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Fourteenth Amendment--Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings

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FOURTEENTH AMENDMENT— CRIMINAL PROCEDURE: THE IMPEACHMENT USE OF POST- ARREST SILENCE WHICH PRECEDES THE RECEIPT OF MIRANDA WARNINGS

Fletcher v. Weir, 102 S. Ct. 1309 (1982) (per curiam).

INTRODUCTION

The law of evidence provides that a witness may be impeached by his prior assertions if the assertions are inconsistent with his testimony.¹ A second evidentiary rule provides that the failure to assert a fact when it would have been natural to do so may be treated as an assertion that the fact does not exist.² Consistent with these two principles, the law of evidence permits a witness's prior silence to be used for impeachment purposes if the silence is inconsistent with the statements which the witness has made at trial.³

Although the impeachment use of prior silence is recognized under traditional evidentiary law, the practice must also satisfy applicable constitutional requirements.⁴ The Supreme Court has reviewed the im-

¹ 3A J. WIGMORE, EVIDENCE §§ 1017-1046 (Chadbourn rev. 1972). Impeachment is the process whereby the veracity of a witness is called into question through the introduction of evidence at trial. The most common and effective method of impeachment involves a showing that the witness has previously made assertions that are inconsistent with his present testimony. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 33, at 66 (1972).

² 4 J. WIGMORE, *supra* note 1, § 1071, at 102. Whether it would have been natural for an individual to make a particular assertion depends upon the circumstances of the particular case. C. MCCORMICK, *supra* note 1, § 34, at 68. In general, this determination is to be made by the trial court. When an evidentiary matter has "grave constitutional overtones," however, the Supreme Court may exercise its supervisory power over the lower federal courts and determine whether a prior assertion is sufficiently inconsistent with trial testimony to be admissible for the limited purpose of impeachment. *Grunewald v. United States*, 353 U.S. 391, 423-24 (1957). For a more complete discussion of the federal supervisory power, see *infra* notes 25-30 and accompanying text.

³ 3A J. WIGMORE, *supra* note 1, § 1042, at 1056.

⁴ The impeachment use of prior silence must always comply with federal constitutional law. The practice must also comply with state constitutional law when a case originates in a state court. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW ch. 1 (1978) [hereinafter cited as J. NOWAK].

peachment use of prior silence under the federal constitution in a number of different situations. In *Doyle v. Ohio*,⁵ the Court held that it is constitutionally impermissible to use a witness's prior silence for impeachment purposes if the silence followed the witness's arrest and his receipt of *Miranda*⁶ warnings.⁷ The Court has reached a different conclusion, however, with respect to pre-arrest silence. In *Jenkins v. Anderson*,⁸ the Court distinguished *Doyle* and held that there is no constitutional limitation on the use of a witness's prior silence for impeachment purposes if the silence preceded the witness's arrest.⁹ Last term, the Court considered the constitutionality of the impeachment use of prior silence in a third situation.

In *Fletcher v. Weir*,¹⁰ the Court held that the federal constitution does not prohibit the use of a witness's prior silence for impeachment purposes if the silence followed the witness's arrest but preceded his receipt of *Miranda* warnings.¹¹ The per curiam opinion emphasized that the states are entitled to determine under their own rules of evidence the extent to which such prior silence may be used to discredit a witness's testimony.¹² The Court's refusal to prohibit the impeachment use of all post-arrest silence as a matter of federal constitutional law is arguably inconsistent with the reasoning in *Doyle* and *Jenkins*. Nevertheless, the Court's decision to defer to state evidentiary law strikes a reasonable balance between the need for impeachment as a means of ascertaining the truth at trial and the concern for the protection of individual rights.

⁵ 426 U.S. 610 (1976). For a more complete discussion of this case, see *infra* notes 45-51 and accompanying text.

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966), requires that the authorities follow certain procedures before subjecting an individual to custodial interrogation. In particular, the individual must be warned 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.

Although the procedural safeguards outlined in *Miranda* are triggered by interrogation and custody rather than by interrogation and arrest, this Note will use the terms "arrest" and "arrestee" to refer to custodial interrogation and to an individual who is being subjected to custodial interrogation.

⁷ 426 U.S. at 619.

⁸ 447 U.S. 231 (1980). For a more complete discussion of this case, see *infra* notes 52-61 and accompanying text.

⁹ *Id.* at 240.

¹⁰ 102 S. Ct. 1309 (1982) (per curiam).

¹¹ *Id.* at 1312.

¹² *Id.*

II. EVIDENTIARY LAW AND THE IMPEACHMENT USE OF PRIOR SILENCE

As noted above, the impeachment use of prior silence must comply with both evidentiary and constitutional law. The first of these standards, however, is not always available as a basis of review. Because the state courts are the final interpreters of state law, a federal court's decision to reverse a state court's ruling on the impeachment use of prior silence must be based upon a violation of federal constitutional law.¹³ Because *Fletcher* originated as a state proceeding, the Court was limited to the application of federal constitutional principles. The Court's consideration of these principles will be discussed below. At this point, however, it will be helpful to examine the traditional standards governing the admissibility of evidence and their application to the impeachment use of a witness's prior silence.

A. THE TRADITIONAL STANDARDS GOVERNING THE ADMISSIBILITY OF EVIDENCE

In addition to satisfying the requirement of inconsistency,¹⁴ the impeachment use of prior silence must meet the traditional standards governing the admissibility of evidence. At the federal level, the standards of admissibility are set forth in the Federal Rules of Evidence and questions of federal evidentiary law are reviewable by the Court through the application of these rules.¹⁵ At the state level, the admissibility of evidence is generally determined in accordance with a controlling evidentiary code.¹⁶ These statutory bases of review are founded on traditional evidentiary law.

The traditional standards for the admissibility of evidence focus upon the concept of relevancy.¹⁷ In general, relevancy is the tendency of evidence to establish the material proposition which the evidence is

¹³ See generally J. NOWAK, *supra* note 4, ch. 1.

¹⁴ See *supra* notes 1-3 and accompanying text.

¹⁵ The Federal Rules of Evidence were approved by Congress on January 2, 1975 and became effective on July 1, 1975. *Preface* to FED. R. EVID. These rules govern proceedings in the courts of the United States and before United States magistrates. FED. R. EVID. 101.

¹⁶ State legislatures have the power to prescribe rules of evidence provided that the rules do not violate constitutional law. See generally 29 AM. JUR. 2d *Evidence* § 9 (1967).

¹⁷ See generally C. MCCORMICK, *supra* note 1, § § 184-185; J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898). Rule 402 of the Federal Rules of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to its statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402. The determination of relevancy is to be made by the trial judge on the basis of his experience and his knowledge of human conduct and motivation. C. MCCORMICK, *supra* note 1, § 185, at 438.

being offered to prove.¹⁸ Evidence is relevant if the existence of the fact which the evidence is being offered to prove renders the fact in issue more probable or improbable than it would otherwise be.¹⁹ Evidence which does not meet this standard is inadmissible at trial.²⁰

Relevant evidence is said to have probative value and is admissible unless its admission is specifically prohibited.²¹ It may be excluded pursuant to a particular statute or constitutional consideration.²² In addition, a court may exclude relevant evidence under traditional evidentiary law if the probative value of the evidence is outweighed by the risks which would accompany its admission.²³ The most important countervailing considerations include the danger of undue prejudice, the risk of distracting the jury, the likelihood of consuming an unreasonable amount of time, and the possibility of unfair surprise.²⁴

B. THE FEDERAL SUPERVISORY POWER

Prior to the enactment of the Federal Rules of Evidence, the Supreme Court was able to review questions of federal evidentiary law under the federal supervisory power. The federal supervisory power authorizes the Court to correct lower federal court procedures that it

¹⁸ C. MCCORMICK, *supra* note 1, § 185, at 435. Related to the concept of relevancy is the concept of materiality. If the proposition which the evidence is being offered to prove is neither a matter in issue nor probative of a matter in issue, the evidence is immaterial. If the proposition which the evidence is being offered to prove is immaterial, the evidence is not relevant. *Id.*

¹⁹ *Id.*, § 185, at 438. Rule 401 of the Federal Rules of Evidence provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

²⁰ 1 J. WIGMORE, *supra* note 1, § 9 at 289. Wigmore expresses this principle as follows: "None but facts having rational probative value are admissible." *Id.*

²¹ *Id.*, § 10, at 293. Wigmore expresses this principle as follows: "All facts having rational probative value are admissible unless some specific rule forbids." *Id.*

²² See generally FED. R. EVID. 402 advisory committee note. Examples of statutes which restrict the admissibility of relevant evidence include 11 U.S.C. § 205(a) (1976) (railroad reorganization petitions inadmissible if dismissed) and 47 U.S.C. § 605 (1976) (interception and divulgence of wire or radio communications prohibited unless authorized by sender). For examples of constitutional considerations which restrict the admissibility of relevant evidence, see *Katz v. United States*, 389 U.S. 347 (1967) (evidence obtained by unlawful search and seizure inadmissible) and *Massiah v. United States*, 377 U.S. 201 (1964) (incriminating statement elicited from an accused in violation of right to counsel inadmissible).

²³ C. MCCORMICK, *supra* note 1, § 185, at 438-41.

²⁴ Rule 403 of the Federal Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The rule does not list the risk of unfair surprise as a ground for the exclusion of relevant evidence. The advisory committee note reasons that the granting of a continuance is more appropriate than the exclusion of evidence as a remedy for unfair surprise. FED. R. EVID. 403 advisory committee note.

deems unfair even though constitutional principles have not been violated.²⁵ The power is generally regarded as having had its origin in *McNabb v. United States*.²⁶ In *McNabb*, the Court reversed a murder conviction on the basis of its "supervisory authority over the administration of criminal justice in the federal courts."²⁷ In the forty years since that decision, the Court has exercised its supervisory power in both civil and criminal cases and has brought about significant reforms in federal lower court procedure.²⁸

The federal supervisory power enables the Court to raise the standards of fairness in the administration of the federal justice system while avoiding the rigidity of constitutional decisions.²⁹ The power is not available, however, when state court procedures are the subject of judicial review.³⁰ When reviewing a state court's impeachment use of prior silence, the Court must affirm the practice in the particular case or prohibit it in all cases as a matter of federal constitutional law. As will be discussed below, the Court was faced with this choice in *Fletcher v. Weir*.

C. *UNITED STATES V. HALE*

In *United States v. Hale*,³¹ the Court exercised its supervisory power and reversed, on the basis of federal evidentiary law, a federal court's decision to permit the impeachment use of prior silence.³² William Hale was arrested after he was identified as the perpetrator of an assault and robbery. He was taken to the police station and advised of his right to remain silent under *Miranda*. At the station, the authorities searched Hale and discovered that he was carrying a substantial sum of money.

²⁵ The Supreme Court possesses an historical power of supervision over the lower federal courts. See generally Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L. J. 1050 (1965) [hereinafter cited as *The Judge-Made Supervisory Power*]; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963) [hereinafter cited as *The Supervisory Power*].

²⁶ 318 U.S. 332 (1943).

²⁷ *Id.* at 340.

²⁸ Federal lower court procedures may be corrected either through a decision limited to the circumstances of the particular case or through the formulation of rules of general application. *The Supervisory Power*, *supra* note 25, at 1659. Moreover, the federal supervisory power authorizes the Court to correct federal lower court procedures regardless of the effect of the procedures on the particular litigants. *The Judge-Made Supervisory Power*, *supra* note 25, at 1077. This authority enables the Court to "shift its focus from the adjudication of the parties' rights to a more general investigation of judicial procedures." *The Supervisory Power*, *supra* note 25, at 1657.

²⁹ Hill, *supra* note 25, at 193.

³⁰ *The Judge-Made Supervisory Power*, *supra* note 25, at 1050 n.2. The courts of general jurisdiction at the state level possess a supervisory power over the lower state courts. *Id.*

³¹ 422 U.S. 171 (1975).

³² *Id.* at 180.

Hale did not respond when questioned as to the source of the money.³³

At his trial in federal district court, Hale testified in his own defense and offered both an alibi for the robbery and an explanation for his possession of the money. The prosecution attempted to discredit this testimony by forcing Hale to admit on cross-examination that he had not provided any exculpatory information when he was questioned shortly after his arrest. The trial court instructed the jury to disregard this portion of the examination but refused to declare a mistrial. Hale was convicted of robbery.³⁴ The court of appeals reversed the conviction³⁵ and the Supreme Court affirmed.³⁶

The Court suggested that in most circumstances "silence is so ambiguous that it is of little probative force."³⁷ The majority reasoned that silence is particularly ambiguous in the post-arrest context because an arrestee is under no duty to speak and has ordinarily been advised by government authorities that he has the right to remain silent.³⁸ Moreover, the majority asserted that a jury is likely to assign more weight to a defendant's post-arrest silence than is warranted.³⁹ Exercising its supervisory power over the lower federal courts, the Court held that the probative value of Hale's post-arrest silence was insignificant and was outweighed by the danger of undue prejudice which would accompany its admission.⁴⁰

³³ *Id.* at 174.

³⁴ *Id.*

³⁵ 498 F.2d 1038 (D.C. Cir. 1974). The court of appeals held that Hale's post-arrest silence was not inconsistent with his testimony at trial and that its use for impeachment purposes was an impermissible infringement upon his fifth amendment privilege against compelled self-incrimination. *Id.* at 1043. The majority asserted that it would be "grossly unfair" to permit the impeachment use of an individual's post-arrest silence after the individual had been informed that he had the right to remain silent. *Id.* at 1044.

³⁶ 422 U.S. at 181.

³⁷ *Id.* at 176. The Court based its decision primarily on the possibility that the defendant had relied upon his right to remain silent. Nevertheless, the Court argued that a number of other factors can cause an individual to remain silent following arrest. The majority suggested that an arrestee may not have heard or fully understood the question, may have felt that there was no need to reply, may have maintained silence because of an unwillingness to incriminate another, or may have been reacting to the inherent pressures of custodial interrogation. *Id.* at 177.

³⁸ *Id.* at 176.

³⁹ *Id.* at 180. The Court argued that the defendant's opportunity to explain his prior silence is unlikely to overcome "the strong negative inference that the jury is likely to draw" from the defendant's failure to speak. *Id.*

⁴⁰ *Id.* Because the Court based its decision on federal evidentiary law, it did not reach the broader constitutional question which had served as the basis for the court of appeals' decision. See *supra* note 35.

The government's argument in *Hale* relied heavily on the Court's decision in *Raffel v. United States*, 271 U.S. 494 (1926). In *Raffel*, the defendant chose not to testify at his trial for conspiring to violate the National Prohibition Act. The jury failed to reach a verdict and a second trial was required. At the second trial, the defendant took the stand to refute the

III. CONSTITUTIONAL LAW AND THE IMPEACHMENT USE OF PRIOR SILENCE

Theoretically, the impeachment use of prior silence may be challenged as violative of either the fifth amendment privilege against compelled self-incrimination or the due process clause of the fourteenth amendment.⁴¹ The fifth amendment guarantees criminal defendants the right to remain silent at trial and prohibits the prosecution from commenting on a decision to exercise that right.⁴² In *Miranda*, the Court extended the fifth amendment right to remain silent to include pre-trial situations in which an individual is subjected to custodial interrogation.⁴³ Because the impeachment use of prior silence burdens the exercise of the fifth amendment right to remain silent by allowing comment on prior silence at trial, one can argue that the practice violates the privilege against compelled self-incrimination. The fourteenth amendment guarantees all defendants the right to due process of law.⁴⁴ Because there are many possible explanations for an individual's failure to speak, one can argue that prior silence is unlikely to be probative of the falsity of a defendant's testimony and that the impeachment use of prior silence therefore violates the due process clause. These arguments have been examined by the Court in the context of both post-arrest and pre-arrest silence.

A. *DOYLE V. OHIO*

In *Doyle v. Ohio*,⁴⁵ the Court prohibited, on the basis of federal constitutional law, the impeachment use of post-arrest silence which follows the receipt of *Miranda* warnings. Jefferson Doyle was arrested and charged with selling marijuana to a local narcotics bureau informant. At the time of the arrest and pursuant to a valid warrant, the police searched Doyle's car and recovered the money that had allegedly been

testimony of a government witness who had offered the same evidence in the first proceeding. Over the objections of defense counsel, the trial court allowed the prosecution to cross-examine the defendant on his silence at the first trial. The Supreme Court concluded that the silence was inconsistent with the defendant's testimony at the second proceeding and that the prosecution's use of the silence for impeachment purposes did not violate the defendant's fifth amendment privilege against compelled self-incrimination. *Id.* at 499. In *Hale*, the Court distinguished *Raffel* by concluding that the defendant's prior silence was not inconsistent with his testimony. 422 U.S. at 171.

⁴¹ See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 85 (1980).

⁴² *Griffin v. California*, 380 U.S. 609, 614 (1965). The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

⁴³ See *infra* note 97.

⁴⁴ The fourteenth amendment provides that "[n]o state shall] deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

⁴⁵ 426 U.S. 610.

used to purchase the marijuana. The authorities informed Doyle of his *Miranda* rights. Although Doyle asked the police why they were arresting him, he did not offer an explanation for his possession of the money.⁴⁶

At his trial in state court, Doyle testified that he had met with the informant to buy rather than to sell narcotics and that the informant had given him the money in order to frame him. The prosecution attempted to impeach Doyle's credibility by asking the defendant why he had not provided this explanation at the time of his arrest. Over the objections of defense counsel, the trial court ruled that this line of cross-examination was proper. Doyle was convicted of selling narcotics and this ruling was upheld by the state appellate court.⁴⁷

The Supreme Court granted certiorari and reversed the ruling of the state courts.⁴⁸ The Court held that the due process clause of the fourteenth amendment prohibits the impeachment use of an individual's post-arrest silence if the individual had previously been informed of his right to remain silent.⁴⁹ The Court advanced two grounds for its decision. First, it contended that post-arrest silence is "insolubly ambiguous" when an arrestee has received *Miranda* warnings because the arrestee may simply be exercising his right to remain silent.⁵⁰ Second, it asserted that it would be "fundamentally unfair" to permit post-arrest silence to be used to impeach an explanation subsequently offered at trial because the *Miranda* warnings contain an implied assurance that silence will carry no penalty.⁵¹

⁴⁶ *Id.* at 611.

⁴⁷ *Id.* at 615.

⁴⁸ *Id.* at 619.

⁴⁹ *Id.*

⁵⁰ *Id.* at 617. In a footnote, the Court cited its decision in *Hale* for the proposition that post-arrest silence may be inherently ambiguous apart from the impact of *Miranda* warnings. *Id.* at 618 n.8. The majority noted, however, that *Doyle* originated in a state court and therefore provided no occasion for the exercise of the Court's supervisory power over the lower federal courts. *Id.* Although the majority asserted that post-arrest silence is "insolubly ambiguous," it contended that it was expressing no opinion as to the probative value of Doyle's post-arrest silence. *Id.* The Court was apparently acknowledging that it was not authorized to review the state court's application of state evidentiary law. See *supra* note 13 and accompanying text.

⁵¹ 426 U.S. at 618. In his dissenting opinion, Justice Stevens argued that there is nothing deceptive in the *Miranda* warnings and that the use of post-arrest silence for impeachment purposes does not violate the due process clause of the fourteenth amendment. *Id.* at 626 (Stevens, J., dissenting). In addition, he asserted that the receipt of *Miranda* warnings does not lessen the probative value of post-arrest silence. *Id.* at 621 (Stevens, J., dissenting). Justice Stevens concluded that Doyle's silence was inconsistent with his subsequent exculpatory statements at trial and was therefore admissible for impeachment purposes. *Id.* at 626 (Stevens, J., dissenting).

Justice Stevens also examined a passage from *Miranda* which the majority did not discuss. In *Miranda*, the Court noted that "it is impermissible to penalize an individual for exercising

B. *JENKINS V. ANDERSON*

In *Jenkins v. Anderson*,⁵² the Court considered for the first time the use of a defendant's pre-arrest silence for impeachment purposes. Dennis Jenkins stabbed and killed a man after an argument and brief struggle. Although Jenkins informed his probation officer of the stabbing three days later, he was not arrested until he turned himself over to the police nearly two weeks after the incident.⁵³

At his trial in state court, Jenkins testified that he had acted in self-defense. The prosecution attempted to discredit this testimony by emphasizing during cross-examination that Jenkins had waited nearly two weeks before reporting the stabbing to the authorities. In its closing argument to the jury, the prosecution once again referred to the defendant's pre-arrest silence. Jenkins was convicted of manslaughter and this ruling was upheld by the state appellate court.⁵⁴ Following his conviction, Jenkins petitioned for a writ of habeas corpus, contending that the impeachment use of his pre-arrest silence violated both his fifth amendment privilege against compelled self-incrimination and his right to due process under the fourteenth amendment.⁵⁵ The district court and the court of appeals refused to grant the writ, and the Supreme Court affirmed the denial of the petition for habeas corpus relief.⁵⁶

In support of its decision, the Court cited *Raffel v. United States*⁵⁷ for

[his right to remain silent] when he is under custodial interrogation. The prosecution may not, therefore, use at trial the fact that [the individual] stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37. Justice Stevens concluded that this passage did not apply. 426 U.S. at 628 (Stevens, J., dissenting). First, he noted that Doyle neither stood mute nor claimed the privilege. *Id.* at 627 (Stevens, J., dissenting). Second, he cited the distinction between the affirmative use of an individual's prior silence and the use of that silence for the limited purpose of impeachment and concluded that *Miranda* was not directed at the latter. *Id.* at 628 (Stevens, J., dissenting). Because the Court in *Doyle* based its decision on the due process clause of the fourteenth amendment, it did not reach this or any other fifth amendment issue.

⁵² 447 U.S. 231.

⁵³ *Id.* at 232.

⁵⁴ *Id.* at 234.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 271 U.S. 494. In *Raffel*, the Court held that the fifth amendment does not prohibit the impeachment use of a defendant's failure to testify at a previous trial. *See supra* note 40. In *Jenkins*, the majority noted that a defendant's silence at a previous trial is more clearly protected by the fifth amendment than is a defendant's pre-arrest silence, and concluded that the Court's decision in *Raffel* therefore established that the impeachment use of pre-arrest silence does not violate the privilege against compelled self-incrimination.

In his concurring opinion in *Jenkins*, Justice Stevens asserted that the Court's reliance on *Raffel* incorrectly implied that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence in a pre-custody context. 447 U.S. at 241 (Stevens, J., concurring). Given that a citizen is under no official compulsion to speak or to remain silent, Justice Stevens reasoned that a voluntary decision to do one or the other does not raise an issue under the fifth amendment. *Id.* at 244 (Stevens, J., concurring). In his dissenting

the proposition that "the [fifth amendment privilege against compelled self-incrimination] is not violated when a defendant who testifies in his own defense is impeached with his prior silence."⁵⁸ The majority acknowledged that the possibility of impeachment by prior silence might discourage the exercise of fifth amendment rights, but argued that this burden was permissible given the importance of impeachment to the ascertainment of the truth.⁵⁹ The Court rejected the defendant's fourteenth amendment claim by noting that "no governmental action induced [Jenkins] to remain silent."⁶⁰ The Court concluded that the fundamental unfairness present in *Doyle* was absent in *Jenkins* because Jenkins's silence did not follow the receipt of *Miranda* warnings.⁶¹

IV. *FLETCHER V. WEIR*

Eric Weir stabbed Ronnie Buchanan during a fight in a night club parking lot in Kentucky. Weir immediately left the scene and did not report the incident to the police. Buchanan died as a result of the stabbing and Weir was ultimately arrested and charged with intentional murder. The authorities apparently did not inform Weir of his *Miranda* rights.⁶²

At his trial in Kentucky state court, Weir testified in his own defense and admitted on direct examination that he had stabbed Buchanan. He asserted, however, that he had acted in self-defense and that the stabbing had been accidental. This was the first occasion on

opinion, Justice Marshall confessed that he found this view of the fifth amendment "incomprehensible." *Id.* at 250 n.4 (Marshall, J., dissenting). Justice Marshall argued that the violation of the fifth amendment occurred not when the defendant remained silent, but when that silence was later used to impeach his credibility at trial. *Id.* (Marshall, J., dissenting). For a more complete discussion of the applicability of the fifth amendment to the impeachment use of pre-arrest silence, see *infra* note 86.

⁵⁸ 447 U.S. at 235.

⁵⁹ *Id.* at 238. For a more complete discussion of the importance of impeachment to the ascertainment of the truth at trial, see *infra* notes 100-01 and accompanying text.

⁶⁰ 447 U.S. at 240.

⁶¹ *Id.* Because *Jenkins* originated in a state court, the Court was unable to exercise its supervisory power over the lower federal courts and did not consider the probative value of Jenkins' pre-arrest silence. The Court noted, however, that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." *Id.*

In his dissenting opinion, Justice Marshall presented three arguments in support of reversal. First, he contended that pre-arrest silence is of so little probative value that to permit its use for impeachment purposes is contrary to the due process clause of the fourteenth amendment. Second, he argued that the fifth amendment right to remain silent applied to Jenkins before the defendant's arrest and therefore precluded the use of Jenkins's silence at trial. Third, he asserted that permitting the impeachment use of pre-arrest silence impermissibly burdens the exercise of the constitutional right to testify in one's own defense. *Id.* at 246 (Marshall, J., dissenting). Justice Brennan joined Justice Marshall in dissent.

⁶² See *infra* note 69.

which Weir had advanced an exculpatory version of the stabbing. On cross-examination, the prosecution emphasized that Weir had failed to report the incident to the police and had at no time offered an explanation for his actions. Weir was found guilty of first degree manslaughter and his conviction was upheld by the Supreme Court of Kentucky.⁶³

Following his conviction, Weir petitioned for a writ of habeas corpus, contending that the impeachment use of his prior silence violated his constitutional rights. The district court granted the writ and the Commonwealth of Kentucky appealed from this judgment.⁶⁴

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's grant of Weir's petition for habeas corpus relief.⁶⁵ The court held that the use of Weir's pre-arrest silence for impeachment purposes was constitutional under *Jenkins*, but that it was inherently unfair under the due process clause of the fourteenth amendment to permit cross-examination on the defendant's silence following arrest.⁶⁶ Although the majority found a "superficial logic" to the position that the impeachment use of post-arrest silence is only unfair when the authorities actually inform an arrestee of his right to remain silent, it rejected this limitation for two reasons. First, the court contended that post-arrest silence is not probative of the falsity of a defendant's testimony.⁶⁷ Second, the court asserted that many if not most arrestees know that they have the right to remain silent and exercise that right.⁶⁸ The court concluded that arrest itself is governmental action which implicitly induces silence, and that it is therefore "fundamentally unfair" to use post-arrest silence for impeachment purposes at trial.⁶⁹

⁶³ 102 S. Ct. at 1310.

⁶⁴ *Id.*

⁶⁵ 658 F.2d 1126, 1133 (6th Cir. 1981).

⁶⁶ *Id.* at 1131. The court of appeals did not articulate the constitutional basis for its decision. Although the majority noted that the district court had relied on the fifth amendment in granting Weir's petition for a writ of habeas corpus and had announced that it was affirming the decision to grant habeas corpus relief, the court of appeals relied on the reasoning in *Doyle* to reach its conclusion and apparently based its decision on the due process clause of the fourteenth amendment. The Supreme Court did not consider whether the impeachment use of Weir's post-arrest silence was prohibited by the fifth amendment privilege against compelled self-incrimination.

⁶⁷ *Id.* at 1130. The court quoted extensively from the majority opinion in *Hale* to support this contention. See *supra* note 37 and accompanying text.

⁶⁸ 658 F.2d at 1131. The court asserted that the news media has widely publicized both the *Miranda* decision and the formal warnings which the authorities must administer before subjecting an individual to custodial interrogation. *Id.*

⁶⁹ *Id.* The Commonwealth of Kentucky argued on appeal that the case should be remanded for an evidentiary hearing to determine if and when the authorities informed Weir of his *Miranda* rights. Because the court of appeals concluded that the defendant's constitutional rights were violated regardless of whether he had received *Miranda* warnings, it decided that a remand was unnecessary. *Id.* at 1129 n.8.

The court also suggested that two practical problems would arise if the constitutional

The Supreme Court summarily reversed the decision of the court of appeals in a brief per curiam opinion which Justices Brennan and Marshall did not join.⁷⁰ The Court contended that the approach taken by the court of appeals was unsupported by the reasoning in *Doyle* and inconsistent with the subsequent interpretations of that case.⁷¹ The opinion asserted that the decisions of the Court had consistently explained *Doyle* as a case in which the government had induced silence by implicitly assuring the defendant that his silence would not be used against him.⁷² Because the record did not indicate that Weir had received *Miranda* warnings, the opinion argued that the government had not induced the defendant to remain silent.⁷³ The Court concluded that the impeachment use of Weir's post-arrest silence did not violate the defendant's right to due process under the fourteenth amendment.⁷⁴

Although the Court declined to prohibit the impeachment use of all post-arrest silence as a matter of federal constitutional law, it emphasized that the state courts are entitled to determine under their own rules of evidence the extent to which prior silence may be used for impeachment purposes at trial.⁷⁵ The opinion cited the decision in *Hale* as an example of this approach and noted that the principles which have developed as a result of federal decisional law are not necessarily based on the federal constitution.⁷⁶ The Court stressed that the state courts are free to disregard non-constitutional principles provided that state procedure remains consistent with due process of law.⁷⁷

protection provided in *Doyle* were conditioned upon an individual's receipt of *Miranda* warnings. See *infra* notes 106-08 and accompanying text.

⁷⁰ 102 S. Ct. 1309. Justice Brennan would have set the case for oral argument. *Id.* at 1312 (Brennan, J., dissenting). Justice Marshall dissented from the summary reversal of the case. *Id.* at 1312 (Marshall, J., dissenting).

⁷¹ *Id.* at 1311.

⁷² *Id.* The Court cited *Roberts v. United States*, 445 U.S. 552 (1980), *Anderson v. Charles*, 447 U.S. 404 (1980), and *Jenkins* in support of this assertion. In *Roberts*, the Court distinguished post-conviction silence from post-arrest silence and emphasized that the latter "may be induced by the assurance contained in *Miranda* warnings." 445 U.S. at 561. In *Anderson*, the Court held that *Doyle* "bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." 447 U.S. at 408. In *Jenkins*, the Court noted that the impeachment use of post-arrest silence in *Doyle* was fundamentally unfair because the silence occurred after *Doyle* had been taken into custody and informed of his right to remain silent. 447 U.S. at 239.

⁷³ 102 S. Ct. at 1312.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1311.

⁷⁷ *Id.* The individual states decide whether to follow or disregard federal decisional law. See generally J. NOWAK, *supra* note 4, at ch. 1. In the context of evidentiary law, a state that has adopted the Federal Rules of Evidence might be inclined to apply federal evidentiary principles. The state courts are also free to grant individuals more rights than those guaranteed by the federal constitution if this is done on the basis of state law. *Id.* See generally

V. AN ANALYSIS OF THE SUPREME COURT DECISION
IN *FLETCHER V. WEIR*

The impeachment use of prior silence raises important evidentiary and constitutional questions which warrant thoughtful examination.⁷⁸ Unfortunately, the Supreme Court opinion in *Fletcher v. Weir* offers little more than an unpersuasive recitation of legal precedent. The opinion does not address the arguments supporting a constitutional prohibition of the impeachment use of all post-arrest silence and does not discuss the practical implications of conditioning the prohibition upon the prior receipt of *Miranda* warnings. Nevertheless, the Court's decision to defer to state evidentiary law rather than to announce a *per se* rule under the federal constitution is neither surprising nor inexpedient.

A. THE REASONING OF THE COURT

In *Doyle*, the Court relied on the due process clause of the fourteenth amendment to prohibit the impeachment use of post-arrest silence which follows the receipt of *Miranda* warnings.⁷⁹ Recently, the Court has retreated from the approach taken in *Doyle* and has demonstrated an unwillingness to prohibit the use of prior silence for impeachment purposes as a matter of federal constitutional law.⁸⁰ The Court's decision in *Fletcher* is consistent with this trend.

As noted above, the Court advanced two grounds for its decision in *Doyle*.⁸¹ First, it reasoned that post-arrest silence is "insolubly ambiguous" when an arrestee has received *Miranda* warnings because the arrestee may simply be exercising his right to remain silent.⁸² Second, it asserted that it would be "fundamentally unfair" to permit post-arrest silence to be used to impeach an explanation subsequently offered at trial because the *Miranda* warnings contain an implied assurance that silence will carry no penalty.⁸³ Each of these arguments apparently contributed to the Court's conclusion that the due process clause of the fourteenth amendment prohibits the impeachment use of post-arrest silence. Because the majority found a violation of due process, it did not reach the defendant's fifth amendment claim.⁸⁴ In *Jenkins*, the Court upheld the impeachment use of prior silence under the fifth amendment

Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

⁷⁸ See *supra* notes 41-44 and accompanying text.

⁷⁹ See *supra* notes 45-51 and accompanying text.

⁸⁰ See *infra* note 105 and accompanying text.

⁸¹ See *supra* notes 50-51 and accompanying text.

⁸² 426 U.S. at 617.

⁸³ *Id.* at 618.

⁸⁴ See *supra* note 51.

and weakened *Doyle* by implicitly rejecting the first of the decision's two fourteenth amendment rationales.⁸⁵

Because *Jenkins* was the first case in which the Court considered whether the fifth amendment prohibits the impeachment use of pre-arrest silence, the Court's decision to deny the defendant's fifth amendment claim did not retreat from precedent. Nevertheless, the Court seemed determined to go beyond the facts of the case and suggest that the impeachment use of prior silence is never prohibited by the privilege against compelled self-incrimination. First, the majority considered and rejected the fifth amendment argument rather than simply holding that the fifth amendment does not apply in the pre-arrest context.⁸⁶ The latter approach would have left open the question whether the privilege against compelled self-incrimination prohibits the impeachment use of post-arrest silence. Second, the majority relied on *Raffel*, a case of questionable vitality, to support its interpretation of the fifth amendment.⁸⁷ The Court's "resurrection" of *Raffel* enabled it broadly to assert that "[the privilege against compelled self-incrimination] is not violated when a defendant who testifies in his own defense is impeached with his prior silence."⁸⁸ Although *Jenkins* involved only the impeachment use of pre-arrest silence, the Court's analysis of the fifth amendment permits the impeachment use of post-arrest silence as well.

The Court's decision in *Jenkins* also limited the protection afforded by the due process clause of the fourteenth amendment. In *Jenkins*, the Court permitted the impeachment use of prior silence that was arguably less probative than the silence involved in *Doyle*. *Jenkins* had not been accused of a crime at the time of his silence and it is unlikely that his knowledge of the doctrine of self-defense was sufficient to overcome his

⁸⁵ See *The Supreme Court, 1979 Term*, *supra* note 41, at 84.

⁸⁶ The fifth amendment does not guarantee an unconditional right to remain silent. It provides only that the criminal defendant may not be compelled to testify. See *supra* note 42 and accompanying text. In *Miranda*, the Court extended the fifth amendment right to remain silent to include pre-trial situations in which an individual is subjected to custodial interrogation. See *infra* note 97. Prior to custodial interrogation, however, an individual does not have a constitutional right to remain silent and is not in a position to have his testimony "compelled." The subsequent impeachment use of his failure to speak therefore does not involve the privilege against compelled self-incrimination. In *Jenkins*, the Court could have employed this analysis and held that the fifth amendment does not apply in the pre-arrest context.

⁸⁷ In *Grunewald*, the Court held that the fifth amendment prohibits the impeachment use of a defendant's decision not to testify before a grand jury. *Grunewald v. United States*, 353 U.S. 391, 415 (1957). In a concurring opinion, four justices reasoned that the use of a constitutional privilege to discredit or convict an individual who asserts it is never justified and argued that *Raffel* should be explicitly overruled. *Id.* at 426. See *Jenkins*, 447 U.S. at 241 n.2 (Stevens, J., concurring).

⁸⁸ 447 U.S. at 235. The reference to the "resurrection" of *Raffel* is taken from the dissenting opinion in *Jenkins*. See *id.* at 252 (Marshall, J., dissenting).

natural reluctance to volunteer to the police that he had killed a man.⁸⁹ Moreover, Jenkins was a black man on parole in a racially divided city and had twice been convicted of felonies.⁹⁰ These considerations suggest that his decision to remain silent was motivated by fear rather than guilt.⁹¹ Nevertheless, the Court concluded that the impeachment use of Jenkins's pre-arrest silence was not prohibited by the due process clause of the fourteenth amendment. Because of the limited probative value of Jenkins's prior silence, this conclusion suggests that virtually any silence is sufficiently probative to satisfy due process of law.⁹²

The Court's decision in *Jenkins* established that the fifth amendment privilege against compelled self-incrimination does not prohibit the use of prior silence for impeachment purposes.⁹³ In addition, *Jenkins* suggests that the due process clause of the fourteenth amendment only prohibits the impeachment use of prior silence if governmental action has induced the silence.⁹⁴ The Court relied on these holdings in *Fletcher* and concluded that the impeachment use of the defendant's post-arrest silence was constitutional because the defendant had not received an "affirmative assurance" that he would not be penalized if he exercised his right to remain silent.⁹⁵ The opinion implied that the government can only induce silence through the reading of *Miranda* warnings.

The Court's analysis in *Fletcher* is arguably unsound. In particular, it seems that the reading of *Miranda* warnings is not the only governmental action that can induce silence. An individual who is aware of his right to remain silent may be induced to exercise that right by the act of arrest.⁹⁶ Because the federal constitution has implicitly assured the individual who is aware of his right to remain silent that post-arrest silence will carry no penalty, the impeachment use of his silence would appear to be "fundamentally unfair" and constitutionally impermissible.⁹⁷

⁸⁹ The evidence suggests that Jenkins had no knowledge of the doctrine of self-defense. When asked to explain why he had not turned himself over to the authorities if he was innocent, Jenkins testified that he did not know anything about the law. Appendix at 38, *Jenkins v. Anderson*, 447 U.S. 231 (1980).

⁹⁰ *Id.* at 48.

⁹¹ See *Jenkins*, 447 U.S. at 248 (Marshall, J., dissenting).

⁹² See *The Supreme Court, 1979 Term*, *supra* note 41, at 85.

⁹³ See *supra* notes 57-59 and accompanying text.

⁹⁴ See *supra* notes 60-61 and accompanying text.

⁹⁵ 102 S. Ct. at 1312.

⁹⁶ This was one of two arguments advanced by the court of appeals in *Fletcher* in support of its position that the due process clause of the fourteenth amendment prohibits the impeachment use of all post-arrest silence. See 658 F.2d at 1131.

⁹⁷ The furnishing of *Miranda* warnings does not create the right to remain silent. The warnings are necessary as "prophylactic safeguards" to counteract the potential for compulsion inherent in custodial interrogation and thereby protect an arrestee's fifth amendment privilege against compelled self-incrimination. The right to remain silent is therefore derived from the federal constitution. See *Jenkins*, 447 U.S. at 247 n.1. (Marshall, J., dissenting).

Moreover, considerable support exists for the position that knowledge of the post-arrest right to remain silent is widespread.⁹⁸ This consideration increases the likelihood that an individual has been induced to remain silent by the act of arrest and suggests that the impeachment use of post-arrest silence violates the due process clause of the fourteenth amendment regardless of whether the individual had received *Miranda* warnings.⁹⁹

Although the act of arrest might induce an individual to remain silent, the mere possibility of such inducement does not necessarily justify the extension of protection under the federal constitution. The concern for the protection of individual rights must be balanced against the need for impeachment as a means of ascertaining the truth at trial. The impeachment process plays a critical role in the adversary system.¹⁰⁰ It forces a witness to explain his prior inconsistent assertions and discourages the presentation of fabricated defenses.¹⁰¹ Because the impeachment use of prior silence enhances the reliability of the criminal process,

⁹⁸ See Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 224 (1979); Note, *Evidence — Exclusion and Suppression — Silence of Defendant When Arrested May Not Be Used to Impeach His Testimony*, 87 HARV. L. REV. 882, 885 (1974). Both of these articles suggest that the public awareness of the post-arrest right to remain silent is extensive. See also *supra* note 68 and accompanying text.

⁹⁹ The federal appellate courts have consistently taken this position. Although the second circuit has noted that the Court's decision in *Jenkins* might require a re-examination of the significance of an individual's having been informed of his right to remain silent, see *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981), the other circuits have not suggested that the constitutional protection provided in *Doyle* should be conditioned upon an individual's receipt of *Miranda* warnings. See, e.g., *United States v. Curtis*, 644 F.2d 263 (3d Cir. 1981); *Alo v. Olim*, 639 F.2d 466 (9th Cir. 1980); *United States v. Harrington*, 636 F.2d 1182 (9th Cir. 1980); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980).

A number of cases decided before the Court's decision in *Jenkins* have reached the same conclusion. See, e.g., *United States v. Nunez-Rioz*, 622 F.2d 1093 (2d Cir. 1980); *Bradford v. Stone*, 594 F.2d 1294 (9th Cir. 1979); *United States ex rel. Allen v. Rowe*, 591 F.2d 391 (7th Cir. 1979), *vacated and remanded for reconsideration in light of Jenkins*, 447 U.S. 917 (1980); *Douglas v. Cupp*, 578 F.2d 266 (9th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979).

In his dissenting opinion in *Jenkins*, Justice Marshall reasoned that the impeachment use of post-arrest silence should be constitutionally prohibited regardless of whether an individual has received *Miranda* warnings. 447 U.S. at 247 n.1 (Marshall, J., dissenting). Justice Marshall argued that post-arrest silence is "insolubly ambiguous." *Id.*

¹⁰⁰ See *Jenkins*, 447 U.S. at 238.

¹⁰¹ The need to develop all relevant facts at trial is both "fundamental and comprehensive." *United States v. Nixon*, 418 U.S. 683, 709 (1974). In *Doyle*, the Court recognized that "unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." 426 U.S. at 617 n.7. The importance of impeachment was also emphasized in *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the Court held that although statements taken in violation of *Miranda* could not be used by the prosecution as part of its case in chief, they were admissible for the limited purpose of impeachment. *Id.* at 225.

it should only be restricted when the possibility of violating individual rights is substantial.

The reading of *Miranda* warnings constitutes the most direct and convincing assurance to an arrestee that he will not be penalized if he remains silent.¹⁰² It establishes that the arrestee is aware of his right to remain silent and increases the probability that he has been induced to exercise that right. When an individual has not been informed of his right to remain silent, a failure to speak is less likely to have constitutional significance. Moreover, an arrestee who has not received *Miranda* warnings will probably inform the authorities of a decision to invoke his right to remain silent and thereby both limit the interrogation and explain his failure to speak. In the absence of an express invocation of the right to remain silent, the receipt of *Miranda* warnings constitutes the point at which the probative value of prior silence is outweighed by the possibility that governmental action has induced an arrestee to remain silent.¹⁰³

The balancing test outlined above supports a refusal constitutionally to prohibit the impeachment use of all post-arrest silence. As indicated, however, an express invocation of the right to remain silent should require constitutional protection regardless of whether an individual has received *Miranda* warnings. An express invocation of the right to remain silent establishes that an individual is aware of his right to remain silent and increases the likelihood that he is relying on the constitutional assurance that silence will carry no penalty.¹⁰⁴ The Court's reasoning in *Doyle* suggests that to permit the impeachment use

¹⁰² The effectiveness of the *Miranda* warnings is thought to follow not only from the important rights which are provided, but also from the fact that the warnings are being administered to the arrestee by his interrogators. See *Miranda*, 384 U.S. at 468. The second of these conditions is essential because it increases an arrestee's confidence in his ability to limit police conduct. See *id.*

¹⁰³ The dissenting opinion in the court of appeals advanced a similar argument. 658 F.2d at 1136 (Engel, J., dissenting). The dissent asserted that prior silence often is of significant probative value and that due process was only implicated in *Doyle* because the probative value of the defendant's post-arrest silence was outweighed by the need to protect the integrity of the implied promise made by the authorities through their reading of the *Miranda* warnings. *Id.* The dissent concluded that, in the absence of express warnings, the need for full factual disclosure in order to ascertain the truth outweighed the constitutional concern for procedural due process. *Id.* at 1137 (Engel, J., dissenting).

The dissent also suggested that the Court's decision in *Doyle* was motivated in part by a concern that the authorities would deliberately use *Miranda* warnings to induce an arrestee to remain silent and thereby obtain impeachment evidence. *Id.* at 1134 (Engel, J., dissenting). Although this concern would explain the Court's emphasis on an individual's receipt of *Miranda* warnings rather than his knowledge of the right to remain silent, no support exists for the dissent's contention in the language of the opinion. Moreover, the clear purpose of custodial interrogation is to elicit information rather than to obtain impeachment evidence for a possible trial. See *infra* notes 110-11 and accompanying text.

¹⁰⁴ An express invocation of the right to remain silent will often render an arrestee's silence

of post-arrest silence under these circumstances would violate the due process clause of the fourteenth amendment. The Court's opinion in *Fletcher* does not recognize this exception and instead focuses exclusively upon whether an arrestee had received *Miranda* warnings at the time of his prior silence. Although this approach is inconsistent with the Court's earlier reasoning, it reflects the Court's apparent intention to limit the impact of its decision in *Doyle*.¹⁰⁵

B. PRACTICAL CONSIDERATIONS

The court of appeals in *Fletcher* suggested that two practical problems would arise if the constitutional protection provided in *Doyle* were conditioned upon an individual's receipt of *Miranda* warnings. First, the majority contended that the knowledgeable defendant would be penalized because he is more likely to exercise his right to remain silent despite the failure of the authorities to inform him of that right.¹⁰⁶ Second, the majority asserted that the police would be encouraged to postpone the reading of *Miranda* warnings if they could use any post-arrest silence for impeachment purposes at trial.¹⁰⁷ Neither of these concerns justifies an unqualified prohibition of the impeachment use of post-arrest silence.¹⁰⁸

natural and therefore inadmissible under traditional evidentiary law. See *supra* notes 1-3 and accompanying text.

¹⁰⁵ In addition to the limitations imposed in *Jenkins*, see *supra* notes 85-94 and accompanying text, the Court has evidenced an unwillingness to remedy violations of its holding in *Doyle*. See, e.g., *Briggs v. Connecticut*, 447 U.S. 912 (1980) (Marshall, J., dissenting from denial of certiorari); *Blakley v. Florida*, 444 U.S. 904, 904-05 (1979) (White, J., dissenting from denial of certiorari). In each of these cases, the state courts permitted the impeachment use of post-arrest silence despite the defendant's receipt of *Miranda* warnings. The Court has also weakened *Doyle* by limiting the definition of "silence." In *Anderson*, the Court examined the combination of post-arrest statements and post-arrest silence and held that a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. *Anderson*, 447 U.S. at 408. This conclusion ignores the ability of an arrestee to invoke his right to remain silent at any time during custodial interrogation.

The Court's apparent retreat from the principles announced in *Doyle* was perhaps inevitable. In *Doyle*, the Court relied on *Miranda* to increase the protection of individual rights at a time when the Court was consistently attempting to limit the impact of *Miranda* and avoid the establishment of *per se* exclusionary rules. See generally Grossman & Lane, *Miranda: The Erosion of a Doctrine*, 62 CHI. B. REC. 250 (1981); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

¹⁰⁶ 658 F.2d at 1132.

¹⁰⁷ *Id.*

¹⁰⁸ A third consideration involves the jury's ability to distinguish between the impeachment use and the substantive use of prior silence. Although prior inconsistent assertions may be introduced to discredit a witness's testimony, they are generally inadmissible as substantive evidence under the rule against hearsay. 3A J. WIGMORE, *supra* note 1, § 1018, at 995. The jury can therefore consider prior inconsistent assertions for the purpose of judging a witness's veracity but must not treat the evidence as direct proof of the offense with which the defendant has been charged. Empirical studies suggest that juries are unable to make this distinc-

The first argument begs the question by assuming a right to constitutional protection. The knowledgeable defendant is by definition more likely to exercise his right to remain silent despite the failure of the authorities to inform him of that right. He is therefore more likely to have the impeachment use of his post-arrest silence examined under state evidentiary law rather than prohibited under the federal constitution. It does not necessarily follow, however, that the knowledgeable defendant is being penalized by the Court's decision in *Fletcher*. The case merely limits the protection afforded under the federal constitution because the protection is not justified. Unless an arrestee has received *Miranda* warnings or has expressly invoked his right to remain silent, the probative value of prior silence outweighs the danger that governmental action has induced the arrestee's failure to speak.¹⁰⁹

The second argument ignores the purpose of custodial interrogation. Because the procedural safeguards outlined in *Miranda* are triggered by the combination of custody and interrogation,¹¹⁰ the authorities could conceivably arrest an individual but not subject him to interrogation and thereby preserve the opportunity to use any post-arrest silence for impeachment purposes at trial. It is unlikely, however, that the Court's decision in *Fletcher* will encourage the police to deliberately postpone the reading of *Miranda* warnings. The purpose of custodial interrogation is to elicit information. From the perspective of the police and the prosecution, the risk that police conduct will be interpreted by a court as interrogation and that valuable statements will therefore be excluded greatly outweighs the possibility that an arrestee will remain silent and that this silence will be admissible for impeachment purposes at trial.¹¹¹

tion when prior inconsistent silence is involved. See Schiller, *supra* note 98, at 225. As a result, it has been argued that the impeachment use of prior silence unduly prejudices the defendant and should therefore be prohibited. *Id.*

Even if one assumes that juries are unable to distinguish between the impeachment use and the substantive use of prior silence, it does not necessarily follow that the impeachment use of prior silence unduly prejudices the defendant. The substantive use of prior inconsistent assertions is arguably desirable. As originally drafted, the Federal Rules of Evidence called for the substantive use of this evidence. FED. R. EVID. 801 advisory committee note. Although legislative compromise limited this provision to prior inconsistent assertions made under oath, some commentators continue to argue that all prior inconsistent assertions should be admissible as substantive evidence. See, e.g., Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d) (1) (A), 613, and 607*, 75 MICH. L. REV. 1565 (1977).

¹⁰⁹ See *supra* notes 102-03 and accompanying text.

¹¹⁰ *Miranda*, 384 U.S. at 444.

¹¹¹ Even if the authorities would be encouraged to postpone the reading of *Miranda* warnings by the decision in *Fletcher*, the Court has indicated that this concern is not controlling. In *Harris*, the Court emphasized that "[t]he impeachment process . . . undoubtedly provide[s] valuable aid to the jury in assessing [a witness's] credibility, and the benefits of this process

The Court's decision in *Fletcher* was undoubtedly influenced by the procedural history of the case. Because *Fletcher* originated in a state court, the Court was forced either to announce a *per se* rule under the federal constitution or to defer to the Kentucky state court and affirm the defendant's conviction.¹¹² The Court's decision to adopt the latter approach shifts to the state courts the responsibility for determining whether to permit the impeachment use of silence which follows arrest but precedes the receipt of *Miranda* warnings.¹¹³ This determination should be made on the basis of state evidentiary law¹¹⁴ and should involve a weighing of the probative value of the prior silence against the standard countervailing considerations.¹¹⁵ This procedure enables the state courts to control the impeachment use of prior silence in accordance with the circumstances of the particular case. Moreover, it preserves the benefits of impeachment and adequately protects individual rights.

As noted above, the impeachment use of prior silence contributes to the ascertainment of the truth.¹¹⁶ In many situations, the probative value of prior silence is significant. For example, an arrestee's failure to inform the authorities of circumstances which would establish his innocence or bring about his immediate release is clearly unnatural and

should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Harris v. New York*, 401 U.S. 222, 225 (1971).

¹¹² See *supra* note 13 and accompanying text.

¹¹³ This shifting of responsibility is consistent with the "new federalism" philosophy of the Burger Court. See generally *Symposium, State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 599 (1981).

¹¹⁴ The states could also make this determination on the basis of state constitutional law. The Burger Court's reluctance to expand individual rights has led many state courts to look to their own constitutions as a source of additional procedural safeguards. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *supra* note 77. This approach is particularly effective because the federal courts cannot review state court decisions based on state constitutional law. See generally J. NOWAK, *supra* note 4, at ch. 1.

Although reliance on state constitutional provisions is not uncommon, this procedure seems inappropriate as a means of restricting the impeachment use of prior silence. The Court did not mention state constitutional law in *Fletcher*, and the opinion suggests that the impeachment use of prior silence is primarily an evidentiary problem. The state courts can look to their own evidentiary law as a source of the greater protection which the Court refused to extend under the federal constitution. This approach enables the state courts to control the impeachment use of prior silence in accordance with the circumstances of the particular case.

¹¹⁵ See *supra* notes 23-24 and accompanying text. The evidentiary analysis should be made outside the presence of the jury, and a decision to introduce the prior silence should be accompanied by a jury instruction which emphasizes that the evidence is being admitted for the limited purpose of impeachment. But see *supra* note 108. Rule 104 of the Federal Rules of Evidence provides that "[h]earings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury [and] [h]earings on other preliminary matters shall be so conducted when the interests of justice require . . ." FED. R. EVID. 104(c).

¹¹⁶ See *supra* notes 100-01 and accompanying text.

should be admissible in the event that he asserts the exculpatory circumstances at trial. Even when the advantages of speaking to the authorities are less obvious, disclosure of a defendant's prior silence may contribute to the development of relevant facts. The application of state evidentiary law is responsive to the need for impeachment in these situations.

In addition to preserving the benefits of impeachment, the application of state evidentiary law adequately protects individual rights. First, the impeachment process requires an initial finding of inconsistency between a witness's testimony and his prior silence.¹¹⁷ This requirement protects the defendant whose prior silence was natural under the circumstances of the particular case. Second, the traditional evidentiary standards of admissibility require that relevant evidence be excluded if its probative value is outweighed by the risks which would accompany its admission.¹¹⁸ This principle enables the state courts to prohibit the impeachment use of prior silence even though the silence was unnatural if this is necessary to protect individual rights. Finally, the defendant has an opportunity to explain his prior silence if the silence is used to impeach his testimony.¹¹⁹ In *Hale*, the majority suggested that this procedure would be unlikely to overcome "the strong negative inference that the jury is likely to draw" from the defendant's failure to speak.¹²⁰ The Court provided no empirical data to support this general proposition, however, and the position does not seem to be validated by experience. A defendant who was aware of his right to remain silent and was induced to exercise that right by his arrest can testify as to the source of his knowledge and the reasons for his conduct.¹²¹ Explanations of prior silence are no different from any other facts about which a witness may

¹¹⁷ See *supra* notes 1-3 and accompanying text.

¹¹⁸ See *supra* notes 21-24 and accompanying text.

¹¹⁹ A witness who has been impeached on cross-examination must be afforded an opportunity to explain his prior assertions and thereby rehabilitate his credibility. 4 J. WIGMORE, *supra* note 1, §§ 1100-1144. Rule 613 of the Federal Rules of Evidence provides that "[e]xtrinsic evidence of a prior inconsistent [assertion] by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." FED. R. EVID. 613(b).

¹²⁰ 422 U.S. at 180. See *supra* note 39 and accompanying text.

¹²¹ The defendant can also explain his prior silence if he was induced to remain silent by any of the other factors discussed in *Hale*. See *supra* note 37. In his dissenting opinion in *Doyle*, Justice Stevens argued not only that a defendant's opportunity to explain his prior silence is sufficient to satisfy the requirements of the fourteenth amendment, but also that the impeachment use of post-arrest silence imposes a greater burden on due process if the defendant's silence preceded his receipt of *Miranda* warnings. He reasoned that the defendant who has been informed of his right to remain silent is better able to explain his silence as a direct consequence of the warnings and is therefore in a better position to rehabilitate his testimony. 426 U.S. at 626 (Stevens, J., dissenting).

testify.¹²² The jury must consider the evidence and determine whether the defendant is telling the truth.

VI. CONCLUSION

The impeachment use of prior silence raises important evidentiary and constitutional questions. The practice contributes to the ascertainment of the truth at trial by forcing a witness to explain his prior inconsistent assertions and by discouraging the presentation of fabricated defenses. At the same time, however, permitting prior silence to be used for impeachment purposes burdens the fifth amendment privilege against compelled self-incrimination where there has been custodial interrogation and threatens the right to due process guaranteed by the fourteenth amendment. An examination of the impeachment use of silence which follows arrest but precedes the receipt of *Miranda* warnings must therefore balance the benefits of impeachment against the concern for the protection of individual rights.

The Supreme Court opinion in *Fletcher v. Weir* contains an unpersuasive recitation of legal precedent rather than a thoughtful discussion of the balancing test outlined above. Nevertheless, the opinion's conclusion that the impeachment use of silence which follows arrest but precedes the receipt of *Miranda* warnings is constitutionally permissible is neither surprising nor inexpedient. The Court's refusal to announce a *per se* rule under the federal constitution and its failure to recognize the need for constitutional protection in the event of an express invocation of the right to remain silent are consistent with the Court's retreat from the protection of individual rights afforded in *Doyle*. At the same time, however, an examination of the facts which distinguish *Fletcher* from *Doyle* suggests that constitutional protection is not justified in the former case. The Court's decision to defer to state evidentiary law recognizes that, unless an arrestee has received *Miranda* warnings or has expressly invoked his right to remain silent, the probative value of prior silence outweighs the possibility that governmental action has induced the arrestee's failure to speak. A constitutional prohibition of the impeachment use of all post-arrest silence is therefore unwarranted. The Court's approach relies on the safeguards provided under traditional evidentiary law and allows the state courts to control the impeachment use of silence which follows arrest but precedes the receipt of *Miranda* warnings in accordance with the circumstances of the particular case.

Although the Court's decision in *Fletcher v. Weir* strikes a reasonable balance between the need for impeachment as a means of ascertaining the truth at trial and the concern for the protection of individual rights,

¹²² See 658 F.2d at 1136 (Engel, J., dissenting).

it is of limited practical importance. In order to avoid the judicial exclusion of evidence, most law enforcement agencies strictly adhere to the dictates of *Miranda* and an individual is seldom subjected to custodial interrogation without having been informed of his right to remain silent. In the unlikely event that the authorities fail to administer *Miranda* warnings, the decision in *Fletcher* is limited to those situations in which the arrestee fails to speak and his silence is subsequently used to impeach his testimony at trial. Nevertheless, *Fletcher* is a significant case. It reflects the Burger Court's continued unwillingness to increase the protection of individual rights and its emerging commitment to the "new federalism" philosophy in the administration of justice.

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