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Jenkins v. Anderson: The Fifth Amendment Fails to Protect Prearrest Silence

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JENKINS V. ANDERSON: THE FIFTH AMENDMENT FAILS TO PROTECT PREARREST SILENCE

INTRODUCTION

In *Jenkins v. Anderson*,[1] the United States Supreme Court allowed the prosecution to impeach the credibility of a criminal defendant's testimony based upon his prearrest silence. It is argued here that the Court's analysis was unsatisfactory and that a vital fifth amendment right has been sacrificed for greater prosecutorial proficiency.

Dennis Jenkins was charged with first-degree murder and tried in a Michigan state court. The defendant's evidence showed that on August 12, 1974, the defendant's sister and her boyfriend were robbed by Doyle Redding and another man. The defendant, Dennis Jenkins, who was nearby, followed the thieves to their destination and reported their whereabouts to the police. The next day, the defendant stabbed and killed Redding. The defendant did not immediately report the stabbing, but did turn himself in to the authorities two weeks later.[2]

At trial, Jenkins took the stand and, for the first time, related an exculpatory version of the event. He testified that on August 13, 1974, he encountered Redding, who accused him of informing the police of the robbery. Then, according to the defendant, Redding attacked him with a knife, and in the ensuing struggle Redding was killed. At trial, Jenkins at all times maintained that he acted solely in self-defense.[3]

On cross-examination, the prosecutor asked the defendant the following questions over the objection of the defendant's counsel:

> Q. And I suppose you waited for the police to tell them what happened?
> A. No, I didn't.
> * * *
> Q. Did you ever go to a Police Officer or to anyone else?
> A. No, I didn't.[4]

The prosecutor again referred to Jenkins' prearrest silence in the closing argument. The defendant was convicted of manslaughter and sentenced to ten to fifteen years' imprisonment.[5]

After exhausting his state remedies, Jenkins sought a writ of habeas corpus in the federal district court. He contended that his constitutional rights were violated by the prosecutor's questions relating to his prearrest silence. The district court denied relief and the United States Court of Appeals for the Sixth Circuit affirmed.[6] The United States Supreme Court

1. 447 U.S. 231 (1980).
2. *Id.* at 232.
3. *Id.*
4. *Id.* at 233.
5. *Id.* at 234.
6. 599 F.2d 1055 (6th Cir. 1979).

granted certiorari.[7] The Supreme Court held that the use of prearrest silence to impeach a criminal defendant's credibility does not violate the fifth or fourteenth amendments.[8]

I. SILENCE PROTECTED: A REVIEW OF PRE-*JENKINS* LAW

The use of a criminal defendant's silence at and before trial is not a new issue.[9] Numerous Supreme Court decisions have dealt with adverse comment by the prosecution on the defendant's silence at trial[10] and with the use of post-arrest silence to impeach the credibility of a testifying criminal defendant.[11]

A. *Adverse Comment*

Since the 1965 case of *Griffin v. California*,[12] the fifth amendment has been held to insure that the silence of a criminal defendant may not be adversely commented upon at trial[13] because such comment would be an impermissible penalty imposed for exercising a constitutional privilege.[14] Just as one may not be compelled to forfeit his privilege against self-incrimination, an individual also has the right not to suffer any penalty for the assertion of a constitutional right. In order to preserve fully the value of the fifth amendment right to silence, adverse comment upon the assertion of such a right must not be allowed.

This "penalty doctrine," first established in *Griffin*, was explained and narrowed in *McGautha v. California*[15] and *Chaffin v. Stynchcombe*.[16] The *McGautha* Court ruled that the Constitution is not violated unless the compulsion of an election between constitutional rights "impairs to an appreciable extent any of the policies behind the rights involved."[17] *Chaffin* recognized that the Constitution does not forbid every government-imposed choice,[18] and implied that the courts should consider whether the state has a legitimate interest in the challenged procedure.[19]

B. *Impeachment*

Prosecutors often attempt to impeach a defendant's credibility at trial

7. 444 U.S. 824 (1979).
8. 447 U.S. 231 (1980).
9. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965); Raffel v. United States, 271 U.S. 494 (1926); Wilson v. United States, 149 U.S. 60 (1893).
10. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965); Wilson v. United States, 149 U.S. 60 (1893).
11. *See* Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); Raffel v. United States, 271 U.S. 494 (1926). *See also* Grunewald v. United States, 353 U.S. 391 (1957).
12. 380 U.S. 609 (1965).
13. *Id.* at 615.
14. *Id.* at 614.
15. 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972).
16. 412 U.S. 17 (1973).
17. 402 U.S. at 213.
18. 412 U.S. at 32.
19. *Id.* at 30-33.

by questioning him about his pre-and post-arrest silence. In *Raffel v. United States*,[20] the Supreme Court allowed the impeachment of a criminal defendant based upon his silence at a previous trial. In *Raffel*, the defendant was charged with violating the National Prohibition Act.[21] At his first trial, the defendant elected not to testify despite the testimony of a government agent that the defendant had made certain admissions to him prior to arrest.[22] When the first trial ended in a mistrial, Raffel elected to testify at his second trial and denied making the purported admissions.[23] On cross-examination, he was asked why he had not testified at the first trial.

In allowing the impeachment, the Court stated that once a defendant takes the stand, he completely waives his immunity of silence and may be cross-examined like any other witness.[24] The narrow holding[25] of *Raffel* was that a defendant's fifth amendment immunity, asserted at a previous trial, does not survive his appearance in a second trial so as to shield his previous silence from comment.[26] The Court found no justification in the underlying fifth amendment policies for extending the defendant's immunity from testifying beyond the trial in which the privilege is exercised.[27]

Nearly a half century later, the Court again addressed the issue of impeachment by reference to a defendant's post-arrest silence. In *United States v. Hale*,[28] the defendant was arrested and convicted of robbery. At the time of arrest and up until trial, the defendant remained silent and refused to explain his possession of $158. He related an exculpatory version at trial, and his testimony was impeached by prosecutorial remarks about his pretrial silence.[29] The Court distinguished *Raffel* on its facts and relied instead on its 1957 decision of *Grunewald v. United States*,[30] which held that it was unlawful to cross-examine a defendant about his fifth amendment invocation at a prior grand jury hearing. The Court in *Hale* reversed the conviction by exercising its supervisory power over the federal courts, holding that it was error to permit cross-examination of the defendant concerning his silence during police interrogation.[31] The Court ruled that any valid impeachment of

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20. 271 U.S. 494 (1926).

21. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (tits. I-II repealed by Liquor Law Repeal and Enforcement Act, ch. 740, § 1, 49 Stat. 872 (1935)).

22. 271 U.S. at 495. At the trial a prohibition officer testified that he had searched a drinking establishment. After the search Raffel admitted to owning the establishment. *Id.*

23. *Id.*

24. *Id.* at 496-97.

25. The case came to the Court upon a certified question: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified . . . upon the first trial[?]" *Id.* at 496. The Court answered in the negative. *Id.* at 499.

26. *Id.* The holding of *Raffel* is questionable in light of later cases. *See* text accompanying notes 68-85 *infra*. Various state cases have concluded that *Raffel* has been impliedly overruled or so eroded as to lack authority. *See, e.g.*, Raithel v. State, 40 Md. App. 107, 388 A.2d 161 (1978); State v. Carmody, 253 N.W.2d 415 (N.D. 1977); McFadden v. Page, 428 P.2d 338 (Okla. Crim. App. 1967); Commonwealth v. Jones, 229 Pa. Super. Ct. 236, 327 A.2d 638 (1974); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1969).

27. 271 U.S. at 498-99.

28. 422 U.S. 171 (1975).

29. *Id.* at 174.

30. 353 U.S. 391 (1957). For a discussion of *Grunewald*, see text accompanying notes 74-78 *infra*.

31. 422 U.S. at 181.

prior inconsistent statements requires that the prior statement[32] be inconsistent with the testimony at trial.[33] Failure to establish the threshold inconsistency between the statements mandates that the prior silence be found devoid of probative value and therefore excludable.[34] Silence, the Court reasoned, is normally so ambiguous that it lacks probative force.[35]

In *Hale*, there were so many alternative explanations[36] for the defendant's silence that his silence established no inconsistency with his trial alibi.[37] Thus, any probative value that existed was outweighed by the possible prejudicial impact.[38] The Court's decision rested on evidentiary grounds, avoiding the constitutional issues. Such avoidance, however, was short-lived.

One year after *Hale*, the Court reached the constitutional issue of impeachment through the use of post-arrest silence in *Doyle v. Ohio*.[39] Doyle was arrested for selling narcotics and given his *Miranda* warnings.[40] At the time of arrest and until trial, Doyle remained silent. At trial, he related an exculpatory defense for the first time.[41] The prosecutor asked him on cross-examination why he had not told this story to the police.[42] He was convicted by the state court, and the United States Supreme Court granted certiorari to resolve a conflict among the federal courts of appeals.[43] The Court held that the use of post-arrest silence to impeach the testimony of a defendant who received the *Miranda* warnings at the time of arrest would be fundamentally unfair and a deprivation of due process.[44] The Court reasoned that post-arrest silence is "insolubly ambiguous" because the silence may be an exercise of the *Miranda* rights recently communicated.[45] Moreover, the *Miranda* warnings are an implied assurance to the arrestee that his silence will not be used against him.[46]

Significantly, the *Doyle* Court noted that silence at the time of arrest may be inherently ambiguous apart from the effect of the *Miranda* warnings.[47] While the issue of post-arrest silence apparently was settled, what remained unresolved was the constitutional validity of impeaching a defend-

32. Wigmore's definition of "inconsistent statement," incorporates behavior, which includes silence. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1040, at 1050 (J. Chadbourne rev. ed. 1970).

33. 422 U.S. at 176.

34. *Id.*

35. *Id.*

36. *See* text accompanying notes 118-19 *infra*.

37. 422 U.S. at 180.

38. *Id.*

39. 426 U.S. 610 (1976).

40. Miranda v. Arizona, 384 U.S. 436 (1966), held that a number of procedural safeguards must be followed before the prosecution will be allowed to use statements made by a suspect during custodial interrogation. Specifically, the Court noted that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

41. Doyle maintained that he was buying the narcotics, not selling them. 426 U.S. at 613.

42. *Id.*

43. 423 U.S. 823 (1975). For a list of federal cases, see 422 U.S. at 173 n.2.

44. 426 U.S. at 618.

45. *Id.* at 617.

46. *Id.* at 618.

47. *Id.* at 617 n.8.

ant's testimony by commenting on silence maintained *prior* to the time of arrest.

II. *JENKINS V. ANDERSON*: THE PROTECTION FAILS

Because the defendant in *Jenkins* asserted violations of his fifth amendment and due process rights, the Supreme Court was forced to face the constitutional issues posed by impeachment through the use of prearrest silence. Although the majority noted that the fifth amendment protects a defendant against comment by the prosecution when the defendant remains silent throughout the trial,[48] the Court relied on *Raffel* to conclude that the use of prearrest silence for impeachment of a criminal defendant does not violate the fifth amendment.[49] The majority interpreted *Raffel* as standing for the proposition that once a defendant elects to testify he may be impeached with his prior silence.[50] In a footnote, the Court indicated that this is true even when the silence stems from an invocation of the fifth amendment privilege.[51]

The Supreme Court next confronted the argument that the prosecutor's impeachment of Jenkins' testimony was an impermissible burden on the fifth amendment right to silence. Relying on the rules of *McGautha*[52] and *Chaffin*[53] and the holding of *Raffel*,[54] the Court found a legitimate state interest in such impeachment (the Court's truth-finding function)[55] and no impairment of the policies underlying the privilege.[56]

In addressing the defendant's due process claim, the majority recognized the common law rule that witnesses may be impeached by their prior silence in situations in which an assertion naturally would have been made.[57] The Court impliedly found that the assertion naturally should have been made by Jenkins; its absence was inconsistent with his exculpatory testimony and, as such, probative.[58] The Court held that *Doyle* was not applicable in this situation, because the due process violation in *Doyle* was a result of governmental action which induced the defendant to remain silent.[59] Since Jenkins' silence took place before he was taken into custody and given *Miranda* warnings, there was no governmental inducement and, therefore, no due process violation.[60] Finding no constitutional violation, the Court affirmed the Court of Appeals' denial of habeas corpus. Justices Stevens and Stewart concurred.[61]

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48. 447 U.S. at 235 (citing Griffin v. California, 380 U.S. 609 (1965)).
49. 447 U.S. at 235-36.
50. *Id.* at 235.
51. *Id.* at 236 n.2.
52. 402 U.S. 183 (1971). *See* text accompanying notes 17-19 *supra*.
53. 412 U.S. 17 (1973). *See* text accompanying notes 17-19 *supra*.
54. *See* text accompanying notes 24-27 *supra*.
55. 447 U.S. at 238.
56. *Id.* at 236.
57. *Id.* at 239.
58. *Id.* at 240.
59. *Id.*
60. *Id.*
61. Justice Stewart concurred with the majority on all points except the fifth amendment

Justices Marshall and Brennan dissented, finding violations of due process, of the privilege against self-incrimination, and of the right to testify in one's own behalf.[62] The dissenters maintained that an accused has an absolute right to testify in his own behalf and a right not to incriminate himself prior to trial. To force an individual to choose between such fundamental guarantees would be a violation of the constitutional provision from which those rights evolve. Thus, the impeachment evidence places an impermissible burden on the fifth amendment privilege against self-incrimination and the right of an accused to testify in his own behalf.[63]

III. THE BURDENS OF IMPEACHMENT

The Court's analysis in *Jenkins* of the fifth amendment issue is incomplete. The majority's reliance upon the often-questioned *Raffel* decision, while omitting any meaningful discussion of the reasons for its resurrection,[64] leaves in question the continued viability of the penalty doctrine as it relates to the fifth amendment. A burden was imposed on the defendant who, in effect, had to choose between providing self-incriminating evidence to the authorities, and risking impeachment should he decide to testify at trial. Nevertheless, the Court relied upon *Raffel*, a questionable 1926 case,[65] decided long before the advent of the penalty doctrine, to support its finding that the policies underlying the privilege against self-incrimination were not appreciably impaired.

A. *Proper Construction of* Raffel

The *Raffel* decision was based on both evidentiary and constitutional grounds. Having found the questioning of the defendant about his prior silence valid for evidentiary purposes,[66] the Court was forced to address the defendant's fifth amendment claim. Noting that the safeguards against self-incrimination are only for the benefit of those who do not wish to testify in their own behalf, the Court looked to the policy underlying the privilege against self-incrimination and found no reason to extend the immunity from giving testimony to a testifying defendant.[67]

The Court's retreat from *Raffel* began in 1943 with *Johnson v. United States*.[68] In that case, Johnson testified about amounts he received from a

issue. On the fifth amendment issue, Justice Stewart joined the separate opinion of Justice Stevens. *Id.* at 245.

Justices Stevens and Stewart found no fifth amendment issue because the defendant was under no official compulsion to speak. Justice Stevens' due process argument was based on his dissent in *Doyle*, in which he maintained that the *Miranda* warnings did not contain an implied assurance that the arrestee's silence would not be used against him. 426 U.S. at 620.

62. 447 U.S. at 245 (Marshall, J. dissenting).

63. *Id.* at 254.

64. In a footnote, the Court referred to the cases that seem to question *Raffel*: United States v. Hale, 422 U.S. 171 (1975); Stewart v. United States, 366 U.S. 1 (1961); Grunewald v. United States, 353 U.S. 391 (1957). 477 U.S. at 237 n.4.

65. *See* note 26 *supra*.

66. 271 U.S. at 497-99.

67. *Id.* at 498-99.

68. 318 U.S. 189 (1943).

criminal syndicate from 1935 to 1937. When asked on cross-examination about monies received in 1938, the defendant was allowed by the Court to assert his fifth amendment privilege. Later, the prosecutor commented to the jury upon the defendant's assertion of the privilege.

The Court began its analysis in *Johnson* with the statement from *Raffel* that there is a difference between the rights of defendants who testify and those of defendants who do not.[69] The *Johnson* Court then cited Dean Wigmore's treatise on evidence[70] for the rule that an accused's voluntary testimony upon any fact is a waiver as to all other relevant facts.[71] Thus, a defendant who testifies has signified his waiver as to all facts "*except those which merely impeach his credit . . . .*"[72]

The Court in *Johnson* recognized that a defendant who testifies waives his immunity from giving testimony and that the waiver is total. Nevertheless, the Court stated that the total waiver applies only to the issues made relevant by the defendant on direct examination and not to items used solely for impeachment.[73]

The holding of *Raffel* was further restricted in *Grunewald v. United States*.[74] One of the defendants in *Grunewald* had previously refused, on the basis of his fifth amendment privilege, to answer certain questions asked of him by a grand jury. At trial, the same questions were asked of the defendant on cross-examination and were answered in a manner consistent with innocence. Subsequently, the prosecutor was allowed to bring out on cross-examination that the defendant had asserted his fifth amendment privilege as to these same questions before a grand jury.

The Court in *Grunewald* found that *Raffel* was not controlling under these circumstances,[75] because *Raffel* does not apply unless the trial testimony and the prior statement are inconsistent.[76] The *Grunewald* Court held that there was no inconsistency between the assertion of the fifth amendment privilege before a grand jury, and exculpatory testimony at trial in response to the same questions.[77] Deciding the case on evidentiary grounds, the Court expressly avoided the necessity of re-examining *Raffel* in light of *Johnson*[78] and declined to reach the constitutional issue.

In *Stewart v. United States*,[79] the Court again held that *Raffel* did not

69. *Id.* at 195; Raffel v. United States, 271 U.S. at 496-97.

70. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2276(2) (J. McNaughton rev. ed. 1961).

71. 318 U.S. at 195.

72. 8 J. WIGMORE, *supra* note 70, § 2276(2) (emphasis added).

73. 318 U.S. at 195-96.

74. 353 U.S. 391 (1957).

75. *Id.* at 418.

76. The inconsistency in *Raffel* was that the defendant remained silent at his first trial in the face of testimony that he had made an admission of guilt. This constituted a circumstance in which it would have been natural to reply. United States v. Hale, 422 U.S. at 175-76; Stewart v. United States, 366 U.S. 1; 5-6 (1961); 3A J. WIGMORE, *supra* note 32, § 1042; Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 204, 206 (1979).

77. 353 U.S. at 420-23.

78. *Id.* at 421. Four Justices would have overruled *Raffel*. *Id.* at 426 (Black, J., concurring).

79. 366 U.S. 1 (1961).

apply to cases where there was no inconsistency between trial testimony and statements made before trial. Stewart was charged with murder and pleaded the defense of insanity. He did not testify at this first two trials, but elected to testify at his third trial. On cross-examination, Stewart was impeached for his failure to testify at the previous trials. His testimony was characterized by the Court as gibberish,[80] consistent with his defense of insanity. Thus, there was no "testimony" to impeach and any impeachment was, therefore, solely of the defendant's demeanor.[81] The Court held that *Raffel* did not permit impeachment of solely demeanor evidence, and found that there was no inconsistency between silence (at one trial) and taking the stand at a subsequent trial.[82]

The resulting view of *Raffel* is that impeachment based on the defendant's prior silence is allowed only when there is an underlying inconsistency between the testimony and the prior statement. The prosecution is not permitted to impeach the defendant's testimony based on his prior silence solely by questioning the defendant's demeanor. This view is reflected in *United States v. Hale*,[83] in which the impeachment of the defendant's testimony based on his post-arrest silence was held invalid. The Court distinguished *Raffel*, noting that the inconsistency in *Raffel*, the failure of the accused to testify at his first trial in spite of uncontroverted testimony that he had made an admission of guilt, was not present in *Hale*.[84] Disposing of the case on evidentiary grounds, the Court did not reach the constitutional issue and again declined to re-examine *Raffel* in light of *Johnson* and *Griffin*.[85]

B. *Assertion of the Privilege*

In general, citizens have a duty to report crime to the authorities.[86] This obligation is not diminished simply because the witness to a crime is himself involved in illicit activities.[87] The obligation to assist authorities, however, is subordinate to the fifth amendment privilege against self-incrimination.[88] Generally, the privilege must be asserted by its claimant in a timely fashion because it is not a self-executing right.[89] Any claim of privilege must be presented to a tribunal for evaluation at the time disclosures are sought.[90]

An exception to the requirement that the claim be expressly asserted has developed. The assertion need not be made where it would, in itself,

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80. *Id.* at 3.
81. *Id.* at 6.
82. *Id.* at 5.
83. 422 U.S. 171 (1975). For a discussion of *Hale*, see text accompanying notes 28-37 *supra*.
84. *Id.* at 175. *See* note 76 *supra*.
85. *Id.* at 175 n.4.
86. *See* Roberts v. United States, 445 U.S. 552, 557 (1980), and authorities cited therein.
87. *Id.* 445 U.S. at 558.
88. *Id.*
89. *Id.* at 559; Garner v. United States, 424 U.S. 648, 653-55 (1976); United States v. Kordel, 397 U.S. 1, 7-10 (1970); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 78-79 (1965).
90. Garner v. United States, 424 U.S. at 653-55.

violate the claimant's privilege.[91] When some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent,[92] the courts will forgive the usual requirement that the claim be presented for evaluation in favor of a claim by silence.[93]

Had Jenkins reported the alleged attack upon him by Redding, he would have supplied valuable evidence linking himself to the incident. He would have provided the police with evidence that he was in the right place at the right time and would have actually admitted to killing the victim. For Jenkins to have asserted the privilege, he would have had to explain to the authorities that he was a witness to a crime and was electing to exercise his privilege, thus alerting the police to the crime and making himself the prime suspect. Jenkins, then, had a right to assert the privilege and fell within the exception to the assertion rule, which excuses him from presenting his claim and allows a claim by silence.[94]

C. *Penalty Doctrine*

The fifth amendment privilege against compelled self-incrimination was incorporated into the fourteenth amendment and made applicable to the states in *Malloy v. Hogan*.[95] In so doing, the Court characterized the privilege as "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[96] One year after *Malloy*, the Court in *Griffin v. California*[97] established the rule that adverse comment by a judge or prosecutor upon a criminal defendant's failure to testify violates the fifth amendment privilege against self-incrimination. Such comment is an impermissible penalty because it "cuts down on the privilege by making its assertion costly."[98]

The proper scope and limits of the privilege are derived from an analysis of its underlying policy justifications.[99] The fifth amendment is premised on the assumption that our system of criminal justice is an accusatorial one, not an inquisitorial one.[100] The privilege protects all persons from abuse by the government of its powers of investigation, arrest, trial, and punishment.[101] Second, the privilege is designed to deter inhumane treatment whereby individuals are compelled by abusive tactics to provide self-incriminating evidence.[102] The privilege also reflects society's unwillingness to sub-

91. *See, e.g.*, Marchetti v. United States, 390 U.S. 39 (1968).
92. 445 U.S. at 560 n.6; Lisenba v. California, 314 U.S. 219, 241 (1941).
93. 424 U.S. at 658 n.11; 390 U.S. at 50.
94. *See* text accompanying notes 91-93 *supra*.
95. 378 U.S. 1 (1964).
96. *Id.* at 8.
97. 380 U.S. 609 (1965). *See* text accompanying notes 12-14 *supra*.
98. 380 U.S. at 614.
99. The purpose of the *Griffin* rule is grounded upon the whole complex of values that the privilege represents. Tehan v. United States, 382 U.S. 406, 414 (1966).
100. Malloy v. Hogan, 378 U.S. at 7-8; Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
101. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484 (1957).
102. Murphy v. Waterfront Comm'n, 378 U.S. at 55; *see also* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955); 8 J. WIGMORE, *supra* note 32, § 2251; Ayer, *The Fifth Amendment*

ject criminal suspects to the "cruel trilemma of self-accusation, perjury or contempt."[103] A fourth widely-noted policy underlying the privilege is that the privilege contributes toward a fair balance between the state and the individual by requiring the government to leave the individual alone until good cause is shown for disturbing him, and by requiring the government in its contest with the individual to shoulder the *entire* load.[104]

Although the *Raffel* decision has been severely limited by subsequent decisions,[105] its fifth amendment holding has never been expressly disavowed.[106] Nevertheless, the *Raffel* Court did not consider an argument based upon a *Griffin*-type (penalty) rationale. Furthermore, the Court in *Raffel* never addressed the fourth policy justification noted above, the requirement that the government shoulder the entire load. The majority in *Jenkins* again failed to address this important policy, citing instead its discussion in *Raffel* of a defendant's right not to testify, for the proposition that *no* fifth amendment right had been impermissibly burdened.[107] By citing *Raffel*, the *Jenkins* Court made the same omission as did the Court in *Raffel*. Thus, to date, the Court has failed to employ the policy that the government must shoulder the entire load in any application of the penalty doctrine.

The rules set forth by the Supreme Court regarding the penalty doctrine are rather general, allowing either a broad or a narrow view to be taken in their application. *Malloy* and *Griffin* initiated the idea that the state violates a defendant's constitutional rights when it penalizes the defendant's assertion of those rights.[108] *McGautha* indicated that while "penalties" are impermissible, some "burdens" on constitutional rights are lawful.[109] The fact that an individual must make tough choices among constitutional rights does not constitute a penalty imposed on those rights.[110] The burden becomes a penalty only when it "impairs to an appreciable extent any of the policies behind the rights involved."[111] *Chaffin* implied that the court should consider the legitimacy of the challenged state action.[112]

An application of the above rules leads to the conclusion that impeachment of a criminal defendant's testimony based upon his prearrest silence, at least in the circumstances of the *Jenkins* case, violates the defendant's privilege against self-incrimination. The *Jenkins* majority noted that the state had at stake the important interest of ascertaining the truth.[113] This truth-find-

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and the Inference of Guilt from Silence: Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 849 (1980).

103. Murphy v. Waterfront Comm'n, 378 U.S. at 55; *see also* Ayer, *supra* note 102, at 849-50.

104. Tehan v. Scott, 382 U.S. 406, 415 (1966); Murphy v. Waterfront Comm'n, 378 U.S. at 55; 8 J. WIGMORE, *supra* note 70, § 2251, at 317. Ayer, *supra* note 102, at 849.

105. *See* text accompanying notes 68-85 *supra*.

106. *Hale*, *Stewart*, and *Grunewald* were all decided on evidentiary grounds using the Supreme Court's supervisory powers over the lower federal courts.

107. 447 U.S. at 235-36.

108. *See* text accompanying notes 96-98 *supra*.

109. 402 U.S. at 217; Schiller, *supra* note 76, at 213 n.96.

110. *Id.* at 214. *See* text accompanying notes 17-18 *supra*.

111. *Id.* at 213.

112. 412 U.S. at 30-33. *See* text accompanying note 19 *supra*.

113. 447 U.S. at 238.

ing function of the courts is significant, and it can at least be argued that impeachment may enhance this interest.[114] It must be remembered, however, that the privilege against self-incrimination "is not an adjunct to the ascertainment of truth."[115] The fifth amendment privilege protects more important constitutional values which reflect the concern of society that the individual be left alone.[116]

The question remains whether the impeachment through the use of prearrest silence impairs any fifth amendment policy.[117] Certainly a burden is imposed on the defendant if he refuses to come forward at the time of the incident. His silence, which may be motivated by fear,[118] an unwillingness to incriminate another, or a reliance on the right to remain silent,[119] may later be used to impeach his trial testimony should he offer an exculpatory version of events. Thus, an individual involved in a possibly criminal activity must decide immediately (for any amount of silence would supposedly be suspect) whether to remain silent and risk impeachment or to forego that right and risk almost certain self-incrimination by providing evidence to the authorities.

Requiring an individual to make such a decision, without the assistance of counsel, tips the balance in favor of the state in its contest with the individual.[120] If government is to shoulder the entire load and leave the individual unmolested in the absence of independent evidence connecting him with a crime,[121] then impeachment for failing to provide the authorities with incriminating evidence appreciably impairs this fifth amendment policy.

The loss of such impeachment evidence would not overly burden the prosecution. Impeachment evidence is, by nature, only used to assess the defendant's credibility, and the Court has noted the probative weakness of silence.[122] Furthermore, the exercise of the privilege cannot be found indicative of guilt or presumptive of perjury.[123] Since the privilege serves to protect the innocent who, like Jenkins, otherwise might be ensnared in ambiguous circumstances,[124] there is no reason to believe that only the

114. *Id.*

115. Tehan v. United States, 382 U.S. at 416.

116. *Id. See* text accompanying notes 12-19, 95-104 *supra*.

117. In addition, the *Jenkins* decision may induce defendants *not* to take the stand because of the impact on the jury of impeachment evidence, thus hindering the ascertainment of truth by depriving the court of the defendant's testimony. Comment, *The Impeachment Exception to the Exclusionary Rule*, 34 U. CHI. L. REV. 939, 944 (1967).

118. Jenkins was a black parolee, making fear a likely explanation for his silence.

119. *See* United States v. Hale, 422 U.S. at 177; Ratner, *supra* note 101, at 492-93; Schiller, *supra* note 76, at 208-09; Note, Robeson v. State: *Cross-Examination of Prearrest Silence*, 67 CALIF. L. REV. 1205, 1210-11 (1979).

120. *See generally* 8 J. WIGMORE, *supra* note 70, § 2251.

121. Ratner, *supra* note 101, at 474.

122. *See* Doyle v. Ohio, 426 U.S. at 617 n.8; United States v. Hale, 422 U.S. at 176-77. Wigmore explains that "failure to assert a fact when it would have been natural to assert it, amounts to an assertion of the non-existence of the fact." 3A J. WIGMORE, *supra* note 32, § 1042, at 1056. Silence often is of little relevence because "the inference of assent may safely be made only when no other explanation is equally consistent with silence." 4 J. WIGMORE, *supra* note 32, § 1071, at 102.

123. Slochower v. Board of Higher Educ., 350 U.S. 551, 557 (1956).

124. *Id.* at 557-58. *See also* Ullmann v. United States, 350 U.S. 422, 426 (1956).

guilty will go free due to the loss of the impeachment evidence. The prosecutor may still cross-examine the defendant on all facets of his exculpatory version as brought out on direct examination.[125] Once the defendant testifies, he must do so completely and without immunity. But the prosecutor must not be allowed to make remarks which infringe upon a defendant's constitutional rights.

CONCLUSION

The impeachment of a criminal defendant's testimony due to his prearrest silence should have been found by the *Jenkins* Court to be a fifth amendment violation. Reliance by the *Jenkins* majority upon *Raffel* was misplaced because *Raffel* applies only when there is an underlying inconsistency between the trial testimony and the prior statement and because it failed to consider an argument based on the penalty doctrine rationale. In *Jenkins*, there was no underlying inconsistency between the prearrest silence and the exculpatory version at trial.

Furthermore, *Raffel* failed to address the fifth amendment policy that the government must bear the entire burden in its contest with the individual. By relying on *Raffel* for its conclusion that no fifth amendment policy was impaired, the *Jenkins* Court also failed to address that issue. By proper application of the penalty doctrine in conjunction with the fifth amendment policy noted above, the Court should have concluded that impeachment based on prearrest silence appreciably impairs that policy.

The penalty doctrine established the principle that impeachment evidence is barred when such impeachment constitutes a penalty imposed upon the prior exercise of the fifth amendment right of silence.[126] When a defendant is compelled to make an election between constitutional rights, and the policies underlying those rights are appreciably impaired, an impermissible penalty exists. In its haste to slam the door on any further expansion of earlier, more liberal decisions, the Court failed to provide a sound analytical base for its holding.

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125. Note, Robeson v. State: *Cross-Examination of Prearrest Silence*, 67 CALIF. L. REV. 1205, 1209 (1979).

126. *See* text accompanying notes 12-14 *supra*.