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The Admissibility of Prior Silence to Impeach the Testimony of Criminal Defendants

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THE ADMISSIBILITY OF PRIOR SILENCE TO IMPEACH THE TESTIMONY OF CRIMINAL DEFENDANTS

The fifth amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[1] An arresting officer must generally inform an accused of this right by delivering the *Miranda* warning.[2] The criminal defendant may invoke the right to remain silent throughout custodial interrogation and in a wide variety of judicial proceedings,[3] including the prior severed trial of a codefendant.[4] If, however, the defendant later chooses to testify at his own trial and offers an alibi, an exculpatory explanation, or a mitigating excuse, the prosecutor may seek to impeach the defendant's testimony by characterizing the prior silence as an inconsistent statement.

A number of constitutional and evidentiary hurdles restrict a prosecutor's use of such silence. Although the Supreme Court has found that a defendant may, under certain circumstances, waive fifth amendment protection,[5] it has also determined that

1. U.S. CONST. amend. V.

2. Miranda v. Arizona, 384 U.S. 436 (1966), mandates that before custodial interrogation an individual must be advised 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 . . . an attorney . . . ." 384 U.S. at 478-79. Without this warning, the police are typically barred from using an arrestee's confessions against him as evidence of a crime. There are of course exceptions to this general rule. *See, e.g.*, New York v. Quarles, 104 S. Ct. 2626 (1984) (holding that a threat to public safety outweighs necessity of giving *Miranda* warnings).

3. *See, e.g., In re* Gault, 387 U.S. 1 (1967) (juvenile proceedings); Miranda v. Arizona, 384 U.S. 436 (1966) (police interrogations); Watkins v. United States, 354 U.S. 178 (1957) (congressional investigations); McCarthy v. Arndstein, 266 U.S. 34 (1924) (civil proceedings); Counselman v. Hitchcock, 142 U.S. 547 (1892) (grand jury proceedings).

4. Although the use of severed trials for codefendants in criminal cases may be increasing, support for this proposition is elusive because state trial courts rarely publish opinions and severence is seldom an issue on appeal. Moreover, few severed trials occur in federal criminal cases. *See* LEXIS, Genfed library, Cases file, search: severed trial and criminal; date aft 1980 (10 severed criminal trials); 1981 (11); 1982 (18); 1983 (15); 1984 (14).

5. Raffel v. United States, 271 U.S. 494 (1926) (finding waiver of fifth amendment protection for impeachment when defendant testifies at his own trial).

the use of this prior silence to impeach the defendant may sometimes violate due process.[6] Thus, two constitutional safeguards, the right against self-incrimination and the right to due process, limit the prosecutor's use of a defendant's prior silence. When a court finds that the defendant has waived fifth amendment protection and that due process concerns do not bar impeachment, it must then determine the admissibility of the prior silence by applying evidentiary rules to the facts of the case. These rules weigh the probative value of the silence against its prejudicial effects. Unfortunately, courts have largely ignored these constitutional and evidentiary principles when presented with the issue of impeachment by post-*Miranda* silence.[7]

This Note focuses on whether a defendant who was called as a witness at the prior, severed trial of a codefendant and refused to testify by invoking the fifth amendment can subsequently be impeached by this silence at his own trial. In addition to the obvious implications this issue has for severed criminal trials, the factors considered when deciding whether impeachment by silence should be allowed generally are in sharpest focus in this factual setting. Thus, the analysis of the constitutional and evidentiary questions this Note enlists to argue that impeachment by silence in this context is permissible applies as well to other situations involving impeachment by post-*Miranda* silence.

Part I examines the fifth amendment privilege against self-incrimination and the waiver of that privilege by a defendant who voluntarily testifies at his own trial. Part II addresses the scope of the fourteenth amendment due process protection against the admission of certain government-induced silence. Part III then argues that the federal evidentiary rules and, by analogy, state evidentiary rules should allow the prosecutor to impeach the defendant by using defendant's silence at the prior severed trial of a codefendant. In the process, the argument suggests relevant

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6. Doyle v. Ohio, 426 U.S. 610 (1976) (finding use for impeachment purposes of a defendant's silence immediately following *Miranda* warnings a violation of due process).

7. Many courts faced with the issue of impeachment by post-*Miranda* silence bar impeachment on federal constitutional grounds without considering factual distinctions in the cases relied upon for precedent. *See, e.g.*, United States v. Meneses-Davila, 580 F.2d 888, 891 (5th Cir. 1978) (overlooking that the case relied upon, Doyle v. Ohio, 426 U.S. 610 (1976), involved silence immediately following the *Miranda* warnings, whereas the case at bar involved silence long after the *Miranda* warnings); *see also infra* note 65. Other courts similarly misplace reliance on United States v. Hale, 422 U.S. 171 (1975), to conclude that post-arrest silence is too ambiguous to be admissible. *See, e.g.*, Webb v. State, 347 So. 2d 1054, 1056 (Fla. Dist. Ct. App. 1977) (ignoring that the defendant in *Hale* received *Miranda* warnings whereas Webb did not), *cert. denied*, 354 So. 2d 986 (1977); *see also infra* note 56.

factors for courts to consider when deciding post-*Miranda* silence impeachment issues.

I. FIFTH AMENDMENT PROTECTION AND THE *Raffel* WAIVER RULE

The Constitution's framers adopted the fifth amendment protection against self-incrimination to prevent compulsory admission of guilt at one's own trial, like that which occurred in the Star Chamber inquisitions.[8] The fifth amendment now applies to a wide variety of proceedings, both formal and informal, other than one's own trial.[9] The Supreme Court has extended the fifth amendment to such proceedings because "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."[10]

This rationale would also seem to justify affording fifth amendment protection to a defendant who is compelled, under threat of legal sanction,[11] to testify at the prior, severed trial of a

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8. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

The purposes of the fifth amendment are:

> (1) the deterrence of torture and other forms of outright coercion, be they physical or mental; (2) the enhancement of human dignity by sparing *guilty* defendants the unhappy choice between harmful disclosure, contempt, or perjury; (3) the assurance of fairness in criminal procedure by cultivating a proper relationship between citizens and their government—or more precisely, by requiring the prosecution to develop and prove a criminal case without help from the defendant, and by leaving citizens free from interference until a significant measure of independent proof has been collected; and (4) the protection of free expression and association by placing a potent weapon against vaguely directed, roving inquiries into the hands of dissident citizens.

Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 848-49 (1980) (emphasis in original) (footnotes omitted); *see also* 8 J. WIGMORE, EVIDENCE § 2252 (McNaughton rev. ed. 1961).

9. *See supra* note 3.

10. Michigan v. Tucker, 417 U.S. 433, 440-41 (1974).

11. Whether called by the codefendant or the prosecutor, a defendant is legally compelled to take the stand as a witness at the prior, severed trial of a codefendant. Compulsion is especially pronounced when the defendant has been subpoenaed. It may be improper, however, for either the codefendant or the prosecutor to utilize the state's power to compel a defendant to take the stand. *See* State v. Nott, 234 Kan. 34, 53, 669 P.2d 660, 676 (1983) (finding error for prosecutor, who knows the witness will invoke the fifth amendment privilege, to compel witness to take the stand); State v. Crumm, 232 Kan. 254, 654 P.2d 417 (1982) (barring either prosecutor or defense counsel from calling a witness he knows will claim the fifth amendment privilege); *cf.* DeLuna v. United States, 308 F.2d 140 (5th Cir. 1956) (holding that when two defendants are jointly tried, a defendant cannot compel a codefendant to testify); United States v. Housing Found., 176 F.2d 665 (3d Cir. 1949) (same).

codefendant.[12] Consequently, if called to the stand, the defendant should be able to refuse to testify at the codefendant's trial by "taking the fifth." If, however, a prosecutor can later use this refusal to testify as an inconsistent statement when the defendant elects to testify at his own trial, then arguably some "testimony" has been compelled.[13] Therefore, prior silence construed

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12. The fifth amendment protection against compelled self-incrimination should apply to a defendant called to the stand at his codefendant's prior trial because that trial is substantially his own. When the fifth amendment was adopted, the practice of severing trials was unknown, and codefendants were tried together in the same proceeding. Logically, the uncontemplated procedure of severing should not be used to circumvent the underlying policy of the fifth amendment, where the defendant is charged with the same crime and faces the same evidence as his codefendant. If, however, the defendant is not charged or suspected of the same crime, a different result might be reached. *Compare* State v. Dodson, 222 Kan. 519, 565 P.2d 291 (1977) (barring use of silence from an assertion of the fifth amendment at a prior unrelated trial), *with* Viereck v. United States, 139 F.2d 847 (D.C. Cir.) (permitting impeachment by defendant's silence from an assertion of the fifth amendment at a prior unrelated trial), *cert. denied*, 321 U.S. 794 (1944).

Federal courts have taken three approaches in determining whether a defendant in the first severed trial may call a codefendant to the stand where the defendant's counsel knows the codefendant will assert the fifth amendment privilege. One view gives the judge discretion to decline to call the witness if the fifth amendment is likely to be invoked for most relevant testimony. *See* United States v. Reese, 561 F.2d 894 (D.C. Cir.), *cert. denied*, 434 U.S. 837 (1977); United States v. Tuley, 546 F.2d 1264, 1268 n.7 (5th Cir. 1977). This approach is premised on the rationale that "[n]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege." United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973). Finding that the fifth amendment is a privilege of refusal and not a prohibition of inquiry, some federal courts require the witness to take the stand and invoke the privilege for specific questions. *See, e.g.*, United States v. Seifert, 648 F.2d 557, 560-61 (9th Cir. 1980) (noting that since a nonparty witness is not on trial, invocation of the fifth amendment privilege is not being used against him); United States v. Stephens, 492 F.2d 1367 (6th Cir.) (finding that a defendant has the right to confront the witnesses against him, so he can call a witness to the stand to invoke the privilege), *cert. denied*, 419 U.S. 852 (1974). Other federal courts have determined that the defendant cannot call a codefendant to the stand when the defendant's counsel knows that the codefendant will assert the fifth amendment privilege because jurors may draw improper inferences from the refusal to testify. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 908-09 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

13. Of course, this silence is an odd type of testimony, because it only becomes "testimony" upon the subsequent fulfillment of a condition, namely that the defendant, called as a witness at the prior trial of a codefendant, takes the stand at his own trial. Because it is the defendant himself who, by testifying at his own trial, has turned his silence into "testimony," perhaps there is no government compulsion. As one judge expressed it:

> That one may remain silent in the face of accusation is a personal option, and a constitutional privilege. There is a difference, however, between silence and compulsion. Compulsion is never permissible. Silence is a choice, a choice depending upon the facts and circumstances, that may contain risks.
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> The majority confuses compulsion with "silence." There is a constitutional protection against compulsion, silence is a choice and a waivable privilege. So long as one maintains silence, we must, as far as possible, protect it from unfavorable inference. When one chooses to speak, however, we owe no duty to protect against any natural inconsistency that may exist between former elected, self-imposed silence and trial testimony.

as testimony might theoretically fall within the purview of the fifth amendment.[14]

This theoretical analysis, however, holds little practical significance because courts need not consider the scope of the fifth amendment protection in cases of impeachment by prior silence.[15] In 1926, the Supreme Court, in *Raffel v. United States*,[16] held that a defendant who testifies at his own trial waives fifth amendment protection against the use of his prior silence for impeachment purposes. In that case, defendant Raffel refused to take the stand at his first trial, which ended in a hung jury.[17] At his second trial, however, he testified to refute the testimony of a prosecution witness.[18] The trial court questioned Raffel about his silence at the earlier trial,[19] and the Supreme Court upheld this use of prior silence to impeach Raffel's testi-

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Commonwealth v. Turner, 499 Pa. 579, 587, 454 A.2d 537, 541-42 (1982) (McDermott, J., dissenting). If, however, the defendant does not take the stand at his own trial, there is, of course, no testimony to impeach. Silence could then be interpreted only as substantive evidence. *See* Griffin v. California, 380 U.S. 609 (1965) (prohibiting adverse prosecutorial comment on the defendant's failure to testify); People v. Quintana, 665 P.2d 605, 609 (Colo. 1983) (en banc) (deciding use of silence unwarranted on evidentiary grounds). Any defendant who testifies at his own trial does so voluntarily because the fifth amendment prevents the state from compelling the defendant to take the stand. *See* United States v. Shuford, 454 F.2d 772, 777 (4th Cir. 1971); United States v. Keenan, 267 F.2d 118, 126 (7th Cir.), *cert. denied*, 361 U.S. 836 (1959); DeLuna v. United States, 308 F.2d 140 (5th Cir. 1956); United States v. Housing Found., 176 F.2d 665, 666 (3d Cir. 1949).

14. Although the fifth amendment precludes government forced self-incrimination (guilt), it does not necessarily prevent self-contradiction (impeachment). *See supra* note 5 and accompanying text. In prosecution immunity cases, the Supreme Court has discussed whether "testimony" is "incriminating" and thus within the scope of the fifth amendment protection. *See, e.g.*, Ullman v. United States, 350 U.S. 422, 430-31 (1956) (incriminating testimony is that which "may possibly expose [the witness] to a criminal charge.") The Supreme Court has, however, implicitly accepted the idea that impeachment constitutes a form of incrimination; otherwise, there would be no need to create a waiver rule to permit impeachment. *See* Raffel v. United States, 271 U.S. 494 (1926), discussed *infra* notes 16-34 and accompanying text. Thus, arguments regarding the theoretical scope of fifth amendment protection notwithstanding, the *Raffel* waiver rule allows impeachment.

15. *Jenkins v. Anderson*, 447 U.S. 231 (1980), expressly avoided deciding whether pre-arrest silence falls within the scope of the fifth amendment protection because it found that *Raffel* rendered the question moot. 447 U.S. at 236 n.2. If pre-arrest silence were within the scope of the fifth amendment, then under *Raffel* the defendant would waive that protection when testifying at his own trial. So, whether or not silence is within the scope of the fifth amendment, the outcome is the same: impeachment is permissible.

16. 271 U.S. 494 (1926).

17. 271 U.S. at 495.

18. The government tried Raffel for conspiracy to violate the National Prohibition Act. The prosecution's witness, a prohibition agent, testified at both trials that after the agent had searched the tavern, Raffel admitted owning it. *Raffel*, 271 U.S. at 494.

19. 271 U.S. at 494.

mony.[20] Thus, the *Raffel* waiver rule permits impeachment when a defendant who invoked[21] the fifth amendment in a prior judicial proceeding voluntarily takes the stand at his own trial.[22] Although several Justices, in 1957, speculated that *Raffel* had been implicitly overruled or limited by subsequent Supreme Court decisions,[23] the Court, in 1980, explicitly reaffirmed *Raffel* in

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20. 271 U.S. at 497-99.

21. In deciding fifth amendment or due process issues, the Court has never distinguished between passive assertion (silence), as in *Raffel*, and active assertion of the fifth amendment. In Grunewald v. United States, 353 U.S. 391 (1957), the defendant invoked the fifth amendment as a witness before his grand jury, but answered the same questions at his trial. When considering the constitutional implications, the Court seemed willing to apply *Raffel* to an active assertion of the fifth amendment, but instead ruled to exclude the invocation of the fifth amendment for evidentiary reasons. Likewise, in Stewart v. United States, 366 U.S. 1 (1961), the Court relied on *Grunewald* to find that the defendant's failure to testify at his first two trials, but not at his third, lacked probative value sufficient to outweigh its prejudicial effect. Again, the Court found it irrelevant that *Raffel* involved passive silence. These cases imply that the Court equates passive silence with an active assertion of the fifth amendment.

22. The Eleventh Circuit Court has noted:

> Once [defendant] took the stand voluntarily to testify in his own behalf, he waived the Fifth Amendment privilege to refuse to answer questions properly within the scope of cross-examination under Rule 611(b) of the Federal Rules of Evidence. Under this rule, a witness may be cross-examined as to matters "reasonably related" to the subject matter of the direct examination *and matters affecting credibility.*

United States v. Pilcher, 672 F.2d 875, 877-78 (11th Cir.) (emphasis added) (citations omitted), *cert. denied*, 459 U.S. 973 (1982); *see also* Neely v. Israel, 715 F.2d 1261, 1264 (7th Cir. 1983) (allowing the prosecutor to question defendant on matters reasonably related to the subject matter of his direct examination, including impeaching defendant's credibility), *cert. denied*, 104 S. Ct. 723 (1984); United States v. Hearst, 563 F.2d 1331, 1342 (9th Cir. 1977) (same), *cert. denied*, 435 U.S. 1000 (1978); United States v. Beechum, 582 F.2d 898, 907 n.8 (5th Cir. 1978) (en banc) (same, but issue not decided, only discussed), *cert. denied*, 440 U.S. 920 (1979). Defendant's "voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between all." 8 J. WIGMORE, EVIDENCE § 2276(2) (McNaughton rev. ed. 1961) (emphasis supplied). Regardless of the scope of waiver with respect to substantive evidence, impeachment evidence is always within the scope of the waiver.

23. In a concurring opinion in Grunewald v. United States, 353 U.S. 391 (1957), Justice Black, joined by Chief Justice Warren and Justices Douglas and Brennan, stated that "to the extent that approval of such a rule in [*Raffel*] has vitality after [*Johnson*], I think the *Raffel* case should be explicitly overruled." *Id.* at 426; *see also* Baxter v. Palmigiano, 425 U.S. 308, 338 n.9 (1976) (Brennan, J., dissenting in part, joined by Marshall, J.).

Johnson v. United States, 318 U.S. 189 (1943), did not affect *Raffel* because *Johnson* did not involve a waiver situation. In *Johnson*, the defendant testified at his own trial, and during cross-examination the trial court improperly permitted the defendant to remain silent under the fifth amendment. Although the prosecutor sought to use this silence to impeach the defendant, the Supreme Court would not permit impeachment. Because the defendant did not follow his silence with further testimony that could be interpreted as an implied waiver, the effect was as if Johnson had taken the stand only to assert his fifth amendment right to remain silent. *See also* United States v. Klinger, 136 F.2d 677, 678 (2d Cir.) (per curiam) (finding that *Johnson* does not limit *Raffel* because *Johnson* only applies when the judge erroneously grants the privilege on cross-

Jenkins v. Anderson.[24]

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examination), *cert. denied*, 320 U.S. 746 (1943).

Defendants have repeatedly attempted to distinguish *Raffel* from *Grunewald* because *Raffel* involved silence at a prior trial, whereas *Grunewald* involved silence before a grand jury. Courts, however, have rejected this distinction. *See, e.g.*, Berra v. United States, 221 F.2d 590, 597 (8th Cir. 1955) (upholding the *Raffel* rule because "we discern nothing unjust or unfair in this rule" and allowing impeachment by commenting on defendant's assertion of the fifth amendment at his grand jury proceeding), *aff'd on other grounds*, 351 U.S. 131 (1956); United States v. Gottfried, 165 F.2d 360, 367 (2d Cir.) (same), *cert. denied*, 333 U.S. 860 (1948); Viereck v. United States, 139 F.2d 847, 858 (D.C. Cir. 1944) (same), *cert. denied*, 321 U.S. 794 (1944); Tomlinson v. United States, 93 F.2d 652, 658 (D.C. Cir. 1937) (allowing impeachment by comment about defendant's failure to testify before his grand jury), *cert. denied*, 303 U.S. 646 (1938); State v. Schroeder, 201 Kan. 811, 820-21, 443 P.2d 284, 292 (1968) (same as *Berra*), *limited in* State v. Mims, 220 Kan. 726, 730, 556 P.2d 387 (1976). Because *Grunewald* is distinguishable, it does not limit *Raffel*. The *Raffel* rule is merely a broad constitutional waiver test. *Grunewald*, however, was decided on the evidentiary theory that the prior silence was consistent with defendant's later testimony; therefore, impeachment could not be allowed. 353 U.S. at 418-24. Thus, even after a defendant takes the stand at his own trial, opening himself up to impeachment under the *Raffel* constitutional waiver rule, the prosecutor may not impeach the defendant unless the prior silence and subsequent testimony are inconsistent under the *Grunewald* evidentiary test. As the *Grunewald* Court noted:

> We may assume that under *Raffel*, [the defendant] in this case [Grunewald] was subject to cross-examination impeaching credibility just like any other witness, and that his Fifth Amendment plea before the grand jury could not carry over any form of immunity when he voluntarily took the stand at the trial. This does not, however, solve the question whether . . . [the] probative value . . . was so negligible as to be far outweighed by its possible impermissible impact on the jury.

353 U.S. at 420 (footnote omitted); *see also* Note, *What You Do Not Say Can and Will Be Used Against You: Prearrest Silence Used to Impeach a Defendant's Testimony*, 16 VAL. U.L. REV. 537, 543 n.41 (1982) (noting the difference between the *Raffel* constitutional issue and the *Grunewald* evidentiary issue). Although the *Grunewald* Court inferred that *Raffel* did not consider the question of inconsistency, 353 U.S. at 420, the Court later pointed out in United States v. Hale, 422 U.S. 171, 175 (1975) that *Raffel* assumed inconsistency. Therefore, any confusion in the law arises from the failure to distinguish between the *Raffel* constitutional waiver rule and the *Grunewald* evidentiary test.

24. 447 U.S. 231, 237 n.4 (1980). The *Jenkins* Court stated: "In fact, no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence." 447 U.S. at 237 n.4. No case since *Jenkins* has reconsidered *Raffel*. "However much *Raffel* has been circumscribed and criticized, it has not been overruled, notwithstanding that the Court has had several opportunities to do so." Culhane v. Harris, 514 F. Supp. 746, 754 (S.D.N.Y. 1981). *See also* United States *ex rel.* Saulsbury v. Greer, 702 F.2d 651, 655 (7th Cir.) (noting that *Raffel* was resuscitated by *Jenkins*), *cert. denied*, 461 U.S. 935 (1983). Without reference to *Raffel* itself, one pre-*Jenkins* commentator asserted that

> the Court should hold that a defendant who waives the privilege at one stage [of the judicial process] does not retroactively waive the privilege for all previous stages . . . . As long as fair cross-examination is allowed in the proceeding in which the waiver takes place, there is no reason to permit the use of prior silence . . . .

Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 204, 205 n.381 (1980). This analysis, which effectively

Sound policy considerations support the *Raffel* waiver rule. These considerations can be demonstrated by examining the two ways the waiver rule may affect a defendant. First, the rule may affect the defendant's decision to testify at his own trial.[25] The defendant, for example, might not testify for fear that the prosecutor will use the prior invocation of the fifth amendment privilege at a codefendant's trial for impeachment purposes.[26] The defendant's decision to testify at his own trial, however, would be only a tactical choice that would receive no constitutional protection.[27] Second, the waiver rule may affect the defendant's decision to assert the privilege in the initial proceeding. The defendant, fearing impeachment if he later testifies at his own trial, may be discouraged from "taking the fifth" at a codefendant's prior trial. The Constitution, however, does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[28] Instead, the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[29] Because the *Raffel* Court found that the waiver rule did not appreciably impair any fifth amendment policies, the defendant's decision about whether to invoke the fifth amendment at his codefendant's trial should likewise receive no constitutional protection.[30]

Analysis of the two possible effects of the *Raffel* waiver rule on a defendant suggests that the state's strong interest in promoting the truth-finding function of the adversary system[31]

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rejects *Raffel*, fails to recognize that any witness taking the stand subjects his credibility to attack as part of a "fair cross-examination." To allow otherwise would allow the defendant, who has the most at stake and thus the strongest incentive to lie, to avoid the traditional function of cross-examination—testing a witness's veracity.

25. The defendant creates this first burden by deciding to testify at his own trial. Consequently, the waiver rule puts the defendant in the same position as that of a defendant impeached by prior bad acts or prior convictions. *See* FED. R. EVID. 404(b), 609.

26. *See* Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 955 (1975) (noting the two potential burdens placed on a defendant by Agnellino v. New Jersey, 493 F.2d 714 (3d Cir. 1974), which permitted impeachment by post-*Miranda* silence). Allowing impeachment by silence may also entice prosecutors to call defendants to testify at preliminary hearings and before grand juries. Saltzburg, *supra* note 24, at 204. Evidentiary rules, however, may curb such behavior.

27. *See* Jenkins v. Anderson, 447 U.S. 231, 238 (1980).

28. Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973).

29. McGautha v. California, 402 U.S. 183, 213 (1971).

30. *See* Raffel v. United States, 271 U.S. 494, 499 (1926) ("We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.").

31. "Truth is the essential objective of our adversary system of justice." United

dominates the fifth amendment proscription against compelled self-incrimination.[32] In effect, the *Raffel* waiver rule provides that a defendant "could not become a witness for himself without becoming equally a witness against himself . . . subject to all legitimate and proper cross-examination."[33] Thus, the defendant who chooses to cast aside his constitutional right to remain silent must speak truthfully and subject himself to the traditional truth-testing function of cross-examination.[34]

II. DUE PROCESS LIMITATIONS ON IMPEACHMENT BY SILENCE

Although a defendant who chooses to testify at his trial waives fifth amendment protection, the fourteenth amendment's general guarantee of "fairness"[35] may still pose a federal constitutional barrier to impeachment by silence.[36] The Supreme Court has held that fairness bars the government from impeaching a defendant's testimony with the very silence that the government implicitly induced.[37] In *Doyle v. Ohio*,[38] the Court found that *Miranda* warnings constitute an affirmative government act that implicitly assures the defendant that his silence will not be used

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States v. Beechum, 582 F.2d 898, 908 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

32. The *Beechum* court stated:

> [When the defendant takes the stand,] "the interests of the [government] and regard for the function of courts of justice to ascertain the truth become relevant, and *prevail* in the balance of considerations determining the scope and limits of the privilege against self-incrimination.". . . [T]he government is entitled to subject his testimony to the acid test of adverse cross examination.

United States v. Beechum, 582 F.2d 898, 908 (5th Cir. 1978) (quoting Brown v. United States, 356 U.S. 148, 156 (1958) (emphasis added)), *cert. denied*, 440 U.S. 920 (1979).

33. Hinton, *Comment on Recent Cases*, 21 ILL. L. REV. 396, 398 (1926) (commenting on *Raffel*).

34. *See* Harris v. New York, 401 U.S. 222, 225 (1971).

35. In Doyle v. Ohio, 426 U.S. 610 (1976), the Court held that a prosecutor could not use a defendant's post-arrest, post-*Miranda* silence to impeach his credibility at his own trial. The Court relied on due process and evidentiary grounds, rather than the fifth amendment privilege against self-incrimination, to reach this decision. As one court noted, "*Doyle* reviewed a state conviction, and was grounded on the Fourteenth, not the Fifth, Amendment. The court referred to the [*Miranda*] warnings as being a prophylactic means of safeguarding Fifth Amendment rights." People v. Free, 131 Cal. App. 3d 155, 162, 182 Cal. Rptr. 259, 262 (1982).

36. A state constitutional due process clause may be an even greater barrier to impeachment by silence than the federal due process clause. *See, e.g.*, Lee v. State, 422 So. 2d 928, 930 (Fla. Dist. Ct. App. 1982) (barring impeachment by silence by interpreting the state due process clause as broader than the federal); *see also infra* note 75.

37. *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976). Of course, the defendant must not only be induced to remain silent, but actually remain silent, to receive the due process protection of *Doyle*. *See, e.g.*, Anderson v. Charles, 447 U.S. 404 (1980).

38. 426 U.S. 610 (1976).

against him.[39] Similarly, in *Johnson v. United States*,[40] the Court applied this elementary fairness standard to prohibit the impeachment use of a defendant's silence that resulted from the trial court erroneously granting a fifth amendment privilege during the cross-examination of the defendant.[41]

A. The "Affirmative Government Inducement" Standard

With an erroneous grant of the fifth amendment privilege in *Johnson* and *Miranda* warnings in *Doyle* as their only guides, courts have struggled to determine what constitutes affirmative government inducement. Because *Miranda* warnings do not create the right to remain silent but merely serve to ensure that an arrestee fully understands that right,[42] some courts have concluded that arrest, not the *Miranda* warnings, represents the government inducement of silence.[43] The Supreme Court, however, rejected this view in *Fletcher v. Weir*,[44] by allowing impeachment by post-arrest, pre-*Miranda* warnings silence.[45]

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39. *Id.*

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

Doyle v. Ohio, 426 U.S. 610, 618 (1976) (footnote omitted).

40. 318 U.S. 189 (1943); *see supra* note 23.

41. 318 U.S. at 197.

42. "[T]he right to silence described in those [*Miranda*] warnings derives from the Fifth Amendment and adds nothing to it." Roberts v. United States, 445 U.S. 552, 560 (1980); *see also* New York v. Quarles, 104 S. Ct. 2626, 2631 (1984) ("The prophylactic *Miranda* warnings are therefore not themselves rights protected by the Constitution. . .") (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

43. *See* Weir v. Fletcher, 658 F.2d 1126, 1130 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982); People v. Conyers, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) (hereinafter cited as *Conyers* I), *vacated and remanded*, 449 U.S. 809 (1980), *on remand*, 52 N.Y.2d 454, 420 N.E.2d 933, 438 N.Y.S.2d 741 (1981) (hereinafter cited as *Conyers* II); People v. Beller, 74 Ill. 2d 514, 386 N.E.2d 857 (1979).

44. 455 U.S. 603 (1982) (per curiam). On remand, the Sixth Circuit directed dismissal of the case without prejudice because there was no evidence that the defendant had received the *Miranda* warning. 680 F.2d 437 (6th Cir. 1982).

45. *See also Conyers* II, 52 N.Y.2d 454, 420 N.E.2d 933, 438 N.Y.S.2d 741 (1981) (barring impeachment only on evidentiary grounds). People v. Free, 131 Cal. App. 3d 155, 182 Cal. Rptr. 259, 264 (1982), however, suggests that *Fletcher* promotes police misconduct. After arrest, the police could delay giving *Miranda* warnings to obtain post-arrest silence for impeachment purposes, and then give *Miranda* warnings so that if the arrestee does talk it will be admissible as substantive evidence. *See* United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2d Cir. 1980) (finding that the police delay in giving the *Miranda* warnings was not intentional, but cautioning against creating an impeachment rule that would act as an incentive for deliberate delay). *But see* Harris v. New

Thus, by itself, an affirmative government act, such as an arrest, has been deemed insufficient to trigger due process protections.[46]

Fletcher implies that the fifth amendment itself does not constitute government inducement sufficient to arouse due process concerns,[47] even though an arrested person may know of and rely on the right to remain silent, without having received *Miranda* warnings.[48] *Jenkins v. Anderson*[49] bolsters this implication. Because *Jenkins* involved pre-arrest silence, the fifth amendment guarantee could have been the only possible government inducement. But, consistent with the *Fletcher* implication, the Court held that this passive governmental assurance of the right to remain silent did not raise a due process fairness issue.[50]

Fletcher, read together with *Doyle* and *Johnson*,[51] suggests that, to raise fairness concerns, an affirmative government act must implicitly assure the accused that his silence will not be used to impeach him.[52] Thus, both an affirmative government

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York, 401 U.S. 222, 225 (1971). "[T]he benefits of [impeachment] should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. . . . [S]ufficient deterence flows when the evidence in question is made unavailable to the prosecution in its case in chief."); *see also Conyers* I, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980). (Meyer, J., dissenting, joined by Jasen and Jones, JJ.) (finding it "highly improbable" that an officer would delay the *Miranda* warnings because improper police practices are used to produce confessions not silence).

46. *See* Weir v. Fletcher, 658 F.2d 1126 (6th Cir. 1981) (barring on due process grounds impeachment by post-arrest silence when *Miranda* warnings are not given), *rev'd*, 455 U.S. 603 (1982) (allowing impeachment); *Conyers* I, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) (same as *Weir*); *Conyers* II, 52 N.Y.2d 454, 420 N.E.2d 933, 438 N.Y.S.2d 741 (1981) (barring impeachment only on evidentiary grounds).

47. The defendant Weir may have relied on both the arrest itself and the fifth amendment in deciding to remain silent, yet the Court held that this did not constitute government inducement. *See* Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam) (finding that arrest and the existence of the fifth amendment, without *Miranda* warnings, do not amount to government inducement to remain silent). Logically, therefore, the Court's decision indicates that neither reason standing alone constitutes a government inducement to remain silent.

48. *See Conyers* I, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) (stating that the government promise embodied in the fifth amendment implying that an accused's silence will not be used against him is sufficient government inducement without the *Miranda* warnings), *vacated and remanded*, 449 U.S. 809 (1980) (remanded in light of Jenkins v. Anderson, 447 U.S. 231 (1980), which suggested that the fifth amendment alone is not government inducement), *Conyers* II, 52 N.Y.2d 454, 420 N.E.2d 857 (1981) (decided on evidentiary grounds).

49. 447 U.S. 231 (1980).

50. *Id.* at 240.

51. *See supra* notes 37-41 and accompanying text. It is also noteworthy that the silence sought to be used for impeachment in both *Doyle* and *Johnson* came immediately after the affirmative government act that arguably induced the silence. *See Doyle*, 426 U.S. at 616 n.6; *Johnson*, 318 U.S. at 192-93.

52. "In the absence of the sort of *affirmative* assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand."

act and an inducement to remain silent are necessary. Only when the defendant meets this threshold affirmative government inducement test need a court consider whether use of prior silence for impeachment of subsequent testimony is "fair."[53]

Doyle, of course, deems "unfair" impeachment by silence that occurs immediately after *Miranda* warnings have been administered.[54] Dictum in *Doyle*, however, suggests that silence occurring long after the *Miranda* "inducement" may be used for impeachment. The *Doyle* Court noted that silence occurring days after arrest and *Miranda* warnings "present[s] different considerations from . . . silence after receiving *Miranda* warnings at the time of arrest."[55] Unfortunately, the *Doyle* Court failed to articulate what these "different considerations" might be. Similarly, federal and state courts have not directly examined these different considerations, although many courts have found that such considerations justify impeachment by prior silence.[56] An

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Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (emphasis added); *see also* United States v. Greene, 698 F.2d 1364, 1374 (9th Cir. 1983) (noting that the affirmative assurance implicit in the *Miranda* warnings triggers due process analysis).

53. Fairness can be viewed from two perspectives. A defendant might contend that the government, through impeachment, is unfairly using silence it implicitly encouraged. The government, however, may attribute any "penalty" caused by the impeachment use of silence to the defendant for choosing to testify, asserting that the penalty "was not a consequence of [defendant's] decision to remain silent; the penalty arose only because the defendant took the stand." Agnellino v. New Jersey, 493 F.2d 714, 724 (3d Cir. 1974).

54. Some commentators have suggested that any unfairness could be eliminated by giving an arrestee a "silence warning"—your silence cannot be used against you to prove guilt, but can be used for impeachment of your credibility if you decide to testify in your own behalf. *See* Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 86 (1980) (citing Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713 (1968)). *But see* Kamisar, *Kauper's* Judicial Examination of the Accused *Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 34 n.70 (1974) (suggesting that the police could not explain, nor could arrestees understand, a more complicated *Miranda* warning).

55. Doyle v. Ohio, 426 U.S. 610, 616 n.6 (1976).

56. Early decisions that involved silence occurring days after *Miranda* warnings completely disregarded the "different considerations" and reached opposite conclusions on the propriety of impeachment by silence. *Compare* United States v. Meneses-Davila, 580 F.2d 888, 891 (5th Cir. 1978) (finding, without mentioning any "different considerations," impeachment of defendant's general pretrial silence a "blatant violation of *Doyle*"); People v. Eliason, 117 Ill. App. 3d 683, 453 N.E.2d 908 (1983) (same); *and* People v. Galloway, 100 Cal. App. 3d 551, 160 Cal. Rptr. 914 (1979) (same); *with* Franklin v. State, 576 S.W.2d 621 (Tex. Crim. App. 1978) (en banc) (allowing impeachment use of defendant's preliminary hearing silence). One commentator has criticized *Franklin* on primarily evidentiary and state procedural, not constitutional, grounds. *See* Note, *Criminal Law—Self-Incrimination—Failure to Relate Exculpatory Story at Pretrial Hearings May Be Used by Prosecution to Impeach Defendant's Testimony at Trial*, 10 ST. MARY'S L.J. 632 (1979).

In United States *ex rel.* Smith v. Rowe, 618 F.2d 1204 (7th Cir. 1980), later vacated by the Supreme Court *sub nom.* Franzen v. Smith, 449 U.S. 810 (1980), the court barred impeachment use of silence coming long after *Miranda* warnings primarily because the

examination of these cases, in conjunction with the underlying purpose of the fifth amendment privilege, suggests that the lapse in time following the inducement, the pressure on the accused to speak, and the presence of legal counsel are factors central to the fairness of using silence for impeachment purposes.

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silence was ambiguous on evidentiary grounds. Extending *Doyle*, but without delineating any "different considerations," the *Smith* court found "the fact that *Miranda* warnings are given and that a criminal defendant retains his fifth amendment right against self-incrimination is of continuing relevance to the fact of a defendant's silence throughout the pretrial period." 618 F.2d at 1213. On remand, the court again asserted without elaboration that the ambiguity of post-*Miranda* silence exists throughout the trial. United States *ex rel.* Smith v. Franzen, 660 F.2d 237 (7th Cir. 1981). The Seventh Circuit found it irrelevant that the post-arrest, post-*Miranda* silence took place when Smith was not under custodial interrogation. *Id.* at 239. Again, the Supreme Court vacated the Seventh Circuit Court's opinion. Lane v. Smith, 457 U.S. 1102 (1982). On remand, the Seventh Circuit found that the trial record did not indicate that Smith had ever received the *Miranda* warnings, so, relying on *Fletcher*, it allowed impeachment. United States *ex rel.* Smith v. Rowe, 746 F.2d 386, 387-88 (7th Cir. 1984) (per curiam).

The Seventh Circuit has also permitted impeachment by post-*Miranda* silence. United States *ex rel.* Saulsbury v. Greer, 702 F.2d 651 (7th Cir.), *cert. denied*, 461 U.S. 935 (1983). The *Saulsbury* court allowed impeachment by silence because it occurred "long after *Miranda* warnings and after circumstances had made the need for an exculpatory explanation, if it existed, far more compelling." 702 F.2d at 656. But the defendant in *Saulsbury* expressly claimed that he had remained silent because of the *Miranda* warnings. 702 F.2d at 655. The court attached significance to this fact, stating that "[o]nce that reason was solicited upon [defense counsel's] direct examination it was not fundamentally unfair for the prosecution, upon cross-examination, to attack the credibility of that explanation . . . ." 702 F.2d at 655-56. Thus, had defense counsel not elicited the reason for silence, the court may have barred impeachment.

In Folston v. Allsbrook, 691 F.2d 184 (4th Cir. 1982), *cert. denied*, 461 U.S. 939 (1983), the court similarly allowed impeachment by silence occurring several months after arrest. As in *Smith*, the record failed to show whether Folston ever received *Miranda* warnings. 691 F.2d at 187. This may explain why the Supreme Court denied certiorari, because absent these warnings *Fletcher* would control.

Folston raises an interesting interpretation of the scope of the term "government compulsion." In *Folston* all of the defendants were being held in the same jail cell. When a codefendant asked Folston an accusatory question, Folston responded with silence. The court implied that there was no government compulsion since the defendant was "not under interrogation by, or even in the presence of, any police officer, attorney or other government representative." 691 F.2d at 187. This implication, however, may be undermined because the prosecutor permitted the codefendant in the cell who testified about Folston's silence to plead guilty to second degree murder in exchange for his agreement to testify against the other codefendants. 691 F.2d at 185. There was no evidence that the codefendant was a government plant, 691 F.2d at 187, yet the plea arrangement raises the possibility that the codefendant may have been acting as a quasi-state agent. *Compare* People v. Galloway, 100 Cal. App. 3d 551, 160 Cal. Rptr. 914, 918 (1979) (finding it unimportant that silence was not before a government agent), *with* People v. Martin, 101 Cal. App. 3d 1000, 1007, 162 Cal. Rptr. 133, 137 (1980) (finding that *Miranda* warnings, upon which *Doyle* is founded, are required only when both custody and interrogation are used by a police official).

B. *The Role of "Different Considerations"*

1. Time— Many courts allude to a time lapse as the "different consideration" referred to in *Doyle*.[57] Read literally, *Doyle* says that silence occurring some time after arrest and *Miranda* warnings presents different considerations.[58] Proponents of this literal reading contend that, after time, silence represents a more careful and deliberate decision than silence immediately following the warning. Opponents, however, contend that the passage of time does not affect the strength of the implicit governmental assurance that the accused's silence will not be used against him. By focusing on time alone, however, both of these arguments fail to recognize the importance of time not as a factor in determining the existence of "different considerations," but as an indication of other highly relevant factors. *Miranda* warnings are required only to inform an accused of his constitutional rights when confronted with the pressures that attend custodial interrogation.[59] The *Miranda* warning implicitly assures an accused that under the circumstances of custodial interrogation his silence will not be used against him.[60] Although the passage of time may not change the strength of the assurance, it often changes the circumstances upon which the assurance is predicated. Thus, it is not time itself which weakens an accused's reliance on *Miranda*; rather, those factors that generally accompany the passage of time—reduced pressure, more information, and advice of counsel—account for the difference.

Even though time may serve as an indicator that circumstances have changed, it seems wiser to consider directly the factors that may change with the passage of time. Two factors, whether pressure has actually been reduced and whether counsel has in fact been provided, form the bases for evaluating whether post-*Miranda* silence can be used for impeachment purposes.

Moreover, to rely on time as the only factor in determining the fairness of using a defendant's silence for impeachment purposes would produce the problems associated with all bright-line tests. Absent other considerations, courts would be forced to decide at precisely what time the defendant's continued silence

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57. *See, e.g.*, United States *ex rel.* Saulsbury v. Greer, 702 F.2d 651, 655 (7th Cir.) (noting in dictum the difficulty of deciding the impeachment issue if the silence had been only one day after the *Miranda* warnings), *cert. denied*, 461 U.S. 935 (1983).

58. *See supra* note 55 and accompanying text.

59. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

60. *See supra* notes 54-56 and accompanying text.

would lose the taint of the prior government assurance. Any time chosen would necessarily be arbitrary[61] and might in some cases undermine the protection *Doyle* was designed to afford the defendant.[62]

2. *Pressure*— The *Doyle* protection springs from *Miranda*'s goal of preventing the government from pressuring the accused into a hurried and uninformed decision to speak.[63] But as the pressure created by arrest and custodial interrogation[64] dissipates and the accused becomes better informed of his constitutional rights, the need for the *Doyle* rule diminishes. Indeed, custodial pressure, a primary concern of the *Miranda* Court, vanishes if the accused is released on bail.[65] Nevertheless, lack of counsel may perpetuate the problem of uninformed decision making. A defendant may concede that the decision to remain silent long after arrest did not arise from police pressure, but may still maintain that it was based on the assurances implicit in the *Miranda* warnings.

3. *Legal counsel*— After the defendant has received legal advice, the argument that he based his continued silence on implied assurances disappears, because counsel should advise him of both his right to silence and the risk of later impeachment

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61. Allowing impeachment an hour, a day, or a week after *Miranda* warnings would be devoid of any policy rationale based on fairness. The *Saulsbury* court, for example, noted that had the defendant's silence been the morning after arrest and *Miranda*, "the decision would be indeed difficult." 702 F.2d at 655.

62. A defendant may be in custody without counsel for hours or days and without any reduction in custodial pressure. Under these circumstances, *Doyle* was intended to prevent impeachment by silence. An arbitrary time rule might deny a defendant such protection.

63. *Miranda* warnings are designed to inform the accused that he need not make a hasty, uninformed decision to confess. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

64. Custodial interrogation has two elements—custody and interrogation by a government official. *See, e.g.*, Annot., 31 A.L.R.3d 565 (1970). Absent custodial detention, there can be no due process violation. *See* Lebowitz v. Wainwright, 670 F.2d 974, 977-78 (11th Cir. 1982). Similarly, absent interrogation by a government official, impeachment by silence of a defendant in custody is allowed. Folston v. Allsbrook, 691 F.2d 184 (4th Cir. 1982). *See supra* note 56. Still, *Fletcher* may indicate that custodial interrogation is not important because the court there held that a defendant can be custodially interrogated without *Miranda* and still be impeached by his silence.

65. Of course, the defendant's post-release silence may be ambiguous because of a diminished need to speak consistent with innocence. Nevertheless, evidentiary considerations, not constitutional ones, should determine the probative weight of such silence. *See* Jenkins v. Anderson, 447 U.S. 231 (1980) (finding no constitutional bar when a suspect is not in custody in a pre-arrest context). Silence in response to incriminating questions other than by the police still may be inconsistent enough with a defendant's subsequent trial testimony to permit impeachment. *See* United States v. Hale, 422 U.S. 171, 176 (1975) ("Silence gains more probative weight where it persists in the face of accusation . . . ."); Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982) (allowing impeachment by silence when defendant was questioned by a codefendant).

that silence creates. *Miranda* warnings are designed to promote a careful, unpressured, and informed decision about whether to remain silent; this same purpose is achieved by reducing pressure and providing counsel.

The foregoing safeguards, reduced pressure and advice of counsel, commonly enjoyed by the defendant by the time his codefendant comes to trial, make the use of prior silence for impeachment purposes fair.[66] Because either defense counsel or the prosecutor will be questioning the defendant who is called to the stand at his codefendant's trial, some pressure remains. This pressure, however, is less likely to be as continuous or harassing as custodial pressure. Indeed, a judge's presence assures the defendant a more impartial listener than the arresting officer or prosecutor.[67] Counsel may also be present to protect the defendant from undue pressure.[68] Moreover, knowing that he is likely to be called as a witness at the prior, severed trial of a codefendant and having received legal advice from counsel, the defendant makes an informed and unpressured decision long before the codefendant's trial. Such silence can be fairly used to impeach.

A trial is designed to ascertain the truth. Use of prior silence to impeach a defendant's trial testimony aids in the truth-testing function. Because the defendant has a critical interest in the outcome of his trial, he may have a great incentive to perjure himself or distort the facts when he testifies. Therefore, truth-testing functions of impeachment and cross-examination should be applied with special vigor to assure the veracity of the defendant's testimony. Allowing impeachment by silence after *Miranda* warnings and after adequate protections have been afforded the defendant to assure an unpressured and intelligently chosen silence[69] would encourage a defendant to tell his exculpa-

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66. Of course, the trial judge would have to decide whether "adequate protection" existed before admitting silence for impeachment purposes. For examples of adequate protection *see supra* notes 62-65 and accompanying text.

67. *See Conyers* I, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) (finding that a suspect may find it useless to justify his apparently criminal behavior to an arresting officer).

68. *See* Kamisar, *supra* note 54, at 33 n.70 (1974) (noting that *Grunewald* distinguished grand jury and other "secret proceedings," where a person testifies without the advice of counsel or other procedural safeguards, from "open court proceedings").

69. After holding that impeachment does not violate the fifth amendment, the court in Neely v. Israel, 715 F.2d 1261, 1265 (7th Cir. 1983) found "no merit to the defendant's argument that he was denied *a fair trial*" (emphasis added), *cert. denied*, 104 S. Ct. 723 (1984). This holding indicates that impeachment is "fair" in many post-arrest, post-*Miranda* situations.

One might argue that the fairness question disappears because the *Raffel* fifth amend-

tory story sometime before his own trial.[70] This encouragement would enhance the fact-finding process:[71] the prosecutor would not be surprised by previously unknown evidence,[72] and the de-

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ment waiver rule also waives the due process fairness requirement. *Raffel* demonstrates that waiver of a constitutional protection can be either implied or express, but must be "an intentional relinquishment . . . of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Once a showing of waiver has been made, the defendant has the burden of proving that his waiver was not intelligently made. Moore v. Michigan, 355 U.S. 155, 161-62 (1957). Just as a defendant who knowingly and intelligently pleads guilty waives his constitutional privilege against compelled self-incrimination, his right to trial by jury, his right to confront his accusers, and his right to due process, *see* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (finding no waiver only because the trial record was inadequate to show that defendant had knowingly pleaded guilty), one could argue that the defendant who takes the stand at his own trial waives the fifth amendment privilege against impeachment by silence as well as the fairness protections of due process.

The central goal of the due process clause is that the defendant receive a fair trial. This general fairness goal, however, provides a weaker justification for denying waiver than the more specific fairness requirement, preventing compelled self-incrimination, embodied in the fifth amendment. *See* Jenkins v. Anderson, 447 U.S. 231, 245-46 n.10 (1980) (Stevens, J., concurring). Thus, because the stronger constitutional protection is waived under *Raffel,* the defendant may also waive the weaker general fairness protection under this rule.

Despite the similar protections of defendant's silence intended under the fifth and fourteenth amendments, the *Raffel* fifth amendment waiver rule has never been applied in a strictly due process context because seemingly different policies underlie the two constitutional issues. *See* United States *ex rel.* Smith v. Franzen, 660 F.2d 237, 240 (7th Cir. 1981) (finding that the policies underlying the due process clause are different from those underlying the fifth amendment, so *Raffel* does not apply in a due process context), *vacated sub nom.* Franzen v. Smith, 449 U.S. 810 (1980), *on remand,* 660 F.2d 237 (7th Cir. 1981), *vacated sub nom.* Lane v. Smith, 457 U.S. 1102 (1982), *on remand sub nom.* United States *ex rel.* Smith v. Rowe, 746 F.2d 386 (7th Cir. 1984) (per curiam); State v. Blevins, 7 Kan. App. 2d 378, 642 P.2d 136 (1982) (finding *Raffel* waiver does not apply to due process claim after *Doyle*). But *Raffel* waiver of due process was never before the *Doyle* Court, so the *Blevins* court's reasoning may be erroneous.

70. This encouragement stops far short of the coercion constitutionally prohibited by the fifth amendment. *See* Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (noting it is defendant's choice to testify).

71. This is the same policy behind notice-of-alibi-defense statutes. *See* FED R. CRIM. P. 12.1(a); Note, *Constitutional Implications of Notice-of-Alibi Provisions,* 21 WAYNE L. REV. 1415 (1975). Indeed, allowing impeachment does not raise the strong constitutional problems that notice-of-alibi statutes do, because notice-of-alibi statutes are often enforced by barring the defendant's alibi testimony altogether—a violation of a defendant's right to testify in his own behalf. *Id.* at 1425-26. Impeachment by prior silence at least allows the defendant to testify. The underlying goal of notice-of-alibi statutes, to prevent the prosecutor's surprise at trial and to increase prosecutorial discovery so as to assure truthful testimony by the defendant, is similary achieved through impeachment by silence. Moreover, some notice-of-alibi laws that prevent the defendant from testifying preclude the impeachment by silence issue altogether. *See, e.g.,* Clenin v. State, 573 P.2d 844, 848 (Wyo. 1978) (Raper, J., concurring) (noting that because notice-of-alibi laws prevent the defendant from constructing an alibi after hearing the state's case, there will be fewer alibi defenses and therefore less impeachment). Hines v. People, 179 Colo. 4, 8, 497 P.2d 1258, 1260 (1972) (en banc) (same).

72. Defense counsel may, and the defendant will, know of an exculpatory story long before trial. If the prosecutor is prepared for such testimony, he can utilize the truth

fendant would not be able to fabricate a story to fit the inculpatory evidence presented by the government.[73]

From the defendant's perspective, allowing impeachment under these circumstances would not violate any constitutional protections. The defendant could still maintain credibility[74] by contending that either advice of counsel, the *Miranda* warnings, or both motivated the decision to remain silent. At a minimum, he could raise the ambiguity of his prior silence. Thus, impeachment by silence, after *Miranda* warnings and adequate safeguards, promotes both the defendant's right to a fair trial and the government's interest in the discovery of truth.

The fourteenth amendment's guarantee of fairness imposes limits on the use of prior silence to impeach subsequent testimony. When the defendant can demonstrate that an affirmative government act and an inducement to remain silent resulted in the prior silence, the court should preclude the use of prior silence for impeachment. The lapse of time between the affirmative government act and the silence should allow impeachment by prior silence when the lapse of time is accompanied by a reduction of pressure or the provision of counsel. These two factors enable the defendant to make a decision about whether to remain silent, based on knowledge that silence may be used to impeach his later testimony.

Allowing impeachment of subsequent testimony by prior silence also supports the truth-testing function of the criminal proceeding. Defendants are encouraged to present exculpatory

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testing function of cross-examination in a more reasoned and thorough manner. Because trial is designed to uncover the truth, within constitutional bounds, the prosecutor should be privy to this evidence early to permit discovery on the validity of the exculpatory story. Allowing impeachment encourages the defendant to divulge the story before trial, and, should he choose otherwise, affords the prosecutor at least some reasonable opportunity to attack the credibility of the story if he is surprised by such testimony at trial. *See also* Ayer, *supra* note 8, at 850 n.34, 864, 868-69.

73. Impeachment by silence provides at least some deterrence to a defendant making up a story to fit within the bounds of the prosecution's case. "To allow a defendant to testify with impunity on matters he chooses and in a manner he chooses is a 'positive invitation to mutilate the truth a party offers to tell.' " United States v. Beechum, 582 F.2d 898, 908 (5th Cir. 1978) (quoting Brown v. United States, 356 U.S. 148, 156 (1958)), *cert. denied*, 440 U.S. 920 (1979).

74. *See* FED. R. EVID. 608 (a)(2) (general rule on rehabilitating credibility). If the defendant really remained silent because of the *Miranda* warnings, "he may explain that fact when he is on the stand." Doyle v. Ohio, 426 U.S. 610, 626 (1976) (Stevens, J., dissenting, joined by Blackmun and Rehnquist, JJ.). The *Doyle* dissenters also noted that the risk that a truthful defendant will remain silent in reliance on the *Miranda* warning "and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury that [we] cannot accept the Court's due process rationale." 426 U.S. at 626.

or mitigating testimony early, preventing later surprise and the tendency to modify trial testimony to support the defendant's interest in acquittal. Concerns for a trial both fair to the defendant and likely to discover the truth support the use of the defendant's prior silence to impeach subsequent testimony.

III. EVIDENTIARY CONCERNS WITHIN THE CONSTITUTIONAL FRAMEWORK

In cases where the Constitution would not preclude the impeachment use of silence, such as a defendant's silence at a co-defendant's trial, the only barrier to the admission of this evidence would be federal or state evidentiary rules.[75] To be

75. Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam), indicates that each "[s]tate is entitled . . . to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." 455 U.S. at 607. And just as *Fletcher* leaves the post-arrest silence evidentiary question in the hands of the state courts, Jenkins v. Anderson, 447 U.S. 231 (1980), gives the pre-arrest silence question to the state courts. 447 U.S. at 240. Although most criminal cases are tried in state courts, this Note uses federal evidentiary analysis because federal courts have considered this problem more than any particular state court. And although state evidence rules sometimes differ from federal rules, federal evidence interpretations commonly serve as guides to state courts. Some states, however, may preclude their courts from following the lead of the federal rules by barring impeachment use of prior silence in state constitutions or statutes.

A state constitution could prohibit impeachment by silence in two ways. Although improbable, a state could adopt a constitutional amendment, or, more likely, its courts could "interpret" the state constitution to give broader protection to defendants than the federal Constitution. Some state courts have so interpreted their state constitutional privilege against self-incrimination, *see* State v. Roth, 549 S.W.2d 652 (Mo. Ct. App. 1977) (prohibiting impeachment by post-*Miranda* silence); Commonwealth v. Turner, 499 Pa. 579, 586, 454 A.2d 537, 540 (1982) (barring impeachment by post-arrest silence even if *Miranda* warnings not given); *In re* Silverberg, 459 Pa. 107, 327 A.2d 106 (1974) (barring impeachment of attorneys at a disciplinary proceeding by use of their silence at a prior investigatory proceeding), *cert. denied*, 456 U.S. 975 (1982); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1969) (barring impeachment by post-*Miranda* silence); Clenin v. State, 573 P.2d 844 (Wyo. 1978) (prohibiting impeachment by post-arrest silence even if *Miranda* warnings not given); or their due process clause, *see* Lee v. State, 422 So. 2d 928, 931 (Fla. Dist. Ct. App. 1982) (prohibiting impeachment by post-arrest silence even if *Miranda* warnings not given); Webb v. State, 347 So. 2d 1054 (Fla. Dist. Ct. App. 1977) (same), *cert. denied*, 354 So. 2d 986 (1977), to bar impeachment by silence. Of course, a broader protection than federal law may not be possible if the state constitution is virtually identical to the United States Constitution and is commonly interpreted in the same manner. *Cf. Conyers* I, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980), decided under a state constitution that was identical to the federal provision, and *Conyers* II, 52 N.Y.2d 454, 420 N.E.2d 857 (1981), barring impeachment by silence on purely evidentiary grounds. *See also* People v. Jordan, 7 Mich. App. 28, 151 N.W.2d 242 (1967) (decided partially on Mich. Const. Art. I, §17, which is identical to federal fifth amendment, without citing *Raffel*); Westmark v. State, 693 P.2d 220 (Wyo. 1984) (finding that the federal fifth amendment and the identical corresponding state

admissible under these rules, the evidence of prior silence to impeach the criminal defendant must be more probative[76] than prejudicial.[77]

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constitutional provisions bar impeachment by silence).

Alternatively, a state legislature could pass a statute that explicitly, or implicitly, prohibits impeachment by silence. Although the Kansas Supreme Court has refused to interpret either its constitution or a parallel statutory embodiment of the fifth amendment to bar impeachment by silence, *see* State v. Nott, 234 Kan. 34, 669 P.2d 660 (1983); *see also* Sanchez v. State, 655 S.W.2d 214 (Tex. Crim. App. 1982) (allowing impeachment, so implicitly deciding that neither state constitution nor state statute prohibited impeachment by silence), a Michigan court has construed a statute to bar impeachment by silence at a preliminary hearing. *See* People v. Jordan, 7 Mich. App. 28, 151 N.W.2d 242 (1967) (barring impeachment by silence at preliminary hearing partly on Mich. Stat. Ann. 1962 Rev. § 27A.2159).

The weakness in a state constitutional or statutory approach is its lack of flexibility to permit impeachment by silence in extraordinary cases. Although state courts have not grappled with this impeachment problem long, two noteworthy cases have already occurred. In People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639 (1974), the defendant, a police officer, had a duty to tell his superiors of his activities, thereby giving his silence unusually high probative value. *See also* People v. Bowen, 65 A.D.2d 364, 411 N.Y.S.2d 573 (1978) (same), *aff'd*, 50 N.Y.2d 915, 409 N.E.2d 924, 431 N.Y.S.2d 449 (1980).

Because such extraordinary cases do occur, a state evidentiary approach on a case-by-case basis is preferable to the rigid state constitutional or statutory rules. This reasoning may explain why most courts have used their evidentiary rules to determine if impeachment by silence is permissible. Unfortunately, many state courts adopting the evidentiary approach have not followed the more considered approach of the federal courts when applying evidentiary principles. *See* Lee v. State, 422 So. 2d 928, 930 (Fla. Dist. Ct. App. 1982) (barring impeachment by post-arrest silence); Phillips v. State, 165 Ga. App. 235, 299 S.E.2d 138 (1983) (same); People v. Beller, 74 Ill. 2d 514, 386 N.E.2d 857 (1979) (barring impeachment by post-arrest silence even if *Miranda* warnings are not given); State v. Williams, 182 N.J. Super. 427, 442 A.2d 620 (App. Div. 1982) (finding that the refusal to testify was not "testimony" under N.J.R. EVID. 63 (1)(a)); *Conyers* II, 52 N.Y.2d 454, 420 N.E.2d 857 (1981) (barring impeachment by post-arrest silence). *But see* State v. Nott, 234 Kan. 34, 669 P.2d 660 (1983) (allowing impeachment but not using federal approach); Sanchez v. State, 655 S.W.2d 214 (Tex. Crim. App. 1982) (same).

76. Probative is used here as synonymous with "relevant," as defined in the Federal Rules of Evidence, FED. R. EVID. 401. Prior silence may be probative in a number of different contexts, but the most common are: (1) to suggest that the trial testimony is a recent fabrication, *see* Fletcher v. Weir, 455 U.S. 603 (1982) (noting that self-defense not claimed until trial); Doyle v. Ohio, 426 U.S. 610, 616 (1976) (reiterating the prosecutor's claim that the defendant fabricated a story to "fit within the seams of the State's case as it was developed at pretrial hearings"); (2) as an adopted admission by silence, *see* United States v. Hale, 422 U.S. 171, 176 (1975); (3) as a tacit admission, *see* Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 GA. L. REV. 27 (1979); and (4) as a prior inconsistent statement, *see* State v. Nott, 234 Kan. 34, 669 P.2d 660 (1983).

77. To be unfairly prejudicial, the evidence of silence must raise the danger of unduly arousing the jury's emotions of prejudice, hostility or sympathy. One court finding of prejudicial impact observed that "[w]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." Walker v. United States, 404 F.2d 900, 903 (5th Cir. 1968). Under the Federal Rules of Evidence, the danger of prejudice must *substantially* outweigh probative value before exclusion is appropriate. *See* FED. R. EVID. 403.

Courts, in weighing the probative value and the prejudicial effect of evidence of prior silence to impeach subsequent testimony, must consider several factors. Silence occurring after arrest, while the defendant is subject to the pressures of custodial investigation, may have limited probative value for impeachment of subsequent testimony. Silence may also occur at judicial proceedings prior to trial, such as before a grand jury, at a preliminary hearing, or at a severed trial of a codefendant. Unlike the passive post-arrest refusal to answer questions without the advice of counsel, silence in a judicial proceeding prior to the defendant's trial involves the invocation of the fifth amendment right to remain silent. This distinction requires separate consideration in an analysis of the use of silence to impeach testimony. In addition to the nature of the prior silence, the nature of the subsequent testimony and the type of criminal proceeding where the silence occurs influences the admissibility of the prior silence.

A. The Nature of the Silence

Applying the standard that evidence must be more probative than prejudicial, federal courts have focused on the ambiguity of silence in determining whether silence actually conflicts with the trial testimony.

In *United States v. Hale*,[78] the Supreme Court, acting in its supervisory capacity over federal courts,[79] relied on common law evidentiary grounds[80] to forbid the impeachment use of silence occurring at the time of arrest. The *Hale* Court doubted the probative value of silence that occurs immediately following arrest, suggesting that it may result from intimidation by the situation, confusion about what is being asked under such stressful conditions, fear of police, unwillingness to incriminate another, or a response to the hostile and perhaps unfamiliar atmosphere of detention.[81] Decided shortly after *Hale*, *Doyle* reiterated the evidentiary finding that silence following arrest and *Miranda* warn-

78. 422 U.S. 171 (1975).

79. Because the Court decided *Hale* in its supervisory capacity over federal courts, the case does not bind state courts. 422 U.S. at 181.

80. The Court decided *Hale* on June 23, 1975, eight days before the Federal Rules of Evidence became effective. Thus, *Hale* relied heavily on Wigmore's evidence treatise. *See* 422 U.S. at 176. Wigmore's analysis "allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." 3A J. WIGMORE, EVIDENCE § 1042 (J. Chadbourn rev. ed. 1970).

81. 422 U.S. at 177.

ings may be "insolubly ambiguous."[82] This ambiguity results because the *Miranda* warnings provide at least one motivation for remaining silent that is consistent with innocence.[83] One court has noted that there exists an underlying ambiguity in all post-arrest silence, because even without the *Miranda* warnings an arrestee may be motivated to remain silent, withholding his exculpatory story, in anticipation of a more receptive audience—such as a judge, jury, or lawyer—than the arresting officer.[84] The several possible reasons for silence immediately following arrest may preclude its use for impeachment of subsequent trial testimony.

B. Post-Arrest Silence and the Invocation of the Fifth Amendment

Although a defendant's silence at a prior judicial proceeding does not mean that his testimony at his own trial is *per se* inconsistent with the prior silence,[85] invocation of the fifth amendment at a prior trial does not present the same ambiguities as silence immediately after arrest. An active assertion of the fifth amendment in response to a prosecutor's question presents less ambiguity than a passive assertion—in effect, silence—for a number of reasons. First, because an active assertion of the fifth amendment occurs in the face of direct accusation, the inference of guilt is stronger than that drawn from the passive assertion of silence in response to detention.[86] Second, the nature of the prosecutor's question may narrowly limit the inferences that can be drawn from an active assertion of the fifth amendment. Consequently, an active assertion of the fifth amendment, at a prior judicial proceeding, followed by an alibi defense asserted in response to the same question at the defendant's subsequent trial, may be enough to raise an inference of prior inconsistent statements. Passive post-arrest silence followed by an alibi defense,

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82. 426 U.S. at 617. *Hale* also noted that silence at the time of arrest may be inherently ambiguous without *Miranda* warnings. 422 U.S. at 177.

83. *See* Doyle v. Ohio, 426 U.S. 610, 617 n.8 (1976); *but see* 426 U.S. at 621 (Stevens, J., dissenting) (arguing that *Miranda* warnings do not lessen the probative value of the silence when used for impeachment purposes).

84. *See supra* notes 67-69.

85. *See* Stewart v. United States, 366 U.S. 1, 5 (1961).

86. Of course, passive silence can be a response to accusation, such as during custodial interrogation. Police reports, however, commonly omit the exact questions asked, so silence is more probative for impeachment purposes in the active assertion context partly because a record exists of the hearing or trial.

however, might not raise such an inference of inconsistent statements.

C. *The Trial Testimony*

The nature of silence, however, is only part of the inquiry. Inconsistency also depends on the defendant's trial testimony. Both exculpatory explanations and mitigating excuses implicate the defendant in the crime charged. The defendant has little incentive to volunteer such incriminating admissions. But inconsistency is more likely when a defendant offers a complete alibi, or flatly denies the charge, because presumably the defendant has a stronger incentive to volunteer his favorable account earlier than at trial to convince the prosecutor to halt the criminal proceedings. Therefore, an active invocation of the fifth amendment followed by an alibi is the most probative evidence for impeachment by prior silence.

D. *The Nature of the Tribunal*

The Court has also noted that "the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment."[87] Unfortunately, the Court has not clarified the relevance of this inquiry. In *Hale* it merely concluded that the "inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence."[88]

A defendant's active invocation of the fifth amendment before a grand jury, however, will not always be inconsistent with his subsequent trial testimony. Indeed, in *Grunewald v. United States*,[89] the Court prohibited impeachment use of a defendant's[90] silence at a codefendant's prior grand jury proceeding. Although the outcome in *Grunewald* was based primarily on the factual determination that the subsequent exculpatory trial tes-

87. Grunewald v. United States, 353 U.S. 391, 422 (1957).

88. 422 U.S. at 177.

89. 353 U.S. 391 (1957).

90. Although the witness had not been formally charged when he was questioned at Grunewald's grand jury proceeding, "[the witness] was quite evidently already considered a potential defendant." 353 U.S. at 423.

timony was not inconsistent with the grand jury silence,[91] the Court also focused on the nature of a grand jury proceeding. Grand juries are secretive and investigative:

> Innocent men are more likely to [remain silent] in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.[92]

The procedural differences between the prior trial of a codefendant and either a grand jury proceeding or an arrest of the defendant safeguard the defendant from making a rushed, uninformed choice to remain silent. Thus, impeachment of such silence should be allowed.

*E. Rehabilitating the Defendant Impeached by Post-*Miranda *Silence*

If impeached by his silence as a witness at a prior trial, a defendant will probably not try to rehabilitate his credibility by claiming that the *Miranda* warnings caused his silence.[93] At a preliminary hearing or a codefendant's prior trial, the presence of a judge assures the defendant of a more impartial listener than the arresting officer or prosecutor,[94] and thereby reduces the incentive to remain silent. Defense counsel may even be present at the codefendant's prior trial, especially if subsequent impeachment is a possibility. After such safeguards are present, continued reliance on *Miranda* seems dubious.

The defendant has an incentive to attribute his prior silence to the advice of counsel.[95] Counsel's advice may be based on a

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91. 353 U.S. at 421-22.

92. *Id.* at 422-23.

93. Relying on the *Miranda* warnings as a basis for silence, long after the warnings were given and after advice from counsel, strains legitimacy because *Miranda* warnings were designed primarily, if not exclusively, to inform an arrestee of his rights at the time following arrest when he has few other procedural protections. *See, e.g., supra* notes 63-69 and accompanying text. Although a defendant may show that the *Miranda* warnings were a subjective reason for his silence in an effort to rehabilitate his credibility, the admissibility and, to an extent, the weight the jury gives the evidence of silence will turn on its objective reasonableness.

94. *See supra* notes 67-68 and accompanying text.

95. *See* Doyle v. Ohio, 426 U.S. 610, 632 (1976) (Stevens, J., dissenting).

variety of legal and tactical considerations that outweigh the defendant's desire to present his story.[96] Nevertheless, *Hale* recognized that prior silence gains probative value when the silence occurs in the face of accusation.[97] As a result, silence may be found to be inconsistent with subsequent trial testimony despite the advice of counsel. Silence in response to specific questions posed at a codefendant's prior trial is the most probative evidence of self-contradiction,[98] although the degree of inconsistency will depend on the defendant's trial testimony and the facts of the given case.[99]

Several factors influence the determination of whether the probative value of prior silence outweighs its prejudicial effect. Passive post-arrest silence has less probative value than does an active invocation of the fifth amendment. Silence in the face of general questions likewise has less probative value than silence in the face of a direct accusation of guilt. The type of tribunal at which the prior silence occurred influences the weighing of the probative and prejudicial nature of the silence for impeachment. The nature of the subsequent testimony offered by the defen-

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96. But to be perceived as a reasonable argument, silence due to advice of counsel may have to be accompanied by an explanation of why counsel advised the defendant to remain silent, which in turn may reflect why defendant's testimony would have tended to incriminate him.

97. *See* United States v. Hale, 422 U.S. 171, 176 (1975); *see also* United States *ex rel.* Saulsbury v. Greer, 702 F.2d 651, 656 (7th Cir.), *cert. denied,* 461 U.S. 935 (1983) (stating that a defendant who took the stand on his own behalf, "by assigning a reason for silence immediately after arrest, chose to indicate to the jury that silence had probative weight and removed that subject from the realm of insoluble ambiguity about which there could be no comment."). This notion of increased probative value in the face of accusation presents a problem in those states or federal courts that still compel a witness to take the stand and assert the privilege for specific questions. The more specific the prosecutor's questions, the more probative the silence will be deemed. Such a prosecutorial tactic may be limited, however, because the more specific a question is, the more it may prejudice a defendant by implying guilt.

98. "[T]he context in which a question is asked imparts additional meaning to the question, and clarifies what information is sought. A question to which a claim of the privilege is interposed must be considered 'in the setting in which it is asked.'" Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 480 (1972) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

One could raise the counterargument that a defendant would naturally present an exculpatory story when his freedom was at stake, as in his own trial, but not when his freedom was not directly at stake, as in his preliminary hearing or a prior codefendant's trial. *See* Note, *supra* note 56, at 638. This analysis, however, fails to recognize that a defendant would likely present his exculpatory story at the preliminary hearing "to persuade the prosecution to dismiss the charges in advance of trial." Doyle v. Ohio, 426 U.S. 610, 632 n.10 (1976) (Stevens, J., dissenting).

99. The trial judge must determine whether there is a sufficient inconsistency for the evidence of silence to be admitted, *see* FED. R. EVID. 104(a), leaving the weight of the inconsistency and its impeachment value to the jury.

dant also affects whether prior silence should be admitted for impeachment. Silence will, in most instances, have sufficient probative value that the court should allow its admission to impeach subsequent testimony.

CONCLUSION

The United States Constitution both permits and restricts the use of a defendant's prior silence to impeach his testimony at his own trial. The *Raffel* waiver rule terminates the protection of the fifth amendment when the defendant voluntarily takes the stand at his own trial, and the fairness requirement of the fourteenth amendment due process clause forbids the use of silence resulting from an affirmative government inducement. The government inducement to remain silent, which may be caused by the shock of arrest, the fearful nature of custody, the *Miranda* warnings, or any combination thereof, will gradually lose its influence on the defendant as pressure is diminished and advice of counsel obtained. In this context, impeachment by prior silence becomes fair. No constitutional barriers to impeachment by prior silence exist if the foregoing procedural safeguards provide the defendant an unpressured and informed environment in which to choose to remain silent. Therefore, admissibility must be determined by applying evidentiary rules to the facts of the particular case.

Recognizing the defendant's incentive to distort the facts, trial judges already admit most other relevant impeachment evidence, allowing the jury to assess the credibility and demeanor of the witness. The defendant, of course, may rehabilitate his credibility by showing that prior silence is consistent with his testimony. But only by allowing prior silence as evidence of impeachment will the jury be fully informed and able to accurately assess the truthfulness of the defendant's testimony. Within the rules of evidence, the defendant as a witness for himself must be impeachable like any other witness, and prior silence is a proper and valuable piece of information in making this determination.

—Rex A. Sharp