilege "remains a doctrine in search of a reason"); Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 197 (1979) ("This controversy over the merits of the [privilege's] diverse policy justifications and over its proper scope and limits continues unabated").

152. McKay, *supra* note 149, at 193-194.

153. 378 U.S. 52 (1964).

154. *Id.* at 56 n.5 (quoting Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 BULL. ATOM. SCI. 181, 182 (1953)). The Court in *Murphy* attempted to articulate the policy justifications for the privilege.

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our

The failure of the Supreme Court to perceive a dominant policy basis for the privilege may help explain the Court's reluctance to apply the penalty analysis in that context. When the Court sees a constitutional right as lacking a firm policy foundation, the Court is less likely to be concerned about penalties that "cut[] down on the [right] by making its assertion costly."¹⁵⁵ A narrow construction of the privilege is predictable when the Court finds no "central policy" that would justify a broader interpretation. Indeed, Justice Cardozo asserted in *Palko v. Connecticut*¹⁵⁶ that the privilege is not an essential element of a fair criminal justice system.¹⁵⁷ When viewed in this light, the Court's refusal to apply the penalty

preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

378 U.S. at 55 (quoting 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2251, at 317 (McNaughton rev. 1961); *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957); *Quinn v. United States*, 349 U.S. 155, 162 (1955)). The passage quoted from *Murphy* has been referred to as a "laundry list of fragmentary justifications for the privilege." Berger, *supra* note 151, at 194.

155. *Griffin v. California*, 380 U.S. 609, 614 (1965).

156. 302 U.S. 319 (1937).

157. *Id.* at 325-26. Justice Cardozo stated:

Few would be so narrow or provincial as to maintain that a fair and enlightened system of criminal justice would be impossible without . . . immunity from compulsory self incrimination. . . . Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

Id. (citations omitted).

analysis to the privilege outside the *Griffin* context¹⁵⁸ is understandable.¹⁵⁹

D. Compelled Self-Incrimination

The Wisconsin Supreme Court, in its 1982 decision in *State v. Fencil*,¹⁶⁰ considered the constitutionality of using the defendant's silence before he received *Miranda* warnings to impeach his trial testimony. The court concluded that the impeachment use of pre-arrest, pre-warning silence violated the privilege against self-incrimination. "If both a person's prearrest speech and silence may be used against that person, . . . [he] has no choice that will prevent self-incrimination."¹⁶¹ If the defendant speaks, he may incriminate himself, and if he does not speak, his pre-*Miranda* silence may be used as a prior inconsistent statement to impeach his trial testimony.¹⁶² The Wisconsin Supreme Court characterized the defendant's choice as a "Catch-22" and treated it as compulsion.¹⁶³

The same analysis was used in a dissenting opinion in *Adamson v. California*,¹⁶⁴ which involved a prosecutor's comment on the defendant's failure to testify at trial.¹⁶⁵ Justice Murphy stated that such a practice

158. The *Griffin* context is the one to which the privilege clearly applies. "Since the right to courtroom silence is the most basic feature of the privilege against self-incrimination, it is deserving of unwavering protection by the Court." Berger, *supra* note 151, at 200.

159. See also *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415-16 (1966), in which the Court held that the *Griffin* rule prohibiting comment on a defendant's failure to testify should not be applied retroactively.

160. 109 Wis. 2d 224, 325 N.W.2d 703 (1982).

161. *Id.* at 237, 325 N.W.2d at 711.

162. As Professor Saltzburg described the problem, defendants may choose either to turn themselves in and talk, in which case their confessions will be used against them, or to remain silent, in which case testimony at trial will lead to the silence being treated as testimony. Imposing this dilemma on suspects compels them to speak, for no matter whether they talk or not, they will be treated as having spoken.

Saltzburg, *supra* note 41, at 204.

163. *Fencil*, 109 Wis. 2d at 237, 325 N.W.2d at 711.

164. 332 U.S. 46 (1947).

165. That practice was subsequently held unconstitutional in *Griffin v. California*, 380 U.S. 609, 615 (1965), but under the theory that it constituted a penalty on the exercise of the privilege against self-incrimination. See *supra* notes 96-100 and accompanying text.

compels a defendant to be a witness against himself in one of two ways: . . . If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences Thus he is compelled, through his silence, to testify against himself. . . . If he does take the stand, . . . he is necessarily compelled to testify against himself.¹⁶⁶

As the Supreme Court noted in *Michigan v. Tucker*,¹⁶⁷ “[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself.”¹⁶⁸ The analytical flaw in the approach suggested by the Wisconsin Supreme Court in *Fencl* is that it incorrectly equates a government-imposed requirement that a defendant make a difficult choice with governmental compulsion. The Supreme Court has always been careful to distinguish between those two situations.

In *Williams v. Florida*,¹⁶⁹ the Court considered the constitutionality of Florida’s rule of criminal procedure requiring a defendant who planned to present an alibi defense to notify the prosecutor before trial.¹⁷⁰ Although the Court acknowledged that the defendant had to choose “between complete silence and presenting a defense,” it concluded that the rule did not violate the privilege against self-incrimination.¹⁷¹ The Court reasoned that the defendant was still free to decide whether to notify the prosecutor and present an alibi defense or to say nothing before trial and not raise alibi as a defense. According to the Court, the real pressure on the defendant was caused by “the strength of the State’s case,” and

166. *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting) (emphasis added). Justice Murphy went on to state that the privilege against self-incrimination “is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements.” *Id.* at 125.

167. 417 U.S. 433 (1974).

168. *Id.* at 448 (emphasis in original).

169. 399 U.S. 78 (1970).

170. *Id.* at 79.

That rule require[d] a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intend[ed] to claim an alibi, and to furnish the prosecuting attorney with information as to the place where he claim[ed] to have been and with the names and addresses of the alibi witnesses he intend[ed] to use.

Id.

171. *Id.* at 84.

"[r]esponse to that kind of pressure by offering evidence or testimony is not compelled self-incrimination."¹⁷²

The defendant in *Crampton v. Ohio*¹⁷³ challenged the constitutionality of Ohio's procedure for determining guilt and punishment in a single trial, even in a capital case. He argued that the Ohio procedure "unlawfully compels the defendant to become a witness against himself on the issue of guilt by the threat of sentencing him to death without having heard from him."¹⁷⁴ As in *Williams*, the Court recognized that under the state procedure at issue, the defendant faced a difficult choice; nevertheless, the Court held that the privilege against self-incrimination had not been violated by putting the defendant to such a choice.¹⁷⁵

The case perhaps most closely analogous to that involving the impeachment use of pre-trial silence is *South Dakota v. Neville*.¹⁷⁶ The state statute at issue in that case provided that a suspect's refusal to submit to a blood-alcohol test was admissible into evi-

172. *Id.* at 85. The Court also stated that the notice-of-alibi rule by itself in no way affected [the defendant's] crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense

Id.

173. 402 U.S. 183 (1971) (decided with *McGautha v. California*), *vacated*, 408 U.S. 941 (1972); *see supra* text accompanying notes 127-29.

174. 402 U.S. at 213.

175. The Court thought that the choice faced by the defendant in *Crampton* was no more difficult than choices faced by defendants under state procedures that had already been found by the Court to be constitutionally permissible.

It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.

Id. at 215 (citations omitted).

176. 459 U.S. 553 (1983).

dence in the suspect's subsequent trial for driving while intoxicated.¹⁷⁷ The defendant in that case had to decide whether to submit to the blood-alcohol test and thereby incriminate himself, or to refuse and thereby incriminate himself. Again, as in *Williams* and *Crompton*, the Court stated:

We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.¹⁷⁸

The difference between *Neville* and a case involving impeachment use of a defendant's pre-*Miranda* silence is that the defendant in the latter situation must choose between two alternatives that constitute incriminating testimony. The defendant may speak and incriminate himself or he may remain silent, and that silence may be used as a prior inconsistent statement to impeach his trial testimony.¹⁷⁹ The defendant in *Neville*, on the other hand, was faced with a choice between incriminating himself by testimonial evidence if he refused to take the blood-alcohol test and incriminating himself by providing physical evidence if he submitted to the test. Seventeen years before *Neville*, the Supreme Court held that a defendant could be compelled to take a blood-alcohol test because it provided nontestimonial evidence, which is not protected by the privilege against self-incrimination.¹⁸⁰

Despite this distinction between the two cases, the analogy is still apt. In both situations, the defendant has to decide whether to incriminate himself by one means or another; no matter which alternative he selects, the result will be evidence that can be used against him later. Because the Court concluded that requiring the defendant in *Neville* to make such a choice did not constitute compulsion, forcing a defendant to choose between incriminating him-

177. S.D. CODIFIED LAWS ANN. §32-23-10.1 (1984).

178. 459 U.S. at 564 (citations omitted).

179. See *supra* note 162 and accompanying text.

180. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

self by speaking or incriminating himself by remaining silent likewise is not compulsion. Indeed, the latter situation involves even less coercion than did *Neville*, because the defendant in a *Jenkins* type case can always avoid the incriminating effect of impeachment by his prior silence by refusing to testify at his trial.¹⁸¹ Furthermore, even if the defendant in a *Jenkins* type situation chooses to take the witness stand, he can plausibly explain his prior silence as reliance on the privilege against self-incrimination or give some other reason consistent with his innocence.¹⁸² Thus, although the analysis based on compulsion is persuasive, the decision in *Neville* suggests that the Court will not find the impeachment use of a defendant's pre-trial silence tantamount to compelled self-incrimination.¹⁸³

The Court's narrow construction of compulsion in cases like *Williams*, *Crampton*, and *Neville* is supported by the history of the privilege, at least according to some commentators. Judge Friendly concluded: "[I]t seems rather plain that what the framers meant by compulsion were such things as brow-beating by a magistrate, punishment for refusing to answer, the *peine fort et dure* for declining to plead, and torture or threats to extract a confession."¹⁸⁴

181. A decision not to testify, however, has its own set of negative consequences. First, the defendant is, of course, relinquishing his "right" to testify. See *supra* notes 123-24 and accompanying text. The Supreme Court simply does not consider unconstitutional a requirement that the defendant, in deciding whether or not to testify, "take into account the matters which may be brought out on cross-examination." *Crampton v. Ohio*, 402 U.S. 183, 215 (1971) (decided with *McGautha v. California*), *vacated*, 408 U.S. 941 (1972). Second, when the defendant does not take the stand, "the jury will always be aware of defendant's silence at trial, even if no instruction is given" or no comment is made by the prosecutor. Stone, *supra* note 101, at 147 n.241. The jury then could still draw an adverse inference from the defendant's failure to testify.

182. See *supra* text accompanying notes 72, 133.

183. One commentator described the Court's approach to compulsion as follows: [T]he Court does recognize that there are some procedures which, if allowed to stand, will impermissibly pressure a defendant to testify and will penalize the nontestifying defendant's exercise of his right. The pressure to testify must be significantly different from that inherent in the trial process, however, and the Court will apparently weigh the jurisdiction's legitimate purpose for imposing the procedure in determining whether it violates the privilege or due process. Ritchie, *supra* note 41, at 430.

184. H. FRIENDLY, BENCHMARKS 272 (1967). Judge Friendly found the compulsion element to be a central feature of the privilege.

What is important is that on any view the Fifth Amendment does not forbid the taking of statements from a suspect; it forbids compelling them. That is

R. Carter Pittman, the author of an important article tracing the history of the privilege, stated that "[t]his privilege against self-incrimination came up thru [sic] our colonial history as a privilege against physical compulsion and against the moral compulsion that an oath to a revengeful God commands of a pious soul."¹⁸⁵

Other scholars have suggested that a narrow interpretation of compulsion is justified by policy. Professor McCormick thought that the privilege should protect an accused from torture and inquisitorial procedure but not from having to answer questions:

[O]rdinary morality . . . sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged. Safeguards for official interrogation are needed, of course. It should be supervised by an impartial judge, who will confine it to relevant inquiries. The witness should have the benefit of charges and of counsel, when appropriate. But to say he shall be free of questioning altogether about his crimes goes too far.¹⁸⁶

what the words say, and history and policy unite to show that is what they meant. Rather than being a "right of silence," the right, or better the privilege, is against being compelled to speak. The distinction is not mere semantics; it goes to the very core of the problem.

Id. at 271 (quoting *Miranda*, 384 U.S. at 444) (emphasis in original).

185. Pittman, *supra* note 136, at 783.

186. McCormick, *supra* note 145, at 222. Dean Pound had previously suggested that type of procedure:

I submit that there should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy. As things are, it is not the least of the abuses of the system of extra-legal interrogation that there is a constant conflict of evidence as to what the accused said and as to the circumstances under which he said or was coerced into saying it.

If such a legal examination were allowed, and provided for, there would be no excuse for third-degree methods and it would be possible to deal with them where they survived. Such a system also would, on the one hand, protect the general run of accused persons in all legitimate interests much more effectively than the present system and, on the other hand, in the case of malefactors who now get the advantage of the immunity, would provide an effective method of reaching the truth and heading off made-to-order defenses.

Pound, *supra* note 146, at 1017.

A similar proposal to allow judicially supervised interrogation of a suspect was endorsed by Justice Walter Schaefer¹⁸⁷ and Judge Henry Friendly.¹⁸⁸ Justice Schaefer believed that "it is entirely unsound to exclude from consideration at trial the silence of a suspect involved in circumstances reasonably calling for explanation, or of a defendant who does not take the stand."¹⁸⁹ He therefore concluded that it was "imperative that the privilege against self-incrimination be modified to permit comment upon such silence."¹⁹⁰ Justice Schaefer would have required that a suspect be advised prior to questioning "that he need not answer," but that if he was later tried, "his failure to answer will be disclosed at his trial."¹⁹¹ According to Justice Schaefer, that threat of disclosure of pretrial silence would not constitute compulsion within the meaning of the fifth amendment.

Scholarly views of the history and policies of the privilege against self-incrimination thus support the Court's restrictive interpretation of the compulsion element. This construction of compulsion certainly would permit the use of a defendant's pre-trial silence to impeach his exculpatory testimony at trial.

E. Fundamental Fairness

In *Doyle v. Ohio*,¹⁹² the Court was confronted with the constitutional questions it had avoided in *Grunewald* and *Hale*. Whereas the earlier cases had involved federal prosecutions, *Doyle* was a state case. Police arrested two defendants for allegedly selling marijuana to a government informant. At the time of their arrest, they received *Miranda* warnings and said nothing. The defendants were tried separately, but the evidence in both trials was virtually

187. Schaefer, *supra* note 151, at 518-21.

188. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713 (1968).

189. Schaefer, *supra* note 151, at 520.

190. *Id.*

191. *Id.* at 520-21. Under Justice Schaefer's proposal, "[t]he only sanction upon a suspect's refusal to respond to questioning before a judicial officer should be to permit the trier of fact to consider that silence for whatever value it has in determining guilt or innocence." *Id.* at 521. Accord Friendly, *supra* note 188, at 713. Judge Friendly would, however, leave undisturbed the *Griffin* rule that "the court cannot comment on the defendant's failure to take the stand at trial." *Id.* at 714.

192. 426 U.S. 610 (1976).

identical.¹⁹³ Each defendant testified that he had been framed by the informant, and that in fact the informant had agreed to sell to the defendants. On cross-examination, each defendant was asked why he had not told this story to the police and narcotics agents at the time of arrest. Neither defendant explained his silence as reliance on the *Miranda* warnings.¹⁹⁴

The Court first reiterated its concern in *Hale* regarding the probative value of such silence. "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."¹⁹⁵ The Court did not, however, rely on that conclusion to decide the case. Rather, the Court reasoned:

[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.¹⁹⁶

Justice Stevens, in his dissent, characterized the majority's approach as an "estoppel theory."¹⁹⁷ This approach required the court to presume, if the defendant was advised of his rights and then remained silent, that his silence indicated reliance on that advice and ultimately required the court to conclude that it would be unfair to use his silence against him.¹⁹⁸ The flaw in the Court's analysis, according to Justice Stevens, was that the two defendants were not exercising their constitutional right to remain silent when they failed to recount the frameup story to the arresting officers. When asked to give reasons for their silence, the defendants did not explain it as reliance in whole or part on that right.¹⁹⁹ Because these defendants were not relying on their privilege against self-

193. *Id.* at 611.

194. *Id.* at 614 & n.5.

195. *Id.* at 617.

196. *Id.* at 618.

197. *Id.* at 620 (Stevens, J., dissenting, joined by Blackmun & Rehnquist, JJ.).

198. *Id.*

199. *Id.* at 622.

incrimination at the time of their arrest, Justice Stevens would have held that using their silence for impeachment purposes was not unfair.²⁰⁰ Indeed, Justice Stevens maintained that even if the defendants had testified that they relied on their right to remain silent, no constitutional impediment would have prevented them from being questioned about that silence and being allowed to explain it as the assertion of their privilege.²⁰¹

The Court in *Jenkins v. Anderson*²⁰² rejected the fundamental fairness analysis applied in *Doyle* because the Court found the facts in the two cases distinguishable:

In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case.²⁰³

The Court in *Jenkins* thus made clear that the analysis in *Doyle* was based on a type of "implicit assurance" theory.²⁰⁴

Justice Marshall, in his dissenting opinion in *Jenkins*, wrote that the reading of the *Miranda* warnings should not have been crucial to the holding in *Doyle* because "[t]he furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution."²⁰⁵ He reasoned that, based on the facts of *Jenkins*, the defendant's pre-arrest silence should not have

200. *Id.* at 622-24.

201. *Id.* at 626.

202. 447 U.S. 231 (1980); see *supra* notes 22-27 and accompanying text.

203. 447 U.S. at 239-40. In *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam), decided six days after *Jenkins*, the Court made clear that *Doyle* would not apply when the defendant spoke instead of remaining silent after receiving *Miranda* warnings. *Id.* at 408-09. In *Charles*, the defendant told the police that he had stolen a car from a particular location, but at trial he testified that he had stolen the car from a different location. The prosecutor questioned the defendant about his prior inconsistent statement and asked why, if the new story were true, the defendant had not told it to police after his arrest. The Court stated:

Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id. at 408.

204. See *infra* note 218 and accompanying text.

205. 447 U.S. at 247 n.1 (Marshall, J., dissenting).

been admissible for impeachment purposes because his silence was ambiguous; it was not clearly inconsistent with the self-defense story he presented at trial. "Since we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights, we must recognize that petitioner may have acted in reliance on the constitutional guarantee."²⁰⁶ Indeed, in Jenkins's case, Justice Marshall thought that Jenkins quite likely was aware of his rights because he had two prior felony convictions and thus had received *Miranda* warnings at least twice before.²⁰⁷ Justice Marshall concluded that because Jenkins could have been relying on his right to remain silent when he failed to come forward before his arrest, his silence was not inconsistent with his trial testimony, and allowing the prosecutor to impeach him with that silence therefore would be fundamentally unfair and a violation of due process.²⁰⁸

The most recent Supreme Court case dealing with impeachment of a defendant's trial testimony by his prior silence is *Fletcher v. Weir*.²⁰⁹ In *Weir*, the defendant was involved in a fight with another man who was stabbed during the fight and later died as a result of the wounds. The defendant left the scene and did not report the incident to the police. At trial, the defendant testified that he had stabbed the victim in self-defense.²¹⁰ During cross-examination, the prosecutor questioned him about his failure to tell his self-defense story to the police at the time of his arrest. Critical to the Supreme Court's analysis was the fact that "the record [did] not indicate that [defendant] Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest."²¹¹ Under the *Doyle* analysis, the Court found no constitutional problem with the cross-examination in *Weir*. "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of

206. *Id.* at 247.

207. *Id.*

208. *Id.* at 249-50.

209. 455 U.S. 603 (1982) (per curiam).

210. *Id.* at 603.

211. *Id.* at 605.

law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."²¹²

The Court recently applied the restricted *Doyle* analysis to a case decided after *Weir* involving the insanity defense. In *Wainwright v. Greenfield*,²¹³ the defendant was arrested for sexual battery. Police officers read him the *Miranda* warnings three times, and each time the defendant stated that he wanted to speak with an attorney before making a statement. The defendant subsequently pleaded not guilty by reason of insanity. At trial, the state in its case in chief brought out the defendant's assertion of his right to remain silent during questioning by the police.²¹⁴ The prosecutor, in the closing argument, "suggested that [the defendant's] repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity."²¹⁵

212. *Id.* at 607. In other contexts, the Court has made clear that some governmental assurance is required before the fundamental fairness analysis may come into play. In *Roberts v. United States*, 445 U.S. 552 (1980), the defendant pleaded guilty to multiple drug offenses but refused to divulge the names of his suppliers to government investigators. The trial judge imposed consecutive sentences for each count and explained to the defendant that the sentences were justified by several factors, including the defendant's refusal to cooperate with the government. *See id.* at 555 & n.3. The defendant contended before the Supreme Court that his refusal to cooperate was an exercise of his privilege against self-incrimination and that the district court had "punished" him for exercising this privilege. *Id.* at 559. The Court disagreed, stating that the defendant's conduct in this case "bears no resemblance to the 'insolubly ambiguous' postarrest silence that may be induced by the assurances contained in *Miranda* warnings." *Id.* at 561 (citing *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976)).

In *South Dakota v. Neville*, 459 U.S. 553 (1983), the defendant asserted at his trial on charges of driving while intoxicated that the admission of his refusal to take a blood-alcohol test violated due process principles set forth in *Doyle* because the arresting officer failed to inform him that his refusal could be used against him in court. The Court concluded that, unlike the *Miranda* warnings in *Doyle*, "[t]he warnings challenged here . . . contained no such misleading implicit assurances as to the relative consequences of his choice" because the officer did warn the defendant that he could lose his driving privileges for a year if he refused to submit to the test. *Id.* at 565. The Court concluded that this warning "made it clear that refusing the test was not a 'safe harbor,' free of adverse consequences." *Id.* at 566.

213. 106 S. Ct. 634 (1986).

214. The arresting officer and a detective, testifying for the prosecution, "described the occasions on which [the defendant] had exercised his right to remain silent and had expressed a desire to consult counsel before answering any questions." *Id.* at 636.

215. *Id.* Florida law requires that if the defendant's evidence "raise[s] a reasonable doubt about his sanity," the state must prove beyond a reasonable doubt that the defendant was sane. *Id.* at 636 & n.1. The state argued that because insanity was similar to an affirmative

The Court concluded that the due process analysis in *Doyle* also applied in *Greenfield*.

It is equally unfair to breach that promise [implicit in the *Miranda* warnings] by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.²¹⁶

The Court found that "silence" in this context "does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted."²¹⁷ The fundamental fairness analysis thus turns on the presence of some act by the government that implicitly assures the defendant that his silence will not be used against him.²¹⁸ In the context of the *Doyle* facts, the reading of the *Miranda* warnings constituted the implicit assurance.

The "implicit assurance" analysis used in *Doyle* and limited in *Jenkins* and *Weir* presents several problems. First, such an approach would allow the state in some cases to benefit from the misconduct of its officers or employees. Consider a case in which the police should have informed the defendant of his *Miranda* warnings—which are required before police subject a suspect to custo-

defense, the state's use of the defendant's silence should have been treated as impeaching that defense. The Court did not express an opinion on that argument. *Id.* at 639.

216. *Id.* at 639.

217. *Id.* at 641 n.13. Justice Rehnquist, joined by Chief Justice Burger, concurred in the result. He wrote separately to distinguish that part of the questioning and prosecutorial comment that he thought was constitutionally permissible from the part that was unconstitutional. Justice Rehnquist stated that "a request for a lawyer may be highly relevant where the plea is based on insanity." *Id.* at 642. He then concluded that the testimony and comment on the defendant's request for an attorney were not unfair under *Doyle* because the request was a statement, not silence, and the police advised him that anything *he said* could be used against him in court. *Id.*

218. Although the Court in *Doyle* also focused on the lack of probative value of the defendant's post-arrest silence, *see supra* text accompanying note 195, the Court recently has noted that "*Doyle's* probativeness rationale is secondary to its implied assurance rationale." *Wainwright v. Greenfield*, 106 S. Ct. 634, 640 n.12 (1986).

dial interrogation²¹⁹—but did not read the warnings. That defendant's silence could be used to impeach his exculpatory trial testimony²²⁰ because, as *Weir* made clear, the *Doyle* analysis is triggered only by the reading of *Miranda* warnings.²²¹ Thus, the application of the *Doyle* approach in such a situation will result in perhaps even greater unfairness to the defendant than the unfairness found by the Court in *Doyle*. In this situation, the government, whose agents—the police officers—violated the law by not reading the *Miranda* warnings at the appropriate time, derives from that violation a benefit: the ability to use the defendant's silence to impeach his exculpatory trial testimony.²²² That evidence

219. See *Berkemer v. McCarty*, 468 U.S. 420, 437, 440 (1984) (*Miranda* warnings were not required where defendant was questioned during a routine traffic stop because such a detention was "temporary and brief" and "comparatively nonthreatening"); *New York v. Quarles*, 467 U.S. 649, 655 (1984) ("the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement'") (quoting *California v. Beheler*, 463 U.S. 1124, 1125 (1983) (citation omitted)); *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984) (*Miranda* warnings required when the situation at issue involved "coercion [like that] inherent in custodial interrogation"). See generally 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.6 (1984).

220. See Stone, *supra* note 101, at 145-46.

221. See *supra* text accompanying note 212.

222. One commentator has argued that the result of *Weir* will be to "encourage[] police to delay the administration of warnings to create silence for later impeachment use." Case Comment, *Use of Post-Arrest, Pre-Warning Silence is Permissible to Impeach Defendant's Exculpatory Trial Testimony*, 61 WASH. U.L.Q. 861, 876 (1983). If true, this would suggest that an exclusionary rule approach should be used to exclude evidence of silence, even for impeachment purposes, whenever the police fail to read *Miranda* warnings at the appropriate time. In fact, however, improper police conduct likely would not be deterred by an exclusionary rule approach. If the police officers confronting a suspect think he is going to speak, they will have a strong incentive to read the *Miranda* warnings to ensure that the suspect's statement will be admissible at trial. If they expect the suspect to remain silent, they will be inclined to withhold the reading of the warnings so that the suspect's silence will be admissible as impeachment evidence should the suspect decide to testify. But at the time they confront a suspect, police officers have no way of knowing whether he will speak or remain silent; thus, they will have no incentive to violate *Miranda*. See *Weir v. Fletcher*, 658 F.2d 1126, 1136 (6th Cir. 1981) (Engel, J., dissenting) (if the police "deliberately withhold *Miranda* warnings so as to preserve the opportunity to use silence for impeachment purposes . . . it may be at the risk of a good opportunity to get a valid confession"), *rev'd*, 455 U.S. 603 (1982) (per curiam). But see Case Comment, *supra*, at 876 n.81 ("Given the many ways in which arrest alone may induce silence, however, . . . the likelihood of a confession is not very great"). Further, even if police officers attempt to analyze the situation in an effort to predict whether the suspect will make a statement, "their well laid plans . . . will be frustrated if the accused never takes the stand." *Weir*, 658 F.2d at 1136 (Engel, J., dissenting). Finally, Professor Stone recognized that, "[g]iven the Court's treatment of the deterrence issue in *Harris* . . . such an argument seems likely to fail." Stone, *supra* note 101, at

would, of course, have been inadmissible under *Doyle* if the police had read the warnings. As the New York Court of Appeals recognized in *Conyers*, "[i]t would appear rather anomalous to 'reward' improper police practices by allowing the existence of such impropriety to serve as the justification for admitting evidence otherwise inadmissible."²²³

An additional problem raised by the *Doyle-Jenkins-Weir* analysis concerns the appropriate procedure for determining whether the prosecutor may use the defendant's pre-trial silence to impeach his testimony at trial. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides for discovery by a defendant of

any relevant written or recorded statements made by the defendant, . . . within the possession, custody or control of the government, . . . [and] the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant, whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.²²⁴

Many states have similar provisions permitting the defendant access to his prior statements made to police officers or other state agents.²²⁵ In *United States v. Holmes*,²²⁶ a government agent questioned the defendant about whether he knew persons who were later indicted as co-defendants. He answered, "No."²²⁷ The government did not reveal the defendant's "no" when it responded to the defendant's discovery request for his prior statements. The United States Court of Appeals for the Seventh Circuit concluded that

146. The Court in *Harris* reasoned that sufficient deterrence would result from excluding a statement taken in violation of *Miranda* from the government's case-in-chief. *Harris v. New York*, 401 U.S. 222, 225 (1971).

223. *People v. Conyers*, 49 N.Y.2d 174, 179, 400 N.E.2d 342, 346, 424 N.Y.S.2d 402, 406, *vacated*, 449 U.S. 809 (1980).

224. FED. R. CRIM. P. 16(a)(1)(A).

225. Most states have a discovery provision that permits the defendant to discover his prior recorded statements. See 2 W. LAFAVE & J. ISRAEL, *supra* note 219, § 19.3, at 485. Some state courts have construed that provision to cover written descriptions of a defendant's oral statements. See *id.* § 19.3, at 487. In addition, "[a]bout half of the states . . . also require disclosure of the substance of certain oral statements of defendant known to the prosecution." *Id.*

226. 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972).

227. *Id.* at 272.

this failure did not violate rule 16 because the court construed the request for "statements" to mean "written statements or confessions, or oral statements which were transcribed verbatim or in substance by a Government employee" and stated that "the word 'no' in answer to a Government agent's question at the time of [the defendant's] arrest [does not] fall[] into either of those categories."²²⁸ The court, citing rule 16, concluded that the government therefore had "no writing which [it] was required to disclose."²²⁹

Because the Court's decisions in *Jenkins* and *Weir*, which held the defendant's silence admissible for use as a prior inconsistent statement, are relatively recent developments, thus far no cases have arisen involving a claim by a defendant that his request to discover prior statements under rule 16 should require the prosecutor to include descriptions of the defendant's silence. If actual words spoken by the defendant do not always constitute a "statement" under rule 16, then courts may not look favorably on the argument that silence in a *Jenkins* or *Weir* situation is a statement for discovery purposes.

Such a result, however, is contrary to the notions of fairness underlying *Doyle*.²³⁰ This becomes clear when the choices faced by a defendant who makes a verbal or written statement are compared with those faced by a defendant who exercised his right to remain silent. When a defendant who spoke to the police at the time of arrest learns through discovery that he made a statement that the prosecutor might use at trial, he may move to suppress the statement on the ground that it was taken in violation of *Miranda*. A defendant in that situation is entitled to a hearing outside the presence of the jury to decide the admissibility of the statement.²³¹ "Ordinarily, if the motion to suppress is made before trial, the admissibility issue will be decided [even] before the jury is selected."²³² If the trial court decides that the statement was taken in violation of *Miranda* but is admissible for impeachment pur-

228. *Id.*

229. *Id.*

230. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

231. *C.f. Lego v. Twomey*, 404 U.S. 477, 483-84 & n.9 (1972) (requiring such a hearing on the issue of the voluntariness of the statement); *Jackson v. Denno*, 378 U.S. 368, 380, 391 n.19 (1964) (same).

232. 1 W. LAFAYE & J. ISRAEL, *supra* note 219, § 10.5, at 802.

poses under *Harris v. New York*,²³³ then the defendant may "take into account the [statement], which may be brought out on cross-examination,"²³⁴ in deciding whether to take the stand.

Current interpretation of rule 16, as exemplified by *Holmes*, does not permit the silent defendant to know before trial whether his pre-trial silence will be admissible for impeachment purposes.²³⁵ Unlike the defendant who speaks, then, the silent defendant must decide whether to take the stand without knowing what the prosecutor may use to impeach his testimony. The Court has stated that "[i]t is not thought overly harsh in such situations to require that the determination whether to [testify] . . . take into account the matters which may be brought out on cross-examination."²³⁶ This suggests that, although a defendant may be required to make hard choices, he should not have to do so without the information necessary to make an intelligent, informed decision.

Moreover, fairness dictates that a similar procedure be afforded defendants who remain silent because the defendant's pre-trial silence in a case like *Weir* is treated as the equivalent of a (prior inconsistent) statement.²³⁷ For example, in future cases like *Weir*, in which the record does not show whether the defendant received *Miranda* warnings, the fact that the defendant remained silent should be included in the prosecutor's response to a discovery request from defense counsel for all the defendant's prior "statements" in the government's possession. The defendant might want to move to suppress the evidence of silence (which would be used as a prior inconsistent statement) on the ground that he received *Miranda* warnings and therefore his silence is not admissible, even for impeachment purposes, under *Doyle*.²³⁸

The next issue raised, then, is which party in that situation will bear the burden of proof? If the prosecutor wants the defendant's pre-trial statements admitted into evidence, the burden is on the

233. 401 U.S. 222 (1971); see *supra* text accompanying notes 116-18, 125-26.

234. *Crampton v. Ohio*, 402 U.S. 183, 215 (1971) (decided with *McGautha v. California*), *vacated*, 408 U.S. 941 (1972); see *supra* text accompanying notes 127-29.

235. See *United States v. Holmes*, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972).

236. *Crampton*, 402 U.S. at 215.

237. See Saltzburg, *supra* note 41, at 204.

238. See *supra* text accompanying notes 195-96.

prosecutor to establish compliance with *Miranda*.²³⁹ This allocation of the burden of proof makes sense because it places the burden on the party who seeks to admit the contested evidence and who has the best access to the relevant information—for example, an arrest record indicating when the warnings were read and by whom.²⁴⁰

In *United States v. Cumiskey*,²⁴¹ the United States Court of Appeals for the Third Circuit considered which party should have the burden of proving whether *Miranda* warnings were given in a case like *Weir*. The court reasoned that “[b]ecause it is the prosecutor who is attempting to establish the relevancy, for impeachment . . . , of post-arrest silence, the government bears the burden of introducing evidence sufficient” to prove the absence of *Miranda* warnings.²⁴² One problem with placing the burden on the prosecutor in such a case is that he is then faced with the difficult task of proving the negative, that the warnings were *not* given. In addition, allocating the burden in this way will, in some cases, result in the anomaly that police officers will be asked to testify that they acted improperly in failing to read the warnings at the appropriate time.²⁴³

Another flaw in making the *Doyle* fundamental fairness analysis turn on the reading of the *Miranda* warnings is that such an approach presumably leaves open the possibility that the warnings could be amended to advise the suspect “that he has the right to remain silent, that anything he says can be used against him in a court of law,”²⁴⁴ and that if he does not say anything, his silence can be used against him. Justice White, in his concurring opinion in *Hale*, noted that the defendant “was not informed here that his silence, as well as his words, could be used against him.”²⁴⁵ One commentator suggested that “the police could, consonant with the

239. See *Colorado v. Connelly*, 107 S. Ct. 515, 522-23 (1986); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); 1 W. LAFAVE & J. ISRAEL, *supra* note 219, § 10.3, at 793.

240. See 1 W. LAFAVE & J. ISRAEL, *supra* note 219, § 10.3, at 789.

241. 728 F.2d 200 (3d Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985).

242. *Id.* at 205.

243. See *supra* notes 219-23 and accompanying text.

244. *Miranda*, 384 U.S. at 479.

245. *United States v. Hale*, 422 U.S. 171, 183 (1975) (White, J., concurring in the judgment).

privilege, warn a suspect that his silence may be used to impeach his testimony at trial" and that such a "‘silence warning’ might make use of postarrest silence ‘fair.’"²⁴⁶ Professor Kamisar has pointed out some of the problems with that "solution:"

[S]uch a revision might only aggravate existing problems. Can a police officer be trusted to explain to a suspect how he can have 'a right to remain silent' and still have his silence used against him at trial? And even if an officer does his very best to explain, can the average suspect be expected to understand?²⁴⁷

An additional concern with the fundamental fairness approach to impeachment by silence is that the Court has construed the implicit assurance too narrowly. In *Jenkins v. Anderson*,²⁴⁸ the Court held that cross-examination of a defendant about his pre-arrest silence was not inconsistent with due process principles because "no governmental action induced [the defendant] to remain silent before . . . [he] was taken into custody and given *Miranda* warnings."²⁴⁹ And in *Fletcher v. Weir*,²⁵⁰ the Court held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of

246. Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 75, 86 (1980). Accord Poulin, *supra* note 41, at 215 n.160 ("Once the specific problem of *Doyle* . . . is removed by informing a defendant that his silence can be used against him, then the way seems open for the use of each 'response' of silence"). Schaefer, *supra* note 151, at 520-21 ("any suspect . . . should be advised . . . that he need not answer [and] he should also be advised that if he is subsequently charged, his failure to answer will be disclosed at his trial").

247. Y. KAMISAR, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, in POLICE INTERROGATIONS AND CONFESSIONS 92 n.12 (1980) (reprinting an article by the same title that originally appeared in 73 MICH. L. REV. 15 (1974)). Professor Kamisar went on to observe that

[t]he available empirical data indicate that a large number of police officers do not give the silence or counsel warnings at all, and many who do, do not give them in a meaningful way; moreover, a significant percentage of suspects either misunderstand the existing warnings or fail to appreciate their significance. . . . In this light, how can anyone seriously suggest that we make the *Miranda* warnings significantly more complicated, yet continue to rely on the uncorroborated oral testimony of the police officer to establish the legality of the questioning?

Id. (citations omitted).

248. 447 U.S. 231 (1980).

249. *Id.* at 240.

250. 455 U.S. 603 (1982) (per curiam).

law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."²⁵¹ According to the Court, then, the government "induces" a defendant to remain silent only when an officer actually reads the *Miranda* warnings to the defendant.

*Connecticut v. Leecan*²⁵² illustrates how the Court's narrow interpretation operates. In that case, the defendant contended that cross-examination concerning his post-arrest silence violated the due process clause, although, as in *Weir*, the record did not show when or whether the *Miranda* warnings were read to the defendant.²⁵³ The defendant argued that the state court should have taken "judicial notice of the probability that at some point between his arrest and his trial he would have been advised of his constitutional right to remain silent."²⁵⁴ The Connecticut Supreme Court stated that "the defendant in this case testified that he had disclosed nothing to the police, not because of any official warning received at arraignment or at any other time, but because his attorney advised him to remain silent."²⁵⁵ The court concluded that "neither the police nor any other government personnel can reasonably be deemed to have induced the defendant's postarrest silence, as is essential to support a claimed violation of *Doyle*."²⁵⁶

In neither *Jenkins* nor *Weir* did the Court accurately focus on exactly what induced the defendant in *Doyle* to remain silent after his arrest. The Court incorrectly assumed in *Jenkins* and *Weir* that the reading of the *Miranda* warnings by a government official constitutes inducement.²⁵⁷ In fact, what induces any defendant to remain silent under those circumstances is not the reading of the warnings, but their substance. Thus, if a defendant is aware of his right to remain silent and chooses not to speak in reliance on that right, he has been "induced" to remain silent by the existence of the right. Under *Doyle*, he can, of course, be impeached if he received no warnings even if he was already aware of his rights.

251. *Id.* at 607.

252. 198 Conn. 517, 504 A.2d 480, *cert. denied*, 106 S. Ct. 2922 (1986).

253. *Id.* at 531, 504 A.2d at 488.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980).

II. AN EXTENSION OF THE *DOYLE* DUE PROCESS THEORY

Under the theory proposed in this Article, the reading of the *Miranda* warnings is irrelevant to the admissibility of the defendant's pre-trial silence. The Court in *Doyle* held that the impeachment use of the defendant's post-arrest silence was "fundamentally unfair and a deprivation of due process" because it violated the assurance that the Court found to be implicit in the language of the *Miranda* warnings.²⁵⁸ If, as this Article asserts,²⁵⁹ defendants who choose to remain silent do so in reliance on the existence of the fifth amendment's privilege against self-incrimination, rather than on the words contained in the *Miranda* warnings, then the "fairness" of allowing the prosecutor to impeach the defendant's trial testimony with the fact of his prior silence does not depend on whether the warnings were read. According to this theory, the due process clause prohibits any use of a defendant's pre-trial silence because to use such silence against a defendant violates the assurance implicit in the privilege against self-incrimination "that silence will carry no penalty."²⁶⁰

A. *Doctrinal Basis for the Doyle Due Process Rationale*

The "implicit assurance" or fundamental fairness rationale of *Doyle* finds support in two cases cited by the Court in a footnote.²⁶¹ In *Johnson v. United States*,²⁶² the defendant was charged with not reporting income he allegedly obtained as "protection" from persons engaged in illegal gambling.²⁶³ At one point during cross-examination by the prosecutor, the defendant asserted his privilege against self-incrimination. The prosecutor, in his closing argument to the jury, contended that the defendant's assertion of the privilege cast serious doubt on his credibility.²⁶⁴

258. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

259. See *infra* text accompanying notes 274-81.

260. *Doyle*, 426 U.S. at 618.

261. *Id.* at 618 n.9 (citing *Johnson v. United States*, 318 U.S. 189 (1943); *Raley v. Ohio*, 360 U.S. 423 (1959)).

262. 318 U.S. 189 (1943).

263. *Id.* at 190.

264. The prosecutor stated: "Now, ladies and gentlemen, can you believe that man told you the truth about anything on the witness stand when he admits that he got numbers

Regarding the prosecutor's reference to the defendant's claim of privilege, the Court in *Johnson* stated:

[W]here the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. . . . If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.²⁶⁵

Otherwise, the Court noted, the defendant could have been misled. When the privilege was granted by the trial court, the defendant expected that his assertion of the privilege would carry no penalty. The Court stated that "[a]n accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one."²⁶⁶ The Court held that when a court permitted a defendant to assert his privilege against self-incrimination, the prosecutor could not suggest that the jury draw an adverse inference from the defendant's silence.²⁶⁷ Without discussing the constitutionality of using a defendant's assertion of the privilege against him, the Court concluded: "That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."²⁶⁸

In *Raley v. Ohio*,²⁶⁹ the defendants were called to testify before a commission of the Ohio legislature investigating allegedly subversive groups. The commission chairman advised three defendants

money in 1938 but won't tell you who he got it from on the ground it would incriminate him?" *Id.*

265. *Id.* at 196-97 (quoting *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853)). The Court noted that the same rule would have applied even if the trial court had incorrectly granted the privilege. *Id.* at 197.

266. *Id.*

267. *Id.* at 196.

268. *Id.* at 199. Ultimately, the Court in *Johnson* found that the defendant had waived any objection to the prosecutor's comment on his assertion of the privilege by withdrawing his exception to it. *Id.* at 200.

269. 360 U.S. 423 (1959).

during questioning that they could refuse to answer questions if doing so might tend to incriminate them. The defendants, who asserted the privilege in response to questions, were subsequently tried and convicted for contempt based on their refusal to answer questions put to them by the commission. The Supreme Court reversed their convictions under the due process clause.²⁷⁰ The Court held that to affirm the convictions "after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him."²⁷¹

In both *Johnson* and *Raley*, officials speaking on behalf of the government had told the defendants that they could assert their privilege against self-incrimination. They relied on the assurances by the officials and refused to speak. The Court in both cases concluded that a defendant could not, consistent with principles of due process, be penalized for asserting the privilege after being induced to do so by the government.²⁷²

B. Doctrinal Basis for the Extension of the Due Process Theory

Closer examination of the reasoning in *Doyle* reveals that, in fact, the implicit assurance to which the Court referred is contained in the substance of the *Miranda* warnings. The Court in *Miranda* required that the suspect be advised, prior to custodial

270. *Id.* at 437. The Court affirmed, by an equally divided vote, the conviction of the only defendant whose assertion of the privilege had been denied and who had been directed by the commission to answer certain questions. Four of the justices believed that no entrapment existed as to this defendant. *Id.* at 443-44 (separate opinion of Clark, J.).

271. *Id.* at 438.

272. The Court reaffirmed the *Raley* analysis in *Cox v. Louisiana*, 379 U.S. 559 (1965). In *Cox*, the leader of a civil rights group planning to demonstrate in front of the local courthouse was given permission by the police chief to march on one side of the street. The demonstration occurred at the location specified by the police chief. The Court, in reversing the leader's conviction for disturbing the peace, obstructing justice, and picketing near a state building, stated:

The situation presented here is analogous to that in *Raley* . . . [A]fter the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly [sic] told him was available to him."

Id. at 571 (quoting *Raley*, 360 U.S. at 426).

interrogation, "that he has the right to remain silent [and] that anything he says can be used against him in a court of law."²⁷³ That a police officer reads those words to a suspect does not add to or detract from the assurance that the Court believed was implicit in them. In *Roberts v. United States*,²⁷⁴ the Court stated that "the right to silence described in those [*Miranda*] warnings derives from the Fifth Amendment and adds nothing to it."²⁷⁵ In other words, that language in the *Miranda* warnings is simply a restatement of the rights guaranteed by the fifth amendment. The privilege against self-incrimination is what gives any person the right to choose to say nothing. Therefore, the implicit assurance "that silence will carry no penalty"²⁷⁶ arises from the fifth amendment itself. Justice Marshall was correct in his dissent in *Jenkins* when he stated that, "properly considered, the use in *Doyle* of postarrest silence for impeachment purposes was fundamentally unfair not because it broke an implied promise by a single narcotics agent, but because it broke a promise made by the United States Constitution."²⁷⁷

Consider the case of the knowledgeable defendant. Assume that the police arrest a lawyer who is suspected of having committed some crime. The police question her at the station, but fail to read her the *Miranda* warnings. She is, of course, aware of her right under the fifth amendment to remain silent, and in reliance on that right, she says nothing. Isn't using that silence to impeach her trial testimony just as "fundamentally unfair" as the Court in *Doyle* found the impeachment of the defendant's exculpatory testimony with his post-warning silence to be? Yet the Court has never asserted that the fairness of the impeachment use of pre-trial silence turns on the knowledge of the particular defendant. Indeed,

273. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

274. 445 U.S. 552 (1980).

275. *Id.* at 560. *Accord Jenkins v. Anderson*, 447 U.S. 231, 247 n.1 (1980) (Marshall, J., dissenting) ("The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution").

276. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

277. *Jenkins*, 447 U.S. at 248 n.1 (Marshall, J., dissenting).

in *Miranda* the Court explicitly rejected an inquiry into whether, in particular cases, the defendant was aware of his rights.²⁷⁸

As the Connecticut Supreme Court noted, in a case decided after *Doyle* but before *Weir*, "[o]ne need not be advised of a right in order to exercise it."²⁷⁹ Even Justice Rehnquist acknowledged that "[a]t this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself.'"²⁸⁰ Indeed, the Court in *Miranda* recognized that many suspects will know their rights; it nevertheless required that the warnings be read to every suspect, to inform "those unaware of the privilege," to "overcom[e] the inherent pressures of the interrogation atmosphere" and to "show the [suspect] that his interrogators are prepared to recognize his privilege should he choose to exercise it."²⁸¹ Because the assurance that silence will not be used against a defendant is implicit in the privilege against self-incrimination, using silence against a defendant who already knows his rights would be as unfair as the Court found the use of *Doyle*'s silence against him.

Even if the defendant was silent for reasons other than reliance on the privilege against self-incrimination, the due process analysis would still mandate exclusion of the silence at trial because determining accurately whether pre-trial silence of a defendant was motivated by the privilege, by fear, or by an intent to fabricate an exculpatory story later is impossible.²⁸² The defendant can, of course, testify as to the reason for his prior silence. Justice Stevens

278. 384 U.S. at 468-69. The Court stated that "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation." *Id.*

279. *State v. Cook*, 174 Conn. 73, 77, 381 A.2d 563, 565 (1977) *cert. denied*, 106 S. Ct. 2922 (1986). The court in that case held the defendant's pre-trial silence inadmissible even though "the record . . . [did] not disclose at what point the *Miranda* warnings were given to the defendant if at all." *Id.*

280. *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (quoting U.S. CONST. amend. V). *Accord* *United States v. Flecha*, 539 F.2d 874, 877 (2d Cir. 1976) ("it is clear that many arrested persons know, without benefit of warnings, that silence is usually golden"); Saltzburg, *supra* note 41, at 203 n.372 ("With the exposure of the public to *Miranda* warnings on television and in movies, it may be that people now have a general familiarity with the right to remain silent").

281. *Miranda*, 384 U.S. at 468.

282. *See supra* text accompanying note 72.

proposed such an approach in his dissenting opinion in *Doyle*.²⁸³ But the majority in *Doyle* rejected this, stating that "the unfairness [that violates due process principles] occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what *may* be the exercise of that right [to remain silent]."²⁸⁴ Similarly, under the proposed theory, requiring the defendant who did not receive warnings to explain his pre-trial silence would violate due process principles. As the Court found in *Doyle*, the "unfairness occurs" when the defendant is asked to testify about the reason for silence that *may* be the exercise of the privilege against self-incrimination.

In this regard, this Article's analysis and the theory of the *Doyle* majority share a negative feature: both analyses will protect some defendants who remain silent not in reliance on their constitutional rights but because they are guilty and need time to concoct a defense.²⁸⁵ Even when they have just been advised of their rights as required by *Miranda*, some defendants will say nothing, again not in reliance on their rights, but because they need time to devise an alibi. According to the Supreme Court, however, "[t]he privilege against self-incrimination serves as a protection to the innocent as well as to the guilty."²⁸⁶

Application of the proposed theory would result in reversal of the convictions in *Raffel* and *Weir*. In *Raffel*, defendant's silence at his first trial was obviously an exercise of his privilege against self-incrimination. Requiring the defendant to explain his silence as an exercise of the privilege or as reliance on the advice of counsel is precisely the sort of penalty that concerned the Court in *Hale*.²⁸⁷

283. Justice Stevens stated:

If the defendant is a truthful witness, and if his silence is the consequence of the *Miranda* warning, he may explain that fact when he is on the stand. Even if he is untruthful, the availability of that explanation puts him in a better position than if he had received no warning.

Doyle v. Ohio, 426 U.S. 610, 626 (1976) (Stevens, J., dissenting).

284. *Id.* at 619 n.10. (emphasis added).

285. That was the inference that the prosecutor in *Doyle* presumably wanted the jury to draw. See *id.* at 619 n.10.

286. *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (5th Cir. 1954)).

287. See *United States v. Hale*, 422 U.S. 171, 180 (1975) ("permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent").

and *Doyle*.²⁸⁸ Indeed, the Court in *Doyle* stated that "the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt."²⁸⁹

In *Weir*, the defendant was silent at the time of his arrest. In that situation, the defendant was not obviously exercising his right to remain silent. As the Court stated in *Hale*, "He may have maintained silence out of fear or unwillingness to incriminate another . . . [or he] may simply [have] react[ed] with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention."²⁹⁰ It is impossible to tell. Nevertheless, "the unfairness [prohibited by due process principles] occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what *may be* the exercise "of a constitutional right."²⁹¹

Likewise, the analysis based on due process would compel reversal of the conviction in *Jenkins*. That the defendant in *Jenkins* had not yet been arrested²⁹² is irrelevant under this theory. "At every stage of the investigative or accusatory process a person must decide what, if anything, to say to the government."²⁹³ The right to remain silent exists even before arrest because the privilege against self-incrimination forbids the government from requiring someone to give testimony against himself at any time. The defendant in *Jenkins* may have known of his rights prior to his arrest and prior to receiving *Miranda* warnings.²⁹⁴ The implicit assurance in the privilege was present under the facts of *Jenkins* just as it was present in *Doyle*. Allowing the prosecutor in *Jenkins* to use the defendant's pre-arrest silence to impeach his trial testimony was, therefore, "fundamentally unfair and a deprivation of due process."²⁹⁵

288. *Doyle*, 426 U.S. at 619 n.10.

289. *Id.*

290. *Hale*, 422 U.S. at 177.

291. *Doyle*, 426 U.S. at 619 n.10 (emphasis added).

292. See *supra* text accompanying notes 22-24.

293. Saltzburg, *supra* note 41, at 204.

294. As noted previously, Justice Marshall thought this was likely because the defendant had two prior felony convictions and therefore had certainly received *Miranda* warnings at least twice before. See *Jenkins*, 447 U.S. at 247 (Marshall, J., dissenting).

295. *Doyle*, 426 U.S. at 618.

The proposed due process theory has the same persuasive appeal as the theory that suggests that a prosecutor should not be permitted to impeach a defendant with his prior silence because that would penalize him for exercising the privilege against self-incrimination or, more accurately, for exercising his right to testify.²⁹⁶ It differs from that theory because according to the proposed theory, the fifth amendment itself does not prohibit the impeachment use of silence; such use of a defendant's silence violates the due process clause because it would be "fundamentally unfair" to breach the promise, implicit in the privilege, that if one chooses to exercise his right to remain silent, that right will not be used against him.

Using the due process clause rather than the privilege against self-incrimination to determine the admissibility of a defendant's pre-trial silence is consistent with history, policy, and precedent. First, there is an obvious difference in the wording of the two clauses. The privilege is phrased in relatively narrower, more specific terms, whereas "the due process clauses are in very general terms."²⁹⁷ The American notion of due process of law grew out of a provision of the Magna Carta: *per legem terrae*.²⁹⁸ As Professor Pennock noted, "It was intended to guarantee—at least to the barons—the common-law rights of Englishmen . . . [and] [t]he barons were demanding justice"²⁹⁹ Although neither the commentators nor the Supreme Court has developed a comprehensive and precise definition of the concept of due process, most commentators and the Court have considered the idea of fairness to be dominant. As Dean Griswold stated, "it is the fundamental and proce-

296. See *supra* text accompanying notes 96-103.

297. Griswold, *Due Process Problems Today in the United States*, in *THE FOURTEENTH AMENDMENT* 167 (B. Schwartz ed. 1970). Accord Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L. J.* 319, 320 (1957) ("it is in the nature of this constitutional provision that all-embracing definitions are impossible"); Ratner, *The Function of the Due Process Clause*, 116 *U. PA. L. REV.* 1048, 1049 (1968) (characterizing the due process clauses as "[p]erhaps the most ambiguous statement in the Constitution"); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 *U. PA. L. REV.* 111, 111 (1978).

298. See Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in *NOMOS XVIII: DUE PROCESS* 4 (J. Pennock & J. Chapman eds. 1977) [hereinafter *NOMOS XVIII*]; Pennock, *Introduction*, in *NOMOS XVIII, supra*, at xv. Ratner, *supra* note 297, at 1049.

299. Pennock, *supra* note 298, at XV.

dural *fairness* that is the essence of due process.”³⁰⁰ Justice Frankfurter agreed: “Fairness of procedure is ‘due process in the primary sense.’”³⁰¹ Prohibiting impeachment use of a defendant’s pre-trial silence under the privilege against self-incrimination would create tension with its history and policies, but doing so under the due process clause is consistent with its history and policies.

Reconsider the dilemma described by Justice Marshall in his dissent in *Jenkins*³⁰² and quoted at the beginning of this Article³⁰³ facing a person who may have violated the law. Initially he must decide whether to go to the police. If he talks, his statements may be used against him if he is brought to trial. If he remains silent, his silence may be used to impeach him, according to the majority in *Jenkins*. The due process theory advocated here eliminates this dilemma by requiring an absolute prohibition on the use of a defendant’s pre-trial silence against him.

In addition, such a prohibition based on the fundamental fairness principle of the due process clause removes the anomaly that exists under current case law and permits the prosecution in some cases to benefit by the misconduct of police officers.³⁰⁴ The defendant will not be penalized by the failure of the arresting officer to read the *Miranda* warnings because the defendant’s silence will be inadmissible whether or not the warnings were read. Further, this theory renders unnecessary a suppression hearing at which the prosecution would have to prove that no *Miranda* warnings were read to the defendant, even if that omission violated *Miranda*.³⁰⁵

300. *Griswold*, *supra* note 297, at 169 (emphasis added). *Accord* *Pennock*, *supra* note 298, at xix (“a central concept of due process [is] fairness”); *Saphire*, *supra* note 297, at 114 (“Due process has often been proclaimed to represent a constitutional concept of fairness”).

301. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). *Accord* *Morrissey v. Brewer*, 408 U.S. 471, 495 (1972) (Douglas, J., dissenting in part) (“the concept of fairness [is] implicit in due process”); *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. New York*, 324 U.S. 401, 424 (1945)) (“Regard for the requirements of the Due Process Clause ‘inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people . . .’”).

302. *Jenkins*, 447 U.S. at 253-54 (Marshall, J., dissenting).

303. See *supra* text accompanying note 10.

304. See *supra* text accompanying notes 219-23.

305. See *supra* text accompanying notes 231-34, 237-43.

Finally, and most importantly, the proposed theory alleviates the unfairness that can occur under the current Supreme Court view when the prosecutor is permitted to impeach a defendant with prior silence that was in fact an exercise of the privilege against self-incrimination. Principles of due process require no less.