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What You Do Not Say Can and Will Be Used Against You: Prearrest Silence Used to Impeach a Defendant's Testimony

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WHAT YOU DO NOT SAY CAN AND WILL BE USED AGAINST YOU: PREARREST SILENCE USED TO IMPEACH A DEFENDANT'S TESTIMONY

INTRODUCTION

The fifth amendment of the United States Constitution protects citizens from government-compelled self-incrimination.[1] Traditionally, involuntary or government-compelled statements have been inadmissible as evidence both during the prosecution's case-in-chief and during cross-examination.[2] The Supreme Court applied the fifth amendment to the states[3] since it recognized the amendment as the backbone of the accusatorial system of criminal prosecution. The right guaranteed by the fifth amendment became known as the right to remain silent.

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1. "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

2. The policy for the exclusion of unconstitutionally obtained evidence was to deter police misconduct. *Weeks v. United States*, 232 U.S. 383 (1913); *see also* Note, *"Evidence—Impeachment—Confession Taken in Violation of Miranda Rule Held Inadmissible for Impeachment Purposes*, 42 N.Y.U. L. REV. 772 (1967). The first exception to this exclusionary rule was the collateral use exception. The courts used the exception when the defendant testified at trial and made affirmative assertions to collateral matters of the crime charged. Walder v. United States, 347 U.S. 62 (1954) (when Walder denied any prior drug connection, the prosecution was allowed to introduce contradictory evidence for impeachment purposes only.) For full discussion on the collateral use exception see note, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967); Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NEV. U.L. REV. 912 (1968); The validity of the collateral use exception was questioned in Miranda v. Arizona, 386 U.S. 436 (1966), where the Court held statements obtained without the defendant's knowledge of his right to remain silent and his right to counsel to be inadmissible both on direct and cross-examination. *Id.* at 477. Uncertain about the effect of *Miranda* on *Walder*, courts denied application of the collateral use exception to unconstitutionally obtained statements. Greshart v. United States, 392 F.2d 172, 178 n.5 (9th Cir. 1968). The Supreme Court clarified the *Miranda-Walder* question when it held that statements inadmissible in the prosecution's case-in-chief due to the lack of *Miranda* safeguards may be used for impeachment purposes to attack the credibility of a defendant's trial testimony if their trustworthiness satifies legal standards. Harris v. New York, 401 U.S. 222 (1971); *accord*, Oregon v. Hass, 420 U.S. 714 (1975).

3. 378 U.S. 1 (1963). The Court further stated:

> Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused,' (citations omitted) or other like inducement far short of 'compulsion by torture,' (citations omitted) it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state inva-

Until 1980, the courts consistently refused to admit[4] both silence at the time of arrest[5] and silence maintained pursuant to judicial assurance of no penalty for such silence.[6] Courts excluded the silence regardless of the purpose for which the evidence was introduced.

Recently, the Supreme Court examined the use of prearrest silence to discredit a defendant's exculpatory trial testimony. In the landmark case of *Jenkins v. Anderson*,[7] the Court concluded that the

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> sion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.

Id. at 8. The fourteenth amendment reads in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

4. Only two of the many purposes for which evidence can be introduced, are addressed in this note. One is to prove the truth of the facts asserted directly and the other is impeachment use of otherwise inadmissible evidence to discredit the witness' testimony. *See* MCCORMICK, EVIDENCE §§ 33, 244 (2nd ed. 1972).

5. Doyle v. Ohio, 426 U.S. 610 (1976). In *Doyle*, the defendant gave an exculpatory trial testimony of a frame-up while at arrest he had remained silent. The Court rejected the use of post-arrest silence for impeachment purposes due to the ambiguous nature of silence. *Id.* at 617-18.

6. Johnson v. United States, 318 U.S. 189, 196-97 (1943): The Court stated:

> An 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. The allowance of the privilege could be a mockery of justice, if either party is to be affected injuriously by it.

Id.

7. 447 U.S. 231 (1980). The facts of *Jenkins* are enlightening. Two weeks after Jenkins stabbed and killed Doyle Redding, he turned himself over to the police. Jenkins testified at trial that he killed Redding in self-defense. According to the exculpatory story, Redding had robbed the defendant's sister on August 12, 1974. Jenkins, who was near the scene of the robbery, attempted to capture the thieves. After his futile attempt, Jenkins reported their location to the police. On August 13, 1974, Redding allegedly attacked Jenkins with a knife, accusing him of reporting the robbery. Jenkins struggled with Redding, stabbed and killed him. During cross-examination, the prosecutor attempted to impeach the defendant's testimony by questioning him about his prearrest silence:

> Q. And I suppose you waited for the police to tell what happened?
> A. No, I didn't.
> Q. You didn't?
> A. No.
> Q. I see. When was the first time that you reported the things that you have told us in court today to anybody?
> A. Two days after it happened.
> Q. And who did you report it to?
> A. To my probation officer.
> Q. Well, apart from him?

use of prearrest silence to impeach a defendant's credibility does not violate the Constitution.[8] The Court reasoned that once the defendant takes the stand he waives his right to remain silent and is subject to cross-examination on all relevant areas.[9] It noted that cross-examination is an essential tool for determining the credibility of witnesses by requiring them to explain prior inconsistent statements and acts.[10]

State courts are not bound by *Jenkins* to admit prearrest silence to impeach the testimony of a defendant.[11] Local evidentiary rules governing probative value and prejudice are still determinative of relevance.[12] Furthermore, *Jenkins* offers no guidance for fifth amendment protection of prearrest silence.[13] Rather, the Court held that the use of prearrest silence for impeachment purposes is not unconstitutional.

The narrow holding in *Jenkins* leaves open many evidentiary and constitutional concerns. The evidentiary concern is the admissibility of non-probative evidence[14] that could prejudice the defendant.[15] The constitutional concern is whether admission of non-probative evidence violates the defendant's rights. These concerns are highlighted when a court must decide whether prearrest silence is admissible to impeach a defendant's exculpatory testimony.

This note addresses the issue of whether prearrest silence should be used to impeach a defendant's testimony. Even if a court determines that this evidence is relevant for impeachment purposes, cer-

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A. No one.
Q. Did you ever go to a police officer or anyone else?
A. No I didn't.
Q. As a matter of fact, it was two weeks later, wasn't it?
A. Yes.

Id. at 233. This questioning was an attempt to suggest that Jenkins would have spoken out if he had killed in self-defense. *Id.* at 254.

8. *Id.* at 240.

9. *Id.* at 238.

10. *Id.* The Court analogized the use of silence as a prior inconsistent statement or act for impeachment purposes.

11. *Id.* at 240.

12. *Id.*

13. *Id.* at 236 n.2: "We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent." *Id.* For a factual account of *Raffel* and the Court's holding, see notes 35-37 *infra* and accompanying text.

14. G. LILLY, EVIDENCE, § 2, at 2-3 (West 1978).

15. Eichel v. New York R.R. Co., 375 U.S. 253 (1963) (admissibility depends upon balancing the probative value of the evidence against the possibility of prejudice.).

tain problems exist. One problem is the jury's inability to distinguish evidence used solely for impeachment from evidence which directly proves the matter in issue. Another problem is the inconsistency between the use of prearrest silence to impeach and the traditional fifth amendment concerns.[16] Since the use of prearrest silence creates these problems, it should not be admissible for any purpose.

USE OF SILENCE FOR IMPEACHMENT: HISTORICAL ANALYSIS

The Supreme Court has examined the law concerning the use of a defendant's silence for impeachment purposes. In *Jenkins*,[17] the Court held prearrest silence constitutionally admissible to impeach a defendant's exculpatory testimony at trial. An understanding of the precedent which leads to the *Jenkins* decision clarifies to what extent silence may be used for impeachment.

Precedent indicates that the primary objective of the American adversary system of justice is to determine truth.[18] To attain this objective, parties in a legal dispute argue the strength of their own contentions and expose the weaknesses of their opponent's claims. The requirement that a defendant testify under oath, and be cross-examined by his opponents, arguably ensures much more credible testimony than statements not subjected to these safeguards.[19] Since out-of-court statements and conduct are not subjected to these safeguards, they are suspect and generally inadmissible as hearsay.[20]

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16. This note only addresses the use of prearrest silence for impeachment during cross-examination.

17. 447 U.S. 231 (1980).

18. Oregon v. Haas, 420 U.S. 714, 722 (1975); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185 (1948).

19. 5 J. WIGMORE, EVIDENCE § 1362, at 3-10 (Chadbourned rev. 1974); Morgan, *supra* note 18, at 185-86:

> No doubt the oath originally furnished a powerful stimulus to compliance with its terms. Unquestioning belief in the inevitability of the punishment which would follow its violation was well-nigh universal . . . and compliance with its terms was imperative. The fear that cross-examination may uncover falsehood . . . is a strong stimulus to sincerity for the average person.

Id. *See also* Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192 n.3 (1940).

20. MCCORMICK, EVIDENCE §§ 244-45, at 580-81 (2d ed. 1972). *See also Morgan, supra* note 18, at 185. Inadmissibility of out-of-court assertions is premised upon the four hearsay dangers: 1) the use of language or non-verbal conduct which requires the factfinder to interpret what the witness means; 2) sincerity; 3) memory; and 4) perception. For a background on the admissibility of hearsay exceptions and which out-of-court assertions are in fact admissible as nonhearsay, *see* § 4 J. WEINSTEIN, EVIDENCE, Rule 803 (1974).

The hearsay rule bars only those out-of-court assertions which are offered to prove the truth of the facts asserted.[21] Because some out-of-court assertions are necessary and reasonably reliable, hearsay exceptions have been created.[22] However, use of an out-of-court assertion to impeach a witness' testimony is neither hearsay nor a hearsay exception.[23] The out-of-court assertion is not introduced to prove the truth of the matter contained in the assertion, but rather to attack the credibility of a witness' testimony.[24] The desired result creates doubt in the jury's mind as to the credibility of the particular witness.[25]

One of the most effective impeachment tools is evidence of prior inconsistent statements. These are statements made by the witness on some previous occasion that are inconsistent with his present testimony. Although the Federal Rules of Evidence[26] allow substan-

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21. *See, e.g.*, Lewis v. Insurance Co. of North America, 416 F.2d 1077 (5th Cir. 1969).

22. *See* MCCORMICK, EVIDENCE, §§ 254-55, at 614-15 (2d ed. 1972).

23. There are five methods of impeaching the credibility of a witness: (1) prior inconsistent statements; (2) bias due to emotional influences such as family ties or pecuniary interest; (3) character of a witness; (4) incapacity to observe, remember or recount the matters about which the witness testified; (5) proof by other witnesses that material facts significantly differ from the witness' version. *See* MCCORMICK, EVIDENCE § 33, at 66 (2d ed. 1972).

Evidence which falls within the category of hearsay exceptions or nonhearsay is admissible to prove the truth of the matter asserted. Thus, out-of-court assertions may be used to show that the statement was made (impeachment) or to show the declarant's state of mind. An example of such a common law hearsay exception or nonhearsay under the Federal Rule of Evidence 801 follows:

X says to Y: "My wife is beautiful and caring."

The next day, X's wife is murdered and X is suspected.

The defense will want to enter the statement not to prove the truth of the matter asserted, that is, that X's wife was beautiful and caring, but to show X's state of mind toward his wife, from which it can be inferred that X loved his wife and did not kill her.

24. MCCORMICK, EVIDENCE § 33, at 66-67 (2nd ed. 1972). As used in the text, the term "witness" includes the defendant who testifies in his own behalf. Another difference between introducing nonhearsay evidence to prove the truth of the facts asserted and inadmissible hearsay for impeachment purposes is the time at which they can be introduced at trial. The former can be entered during the case-in-chief while the impeachment may only be attempted during cross-examination or rebuttal.

25. 3 WEINSTEIN, EVIDENCE § 607(06), at 607-59 (1978).

26. FED. R. EVID. 801 (d)(1)(A)'

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion of (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the

tive use of some prior inconsistent statements in the prosecution's case-in-chief, prior statements unconstitutionally obtained may only be used for impeachment. The policy reason for the limited use of tainted evidence is to deter police misconduct.[27]

Arguably, the same policy reason supports the limited use of silence as evidence. Until *Jenkins*,[28] prearrest silence could only be admitted as evidence through the tacit admission rule.[29] This allows evidence of silence maintained in the face of an accusation, if the accusation gives rise to an inference that the defendant agrees with it.[30] The underlying assumption of the rule is that an innocent man will deny a false accusation, and thus, failure to deny tends to prove the truth of the accusation.[31] The limitation of the admissibility of such silence deterred police from making unwarranted accusations against one who is not formally charged.[32] "If the unfortunate 'declarant' abides by the maxim that *'silence is golden'* and holds his tongue, he may find police accusations brought into court against him as . . . evidence . . . against him."[33] Thus, to deter such police misconduct courts carefully scrutinize the rule.[34]

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declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if—

(1)*Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, of (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity of (B) a statement of which he has manifested his adoption or belief in its trust, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator or a party during the course and in furtherance of the conspiracy.

Hereinafter, the Federal Rules of Evidence will be cited as the Federal Rules.

27. 3 J. WEINSTEIN, EVIDENCE, § 607(09), at 607-84 (1978).
28. Jenkins v. Anderson, 447 U.S. 231, (1980).
29. *See* MCCORMICK, EVIDENCE, § 161, at 353 (2nd ed. 1972).
30. *Id.*
31. *Id.*
32. *Id.* at 354.
33. *Id.*
34. *Id.* at 353.

The Supreme Court first discussed the use of silence to impeach in 1925.[35] *Raffel v. United States* affirmed the use of evidence of silence in one trial to impeach a defendant's denial of the crime charged in a subsequent trial.[36] The Court reasoned that since the defendant took the witness stand, he waived his fifth amendment immunity from self-incrimination.[37] Later, the Court disallowed prosecutorial comment on a defendant's silence after the court had assured the defendant of the right against self-incrimination.[38] Then, in *Grunewald v. United States*,[39] the Court disallowed the use of the defendant's pre-trial silence for impeachment on the theory that the silence was not inconsistent with his later testimony.[40] Distinguishing the issues presented, the Court in *Grunewald* declined to decide whether or not *Raffel* remained valid law.[41]

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35. 271 U.S. 494 (1925). In *Raffel*, the defendant was indicted and twice was tried for conspiracy to violate the National Prohibition Act. At the first trial a prohibition agent testified that after the tavern search, the defendant admitted ownership. Raffel did not testify and because the jury could not agree, a mistrial resulted. The prohibition agent testified once more at the second trial after which the defendant took the stand and denied making any statement of ownership. The Court and the prosecution asked Raffel to explain his prior trial silence and he was subsequently convicted. *Id.* at 495.

36. *Id.* at 498.

37. Interestingly, *Raffel* draws its reasoning from Fitzpatrick v. United States, 178 U.S. 304 (1899) and Reagan v. United States, 157 U.S. 301 (1894), two cases which did not involve silence. However, those cases laid the groundwork for the fifth amendment immunity waiver which, according to the Court, placed the defendant on the same level as an ordinary witness, who is open to any cross-examination of the facts in issue:

> Where 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, as to the circumstances connecting him with the alleged crime.

Fitzpatrick v. United States, 178 U.S. at 315.

38. Johnson v. United States, 318 U.S. 189, 196-97 (1943) (the lower court gave the defendant a choice either to testify or to refuse to do so). The Court has also rejected such a choice. *See* note 7 *supra*.

39. 353 U.S. 391 (1957) (Income tax fraud case for failure to report 1938 income).

40. *Id.* at 424. It is here that the Court recognized that the meaning of "inconsistency" is germane to the impeachment scope of prior inconsistent statements. *Grunewald's* test for inconsistency is discussed at notes 128-35 *infra* and accompanying text.

41. The failure to declare *Raffel* invalid was deliberate since the issues in *Raffel* and *Grunewald* differed. *Raffel* was faced with a constitutional issue of whether a defendant who takes the stand on a second trial can continue to take advantage of the privilege asserted at the first trial. *Raffel*, 271 U.S. at 496. In *Grunewald*, the evidentiary question was whether the cross-examination was probative in impeaching the defendant's credibility. *Grunewald*, 353 U.S. at 420.

Faced with whether silence can be used as a prior inconsistent statement, the Court reexamined *Raffel* and *Grunewald* in *Stewart v. United States*.[42] In *Raffel*, the Court held that once a defendant takes the stand, he is subject to cross-examination on all areas.[43] Based on this concept, the Court accepted without question the use of prior trial silence as a prior inconsistent act to impeach a defendant's subsequent trial testimony.[44] The *Grunewald* decision specifically stated that since pretrial silence was consistent with a defendant's exculpatory testimony, it could not be used as a prior inconsistent act for impeachment purposes.[45] In *Stewart*, the Court reached the issue of whether a defendant's prior trial silence was inconsistent with his exculpatory testimony at trial. It held that neither *Raffel* nore *Grunewald* justified the use of prior trial silence as a prior inconsistent act because the Court had never found a basic inconsistency between silence and trial testimony.[46] Thus, the Court refused to allow the prosecution to question a defendant about his prior trial silence. Despite its decision, the Court did not overrule *Raffel*, but rather, permitted the two conflicting decisions on the use of a defendants silence before trial to stand.

When the conflict between the prior silence cases again emerged, the Court followed the rationale that since pre-trial silence is consistent with a defendant's exculpatory testimony, it cannot be used as

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42. 366 U.S. 1 (1965). In *Stewart*, after three trials on a murder charge, the defendant testified only in the last trial when he dropped his insanity defense asserted in the first two trials. On cross-examination, the prosecution commented on Stewart's prior silence. The Supreme Court held such comment to be error. *Id.* at 2-5.

43. 271 U.S. at 497.

44. *Id.*

45. 353 U.S. at 422.

46. 366 U.S. 1, 5. In 1965, the Court in Griffin v. California, 380 U.S. 609 (1965), held that the fifth amendment forbids comment on the defendant's silence by the court. In *Griffin*, the defendant was convicted of first degree murder. He did not testify at trial on the guilt issue but did so at a separate trial as to the penalty issue. The California Supreme Court instructed the jury that a defendant has a constitutional right not to testify but that inferences of guilt and truth of such matters which he would be expected to deny or explain could be drawn if in fact he did not do so. The Supreme Court found this to be reversible error. *Id.* at 610.

47. 422 U.S. 171 (1975). Hale was arrested for robbery after immediate capture from a getaway chase. He was taken to the police station, advised of his *Miranda* rights and searched. When the search produced $150, Hale remained silent to questions about the origin of the money. At trial, Hale presented an exculpatory story. He explained that the money which came from his wife's welfare check was to be used for money orders and that he had fled because he feared connection with his companion whom Hale knew to be carrying narcotics. The prosecution sought to impeach the defendant with his silence about his exculpatory story at the time of arrest. *Id.* at 174.

a prior inconsistent act for impeachment.[48] In *United States v. Hale*, the Court further held that the numerous motivations to remain silent make the maintenance of silence ambiguous.[49] Because the Court determined no clear method of ascertaining why the defendant remained silent before trial, it prohibited the use of silence for any purpose.[50] The Court's determination that silence is ambiguous is supported by a defendant's *Miranda* rights. The *Miranda* rights provide one more motivation for a defendant to remain silent.[51]

A defendant's post-arrest silence may be an exercise of his right to remain silent.[52] A year after the *Miranda* decision, the Court relied on its previous determination of the ambiguity of silence and held that since silence may be nothing more than an invocation of those rights enumerated in the *Miranda* warnings, "every post-arrest silence is insolubly ambiguous."[54] The Court concluded that allowing post-arrest silence to impeach subsequent trial testimony would be fundamentally unfair.[55]

Despite these cases which prohibit post-arrest silence, the Court held prearrest silence constitutionally admissible to impeach a defendant's exculpatory trial testimony.[56] The Court stated that once a defendant takes the stand, he has waived his fifth amendment immunity and thereby subjects himself to all areas of cross-examination.[57] Furthermore, the Court permitted prearrest silence to be used as prior

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48. *Id.* at 175.

49. *Id.* at 176. Further development of the ambiguity of silence is dealt with in notes 87-95 *infra* and accompanying text.

50. *Id.*

51. Miranda v. Arizona, 386 U.S. 436 (1966). The *Miranda* rights read as follows:

> The defendant must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Id.* at 479.

52. *See* note 51 *supra.*

53. Doyle v. Ohio, 426 U.S. 610 (1976). Doyle was arrested and charged with a marijuana sale to police officers. The defendant remained silent during and after arrest but later testified that he had been framed. In an impeachment effort, the prosecution asked Doyle to explain his post-arrest silence about the claimed frameup. *Id.* at 611, 613.

54. *Id.* at 617.

55. *Id.* at 617-18.

56. 447 U.S. 231, 240-41 (1980). For a factual account of *Jenkins, see* note 7 *supra*; Raffel v. United States, 271 U.S. 494 (1926).

57. 447 U.S. at 238.

inconsistent statements or acts and left the balancing of probative value and prejudice to the states.[58]

Thus, prearrest silence can be constitutionally used to impeach a defendant's testimony.[59] However, because of the narrow holding in *Jenkins*,[60] many questions remain as to the relevancy of prearrest silence, the prejudice of using silence to impeach, and traditional fifth amendment concerns.

The Relevance of Prearrest Silence To Impeach A Defendant's Testimony

Although the Court held that prearrest silence, as a constitutional matter, was admissible to impeach a defendant's exculpatory testimony, it did not posit any guidelines for the evidentiary concerns of relevance and prejudice.[61] Rather, the *Jenkins* decision specified that the relevance of a defendant's prearrest silence is a question of state evidentiary law.[62] The Court's failure to address evidentiary rules in these areas exacerbates the problem of differing state standards.[63] Due to these divergent standards, the issue arises whether prearrest

58. *Id.* at 239-40.

59. Id. at 240-41.

60. *See* notes 8 and 56 *supra* and accompanying text; *Jenkins* did not confine its use of precedent to those cases strictly concerned with silence but rather looked to *Harris v. New York*, 401 U.S. 222 (1971). Charged with two heroin sales to a police officer, Harris took the stand and denied one sale but conceded making the other which he claimed to be a sale of baking powder. On cross-examination, the prosecutor impeached Harris with statements he made prior to any *Miranda* warnings. *Id.* at 222-24. *Accord, Oregon v. Haas*, 420 U.S. 714 (1975) (correct *Miranda* warning; the defendant gave a statement after he requested counsel).

In *Harris*, the Court held that constitutionally inadmissible statements may be used for impeachment purposes if their trustworthiness satisfies legal standards. *Id.* at 222-25. The dissent strongly suggests that such impeachment use of illegally obtained evidence is indeed an incentive for police misconduct. *Id.* at 231-32 (Brennan, J., dissenting). Because the defendant did not claim that his statements were involuntary or coerced, they were admissible as prior inconsistent statements to impeach his trial testimony. *Id.* at 225-26. *Haas* merely reaffirmed *Harris*. *Oregon v. Haas*, 420 U.S. at 723. Therefore, utilization of *Raffel*, *Harris* and *Haas* supported the permissible use of a defendant's prearrest silence to discredit his exculpatory testimony at trial.

61. *Jenkins*, 447 U.S. at 238-39.

62. *Id.* at 239 n.5.

63. The following have denied the use of prearrest silence for impeachment purposes as irrelevant: the Seventh Circuit, United States v. Rowe, 618 F.2d 1204 (7th Cir.), *cert. granted*, 949 U.S. 810 (1980), *vacated and remanded*, 449 U.S. 810 (1980)); the Sixth Circuit, Minor v. Black, 527 F.2d 1 (6th Cir. 1975); New York, People v. Conyers, 424 N.Y.S.2d 402, 400 N.E.2d 342, 49 N.Y.2d 174 (1980); Colorado, People v. Cole, 551 P.2d 210 (Co. App. 1976), *aff'd*, People v. Cole, 570 P.2d 8 (Colo. App. 1977) and Florida, Weiss v. State, 341 So. 2d 528 (Fla. App. 1977); Webb v. State, 341 So. 2d 1054 (Fla. App. 1977); Brooks v. State, 347 So. 2d 444 (Fla. App. 1977). Those states

silence *is* relevant to impeach the credibility of a defendant's exculpatory testimony given at trial. To fully analyze the relevance of prearrest silence, it is necessary to define silence[64] and analyze its meaning in terms of case precedent, hypothetical fact situations,[65] and various theories on its relevancy.[66] Such analysis can only be comprehended when there is a basic understanding of relevance.

Relevancy—Its Definition And Application

Relevance is the foundation upon which the admissibility and exclusion of evidence rests.[67] The Federal Rules define relevancy as a relationship between an item of evidence and a "fact that is of consequence to the determination of the action."[68] Most courts ask whether a reasonable person would believe that the offered evidence renders the desired inference more probable than it would be without the evidence.[69] The judge has a duty to identify terms of a relevancy relationship in the particular case where relevancy is not immediately apparent.[70]

Without a judicial finding of relevancy, one can only speculate how the proffered evidence may affect the probability of the consequential fact. If it is impossible to demonstrate such an effect, the

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which have allowed its use include Maryland, Robeson v. State, 39 Md. 365, 386 A.2d 795 (1978) and Kansas, State v. Taylor, 223 Kan. 261, 574 P.2d 210 (1977).

Because federal courts utilize state laws in habeas corpus cases, uniformity of standards is threatened. Fay v. Noia, 372 U.S. 391, 430 n.40 (1962). The only power that federal courts have over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. The law used to accomplish such review is state law. The uniformity of federal courts is not threatened as a matter of strict federal criminal prosecutions. United States v. Gillock, 445 U.S. 360, 374 (1980).

64. *See* notes 76-78 *infra* and accompanying text.

65. *See* notes 102-10 *infra* and accompanying text.

66. *See* notes 92-121 *infra* and accompanying text.

67. Advisory committee notes following FED. R. EVID. 402.

68. FED. R. EVID. 401: " '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 than it would be without the evidence." *See also* James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689 (1941).

69. United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968). The court's function in determining relevancy is "only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to other rules, admissible." *Id.* at 56; 1 J. WEINSTEIN, EVIDENCE, § 401(07), at 401-27 (1978).

70. McCormick describes the judicial role in a discussion of the relevance of a defendant's attempted escape to show consciousness of guilt:

> There are no statistics for attempts at escape by those conscious

evidence should be excluded.[71] Thus, to be relevant and therefore admissible, the offered evidence must tend to make the existence or nonexistence of a fact more probable.

Relevancy Requires That Silence Have Meaning

To be relevant, silence must have some meaning which has a probative effect on a consequential fact. For silence to have meaning, a party must either intend his silence to communicate his beliefs[72] or remain silent when accused of a crime.[73] In a criminal prosecution, a defendant's silence has meaning if it gives rise to a reasonable inference of guilt or material issue.[74] The Court held that silence during and after arrest is ambiguous and irrelevant to establish an inference of guilt.[75] To determine whether silence before an arrest is communicative, the courts must consider a tacit admission or silence in general which is ambiguous and therefore irrelevant.

It is difficult to define silence. In *Stewart v. Wyoming Cattle Ranch Co.*, the Supreme Court held that silence is not necessarily equivalent to a false representation and suggested that mere silence was quite different from concealment.[76] A lower court stated that silence was a species of conduct, and constituted an implied assertion of the existence of the state of facts in question.[77] These two cases

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> of guilt and those not so conscious which will shed light on the probability of the inference. The answer must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation. He must ask himself, could a reasonable man believe that the attempt makes it more possible that he was conscious of guilt, and if the answer is yes, the evidence is relevant.

MCCORMICK, EVIDENCE, § 185, at 438 (2d. ed. 1972).

71. The analytic process for determining whether or not evidence is relevant in a conspiracy prosecution is seen in United States v. Ariza-Ibarra, 605 F.2d 1216, 1225 (1st Cir. 1979). In a narcotics conspiracy prosecution, evidence that cash in excess of $5 million had been deposited with the cash brought into the bank in suitcases was properly admitted since "the jury might reasonably believe that one engaged in a legitimate commodities business would not operate in this way" and could "logically infer that the defendants were in fact engaged in illicit activities of the sort indicated in the other evidence." *Id.* See also, St. Clair v. Eastern Airlines, Inc., 279 F.2d 119 (2d Cir. 1960). The Second Circuit reversed the district court decision to admit the plaintiff widow's testimony about her pre-marital relationship with the deceased as evidence of the decedent's ability to financially support his family.

72. FED. R. EVID. 801 and the advisory notes following the rule.

73. *See* note 81 *infra* and accompanying text.

74. *See* notes 83-86 *infra* and accompanying text.

75. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

76. 128 U.S. 383, 388 (1888).

77. Carmine v. Bowen, 104 Md. 198, 204, 64 A. 932, 934 (1906).

demonstrate the difficulty of defining silence. In one case, the Court found silence to be essentially non-communicative, whereas in the other, the lower court determined silence to hold some aspects of communication. While in some instances silence is communicative, the defendant may not intend that his prearrest silence be communicative.[78]

In the absence of an accusation, prearrest silence is a non-response, that is, there is nothing to which a defendant can respond. Arguably, a defendant who remains silent before arrest and before being confronted with any charges does not intend his non-responsive silence to be communicative. Even if instances exist where a court would find prearrest silence communicative, the numerous motivations to remain silent would make a defendant's silence ambiguous.[79] But the point remains that in the absence of an accusation, silence does not appear communicative.

A relevancy problem not only exists when a defendant does not intend to communicate through silence, but also when he remains silent in the presence of an accusation. The relevance of silence to a particular fact is often dependant upon an inference that a person would not have acted as he did unless he believed that same particular fact to exist.[80] This inference is most often used in the context of tacit admissions where an accused is silent in the face of an accusation.[81] Courts have sometimes relied on the maxim that "silence indicates

78. FED. R. EVID. 801(a). A statement, as defined by the Federal Rules, is "an oral or written assertion or nonverbal conduct," which is intended as an assertion. The advisory committee notes following Federal Rule of Evidence 801 explain that non-assertive silence is excluded from the hearsay category because the dangers of memory, narration and perception of the actor, though untested, are minimal in the absence of an intent to assert.

79. *See* notes 92-95, 102-107 *infra* and accompanying text for extensive discussion of the ambiguity of prearrest silence.

80. Munice Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1182 n.6. (5th Cir. 1975).

81. The courts have used the tacit admission rule with caution because first, the nature of the evidence is an open invitation to manufacture evidence, which must be guarded against. People v. Aughinbaigh, 36 Ill. 2d. 320, 323, 223 N.E.2d 117, 119 (1967). Second, *Miranda* imposed constitutional limitations on this type of evidence. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). Third, there is such a subtle distinction between offering the evidence for the truth of the facts asserted and offering it to show acquiescence, and therefore because the statement is ordinarily very damaging, assurance of acquiescence is required by the following:

a) the statement must have been heard by the party accused of consent;
b) the accused must have understood the statement;
c) the subject matter must have been within his knowledge;
d) the accused must have been capable of response;

consent" to justify the relevancy in admitting evidence of the accusation and the silence.[82]

Alternatively, other courts justify the relevancy of silence or non action by adopting the belief that the natural act of an innocent man is to deny an injurious charge.[83] Silence in the face of an injurious accusation is therefore unnatural and may create an inference of guilt.[84] Courts have found that acts of flight, threats, and changing appearance are relevant to infer consciousness of guilt.[85] These acts appear unnatural for an innocent man. However, even these acts are inadmissible when prejudice outweighs relevance or when it is questionable whether the jury can draw a reasonable inference of guilt from them.[86]

For silence to be admissible, it must reasonably indicate guilt and not merely indicate an unnatural act.[87] The Court held that the jury cannot draw a reasonable inference of guilt from post-arrest silence.[88] Since silence that merely indicates unnaturalness is irrelevant to determine consciousness of guilt, it should not be relevant

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e) and consideration of the age of the accused and his relationship to the accuser.

See Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional - A Doctrine Ripe For Abandonment,* 14 GEO. L. REV. 27 (1979).

82. Note, *Developments in the Law - Confessions,* 79 HARV. L. REV. 938, 1036 (1968).

83. People v. Nitti, 312 Ill 73, 94, 143 N.E. 448, 455 (1924). *But see* United States v. Hales, 422 U.S. 171, 181 (1975) (Burger, J., concurring): Chief Justice Burger suggested that it is not any more probable that the innocent rather than the guilty protest their innocence. *Id.*

84. *See* note, *supra* 82, at 1039.

85. *See* United States v. Castillo, 615 F.2d 878 (9th Cir. 1980) (the defendant threatened a witness who had cooperated with the FBI); United States v. Morales, 577 F.2d 769 (2nd Cir. 1978) (while use of a false name on a suitcase containing heroin was admissible to show consciousness of guilt which might be considered along with all other relevant evidence bearing on the issue of whether the defendant knew she was carrying narcotics, it was error to charge that this conduct was unequivocally probative of guilt); United States v. Alonzo, 571 F.2d 1384 (5th Cir.), *cert. denied,* 439 U.S. 847 (1978) (evidence of flight may be relevant); United States v. Lind, 542 F.2d 598 (2nd Cir. 1976), *cert. denied,* 430 U.S. 947 (1977) (the defendant's attempt to alter his appearance before surrendering was relevant to his consciousness of guilt).

86. United States v. Check, 582 F.2d 668, 685-86 (2d Cir. 1978) Death threat testimony may be relevant to consciousness of guilt, but severe prejudice may result from the use of such evidence. Accordingly, its use is limited to situations where there is a clear need for the prosecution to use such testimony; United States v. Hale, 422 U.S. 171, 180 (1975) (the jury is unlikely to distinguish between impeachment use and substantive use of evidence); *see* note *supra* 83, at 1039.

87. *See* note *supra* 82, at 1039.

88. Hale v. United States, 422 U.S. 171, 180 (1975).

to impeach a defendant's credibility. There are many reasons for maintaining silence, a few of which include intimidation, confusion, and fear.[89] The Court suggested that because these are normal reactions of a defendant, they should have no bearing on his credibility or consciousness of guilt.[90] The Court used this rationale to hold that every post-arrest silence is ambiguous since a defendant may be exercising his constitutional right to remain silent.[91]

Prearrest Silence Is As Ambiguous As Post-Arrest Silence

Since the Court held post-arrest silence to be a constitutional right of all defendants,[92] it has not used a defendant's post-arrest silence to infer guilt or to impeach his credibility. The Court, in *Jenkins*, did allow such use of prearrest silence.[93] A comparison of post-arrest silence cases with cases involving prearrest silence will show the impropriety of allowing prearrest silence to be used against the defendant.

The Court found post-arrest silence to be ambiguous because of the numerous reasons for a defendant to remain silent.[94] These same motivations to remain silent are inherent during the prearrest stage. Intimidation, fear and emotional and confusing circumstances are three seemingly normal reasons for silence during police investigation. This is particularly true if a person does not consider himself to be a suspect, or if, for some reason he is unable to remember the facts of the crime or his involvement. Previous unpleasant contacts with the police and courts could invoke such fear in a suspect that even if he is innocently involved or at least knowledgeable about the crime, he will not speak out.

Another plausible reason for the silence of a defendant who is familiar with the judicial system is knowledge of the right to remain silent.[95] To allow arrest to trigger a defendant's fifth amendment right

89. *Id.* at 177.

90. *Id.*

91. Doyle v. Ohio, 426 U.S. 610, 617 n.8. *Doyle* adopted *Hale's* view of the various and inherent ambiguities of motivations for remaining silent.

92. *Id.*

93. Jenkins v. Anderson, 447 U.S. 231 (1980).

94. United States v. Hale, 422 U.S. 171, 177 (1975).

95. *See* note 51 *supra*. If the meaning of prearrest silence is interpreted literally, any silence that occurs between the completion of the crime and the arrest on advice of counsel could be as damaging as if he had obtained no professional advice. During the prosecution's cross-examination of the defendant in United States v. Raffel, 271 U.S. 494, 495 (1926), the Court allowed the defendant's silence at a prior trial

to remain silent is a dilution of that right which is guaranteed to all citizens. Since a defendant could maintain prearrest silence because of his knowledge of his fifth amendment rights, it follows that prearrest silence is as ambiguous as post-arrest silence. Because of its ambiguity, prearrest silence is irrelevant either to infer guilt or to impeach a defendant's credibility. The irrelevancy of prearrest silence is not only found when it is compared to post-arrest silence, but also when it is compared to another prearrest act.

Prearrest Silence Contrasted To The Prearrest Act Of Flight

Flight to avoid the police and silence both may occur before formal charges are filed. The courts are divided on whether an *act* of flight from police is relevant to establish guilt.[96] Since silence is not even an act, but a *negative act*, then logically, it should be less relevant than the *affirmative act* of flight. A comparison of flight and prearrest silence shows that prearrest silence should be irrelevant.

The Eighth Circuit held it erroneous to instruct the jury that flight could be considered as evidence of guilt.[97] In *United States v.*

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on the advice of counsel to impeach his testimony at the subsequent trial. However, this rule is not universal. For example, Florida courts, on occasion, have reversed the trial court and held prearrest silence on advice of counsel to be admissible for all purposes. Weiss v. State, 341 So. 2d 528 (Fla. App. 1977).

This rejection of any prearrest silence when maintained upon advice of counsel, is only one example of the divergent interpretations by the states of the scope of prearrest silence. *See* note 63 *supra* and accompanying text for another example of conflicting state laws concerning the use of prearrest silence. Because the Court in *Jenkins* failed to delineate the scope of prearrest silence, at least two open questions face the states. One is whether prearrest silence will occur when silence is directed toward everyone or only the police. (*See* notes 109-10 *infra* and accompanying test). The question is in which of these instances prearrest silence is significant. Another issue is whether other evidentiary tools, such as admission of a party, make irrelevant the use of a defendant's prearrest silence. The relevancy examples in notes 111-120 *infra* and accompanying text show why the Court's refusal to find a constitutional violation by impeachment use of prearrest silence in *Jenkins* should not be read as a blanket authorization or endorsement of the admissibility of prearrest silence.

96. *See* United States v. Alonzo, 571 F.2d 1384 (9th Cir.), *cert. denied*, 439 U.S. 847 (1978). *But cf.* Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963): "We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." *Id.*

It can be logically deducted that silence, a non-act, is intended to communicate nothing. Flight, an act, is not intended to communicate, but is admissible to show the actor's state of mind. Thus, one needs to speculate as to the actor's state of mind. But, on the other hand, the meaning of silence seems far more speculative than that of flight. Therefore, flight, which is of questionable probative value, seems far more probative than silence.

97. United State v. White, 488 F.2d 660, 662 (8th Cir. 1973).

White, the court used three factors to determine whether flight was evidence of guilt. First, at the time of flight, the defendant had not been informed of the crime with which he was subsequently charged.[98] Second, five months had elapsed since the occurrence of the alleged crime and the defendant's flight.[99] Third, the defendant was unaware that he was being sought for such crime.[100] At least one of these factors may be pertinent to cases where the defendant has maintained prearrest silence.

A person who is silent before arrest may have no knowledge of the crime subsequently charged, in which case it would be normal to say nothing. The only reason for his silence may be that he has nothing to report. Therefore, silence is not probative of whether a defendant committed the crime and it does not impeach a defendant's credibility. Silence under these circumstances is irrelevant for impeachment and for any other purpose.

The Evidentiary Ground Of Relevance Excludes the Use Of Prearrest Silence

The Court decided whether prearrest silence is constitutionally admissible for impeachment purposes, but made no evidentiary determination.[101] Facts similar to *Jenkins* require prearrest silence to be inadmissible strictly on the evidentiary ground of relevance. In a given fact situation, X left Y at Y's office following an exchange of blows in a struggle over a disputed business deal. X then left town on a business trip unaware that Y was dead. X was arrested two weeks later and he claimed self-defense. Here, the defendant has knowledge of the facts. Though the facts concerning the period of prearrest silence and the exculpatory defense are similar to *Jenkins*[102] where the Court held use of prearrest silence to impeach constitutional,[103] the post-arrest cases[104] exclude the use of silence on evidentiary grounds of relevance.[105] The Supreme Court previously ruled on the evidentiary matter of post-arrest silence and found the silence ambiguous.[106] This analysis should logically be extended to

98. *Id.*
99. *Id.*
100. *Id.*
101. 447 U.S. at 239.
102. For the facts of *Jenkins*, *see* note 7 *supra*.
103. *Jenkins*, 447 U.S. at 240.
104. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975).
105. Jenkins, 447 U.S. at 239 n.5.
106. *Doyle*, 426 U.S. at 617 n.8.

prearrest silence as well. Since the Court in *Jenkins* did not make a ruling on the evidentiary issues of prearrest silence,[107] such an analysis is consistent with that decision. Also, because of its ambiguity, prearrest silence is irrelevant for any purpose.

The silence of a defendant who knows about his victims death may be more relevant because of his knowledge of the facts of the crime with which he is charged than a defendant who knows nothing about the crime. The cases where a defendant knows enough to report, and does not, is called a confession and avoidance case. Even if the evidence of a defendant's prearrest silence in a confession and avoidance case is relevant, it is inadmissible since the relevance does not outweigh the prejudice to the defendant. A strong parallel exists between these two types of cases and the disappearing misprision statutes.[108] Even though it is difficult to find prearrest silence relevant on evidentiary grounds and, in contrast to the misprision statutes, the source to which the defendant directs his silence may create relevancy of the silence.

Prearrest Silence May Be Created When A Defendant Speaks to No One Before Arrest Or When He Speaks To People Other Than The Police

The time at which prearrest silence arises in issue may depend on the person with whom the defendant fails to speak. This issue arises in a fact situation where X killed Y in self-defense. Frightened, X consulted his family before turning himself in to the police three days later. X was not silent in the presence of his family, yet he remained silent in the presence of the police.

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107. *Jenkins* 447 at 240.

108. 18 U.S.C.A. 4 (West 1981): The Federal misprision statute reads as follows:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

The misprision statutes stipulate that a person with sufficient knowledge of a crime has a duty to report. When he has insufficient knowledge of the facts, no duty exists. United States v. Hodges, 566 F.2d 674 (9th Cir. 1977). There are two reasons for the disappearance of the statutes. First, there is a fine line between having sufficient and insufficient knowledge. Marbury v. Brooks, 20 U.S. 556 (7 Wheat. 1822) ("It may be the duty of a citizen to accuse every offender and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." Id. at 575-76.) Second, required reporting is incriminating and therefore violates the fifth amendment right to silence. United States v. Jennings, 603 F.2d 650 (7th Cir. 1979); United States v. Kuh, 541 F.2d 672 (7th Cir. 1976). Even the federal statute has fallen into disuse and would

It is an unresolved question whether prearrest silence is confined to non-verbal conduct with the police, or whether it encompasses all periods of X's silence before arrest. Literal interpretation would mean that prearrest silence embraces the total period from the time of the crime to the time when X is arrested. If X speaks to his family, his self-defense testimony may be challenged indirectly. For instance, if a member of X's family testifies in his behalf that X in fact told him immediately after the crime that he (X) killed Y in self-defense, the family member is subject to impeachment through the use of bias.[109] This would be an indirect attack on X's defense, or at least damaging to his defense. In a situation where X did not claim self-defense in the presence of his family, and a family member's trial testimony incriminates him, there is no need to impeach X by his prearrest silence. X's statements to his family are admissible as nonhearsay.[110] Therefore, since X's statements speak for themselves, his prearrest silence to the police becomes irrelevant for impeachment.

The Relevance Of Prearrest Silence When Used In Conjunction With Other Prearrest Acts

It seems highly prejudicial and unfair to impeach a defendant's later testimony with his prearrest silence unless, perhaps, "silence" acquires meaning when it is simultaneously exercised with other non-verbal acts occuring before arrest. One state court held that since the defendant's prearrest silence is "germane to his conduct, i.e., his hiding from the police," it is admissible to impeach his credibility.[111] The defendant knew there was a warrant for his arrest and acted on

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be eliminated from the proposed new federal criminal code. *See* the National Commission on Reform of Federal Criminal laws - Final Report, Proposed New Federal Criminal Code 1303 (1971), *cited in* W. LAFAVE, CRIMINAL LAW § 66, at 526 (1972). The problems which have caused the disuse of the misprison statutes are found in the use of prearrest silence. In a situation where a defendant has insufficient knowledge about the facts of the crime charged, his silence is irrelevant to impeach his exculpatory testimony. Likewise, where sufficient knowledge triggers a duty to report, such prejudicial imposition is not outweighed by any relevance it might have.

109. The law recognizes that a witness' emotions or feelings toward the defendant may color his testimony. Partiality due to a relationship is a permissible area of cross-examination to impeach a witness' credibility. *See* Williams v. State, 44 Ala. App. 503, 214 So. 2d. 712 (1968).

In a fact situation where X talks to a stranger about his act of self defense, the prosecution can not impeach him through bias as in the case of the family members.

110. Federal Rule of Evidence 801 reads in pertinent part: "A statement is not hearsay if . . . [t]he statement is offered against and is . . . his own statement, in either his individual or a representative capacity."

111. Robeson v. State, 39 Md. App. 365, 377, 386 A.2d 795, 801 (1978).

this knowledge by remaining silent, by packing his clothes and moving to his girlfriend's apartment to evade the police.[112] Accordingly, the court deemed prearrest silence relevant to impeach his credibility.[113]

Similarly, federal courts allow prearrest silence to impeach a defendant's exculpatory testimony. In one case, when the police arrived at the scene of the crime, the defendant fled behind another suspect.[114] The defendant's trial testimony, that he ran with the intent to catch the true assailant, was impeached by his failure to report to the police what actually happened.[115] However, since flight, threats, and changing appearance are relevant by themselves to show consciousness of guilt,[116] evidence of prearrest silence is unnecessary to make these acts relevant. Since the silence is made more probative only when considered in conjunction with the defendant's other prearrest acts, it should be irrelevant as a means for impeachment.[117] Even so, duration of the silence may be significant.

The Duration Of Prearrest Silence

If duration imputes meaning to the prearrest silence, it may be relevant to the issue of guilt.[118] It remains unresolved whether duration of the silence is significant. On the other hand, it may go to the weight of the evidence, but presumably prearrest silence of one day or as little as five hours could be used. If one day is the same as one year with regard to the admissibility of impeachment use of prear-

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112. *Id.*

113. *Id.* at 381, 386 A.2d at 803.

114. Ester v. United States, 253 A.2d 537 (D.C. 1979).

115. *Id.* at 538.

116. *See* note 85 *supra* and accompanying text; *cf.* State v. Taylor, 223 Kan. 261, 574 P.2d 210 (1977). *Id.; see also* Schuman v. Bader & Co., 227 Ill. App. 28 (1922) (repairs not admissible to prove prior condition where plaintiff had proved such condition by other witnesses). Though *Schuman* is a civil action dealing with admissions by remedial measures, it can be analogized to a case involving prearrest silence. If a fact can be shown by other means, a defendant's prearrest silence is irrelevant and thereby inadmissible.

117. *Accord,* Anderson v. Charles, 447 U.S. 404 (1980). The Court held that the prosecutor's questions about the defendant's silence "were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id.* at 409. *See also* States v. Franklin, 586 F.2d 560, (5th Cir. 1978).

118. Of the judicial opinions listing the duration of prearrest silence, the shortest duration is seven days. Jenkins v. Anderson, 447 U.S. 231 (fourteen days); United States v. Rowe, 618 F.2d 1204 (7th Cir.), *cert. granted,* 449 U.S. 810 (1980), *vacated and remanded* 449 U.S. 810 (1980) (seven days); State v. Clark 223 Kan. 83, 574 P.2d 174 (1977) (seven days); Weiss v. State, 341 So. 2d 528 (Fla. App. 1977) (seven days).

rest silence, the result is a deterrent to the reporting[119] of the incident at any time after the immediate occurrence. This is especially true since the act of reporting is highly incriminating.[120] Once a person delays reporting for whatever reason, his silence becomes a threat to his trial testimony.

Prearrest Silence Is Irrelevant For Impeachment

Since the Supreme Court formulated no guidelines to determine the relevancy of prearrest silence, states are developing conflicting interpretations. The judicial struggle with the definition of silence depicts this conflict. Because of the ambiguous nature of silence, unless and until prearrest silence is clearly defined, it should not be admissible to impeach a defendant's later exculpatory testimony. It is highly speculative whether the Court should consider certain features of silence, such as duration and corroborative use, with other prearrest activities to impute meaning to prearrest silence.

Not one area clearly establishes prearrest silence as relevant to show any material issue—except that the defendant made a choice to talk at one time, and not to talk at another time. Since introduction of such evidence could prove unduly prejudicial to the defendant, its use seems fundamentally unfair.[121] The process by which the probative value of a piece of evidence is weighed against its possible prejudice is delicate. The reasons for such balancing are set forth below.

PREJUDICE AND THE USE OF PREARREST SILENCE FOR IMPEACHMENT

Even if the evidence is relevant, the question remains whether the probative value is worth the cost.[122] Judge Learned Hand stated

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119. Abbie Hoffman maintained an extremely long period of prearrest silence. *See* N.Y. Times, Sept. 4, 1980, § 1, ed. 5.

120. United States v. Jennings, 603 F.2d 650 (7th Cir. 1979). The prosecution of police officers under the Federal misprision statute for their failure to report a narcotics sale violated their fifth amendment right against self-incrimination since such disclosure would have led to their prosecution for a variety of crimes.

121. Relevant evidence is excluded if its prejudicial effect on the jury's decision outweighs its probative value. *See* United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973). In *Wright,* the court refused to admit evidence showing a robbery victim to be a homosexual who had made advances toward the defendant. Bias is unquestionably highly relevant and rejection of a sexual advance may well give rise to bias but such evidence was more prejudicial than probative so that though relevant, it was not admitted. *Id.*

In *Wright,* the impact of the evidence was prejudicial to the prosecution. It seems only fair that a defendant should have the same standard to exclude prejudicial evidence.

122. 1 J. WEINSTEIN EVIDENCE, § 403(01), at 403-7 (1980).

that "[t]he competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for truth . . . and that does not inevitably follow from the fact that it is rationally relevant."[123] Thus, there are two issues ripe for examination. The first is whether prearrest silence may be used as a prior inconsistent statement for impeachment purposes. The second issue is whether such use is so prejudicial to the defendant that it should be altogether barred.

Use Of Prearrest Silence As A Prior Inconsistent Statement Or Act

The Court in *Jenkins*[124] suggested that distinctions between statements and silence are immaterial for impeachment purposes.[125] Prior inconsistent *acts* may reflect a defendant's credibility as accurately as prior inconsistent *statements*.[126] Furthermore, silence can be construed as an implied assertion and thus can be used as a prior inconsistent statement or act for impeachment purposes.[127]

For prearrest silence to be used as a prior inconsistent act for impeachment, the silence must be inconsistent with the defendant's exculpatory testimony. Most courts have defined inconsistency as something that conflicts with the trial testimony.[128] In *Grunewald v.*

123. United States v. Krulewitch, 145 F.2d 76, 80 (2nd Cir. 1944), *rev'd on other grounds*, 336 U.S. 440 (1949).

124. 447 U.S. 231 (1980).

125. A very strong constitutional argument distinguishes statements from silence. *See* notes 158-70 *infra* and accompanying text.

126. *Jenkins*, 447 U.S. at 238: "Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of a witness by asking them to explain prior inconsistent statements and acts." *Id. But cf.* People v. Conyers, 424 N.Y.S.2d 402, 400 N.E.2d 342, 49 N.Y.2d 174 (1980); *cert. granted*, 449 U.S. 809 (1980), *remanded and vacated*, 449 U.S. 809 (1980) in light of Jenkins v. Anderson, 447 U.S. 231: "An inconsistent statement is much more probative than is silence." *Id.* at 408, 100 N.E.2d at 348, 49 N.Y.2d at 182. *But see* United States v. Harp, 513 F.2d 786, *vacated*, 423 U.S. 513 (1975). In *Harp*, the court held that a defendant who elects to explain participation in a crime subjects his testimony to the impeaching effect of prior inconsistent action.

127. *See, e.g.*, Muncie Air Lines Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1182 n.6 (5th Cir. 1975).

128. Some courts require varying degrees of inconsistency. United States v. Dennis, 625 F.2d 782 (8th Cir. 1980) (inconsistency is not limited to diametrically opposed answers, inability to recall, silence or changes of position); Commonwealth v. Rickles, 305 N.E.2d 107 (Mass. 1973) (prior inconsistent statements need not directly contradict a witness' testimony, it is enough if its implications flow in a different direction); *cf.* State v. Clay, 29 Ohio App. 206, 280 N.E.2d 385 (1972). For a statement to be admissible to impeach a witness, it must relate to material facts in the case, it must be contradictory or be inconsistent with the witness' testimony at trial and tend to disprove in some degree, the case of the party who called the witness.

United States,[129] where the silence in issue occurred at a grand jury hearing, the Supreme Court held three factors to be determinative of "consistency." Those factors were: repeated assertions of innocence before the grand jury; the non-adversarial nature of the grand jury in which there is no confrontation, no counsel, and compelled appearance; and the focus on the defendant that made it natural for him to fear that he was questioned solely to provide evidence against himself.[130] In light of these three elements, the Court held that use of the defendant's prior silence to impeach him in a subsequent trial was improper.[131]

The Court later extended this decision and held that a defendant's silence at the time of arrest to be improper impeachment evidence.[132] The Court, in *United States v. Hale*, stated that the three factors provided an even stronger argument for consistency in the case of silence at the time of arrest then they did for the *Grunewald* defendant.[133] Prearrest silence does not involve a *Grunewald* grand jury nor a *Hale* arrest, yet it also is a time during which the suspect has no confrontation privileges, no right to counsel and a fifth amendment right to remain silent. It is likely that a defendant will be silent for the very reasons which *Hale* deemed to be ambiguous.[134] Although prearrest silence carries no express assertion of innocence, neither does it express guilt. The prosecution contended that Hale's silence at the time of arrest was probative of the falsity of his later trial testimony because the incentive of immediate release, and the opportunity for independent corroboration, would have prompted an innocent suspect to explain away the incriminating circumstances.[135] The Court disagreed and held that the defendant had no reason to think that any explanation he might make would hasten his release.[136] This

129. 353 U.S. 391 (1957). Charged with preventing criminal prosecutions of certain taxpayers for tax evasion, Halperin, another defendant, relied on the fifth amendment and refused to answer grand jury questions. He later testified at trial, answering the same questions he had earlier refused to answer. The Court reasoned that to answer the grand jury questions would have incriminated him but later answers given at trial were consistent with innocence. *Id.* at 422. "For example, had he Halperin stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though his friendship with Grunewald was above reproach." *Id.*

130. *Id.* at 423.

131. *Id.* at 420.

132. 422 U.S. 171, 179 (1975).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

view, together with the numerous other explanations for silence, convinced the Court that pretrial silence is not sufficiently probative of an inconsistency with later testimony.[137] If the defendant realizes that telling his exculpatory story will not guarantee either belief or release, he may remain silent for fear of providing the police with self-incriminating information.

This is especially true in the confession and avoidance cases where the defendant has enough knowledge to report the crime. In *Jenkins*, the Supreme Court assumes a natural motivation in the average person to report.[138] However, the typical defendant is not the average person. The expected behavior of an average person to report a crime to police is inapplicable to the typical defendant who fears that he will not be believed. The court should not impeach the typical defendant with his silence. Such use of prearrest silence would be unduly prejudicial to the defendant since there is no inconsistency between a fear to report and exculpatory testimony at trial.

If silence is introduced as a prior inconsistent act for impeachment purposes, there must be an inconsistency between the prearrest silence and the trial testimony. However, the Supreme Court ignored this requirement in *Jenkins*[139] by relying on *Raffel v. United States*[140] where the Court assumed inconsistency without analysis.[141] The Court's determination in *Jenkins* that prearrest silence may be used to impeach as a prior inconsistent act[142] is also based on the assumption of inconsistency between prearrest silence and trial testimony. Thus, the Court has ignored its previous decision[143] that a prior inconsistent statement may be used to impeach later testimony only if inconsistent with that testimony.[144] The improper use of silence as a prior inconsistent act for impeachment may cause the jury to premise its verdict on inadmissible evidence.

The Fear Of Jury Prejudice

When the jury gives a piece of evidence more weight than the

137. *Id.* at 180.

138. 447 U.S. 231 (1980).

139. *Id.*

140. 271 U.S. 494 (1926).

141. United State v. Hale, 422 U.S. 171, 175 (1975) interpreting *Raffel* to hold that the inconsistency between the defendant's prior trial silence and his present trial testimony was assumed.

142. *Jenkins*, 447 U.S. at 238.

143. United States v. Hale, 422 U.S. 171 (1975); Grunewald v. United States, 353 U.S. 391 (1957).

144. *Gruenwald*, 353 U.S. at 422.

evidence warrants, the verdict may prejudice the defendant. In *United States v. Hale*, the Court excluded silence for impeachment of a defendant's testimony.[145] The Court feared that the jury would assign much more weight to the defendant's previous silence than the silence warranted.[146] If the jury miscalculates the weight to be given to prearrest silence, the prosecution's burden of proving guilt beyond a reasonable doubt will be alleviated at the defendant's expense. Empirical studies show that juries do not distinguish between silence, as evidence of the untrustworthiness of a defendant's exculpatory trial testimony, and silence as substantive evidence of guilt.[147] This uncontrollable and immeasurable inference of guilt makes the use of prearrest silence inherently prejudicial, outweighing any possible relevance prearrest silence may possess.

Thus, prearrest silence should be inadmissible to impeach a defendant's exculpatory trial testimony on the evidentiary grounds of undue prejudice to the defendant, even if such evidence is deemed to be relevant. First, prearrest silence must be inconsistent with the later trial testimony to be used as a prior inconsistent act to impeach such testimony. Second, even if found to be inconsistent, the unknown inference that will be drawn by the jury makes impeachment use of prearrest silence so prejudicial to the defendant that the courts cannot justify its use for any purpose. Accordingly, the prejudicial impact of prearrest silence should preclude its admission to impeach the defendant's exculpatory testimony.

TRADITIONAL CONSTITUTIONAL CONCERNS AND IMPEACHMENT USE OF PREARREST SILENCE

To be admissible, evidence must satisfy evidentiary standards concerning relevance and prejudice and must comply with traditional constitutional concerns. Thus, even if prearrest silence is relevant and its probative value outweighs its prejudicial impact, it may not be used for impeachment unless it fulfills the fifth amendment guarantees. In *Jenkins v. Anderson*,[148] where impeachment use of prearrest silence was held not to violate the Constitution, the Court did not reach the issue of whether prearrest silence may be protected by the fifth amendment.[149] The Court deemed the issue to be immaterial since the

145. 422 U.S. at 180.

146. *Id.*

147. *See* H. KALVEN AND H. ZEISEL, THE AMERICAN JURY, 127-28, 177-80 (1966); Hoffman and Bradley, *Jurors On Trial,* 17 MO. L. REV. 235, 243-44 (1952).

148. 447 U.S. 231 (1980).

149. *Id.* at 236 n.2.

Raffel rule,[150] that once a defendant takes the stand he waives his fifth amendment immunity, permits impeachment "even if the prearrest silence were held to be an invocation of the fifth amendment right to remain silent."[151] Despite this ruling, fifth amendment concerns should not be sidestepped. If the fifth amendment permits the use of prearrest silence, which *Jenkins* did not decide,[152] then the defendant's right to testify in his own behalf, and his right against self-incrimination, are seriously threatened.[153] Traditional fifth amendment concerns support this contention.

Traditional Fifth Amendment Concerns

The fifth amendment protects the right not to be compelled to speak in an incriminating way.[154] The guidelines set forth in *Miranda v. Arizona*[155] serve to prevent an infringement of the primary goal of the fifth amendment which is voluntariness of any statement given by a defendant. Voluntariness insures the trustworthiness of a defendant's statement.[156] If a statement must be given voluntarily to be admissible in court, the voluntariness requirement deters the police from coercing confessions.[157] The requirement also preserves the defendant's right *to* choose whether or not to make a pretrial statement or to testify.[158] If a statement is voluntarily given, it is deemed trustworthy and in compliance with the fifth amendment right against compelled self-incrimination.

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150. Raffel v. United States, 271 U.S. 494 (1926). The rule referred to by *Jenkins* is that once the defendant takes the stand, he waives his immunity from giving testimony and is subject to cross-examination impeaching his credibility just like any other witness. *Id.* at 496-97.

151. *Id.* at 236 n.2.

152. *Id.* "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent." *Id.*

153. It is important to note, however, that despite the fifth amendment analysis which follows, the current law, as set forth in *Jenkins* and *Raffel*, is that the use of prearrest silence to impeach a defendant's exculpatory testimony is constitutional.

154. The fifth amendment is set forth in note 1 *supra.*

155. 386 U.S. 436 (1966). For the *Miranda* warnings, *see* note 51 *supra.* If an involuntary statement is obtained in violation of these rights, it is inadmissible.

156. Brown v. Mississippi, 297 U.S. 278 (1936).

157. Davis v. North Carolina, 384 U.S. 737 (1966); *see generally* Kamisar, *What Is An Involuntary Confession,* 17 RUTGERS L. REV. 729 (1963).

158. Lisenba v. California, 314 U.S. 219 (1941); *see generally* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 U. CHI. L. REV. 313 (1964).

Voluntariness is an important factor in the determination of trustworthiness.[159] The Supreme Court currently holds that, despite *Miranda* violations, voluntary statements are admissible for impeach-

159. Prior to *Miranda*, the admissibility of statements was determined solely by the voluntariness test set forth in Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961). Unless statements are voluntarily given, they are inadmissible in a criminal trial either as direct evidence or for impeachment purposes. Mincey v. Arizona 437 U.S. 385, 398 (1978); Jackson v. Denno, 378 U.S. 368, 376 (1964); Malloy v. Hogan, 378 U.S. 1, 67 (1964). The voluntariness of a statement must be determined from the totality of circumstances. State v. Munro, 295 N.W.2d 437 (Ia. 1980); People v. Kincaid, 42 Ill. 2d. 854, 409 N.E.2d 469 (1980). The factors relevant to voluntariness are (a) the duration of the interrogation; (b) whether a defendant was partially or wholly informed of his rights; (c) physical surroundings during the interrogation; (d) whether the interrogator was attempting to elicit a confession in accord with police preconceptions; (e) whether there was physical abuse or threats thereof; (f) the health of the confessor, (g) the confessor's prior experience with the law. *See* Note, *Constitutional Law — Confessions — Miranda Warnings Need Not Be Given Where There is no Indication of Actual Custody and Where the Defendant's Freedom to Depart is not in fact Restricted,* 5 AM. J. CRIM. LAW 334, 338 (1977), *quoting* MCCORMICK, EVICENCE, § 149, at 318 (2d ed. 1972). Another interpretation of the test is whether a self-incriminating statement was (a) freely self-determined, (b) the product of rational intellect and free will without compulsion or inducement of any sort and (c) whether the defendant's will was overborn. Taylor v. Sate, ____, Ind. ____, 406 N.E.2d 247 (1980); Moss v. State, 386 So. 2d 1129 (Miss. App. 1980). In *Moss,* the statement of a defendant regarding the shooting of the victim which was given after the defendant was advised of his *Miranda* rights and after the defendant had signed a waiver of his rights in the presence of two witnesses, which was reduced to writing by a deputy sheriff, read to the defendant, and signed by him in the presence of three witnesses, and which was testified to by the witnesses as being under no threats, promises, force or pressure of any kind, was entirely voluntary and was properly admitted into evidence.

The practice that the defendant is entitled to a pre-trial hearing to determine voluntariness (Jackson v. Denno, 378 U.S. 368 (1964) has been varied among state courts: Those states in favor of the *Denno* hearing are New York, People v. Lithy, 353 N.Y.2d 301 (N.Y.Cr.Ct. 1974); and Florida, Retherford v. State, 265 So. 2d 80, *quashed,* 270 So. 2d 363, *cert. denied,* 412 U.S. 953 (Fla. App. 1972). Those state courts not requiring a *Denno* hearing before a confession is usable for impeachment purposes are Kansas, State v. Andrews, 218 Kan. 156, 542 P.2d 325 (1975); Arkansas, Williams v. State, 523 S.W.2d 377 (Ark 1975) and Illinois, People v. Moore, 54 Ill. 2d 25, 294 N.E.2d 297 (1973).

When the defendant challenges the statement as involuntary, the prosecution must prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). States may differ and require a higher standard. State v. Vernon, 385 So. 2d 200 (La. 1980). The Louisiana court held that before a confession or inculpatory statement may be introduced into evidence, the state must prove affirmatively and beyond a reasonable doubt that the statement was free and voluntary and not made under the influence of fear, duress, menaces, threats, inducements or promises. After the *Denno* hearing, the judge is required to make an unambiguous ruling for the record. United States v. Brown, 575 F.2d 796, 748-49 (9th Cir. 1978) (independent determination of the voluntariness issue is required of federal courts); accord, Beckwith v. United States, 425 U.S. 341, 348 (1976).

Harris v. New York, 401 U.S. 222 (1971), reaffirmed the voluntariness standard

ment purposes.[160] This position is premised on the assumption that if a defendant makes a statement of his own free will, and not because of pressure exerted by the police, the statement is trustworthy.[161] Conversely, involuntary statements cannot be used for any purpose because they are not trustworthy.[162] Therefore, the reliability of prearrest silence in determining a defendant's credibility may rest upon whether prearrest silence more closely resembles an involuntary statement or a voluntary statement.

Although silence is neither a statement nor an utterance, it can be communicative and thereby equated to a statement.[163] If the defendant is subjected to police coercion, there are many reasons why he might make an involuntary statement. These reasons include a desire to be free of questioning, a misunderstanding of his rights, a belief that his self-defense story will be unaccepted, or the hope that he will escape severe punishment by telling the police what he believes they want to hear. These statements are not trustworthy because the motivations which trigger them are inherently ambiguous. Prearrest silence is similarly ambiguous.[164]

Not only is prearrest silence ambiguous as demonstrated by the use of different fact situations and by application of the Court's analysis of post-arrest silence,[165] but its use for impeachment indirect-

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which *Miranda* did not reach: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Miranda v. Arizona, 384 U.S. 436, 478 (1966). There is general agreement among the judiciary that voluntary statements can be used for impeachment despite a *Miranda* violation. Harris v. New York, 401 U.S. at 224. For a general overview of voluntariness, *see* Note, *Project Ninth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1978-1979,* 68 GEO. L. J. 269, 376-79 (1979).

The trustworthiness factor is not solely determinative of voluntariness. Haynes v. Washington, 373 U.S. 503 (1963); *but cf.* Hutcherson v. United States, 351 F.2d 748 (D.C. Cir. 1965).

160. Oregon v. Haas, 420 U.S 714 (1975); Harris v. New York, 401 U.S. 222 (1971). California, Pennyslvania, and Hawaii have rejected *Harris* as a matter of state constitutional law. People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971). Alaska has also rejected *Harris* by adopting Rule 26(g) of the Alaska Rules of Criminal Procedure.

161. *See* note 157 *supra*; Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence,* 16 AMER. CRIM. L. REV. 197, 205 (1979).

162. Mincey v. Arizona, 437 U.S. 385, 398 (1978).

163. *Id. See also* advisory committee notes following Federal Rule of Evidence 801.

164. *See* notes 88-91 *supra* and accompanying text.

165. *See* notes 88-91, 97-111 *supra* and accompanying text.

ly produces coercion. By upholding the use of prearrest silence in *Jenkins*, the Supreme Court, in effect, issued an ultimatum to future defendants: either report the crime immediately, despite the self-incriminating aspects, or suffer the consequences through the prosecution's use of silence to impeach exculpatory testimony at trial. This dilemma amounts to indirect compulsion.

The Supreme Court recently upheld indirect compulsion.[166] In the lower court, the prosecution, during closing argument, questioned the defendant's failure to report his alibi before arrest.[167] The Seventh Circuit made three important determinations. First, it found no legal distinction between the prosecutor's comments to the jury and any attempt he might have undertaken to impeach the defendant or the defendant's alibi witness on cross-examination.[168] Second, the court held that the prosecutor's comments about the defendant's prearrest silence constituted an impermissible invasion of the defendant's rights since the remarks were "of such a nature that the jury would naturally and necessarily take them to be a comment on the defendant's silence."[169] Third, such invasion of the defendant's rights was found to be in constitutional error.[170] But the United States Supreme Court granted certiorari and remanded *Rowe* to be reviewed in light of *Jenkins v. Anderson*.[171]

Hence, the remand of *Rowe* indicates that *Jenkins* has broader implications than its impact on prearrest silence, since Rowe exercised his right not to testify and to remain silent pursuant to the fifth amendment. The Court's decision therefore fosters indirect compulsion of a defendant to report a crime before arrest. Ambiguity and a close affiliation with government coercion are two characteristics common to both prearrest silence and involuntary statements. Therefore, since prearrest silence is more like the involuntary statement than the voluntary statement, it too should be barred from any use. Prearrest silence may be communicative as an implied assertion, but whether it conveys a trustworthy and reliable communication is purely speculative. To allow such an ambiguous and therefore prejudicial piece of evidence to discredit a defendant's testimony infringes upon constitutional safeguards.

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166. United States v. Rowe, 618 F.2d 1204 (7th Cir.), *cert. granted*, 449 U.S. 810 (1980), *vacated and remanded*, 449 U.S. 810 (1980).

167. *Id.* at 1207.

168. *Id.*

169. *Id.* at 1210.

170. *Id.* at 1213.

171. 449 U.S. 810, (1980).

The Supreme Court set forth a test to determine whether such a burden upon the exercise of constitutional rights is an impermissible penalty.[172] The test stipulates that a burden becomes a penalty if any traditional fifth amendment "right to silence" policies are impaired[173] or if the state's burden in proving a defendant guilty is materially lessened.[174] *United States v. Hale*[175] states that the reduction of the state's burden is an evidentiary bar to impeachment use of prearrest silence.[176] To bar such use on constitutional grounds, the burden flowing from the impeachment must substantially impair a constitutional policy.[177] It is the ambiguity of prearrest silence, the unknown reason for maintaing such silence, that makes it untrustworthy as evidence and its use thereby constitutes a penalty.

Furthermore, even if the defendant is not penalized by such a burden, another fifth amendment concern is whether the goals of using prearrest silence to impeach a defendant's credibility are met. The apparent objectives are to deter perjury and to encourage the reporting of crimes. Though the fear of prejury is valid, it must be strictly balanced against both the defendant's right not to incrimiate himself and the policy to prohibit police misconduct.[178] It must, however, be the goal of deterring perjury that is sought and not the goal of burdening a defendant's right to testify. The right to testify is burdened if a defendant's prearrest silence can impeach his testimony. Such a burden on the right to testify dilutes the constitutional rights guaranteed a criminal defendant.

The fear of a defendant's intentional perjury prompted the Court to distinguish the prosecution's affirmative use of the defendant's prior silence to show guilt, from the use of prior silence for impeachment purposes.[179] *Raffel* expressly held that the defendant's silence at a prior trial was admissible for purposes of impeachment, despite the federal

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172. *Chaffin v. Stynchcombe*, 412 U.S. 12 (1973); *McGautha v. California*, 402 U.S. 183, 215-16 (1971); *see also* Brooks v. Tennessee, 406 U.S. 605 (1972). The court held the fifth amendment privilege to be a "right to remain silent unless he (defendant) chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for . . . such silence." *Id.*

173. *McGautha*, 402 U.S. at 213.

174. *See* Tehan v. Shott, 382 U.S. 406, 416 (1966).

175. 422 U.S. 171 (1975).

176. *See* notes 62-120 *supra* and accompanying text.

177. Mincey v. Arizona, 437 U.S. 385 (1978).

178. Walder v. United States, 347 U.S. 62, 65 (1954); *see* Comment, *People v. Disbrow: Halting the Erosion of the Right Against Self-Incrimination*, 9 So. W. L. Rev. 771, 778 (1977).

179. *Raffel v. United States*, 271 U.S. 494, 496-97 (1926).

court prohibition of a defendant's silence in the prosecution's case-in-chief as evidence of guilt.[180] *Jenkins v. Anderson*[181] revitalized the *Raffel* holding that a defendant's decision to take the stand is a waiver of his right to remain silent.[182]

A reason for the *Jenkins* conclusion may be the traditional posture of cross-examination itself. Cross-examination to attack the credibility of a witness is largely discretionary as to the extent and period to be covered.[183] The relation and apparent character of the witness under examination and the circumstances attending the particular case determine the scope of cross-examination.[184] The cross-examiner should be accorded wide latitude in attempting to elicit facts that would tend to impeach or contradict testimony given on direct examination.[185]

However, it is impermissible to accomplish indirectly that which cannot be accomplished directlly.[186] Because *Raffel*[187] dilutes a defendant's fifth amendment right to remain silent by burdening the exercise of his right to testify in his own behalf, it is indirectly circumventing an express constitutional prohibition. Hence, the fear of perjury should not permit the use of prearrest silence to impeach a defendant's exculpatory testimony unless the possibility of perjury outweighs the consequences of the dilution.

The second fifth amendment goal of increasing the reporting of crimes is, however, not so acceptable a goal even if analyzed through a balancing process like the prejury aspect. The sanction of impeachment use of prearrest silence does not encourage reporting. There is no duty to speak,[188] and where there is no duty to speak, silence is void of meaning or at least cannot be deemed the equivalent of concealment or suppression.[189] However, a New York appellate court

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

181. 447 U.S. 231, (1980).

182. *Id.* at 241 (Stevens J., concurring); *see Doyle v. Ohio*, 426 U.S. 610, 632-33 (Stevens J., dissenting).

183. Johnston v. Jones, 66 U.S. 209 (1 Black) 1861.

184. Parr v. McDade, 161 Ind. App. 106, 314 N.E.2d 768 (1974).

185. Self v. Dye, 257 Ark. 360, 516 S.W.2d 397 (1974).

186. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

187. Raffel v. United States, 271 U.S. 494 (1926).

188. Wardius v. Oregon, 412 U.S. 470 (1973) (absent an alibi statute, the defendant has no duty to inform the police of his alibi); Mabury v. Brooks, 20 U.S. 556 (7 Wheat.) 1822 "(It may be the duty of a citizen to accuse every offender and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." *Id.* at 575-76.).

189. Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 148, 46 A. 347, 351 (1900): "There is a distinction between the suppression of a fact and mere silence. Where

held that a police officer has a duty to report.[190] The court stated that the duty to report is limited to people in positions similar to that of a police officer. The court reasoned that the official status of a law enforcement officer requires him to promptly report an illegal act.[191] It is questionable, however, whether a reasonable person, without such a duty, would report a crime even if a duty existed.

If a defendant thinks about the prearrest impeachment sanction, it surely serves as a deterrent to reporting.[192] According to the analysis on the duration of prearrest silence,[193] if a person has waited a week, or even a day, he probably will not report. This result is foreseeable because any period between the crime and the reporting constitutes prearrest silence which may be used to impeach a defendant's exculpatory testimony. Therefore, the impeachment use of prearrest silence only adds to the defendant's dilemma. The purpose of the fifth amendment is to prohibit the government from encouraging or discouraging any act by a defendant which would serve to incriminate him.[194] Thus, rather than encouraging crime reporting, the sanction of impeachment deters reporting.

Furthermore, by such sanction, the government compels the defendant to incriminate himself. Delay only aggravates the self-incriminating aspect of the reporting compelled by the government. Even though the impeachment sanction's goal of deterring perjury may prevail on a balancing test, the goal of encouraging reporting fails. By this analysis, then, the use of prearrest silence for impeachment does not constitute harmless error,[195] but dilutes a defendant's fifth amendment rights.[196]

To prevent dilution of a defendant's rights, traditional constitu-

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there is an obligation to speak, a failure to speak will constitute the suppression of a fact; but where there is no obligation to speak, silence cannot be termed suppression." *Id.* Accord, Stewart v. Wyoming Cattle Ranch Co., 128 U.S. 382, 388 (1888) ("[M]ere silence is quite different from concealment." *Id.*)

190. People v. Rothchild, 361 N.Y.S.2d 901, 35 N.Y. 740, 320 N.E.2d 639 (1974). *But see* United States v. Jennings, 603 F.2d 650 (7th Cir. 1979).

191. Rothchild, 361 N.Y.S.2d at ____, 35 N.Y. at ____, 340 N.E. at 642.

192. This is particularly true in those cases where a defendant maintains silence on the advice of his attorney; *see* note 96 *supra.*

193. *See* notes 118-19 *supra* and accompanying text.

194. *See* note 1 *supra; e.g.,* Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

195. *See* note 197 *infra.*

196. Note, *Criminal Law—Self Incrimination - Failure to Relate Exculpatory Story at Pretrial Hearings May Be Used By The Prosecution to Impeach a Defendant's Testimony at Trial,* 10 ST. MARY'S L.J. 632 (1979): "A defendant will not know whether to speak or remain silent lest his silence be misconstrued. A defendant should be under

tional policies must be preserved. Since trustworthiness is a major concern, it should not be cast aside for the sake of furthering the goals of avoiding perjury and encouraging reporting of crimes. Moreover, since at least one of two apparent goals is invalid, to maintain the sanction for the sake of a fear of perjury on the theory of harmless error would be an intolerable penalty to the defendant. Prearrest silence closely resembles an involuntary statement. Involuntary statements are inadmissible for lack of trustworthiness to impeach a defendant's trial testimony. It follows that prearrest silence should be similarly excluded. Finally, the criminal defendant's sacrifice of his right to testify in his own behalf to maintain his fifth amendment right not to incriminate himself, is a dilution of his traditional constitutional rights.

Conclusion

The narrow focus of the *Jenkins* decision left many unresolved evidentiary and constitutional questions. Since the Supreme Court found it unnecessary to create evidentiary guidelines for the states, the numerous evidentiary questions arising from *Jenkins* are destined for conflicting resolutions. However, prearrest silence is so inherently ambiguous that it is not relevant to impeach a defendant's exculpatory testimony. Neither the duration of the silence, nor the use of it in conjunction with other prearrest acts, is sufficient to make it relevant to any material issue. Therefore, it is irrelevant to make any disputed fact more or less probable. Any probative value that prearrest silence might have, is outweighed by the prejudicial impact of such silence when it is used to impeach a defendant's exculpatory testimony. Furthermore, since prearrest silence is not inconsistent with later exculpatory testimony, it should not be allowed as a prior inconsistent statement to impeach such testimony.

The inconsistency of the *Jenkins* decision with traditional constitutional concerns, threatens to dilute the defendant's traditional constitutional rights. The Court's goal to deter perjury and encourage crime reporting are insufficient to divest a criminal defendant of his right to remain silent and to practice his right to later testify in his own behalf. Furthermore, the traditional constitutional concern for trustworthiness which has always helped to ensure the discovery of truth, should not be sacrificed by allowing the government to indirectly compel a defendant to report an event which will likely be incrim-

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no compulsion to speak unless he chooses to do so. . . . To hold otherwise is to seriously abridge a right that is fundamental to traditional concepts of justice." *Id. See also* Note, *Silence As Incrimination In Federal Courts,* 90 MINN L. REV. 598, 640 (1955-56).

inating. Like the involuntary statement, prearrest silence is not trustworthy and should be inadmissible for all purposes.[197]

The most disturbing aspect of *Jenkins* is that it may eventually be the rationale used to admit post-arrest silence to impeach a defendant's testimony.[198] The Supreme Court has recently remanded a state supreme court decision and a circuit court decision that held post-arrest silence inadmissible for impeachment purposes for re-examination in light of *Jenkins*.[199]

Analysis of prearrest silence has shown several things. First, it is irrelevant to impeach a defendant's trial testimony. Second, even if it is relevant, the use of prearrest silence is outweighed by its prejudice. Third, use of prearrest silence for impeachment is inconsistent with traditional fifth amendment concerns. Finally, the ramifications of *Jenkins* threaten to allow the use of a defendant's post-arrest silence for impeachment. Where and when the Court will stop this trend of restricting a defendant's constitutional rights is questionable and frightening.

Debra M. Williamson

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197. The real threat of the *Jenkins* decision in the law of prearrest silence is the impending ramifications of the unresolved issues as discussed in the text. One such outgrowth may presently be a reality in many courts. The issue facing these courts is how a judge should rule in light of the consequences to a defendant if the prearrest silence is admissible impeachment evidence and to the government if such silence is denied admission. If the defendant's objection to the impeachment use of prearrest silence is overruled, the defendant has an extremely heavy burden to convince the appellate court that its use was so prejudicial as to require reversal. Because of the wide use of harmless error (harmless error occurs when there is no reasonable possibility that error might have contributed to the conviction. United States v. Rowe, 618 F.2d 1204 (7th Cir.), *cert. granted,* 449 U.S. 810 (1980), *vacated and remanded,* 449 U.S. 810 (1980)), many judges will find its use impermissible but not demanding reversal. *See, e.g.,* Chapman v. California, 386 U.S. 18 (1966). Alternatively, if the objection is sustained and the defendant is acquitted, the prosecution is left with no recourse as they are barred by the double jeopardy rule.

198. Doyle v. Ohio, 426 U.S. 610 (1976).

199. New York v. Conyers, 424 N.Y.S.2d 402, 400 N.E.2d, 342, 49 N.Y.2d 174, *cert. granted,* 449 U.S. 809 (1980), *vacated and remanded,* 449 U.S. 809 (1980) in light of Jenkins v. Anderson, 447 U.S. 231 (1980). In *Conyers,* the prosecutor commented on the defendant's silence at the time of arrest. The New York Supreme Court found this to be impermissible in light of Doyle v. Ohio, 426 U.S. 610 (1976). The Supreme Court has now remanded it for review in light of *Jenkins;* United States v. Rowe, 618 F.2d 1204 (7th Cir.), *cert. granted,* 449 U.S. 809 (1980), *vacated and remanded,* 449 U.S. 809 (1980) in light of *Jenkins.* The prosecution indirectly commented on the defendant's pre-arrest silence through comments on his alibi witness' prearrest silence. The Seventh Circuit found the comments to be impermissible and granted a new trial within 120 days or a writ would issue. The Supreme Court remanded the case to be determined in light of *Jenkins.*