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Havens, Jenkins, and Salvucci, and the Defendant's "Right" to Testify

CRAIG M. BRADLEY*

Three recent Supreme Court opinions that enlarge the scope of permissible impeachment may substantially influence the criminal defendant's decision whether to take the stand. In this article, Professor Bradley evaluates the current status of the defendant's "right" to testify, assesses the impact of these cases on that right, and offers cogent advice on effective strategies for practitioners.

Last term, the Supreme Court decided two cases, United States v. Havens,1 and Jenkins v. Anderson,2 that significantly expanded opportunities for impeaching criminal defendants who choose to testify. Havens held that unlawfully seized and otherwise excluded evidence could be used to impeach not only direct testimony but even statements first elicited from the defendant during cross-examination.3 Jenkins endorsed the use of pre-arrest silence prior to receipt of Miranda warnings to impeach the defendant's testimony.4 A third decision, United States v. Salvucci,5 "broadly hinted,"6 but did not expressly conclude, that the defendant's testimony at a pretrial hearing on a suppression motion could be used to impeach subsequent testimony at trial.7 Consequently, defendants deciding whether to testify must evaluate several new potentially adverse effects of taking the stand. This article considers the appropriateness of placing those additional burdens upon the defendant's testimony.8 In grappling with that question, it is necessary first to determine the nature of the defendant's "right" to testify. The conclusion reached here is that the criminal defendant has a due process right to testify as an ordinary witness, but that it is frequently impossible to treat the defendant as "just another witness." In those circumstances, the right to testify requires that impeachment of the defendant must be limited. The middle sections of the article examine Havens, Jenkins, and Salvucci in detail, and evaluate the degree to which each impermissibly burdens the defendant's right to testify.9 These sections will argue that Havens improperly entrenches upon the defendant's

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1. 100 S. Ct. 1912 (1980).
2. 100 S. Ct. 2124 (1980).
3. The cross-examination questions must be reasonably suggested by the defendant's answers during direct examination, however. 100 S. Ct. at 1917. Havens thus broadened the long-standing rule of Walder v. United States, 347 U.S. 62 (1954), that allowed the use of illegally seized evidence to impeach the defendant's direct testimony.
4. 100 S. Ct. at 2130. Jenkins thus limited the rationale of Doyle v. Ohio, 426 U.S. 610 (1976), which held that a defendant's silence after receipt of Miranda warnings could not be used to impeach his testimony.
5. 100 S. Ct. 2547 (1980).
6. Id. at 2555 (Marshall, J. dissenting).
7. Id. at 2554 nn.8 & 9.
8. A full discussion of the impact of these three cases on defendants would treat two sets of rights. The first set includes those rights that shape the options available to the defendant at trial—such as the defendant's right, if any, to take the stand. The second set encompasses underlying rights that particularly affect pretrial conduct: in Havens, the fourth amendment right to exclude evidence that was the product of an illegal seizure and in Jenkins, the fifth amendment right to remain silent in dealing with the police. This article discusses only the first type, focusing upon the impact of the cases on the defendant's "right" to testify.
9. As the Supreme Court has repeatedly declared, an impermissible burdening of rights is not shown by
right to testify, insofar as the decision permits use of suppressed evidence to supplement indirectly the prosecution's case on the issue of guilt rather than to damage credibility. While the evidentiary conclusions of *Jenkins* may be faulty, the rationale applied to *Havens* supports limited use of pre-arrest silence to assail the credibility of a defendant. The correctness of *Salvucci* 's ambiguous endorsement of impeachment by use of statements from a prior suppression hearing depends upon the substantiality of the defendant's inconsistent assertions. Such impeachment should be allowed if its primary impact is to correct false statements in the defendant's direct testimony, but not if it serves primarily as a gratuitous supplement to the prosecution's case-in-chief. The final portion of the article briefly treats the tactical problems posed for defense counsel by these three cases.

I. THE "RIGHT" TO TESTIFY

The proposition that the defendant has a right to testify at trial may seem indisputable. Indeed, the Supreme Court has frequently, if off-handedly, referred to such a right. In *Harris v. New York,* the Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." Similarly, in *Brooks v. Tennessee,* the Court observed: "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."

No such right to testify, however, appears in the Bill of Rights. Indeed, as the Supreme Court recognized in *McGautha v. California,* such a right certainly did not exist at the time the Constitution and the Bill of Rights were framed. Rather, the accepted view at that time was that the accused, as a party to the litigation, was disqualified from testifying because of his interest in the outcome. Not until 1827 was this rule authoritatively criticized, and not until 1859 did any state declare the testimonial competence of the criminal defendant to testify. Britain did not establish such a right for all criminal defendants until 1898, and only in 1962 did Georgia become the last state to guarantee a right to testify as a matter of state law. While no historic right to testify existed, this did not mean that the accused was given a mere finding that a choice imposed upon the defendant may have a "discouraging effect on the the defendant's assertion of his trial rights ...." *Chaffin v. Stynchcombe,* 412 U.S. 17, 31 (1973). Rather, it is necessary to consider the purpose of the rule in question, and to ascertain whether the benefits to society at large outweigh the detriment to the individual defendant. See *Corbitt v. New Jersey,* 439 U.S. 212, 218-22 & nn.8 & 9 (1978). The most common example of this type of balancing is the Court's approval of laws that encourage the defendant to waive his right to a jury trial by pleading guilty. See id.
no opportunity to tell his side of the story. Rather, the practice was to permit him to make an unsworn statement not elicited through direct examination by counsel but also not subject to cross-examination.\textsuperscript{20} In \textit{Ferguson v. Georgia},\textsuperscript{21} however, the Supreme Court declared this practice an unconstitutional deprivation of due process insofar as it denied the accused "the right to have his counsel question him to elicit his statement."\textsuperscript{22}

No clear declaration of a constitutional right to testify emerged from \textit{Ferguson}, despite concurring opinions in which Justices Clark and Frankfurter urged such a ruling.\textsuperscript{23} The majority held only that the Georgia statute at issue was unconstitutional as written,\textsuperscript{24} leaving open the question of whether a statute hypothetically redrawn to allow unsworn statements elicited by counsel while maintaining the incompetence of defendants to offer sworn testimony would be constitutional.\textsuperscript{25} Why the Court declined to reach the issue is unclear, but a footnote in the opinion indicates that the petitioner's failure to assert such a constitutional right to testify may have been a major factor.\textsuperscript{26} Whatever the reason for the Court's limited focus, the reserved issue became moot with respect to Georgia because Georgia enacted a testimonial competence statute.\textsuperscript{27}

After \textit{Ferguson} and the subsequent Georgia statutory revision, then, it had become a federal constitutional right for the defendant to give a statement elicited by questions from counsel, and a matter of federal\textsuperscript{28} and state statutory\textsuperscript{29} or state constitutional\textsuperscript{30} law that the defendant was a competent witness in all American jurisdictions. In addition, \textit{Ferguson} provided the foundation for subsequent assumptions that a constitutionally-guaranteed right to testify may be read into the sixth and fourteenth amendments.\textsuperscript{31}

The sixth amendment rationale for such a right emerges only tacitly from \textit{Ferguson}, as that case focused upon the right to effective representation by counsel as an aspect of due process under the fourteenth amendment.\textsuperscript{32} The subsequent definitive application of the sixth amendment to the states in \textit{Gideon v. Wainright},\textsuperscript{33} however, assured a constitutional basis other than due process for a state defendant's right to effective representation. The eventual willingness of the Court in \textit{Faretta v. California}\textsuperscript{34} to equate the defendant's sixth amendment right to

\textsuperscript{20} See 2 Wigmore, \textit{supra} note 15, at § 579.
\textsuperscript{21} 365 U.S. 570 (1961).
\textsuperscript{22} Id. at 596. \textit{Ferguson} involved two provisions of the Georgia Code, §§ 38-415 and -416, both of which had been upheld by Georgia courts. The majority of the Court specifically limited itself to a consideration of § 38-415, the unsworn statement section. The incompetency statute, § 38-416, was not addressed because appellant raised no question as to its constitutional validity. \textit{Id.}
\textsuperscript{23} Id. at 598, 601 (Clark & Frankfurter, JJ., concurring). The opinions urged the Court to hold the incompetency provision unconstitutional.
\textsuperscript{24} Id. at 596.
\textsuperscript{25} Id. at 570 n.1.
\textsuperscript{26} Id. (citing Brief for "Appellant" [sic] at 6-7). The majority also noted that adjudicating the validity of the incompetency statute, § 38-416, "would be disrespectful of the state's procedures." \textit{Id.}

Possibly the Court also felt that the declaration of a right to testify would interfere with the well-established right of the prosecution to impeach the defendant with evidence of prior convictions if he took the stand. \textit{See} McGautha v. California, 402 U.S. 183, 215 (1971).
\textsuperscript{27} See note 19 \textit{supra}, and accompanying text.
\textsuperscript{28} See note 17 \textit{supra}.
\textsuperscript{29} See generally \textit{Ferguson v. Georgia}, 365 U.S. at 596-98 (list of statutes and state constitutional provisions that establish the defendant's right to testify in all states).
\textsuperscript{30} See \textit{id.}
\textsuperscript{31} \textit{See}, United States v. Grayson, 438 U.S. 41, 56 & n.2 (1978) (Stewart, J., dissenting) (right to testify has both statutory and constitutional bases).
\textsuperscript{32} See note 22 \textit{supra}, and accompanying text.
\textsuperscript{33} 372 U.S. 335 (1963) (state must provide counsel to indigent defendant in all criminal cases).
\textsuperscript{34} 422 U.S. 806 (1975) (defendant on sixth amendment grounds could refuse representation by state-appointed counsel if he preferred to represent himself).
competent counsel with a right "to make his own defense"\textsuperscript{35} in a state proceeding seemingly leaves little room for doubt that the sixth amendment does incorporate a right to testify.\textsuperscript{36}

Likewise, the fourteenth amendment grounds for such a right are persuasive. A reading of \textit{Ferguson} together with an earlier case, \textit{In re Oliver}, \textsuperscript{37} suggests that the defendant's opportunity to take the stand may be characterized as a critical component of due process. In \textit{Oliver}, the Court set forth "the most basic ingredients of due process of law,"\textsuperscript{38} concluding that:

\begin{quote}
A person's right to reasonable notice of a charge against him, and \textit{an opportunity to be heard in his defense}—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, \textit{to offer testimony}, and to be represented by counsel.\textsuperscript{39}
\end{quote}

Prior to \textit{Ferguson}, the rights "to be heard in [one's own] defense" and "to offer testimony" might have been thought to be vindicated by an unsworn statement. After \textit{Ferguson}, it is clear that the only way to preserve such rights is to afford the defendant the opportunity to testify on his own behalf as a matter of due process.\textsuperscript{40} This logical conclusion perhaps explains why the Supreme Court has apparently taken such a right for granted in several cases decided since \textit{Ferguson}.\textsuperscript{41}

Although the Court has recently assumed the existence of a right to testify, that right is plainly a qualified one. The Court is adamant about such limitations as those expressed in \textit{Brown v. United States}:\textsuperscript{42} "If [the defendant in a criminal case] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination."\textsuperscript{43} A much earlier statement of similar principles notes that "it is clear that the prosecution has a right to cross-examine [the defendant]... with the same latitude as would be exercised in the case of an ordinary witness... ."\textsuperscript{44} The evident import of these statements

\textsuperscript{35.} Faretta v. California, 422 U.S. at 819.
\textsuperscript{36.} In United States v. Grayson, 438 U.S. 41 (1978), Justice Stewart observed: "I cannot believe that [the right to testify] is not also a constitutional right, for the right of a defendant under the Sixth and Fourteenth Amendments 'to make his own defense' surely must encompass the right to testify in his own behalf." \textit{Id.} at 56 n.2 (Stewart, J., dissenting) (citing Faretta v. California, 422 U.S. 806 (1975)).
\textsuperscript{37.} 333 U.S. 257 (1948) (petitioner convicted of contempt for false and evasive testimony without notice, hearing, and counsel denied due process).
\textsuperscript{38.} The passage from \textit{Oliver} was so described by the Court in \textit{Washington v. Texas}, 388 U.S. 14, 18 (1967) (state statute prohibiting co-participants in crime from testifying for one another contravenes sixth amendment right, applied to states via fourteenth amendment, to have compulsory process for obtaining favorable witnesses).
\textsuperscript{40.} \textit{See} Ferguson v. Georgia, 365 U.S. at 602 (Clark, J. concurring).
\textsuperscript{41.} \textit{See}, e.g., Corbitt v. New Jersey, 439 U.S. 212, 219 n.8 (1978) (defendant may have right of constitutional dimension to testify or remain silent); Brooks v. Tennessee, 406 U.S. 605, 612 (1972) (state rule found to infringe upon defendant's rights of due process as defined in \textit{Ferguson}); Harris v. New York, 401 U.S. 222 (1971) (both majority ("Every criminal defendant is privileged to testify in his own defense.") and dissent ("The choice of whether to testify in one's own defense... is an exercise of the constitutional privilege [against self-incrimination].") assumed right to testify; only scope of right was at issue).
\textsuperscript{42.} 356 U.S. 148 (1958).
\textsuperscript{43.} \textit{Id.} at 154-55.
\textsuperscript{44.} Fitzpatrick v. United States, 178 U.S. 304, 315 (1900).
is that the defendant's rights to present testimony is a right to testify as an ordinary witness, no more and no less. Accordingly, the Court has held that the defendant who testifies may be impeached with prior convictions, prior inconsistent statements, and any other relevant evidence that contradicts his direct testimony—despite the potential of such attacks for discouraging him from taking the stand at all. In seeking to ensure that the testifying defendant neither benefits nor suffers from his position insofar as impeachment is concerned, however, the court has failed to consider the essential impossibility of treating the defendant like any other witness in certain circumstances discussed below.

While the "ordinary witness" principle may appropriately suggest some limitations on the defendant's right to testify, the Court too facilely concluded in Havens and Jenkins, and implied in Salvucci, that because any other witness could be impeached by the evidence in question, ipso facto the defendant also could be impeached. The peculiar position of the criminal defendant requires a more penetrating analysis of cases that may critically erode his constitutional right to testify by permitting impeachment that is more prejudicial than probative.

II. UNITED STATES v. HAVENS

United States v. Havens is particularly illustrative of the problem. In that case, respondents Havens and McLeroth were underemployed attorneys from Indiana who sought to supplement their incomes by smuggling cocaine. Havens, the prime mover, traveled to Peru four times in connection with this operation, accompanied on his first, third, and fourth trips by McLeroth. On the first trip, they taped cocaine to McLeroth's body and successfully smuggled it into the United States. On the third trip, no cocaine was procured in Peru, and they returned empty-handed. On the fourth trip the pair placed the cocaine in pockets that had been sewn onto a T-shirt. McLeroth then wore this garment under his regular clothing on the flight back to the United States. Havens passed through customs without incident, but McLeroth was searched and the cocaine was found. Upon questioning, McLeroth implicated Havens, who was located in the airport and arrested. Havens's luggage was seized and searched without a warrant. Customs officials found no drugs but did find a T-shirt "from which pieces had been cut that matched the pieces that had been sewn into McLeroth's..."
The T-shirt and other material found during the illegal search were suppressed on motion prior to trial. At trial, McLeroth testified that Havens had planned the operation. He described how the cocaine had been "taped" and "wrapped" around his body during the first trip. Regarding the fourth trip, he testified that Havens had supplied the altered T-shirt and had sewn the cocaine into it. On direct examination, Havens denied that he was guilty of any count of the indictment. He offered an innocent explanation for his frequent trips to Peru. The following series of questions and answers then took place:

Q: Before you returned to the United States, did you engage in purchasing cocaine. . . .? [apparently referring to the fourth trip]
A: No . . . .
Q: And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body. . . .?
A: Yes, I did.
Q: Did you ever engage in that kind of activity with Mr. McLeroth. . . . on that fourth visit to Lima, Peru?
A: I did not.

On cross-examination, Havens testified as follows:

Q: Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
A: I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

Q: And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?
A: Absolutely not.
Q: Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?
A: Not to my knowledge.
Q: Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975?
A: Not to my knowledge. No.

58. United States v. Havens, 100 S. Ct. at 1914.
59. Id.
60. Both men were charged in a three-count indictment, but McLeroth pleaded guilty to one count and testified against Havens. Id.
62. Id. at 18.
63. Id. at 21. McLeroth indicated that the body stocking and heavy-duty supporter which he wore over the T-shirt had also been supplied by Havens. Id. at 27.
64. Id. at 30-31.
65. See id. at 31-32.
66. Id. at 33-34.
67. Id. at 35, 46. See also United States v. Havens, 100 S. Ct. at 1914.
Havens was convicted of importing and possessing cocaine, but the Court of Appeals for the Fifth Circuit reversed.\textsuperscript{68} That court relied on \textit{Agnello v. United States}\textsuperscript{69} and \textit{Walder v. United States}\textsuperscript{70} for the proposition that the Government could use illegally seized evidence at trial only for the purpose of contradicting a particular statement made by the defendant on direct examination.\textsuperscript{71} Moreover, the court asserted that the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case-in-chief."\textsuperscript{72} The Supreme Court reversed.\textsuperscript{73} The majority conceded that \textit{Agnello} prohibited "smuggling in," during cross-examination, evidence that had been barred from the Government's case-in-chief by the exclusionary rule.\textsuperscript{74} In this case, however, the Court found that the prosecutor's questions were properly rooted in the defendant's direct testimony.\textsuperscript{75} Accordingly, the evidence had not been "smuggled in."\textsuperscript{76}

After disposing of \textit{Agnello}, the Court relied on \textit{Harris v. New York}\textsuperscript{77} and \textit{Oregon v. Hass}\textsuperscript{78} for the proposition that the deterrent function of the exclusionary rule is "sufficiently served by denying its use to the government on its direct case."\textsuperscript{79} Under that rationale, said the Court, if the defendant lies during proper cross-examination, he may be impeached by suppressed materials exactly as he might be impeached under \textit{Harris, Hass}, and \textit{Walder} for untruths spoken during direct testimony.\textsuperscript{80}

Justice Brennan argued in dissent that the majority was untrue to \textit{Agnello} in allowing

\begin{itemize}
\item \textsuperscript{68} United States v. Havens, 592 F.2d 848 (5th Cir. 1979).
\item \textsuperscript{69} 269 U.S. 20 (1925).
\item \textsuperscript{70} 347 U.S. 62 (1954).
\item \textsuperscript{71} United States v. Havens, 592 F.2d at 851 (citing Walder v. United States, 347 U.S. 62 (1954)). Both the court of appeals and the Supreme Court agreed that Havens's direct testimony did not frame with sufficient specificity a statement that could thereafter be impeached by introduction of the T-shirt. \textit{Id.} at 852; 100 S. Ct. at 1915. This conclusion is questionable. Havens's denial during his direct examination that he had "taped anything on or draped anything around . . ." McLeroth's body might easily be read to have "opened the door" to impeachment by any evidence indicating that Havens had in fact assisted in "taping" or "draping" McLeroth—thereby avoiding the problematic issue of impeachment addressed to matters raised during cross-examination. Nevertheless, the remainder of this article will assume, along with the Court, that \textit{Havens} had not "opened the door" on direct examination.
\item \textsuperscript{72} 592 F.2d at 851 (quoting Walder v. United States, 347 U.S. at 65).
\item \textsuperscript{73} United States v. Havens, 100 S. Ct. 1912, 1915 (1980).
\item \textsuperscript{74} \textit{Id.} at 1915-16.
\item \textsuperscript{75} The majority opinion stated that the prosecutor could properly raise questions on cross-examination that "would have been suggested to a reasonably competent cross-examiner" by the defendant's direct testimony. 100 S. Ct. at 1916.
\item \textsuperscript{76} 100 S. Ct. at 1916. The distinction between \textit{Agnello} and \textit{Havens} is troublesome. In \textit{Agnello}, the evidence at issue was a can of cocaine illegally seized from the petitioner's bedroom. On direct examination, Agnello testified that he had received certain packages from one co-defendant for delivery to another, but that he had not known that they contained cocaine or narcotics. On cross-examination, he testified that he had never seen narcotics. The Government then introduced evidence of cocaine found in his bedroom. 269 U.S. at 29-30. The defendant's statement on cross-examination led to the introduction of narcotics found in his bedroom. Accordingly, the Court found that the evidence was "smuggled in." Contrary to the Court's analysis, however, virtually the same type of cross-examination occurred in \textit{Havens}: a general denial on direct examination followed by a loosely related question on cross-examination, the answer to which could be contradicted by the introduction of suppressed evidence.
\item \textsuperscript{77} 401 U.S. 222, 224 (1971).
\item \textsuperscript{78} 420 U.S. 714, 722 (1975).
\item \textsuperscript{79} United States v. Havens, 100 S. Ct. at 1916. The Court emphasized that only a "speculative possibility" exists that the deterrent function of the exclusionary rule would be served by making unconstitutionally obtained evidence unavailable to the Government for otherwise proper impeachment. \textit{Id. See also} \textit{Harris v. New York}, 401 U.S. at 225; \textit{Oregon v. Hass}, 420 U.S. at 723.
\item \textsuperscript{80} United States v. Havens, 100 S. Ct. at 1916.
\end{itemize}
impeachment regarding matters first used during cross-examination; such a rule placed an impermissible burden, he said, on the defendant's right to testify. In addition, he expressed concern that the exclusionary rule was undermined by allowing any use of tainted evidence.

A preliminary analysis of the impact of the Havens ruling on the defendant's right to testify would, as discussed above, focus upon whether Havens was treated like any other witness. At first glance, it would appear that the respondent was so treated. He was subjected to cross-examination that was suggested by his direct testimony; when he denied knowledge of possession of the T-shirt, it was introduced into evidence along with testimony that it had been found in his suitcase. Certainly, any other witness would have been subjected to the same scrutiny.

Yet such an analysis overlooks the fundamental truth that the criminal defendant is not like, and cannot be treated like, any other witness. The differences are many. Unlike other witnesses, for example, the defendant cannot be compelled to testify and may not be excluded from the courtroom pursuant to a rule on witnesses. More importantly, he is the only witness at the criminal trial with a direct personal stake in the outcome.

The decision whether to call any other witness to the stand is governed only by consideration of the probative value and credibility of that witness's testimony. The defendant, however, is forced to consider another factor. Even if he believes that his testimony will further his case and that he can deal with cross-examination and impeachment, he may have to forego testifying because evidence that is otherwise inadmissible might be used against him if he takes the stand. To the extent that the defendant avoids testifying because the otherwise inadmissible evidence implies his guilt—rather than because it is probative on the issue of his credibility—the crucial decision whether to testify is made on the basis of factors wholly apart from those which affect any other witness.

As every prosecutor is gleefully aware, evidence that addresses guilt as well as credibility, such as suppressed material or prior convictions, is extremely useful in bolstering the Government's case-in-chief—irrespective of its impeachment value, and notwithstanding an instruction to the jury to consider the evidence solely with regard to the defendant's credibility. Havens exemplifies this strategy. Only slight damage to Havens's credibility flowed from the introduction of the T-shirt to show that the defendant's recollection of the contents of a suitcase was false. Rather, the primary objective of the exercise was to admit the T-shirt so it could be linked to other Government testimony bearing on the issue of guilt. The nature of the evidence rather than the purpose for which it is ostensibly offered determines its significance for the defendant.

81. United States v. Havens, 100 S. Ct. at 1918 (Brennan, J., dissenting).
82. Id. at 1914-15. Justice Brennan's first argument was joined by Justices Stewart, Marshall, and Stevens; the second by Justice Marshall alone.
83. Id.
84. See Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972) (rule that criminal defendant desiring to testify must do so before any other defense testimony is presented violates defendant's privilege against self-incrimination and denies him "guiding hand of counsel" guaranteed by due process).
85. The decision focuses upon such factors as the usefulness and relevancy of the testimony, the demeanor of the witness, and the extent to which the witness will stand up to cross-examination and impeachment.
86. Such an instruction was given in Havens. 100 S. Ct. at 1914-15. The Supreme Court has recognized in past decisions, however, the ineffectiveness of instructions to disregard, stating that, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968) (jury instruction not sufficient to cure prejudice to defendant of admission of co-defendant's involuntary confession); Jackson v. Denno, 378 U.S. 368 (1964) (same).
87. United States v. Havens, 100 S. Ct. at 1914.
88. This "more prejudicial than probative" effect was the very argument successfully made by the Government in its battle in Walder for an exception to the Agnello rule. The Government pointed out in its brief that in Agnello:
Because other witnesses are much less vulnerable to damaging consequences from evidence that by its nature serves dual purposes, the decision whether such a witness should testify is unlikely to be colored by concerns other than probativity and credibility. If the defendant's right to testify is to be qualified with the words "as an ordinary witness," his decision whether to testify ought to be based, as far as possible, on those same concerns. He should be encouraged to testify if he can offer cogent evidence that will help his case. He should be discouraged from testifying if he will become confused on cross-examination or if his credibility could be significantly impaired by impeachment evidence. But he may properly be dissuaded from testifying because one result of his appearance on the stand would be the enhancement of the prosecutor's case-in-chief with evidence that could not have been used but for his decision to exercise his constitutional right.

The Supreme Court sought to prohibit precisely this vice in Agnello, as Justice Brennan observed in his dissent in Havens. In both cases, in fact, the crucial problem was not the scope or the source of cross-examination questions, but was the no-win choice forced upon the defendant. The mere appearance of the defendant on the stand to offer the most minimal testimony allowed the Government to engage in an impeachment exercise with the primary effect of permitting the use of incriminating evidence excluded from the prosecution's case-in-chief. The sweeping but workable rule that illegally seized evidence "shall not be used at all" was the virtue of the Agnello decision; the Court's subsequent retreat from that rule has propagated ad hoc and virtually untenable distinctions. In Walder v. United States, the Court attempted to recast the defendant's Agnello right to testify without fear of admitting excluded evidence to accommodate the countervailing right of the prosecution to impeach false testimony. The defendant in that case denied during direct examination that he had ever possessed narcotics. The Government was then allowed to cross-examine him concerning the suppressed evidence so closely related in point of time to the offense charged that there was a real danger that the suppressed evidence would be considered by the jury as proof of guilt, [and] as of affirmative benefit to the Government. No such danger existed here, since the suppressed evidence related to a point in time remote from the offenses charged...[and therefore had its primary impact on credibility rather than guilt].


90. 100 S. Ct. at 1918 (Brennan, J. dissenting).
91. Some support is present in Agnello for the claim that the Government's cross-examination was beyond the scope of direct examination, or otherwise improper per se. See note 76 supra. Clearly, however, proper cross-examination of one who denies knowing that he carried narcotics includes asking whether he has seen narcotics before. See generally McCormick, Evidence §§ 21-22 (2d ed. 1972) [hereinafter cited as McCormick]. Likewise, in Havens, appropriate cross-examination of the defendant's denial of any connection with the "wrapping or draping" of McLeroth included asking whether he knew about the T-shirt from which wrapping material had been cut.
93. The Havens majority concluded that the rule that illegally seized evidence "shall not be used at all" was rejected by later cases. 100 S. Ct. at 1915.
94. 100 S. Ct. at 1918 (Brennan, J., dissenting).
96. Id. at 63.
heroin unlawfully seized from his house two years earlier. The Court held that the impeachment was proper, noting implicitly that the defendant's statement on direct examination was collateral to the elements of the particular case. It further explained:

[T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal, evidence illegally secured by it and therefore not available for its case-in-chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

Walder strikes a proper balance in implying that the prosecutor should have greater freedom to impeach statements offered during direct examination than those elicited on cross-examination. But the Court's declaration of a general right to deny all the elements of the offense is inconsistent with the rationale that the defendant may not "affirmatively resort to perjurious testimony" in any case where the defendant would perjure himself by denying one of the elements of the offense. Suppose, for example, that a defendant charged with knowingly selling heroin takes the stand to deny that he knew the substance sold to an undercover agent was actually heroin (i.e., generally denies an element of the prosecution's case, as Walder says he has a right to do). The prosecution might wish to impeach that testimony with a confession improperly obtained from the defendant at the time of arrest, yet would be barred from doing so by Walder. Given Walder's holding that a similar statement regarding a collateral issue is impeachable, prohibiting the impeachment of a perjurious statement that bears on an essential element of the case makes little sense. In Harris v. New York, on facts similar to those suggested above, the Court concluded that the prosecutor could use illegally obtained evidence to impeach any reasonably related assertion made by the defendant on direct examination. Certainly Harris represented a more satisfactory balancing of the rights to testify and impeach than did Walder. The primary result of the impeachment in Harris was to expose the defendant's false testimony, whatever the additional impact on the issue of guilt. Such a result was the goal of the Walder opinion as well, despite the confusing reference to a right to deny all the elements of an offense.

Havens, however, does not follow from Harris. The defendant in Harris sought to use the exclusionary rule as a sword, advancing false direct testimony pertaining to a fundamental element of the case. Havens, by contrast, sought only to be shielded by the exclusionary rule— an objec-

97. Walder v. United States, 347 U.S. at 64.
98. Id. at 65.
99. Id.
100. 401 U.S. 222 (1971).
101. Id. at 225. The defendant's statement in Harris had been taken by the police without proper Miranda warnings. The majority found that the statement nevertheless could be used for impeachment. Id. Justice Brennan argued in dissent that the constitutional privilege against self-incrimination "forbids the prosecution to use a tainted statement to impeach the accused." Id. at 230 (Brennan, J., dissenting). The dissent also contended that Walder allowed only impeachment of a defendant's testimony concerning collateral matters, and not that concerning fundamental elements of the case against him. Id. at 227-28. The dissent did not address the question of whether an untainted prior inconsistent statement could be used to impeach a criminal defendant's denial of complicity in a crime.
102. The Harris Court viewed Walder as compatible with its ruling. Although Walder had involved impeachment on collateral matters, and Harris was impeached on a matter directly related to the offense charged, the Court was "not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder." 401 U.S. at 225. The Havens Court reaffirmed that proposition. 100 S. Ct. at 1915.
tive that *Harris* had implied was a matter of constitutional right.\textsuperscript{103} Havens made no statement during his direct testimony that could reasonably have been impeached by the suppressed evidence.\textsuperscript{104} Only when forced to testify about that evidence on cross-examination did he offer an impeachable statement.

Under *Agnello*, the prosecutor cannot be permitted to introduce matters closely related to suppressed evidence and then use that evidence to impeach the defendant's attempts to avoid the subject.\textsuperscript{105} *Agnello* and *Harris* read together, then, encourage the defendant both to exercise his right to testify and to testify truthfully. To the extent that the defendant affirmatively resorts to perjury he derogates the right to testify and is properly impeached. Under the rule adopted in *Havens*, however, the defendant is discouraged from testifying at all because of fear bordering on certainty that the prosecutor will be able to introduce otherwise excluded evidence strongly indicative of guilt, irrespective of the content of the defendant's direct testimony. Not only is the factfinding process thereby significantly impaired, but the defendant is forced to trade a constitutional right to testify in exchange for a constitutional right to suppress illegally seized evidence.

*Havens* is also distinguishable from *Walder* on the same theory. In *Walder*, the defendant attempted to "turn the illegal method by which evidence in the Government's possession was seized to his own advantage;"\textsuperscript{106} Havens, by contrast, was simply attempting to offer his side of the story in direct testimony without affirmatively taking advantage of the exclusion of some evidence from the case.\textsuperscript{107} One might object that Havens's side of the story was a lie that ought to be as impeachable as any other lie.\textsuperscript{108} But that argument merely illustrates the underlying tension between the exclusionary rule and the search for truth. The exclusionary rule always diminishes the breadth of the search for truth by excluding relevant and frequently probative evidence of guilt.\textsuperscript{109} It is true that limiting the prosecutor's use of excluded evidence to direct impeachment of plainly assailable statements would allow a defendant like Havens to "get away" with misleading testimony,\textsuperscript{110} but only to the degree that he has already benefited from the exclusion of the evidence in the first place.

If the right to testify is to mean anything, it must contemplate that the defendant can take the stand without fear that the exclusionary rule will be circumvented\textsuperscript{111} by impeachment

\textsuperscript{103} The Court said in *Harris*: "The shield provided by *Miranda* cannot be perverted into a license to use perjury. . . ." 401 U.S. at 226. See *Walder* v. United States, 347 U.S. 62, 65 (1954) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.").

\textsuperscript{104} See text accompanying note 67 supra. But see note 91 supra.

\textsuperscript{105} *Agnello* held that the prosecutor may not bring up a subject related to excluded evidence unless the defendant does so first. 269 U.S. at 29-30; see note 76 supra.

\textsuperscript{106} *Walder* v. United States, 347 U.S. at 65. The Court noted that "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed narcotics." *Id.* This perjurious testimony on direct examination opened the door for the Government to attack his credibility by using the excluded evidence. *Id.*

\textsuperscript{107} Again the Court made this assumption in *Havens*. See note 71 supra, and accompanying text. An argument could be made that this assumption was wrong—that Havens was impeachable as a result of his misleading testimony on direct. But the decision in *Havens* is based upon a contrary assumption. *Id.*

\textsuperscript{108} Havens's "lie" on direct examination was that he had not aided McLeroth in concealing cocaine. 100 S. Ct. at 1914. The Government's discovery in Havens's bag of the T-shirt does not conclusively refute this "lie," for McLeroth could have placed the T-shirt in the bag without Havens's knowledge. See *id.* (Havens claimed that the T-shirt belonged to McLeroth).

\textsuperscript{109} See generally *McCormick*, supra note 91, at § 166 (2d ed. 1972) (discussion of policy basis for fourth amendment exclusionary rule).

\textsuperscript{110} See *Harris* v. New York, 401 U.S. at 225 (defendant's privilege to testify on his own behalf does not include privilege to commit perjury).

\textsuperscript{111} With respect to the scope of the exclusionary rule, one could argue that any use of excluded
evidence ostensibly directed toward credibility but effectively indicative of guilt. Accordingly, if the prosecutor offers evidence for impeachment purposes that was excluded from the Government's case-in-chief, the test of admissibility should focus upon whether that evidence will tend, as its primary effect, to prove guilt. If it so tends, it should be excluded as an impermissible burden on the right to testify—regardless of the propriety of the cross-examination under traditional evidentiary standards.

This proposed rule will enhance the search for truth, notwithstanding the necessity for barring some evidence that might be admitted under Havens. Havens itself recognized truth as the "fundamental goal of our legal system;" yet its holding, which discourages prospective witnesses from offering testimony for reasons unrelated to its credibility, does not advance that goal. A court that decides before trial to suppress evidence has already determined that the fourth amendment requires that the search for truth be circumscribed. Once that decision is made, whittling away at the protections imposed by the fourth amendment by placing burdens on the right to testify is inappropriate. The Havens ruling advances the search for truth only to the extent that it admits otherwise excluded evidence having substantial probative value regarding the issue of credibility, wholly apart from its implications respecting guilt. The exclusionary rule can be validly overridden, then, only if the evidence in question primarily assails the credibility of the defendant's direct testimony.

The Court engaged in just such an impact analysis in Grunewald v. United States,115 where it considered the ramifications of the rule that a defendant who testifies be treated "like any other witness."116 In Grunewald, the defendant had asserted his right to silence rather than testify before a grand jury. At trial, the prosecutor sought to impeach the defendant's exculpatory testimony with his seemingly inconsistent earlier silence.117 The Court disallowed that tactic, reasoning:

[W]e may assume that under Raffel, [petitioner] in this case was subject to cross-examination impeaching his credibility just like any other witness. . . . This does
not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of [petitioner's] credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.118

In Loper v. Beto119 the Court utilized a similar analysis to invalidate another type of impeachment. In that case, prior uncounseled convictions were offered ostensibly to impeach the defendant's credibility. A plurality of the Court considered it significant that the convictions were not used "for the purpose of directly rebutting a specific false statement made from the witness stand. . . . The previous convictions were used, rather, simply in an effort to convict [petitioner] by blackening his character and thus damaging his general credibility in the eyes of the jury."120 Neither the Loper plurality nor this article takes the position that the use of prior convictions to impeach, alone, constitutes reversible error.121 But Loper and Grunewald plainly highlight the importance of carefully evaluating the impact of

118. Gruenwald v. United States, 353 U.S. at 420. The Court emphasized that the invocation of the privilege against self-incrimination before the grand jury, and subsequent response to the questions at trial, were "wholly consistent with innocence." Id. at 421. Unlike in Havens, the impeachment in Grunewald was impermissible as a matter of evidence. The inconsistencies asserted were insufficiently probative to permit the evidence of silence to go to the jury. While typically such a decision is left to the informed discretion of the trial court, the Court's finding of "grave Constitutional overtones" caused it to exercise its supervisory powers to reverse. Id. at 423-24. See also United States v. Hale, 422 U.S. 171 (1975) (Court, exercising supervisory power, concluded that use of accused's silence during police interrogation to impeach subsequent exculpatory statements at trial was intolerably prejudicial).

120. Id. at 482 n.11 (footnotes omitted).
121. Loper's conviction was reversed only partially because prior convictions were used to prejudice the jury with respect to Loper's character. The primary reason for the Court's action was that the prior convictions used by the prosecution were un resent. Relying heavily upon Gideon v. Wainwright, 372 U.S. 335 (1963), the Court found that the use of such convictions was a violation of the accused's due process rights. 405 U.S. at 483-84.

The use of prior convictions for impeachment does, however, raise the same issue presented by Havens: when may material that is inadmissible in the prosecution's case-in-chief be used for impeachment? The answer suggested in this article, based upon Agnello, Walder, and Grunewald is: when the primary impact of such material is on credibility rather than guilt. Absent a denial by the defendant of past criminality, prior convictions are ostensibly used solely to impeach his general credibility. The jury is instructed not to consider the prior convictions with respect to guilt. Yet no less than in the case of excluded evidence, prior convictions can cause the jury to believe that the defendant is guilty without regard to the convictions' probative worth in assessing credibility. This is especially true when the prior conviction is for a crime similar to the one at bar. McCormick summarizes the problem:

The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon . . . the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record' of past convictions, particularly if the convictions are for crimes similar to the one on trial, there is an obvious danger that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge . . . than they will to the legitimate bearing of the past convictions on credibility.


If the defendant is on trial for rape, it may be persuasively argued that the impact of his prior robbery conviction upon the issue of his credibility outweighs the impact on the question of guilt. But when he is on trial for robbery, that prior conviction stands like a beacon, lighting the road for a guilty verdict. Consequently, the defendant, whether guilty or innocent, will almost certainly not testify if he has a prior conviction for a similar crime. See, e.g., Langbein, Land Without Plea Bargaining: How the Germans Do It,
impeachment evidence on the issue of guilt. The claim that the jury can consider certain evidence only for the purpose for which it is offered, while ignoring other permissible but irresistible implications, defies human nature.122

This careful evaluation of impact is in keeping with the principle that the defendant be treated like any other witness insofar as possible. Suppose a defense witness, X, testifies that the defendant, Y, was with him in Cleveland on the night that the robbery with which Y is charged occurred in Toledo. Suppose further that the prosecutor has a witness who saw X and Y together in Toledo that night. Obviously, impeachment123 of X's alibi testimony will inevitably generate serious questions about the defendant's guilt as well as about X's credibility. Because the primary effect of the prosecution witness's testimony will be to impeach credibility, however, the testimony is properly used against either X or Y. In such circumstances, the search for truth legitimately overrides any incidental infringement of exclusionary principles.124

78 Mich. L. Rev. 204, 208 (1979); H. Kalven & H. Zeisel, The American Jury 146, 160-69 (1966) (defendants without a criminal record elect to testify 37% more often than do defendants with a record of past convictions). A rule that discourages the defendant from fully and honestly presenting his side of the case derogates the essential rationale of the fact finding process and consequently derogates the defendant's right to testify. See generally Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). In Luck, the court was faced with a District of Columbia statute which stated that a witness's prior conviction "may be given in evidence to affect [his] credibility." Act of Dec. 23, 1963, Pub. L. No. 88-241, ch. 3, § 14-305, 77 Stat. 519 (current version at D.C. Code Ann. § 14-305 (1973)). The court construed the language to mean that trial courts were not required to allow impeachment by convictions, but were only required to use sound judicial judgment in making such a determination. Id. at 768. The Luck doctrine was subsequently refined in Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). Gordon enumerated several factors to help the court in making its determination concerning the propriety of a conviction: (1) the nature of the conviction, (2) its remoteness in time, (3) its similarity to the crime charged, (4) the need for the defendant's testimony, and (5) the importance of the credibility issue. Id. at 940-41. In large part, this doctrine required the trial court to determine whether the probative value of the evidence outweighs the prejudicial risk resulting.


Assuming that prior convictions are relevant to the question of credibility, it does not seem fair to the prosecution to allow the defendant in an armed robbery case to be impeached with a prior burglary conviction but not with a prior armed robbery conviction. The best way to escape this difficulty is to permit the prosecutor to ask, as to all prior convictions, "Isn't it true that in 1977 you were convicted of a felony in (the state in question)"? This form of question, if applied in all cases, would allow the prosecution to impeach the defendant's credibility without adding the additional stigma of branding the defendant as a rapist or murderer (crimes that are more inflammatory and less relevant to his credibility than a crime involving dishonesty, such as embezzlement).

122. One survey revealed that 98% of attorneys questioned believed that it was impossible for a limiting instruction on impeachment testimony to be effective. Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record, 4 COLUM. J. L. & SOC. PROB. 215 (1968). See also Broeder, The University of Chicago Jury Project, 38 NEB. L. Rev. 744 (1959) (limiting instruction on this issue serves merely to sensitize jury to evidence in question); see note 112 supra, and accompanying text.

123. For purposes of clarity, this hypothetical ignores the substantial likelihood that the prosecution witness's testimony could be presented as part of the prosecution's case-in-chief.

124. See Oregon v. Hass, 420 U.S. 714, 722 (1975) (testimony inadmissible in prosecution's case-in-chief admissible for impeachment of defendant's direct testimony because arriving at truth is a fundamental goal of legal system); Harris v. New York, 401 U.S. 222, 225 (1971) (impeachment a valuable aid to elicitation of truth justifying use of illegally seized evidence; police sufficiently deterred by other measures from violating exclusionary rule.)
In summary then, it is only when the prosecution seeks to use evidence relevant to the issue of guilt but barred from the prosecution's case-in-chief either because of prejudice, as in the case of prior convictions, or because of the exclusionary rule, as in Havens, that the tension between exclusionary principles and the search for truth becomes evident. If the prosecution seeks to impeach the defendant with material barred from its case-in-chief, the due process right to testify requires the prosecution to demonstrate that the primary effect of such impeachment will be to damage credibility, not to supplement the prosecution's case on the issue of guilt with otherwise inadmissible evidence. Any less stringent rule may impermissibly burden the defendant's constitutional right to take the stand. When the ostensible search for truth becomes merely a vehicle for circumventing the proper functioning of the exclusionary rule—that is, when the primary impact of impeachment is to inculpate the defendant—then it is an exaltation of form over substance to allow that "impeachment" to proceed.

III. JENKINS v. ANDERSON

In Jenkins v. Anderson, the petitioner stabbed and killed a man named Redding in Detroit, Michigan. He was not immediately apprehended, but eventually turned himself in to the authorities. At trial, petitioner testified that he had stabbed Redding in self-defense after Redding had attacked him with a knife.

On cross-examination, the prosecutor questioned petitioner about his actions after the stabbing. Petitioner admitted that he had not waited for the police to tell them what had happened, and that he did not turn himself in until approximately two weeks after the incident. During the closing argument, the prosecutor observed that the defendant had "waited two weeks... before he did anything about surrendering himself," and claimed that the defendant had used the time to "line up" defense witnesses.

Petitioner subsequently was convicted of manslaughter. His appeal, federal habeas corpus petition, and federal appeal were all unsuccessful. The Supreme Court granted

125. See note 123 supra.
126. The use of suppressed evidence to impeach plainly would be permissible where the defendant's credibility rather than his guilt was the focus of the evidence. If Havens had testified during cross-examination that he had never traveled to Peru prior to the trip in question, for example, the prosecution properly could have introduced an itinerary detailing Havens's earlier trips, although the document had been illegally seized from his suitcase, because such evidence would have no particular bearing on the question of guilt.
127. See United States v. Havens, 100 S. Ct. at 1919 (Brennan, J., dissenting) (defendant relinquishes right to testify for right to avoid illegal conviction; "one constitutional privilege purchased at the expense of another"); cf. Simmons v. United States, 390 U.S. at 394 (Court found it "intolerable" that constitutional right under fifth amendment should have to be surrendered in order to assert constitutional right under fourth amendment). But cf. Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) (New Jersey sentencing scheme requiring choice of pleas not violative of constitutional rights; not every burden on exercise of those rights invalid); McGautha v. California, 402 U.S. at 213 (in companion case, Ohio procedure allowing jury determination of guilt and punishment in single trial does not unconstitutionally compel self-incrimination; Constitution does not forbid requiring defendant to choose among difficult alternatives).
129. Id. at 2126. Petitioner testified that he had decided to turn himself in after talking to Coleman Young (the mayor of Detroit). Appendix at 37, Jenkins v. Anderson, 100 S. Ct. 2124 (1980).
130. 100 S. Ct. at 2126.
131. Id.
134. Id.
certiorari but ultimately affirmed the conviction.\textsuperscript{136}

The Court, relying on \textit{Raffel v. United States},\textsuperscript{137} based its decision on the principle previously discussed in this article: once the defendant chooses to testify, he may be cross-examined like any other witness.\textsuperscript{138} In this regard, the Court found that "common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."\textsuperscript{139} Petitioner's failure to turn himself in to the police could be equated to a failure to state a fact; accordingly, the petitioner's story could properly be impeached by evidence of his inaction.\textsuperscript{140}

The issue regarding the defendant's right to testify\textsuperscript{141} is whether the petitioner was properly treated like any other witness when he took the stand.\textsuperscript{142} The answer, given the Court's analysis of the evidentiary law noted above, is yes. Any witness can be properly impeached by silence under appropriate circumstances.\textsuperscript{143} If a witness standing at the scene of a crime is questioned by the police but does not reply, his subsequent testimony that the defendant acted in self-defense surely could be impeached by that silence. Similarly, in \textit{Jenkins}, assuming as did the Court that petitioner's silence was probative,\textsuperscript{144} impeaching petitioner with that silence was perfectly/permissible provided that the impact of that exercise on credibility was more substantial than the impact on guilt.\textsuperscript{145} The latter condition appears to have been fulfilled, for proof of the elements of the prosecution's case-in-chief—that the defendant stabbed the victim, for example, or that the act was unprovoked—was not significantly advanced by evidence of petitioner's post facto silence. While such a silence prior to arrest might be viewed by the jury as evidence of a guilty conscience, the impeachment value of the defendant's original failure to assert self-defense plainly outweighs that speculative prejudicial effect.\textsuperscript{146} Only if pre-arrest silence is not probative of a defendant's credibility, and prejudice to the defendant might result, should it be barred from use for impeachment.\textsuperscript{147} The problem with \textit{Jenkins} is not its treatment of the defendant's right to testify,\textsuperscript{148} rather it is the Court's preliminary evidentiary conclusion that petitioner, by delaying his surrender to the police, had "fail[ed] to state a fact

\textsuperscript{135} 100 S. Ct. 45 (1979).
\textsuperscript{136} Jenkins v. Anderson, 100 S. Ct. at 2127.
\textsuperscript{137} 271 U.S. 494, 497 (1926) (defendant taking the stand in own behalf may be cross-examined for purpose of impeaching credibility; refusal to testify in first trial may be commented upon during second trial).
\textsuperscript{138} Jenkins v. Anderson, 100 S. Ct. at 2127-28.
\textsuperscript{139} Id. at 2129.
\textsuperscript{140} See generally 3A J. Wigmore, \textit{Evidence} § 1042. (Chadbourne rev. ed. 1970) [hereinafter cited as 3A Wigmore]
\textsuperscript{141} The defendant's right to testify is the only aspect of the case discussed here. Note, however, that the Court tacitly admitted that petitioner's inaction was an exercise of his underlying constitutional right to silence, but concluded that impeachment with that silence did not violate the fifth or fourteenth amendments. 100 S. Ct. at 2128-29. The majority felt that any chilling effect that such impeachment might place upon the original exercise of the right to silence was permissible. \textit{Id.} at 2128-29.
\textsuperscript{142} Justice Stevens, concurring in the result, felt that the Court's fifth amendment analysis was inappropriate where, as here, the defendant had not asserted the privilege at all but had simply failed to present himself to the police for questioning. \textit{Id.} at 2130.
\textsuperscript{143} Justice Marshall, joined by Justice Brennan, dissented, arguing that impeachment by pre-arrest silence placed "an impermissible burden on the exercise of the privilege [against self-incrimination]." \textit{Id.} at 2135.
\textsuperscript{144} See text accompanying notes 10 through 51, \textit{supra}.
\textsuperscript{145} See 3A Wigmore, \textit{supra} note 140, at § 1042.
\textsuperscript{146} But see text accompanying notes 149 through 158 \textit{infra}.
\textsuperscript{147} See notes 126 through 127 \textit{supra}, and accompanying text.
\textsuperscript{148} Furthermore, the inescapable embarrassment to the accused from an assertion of the right to silence has long been considered unavoidable, as the \textit{Jenkins} Court recognized. 100 S. Ct. at 2128.
in circumstances in which that fact naturally would have been asserted.”148 As Justice Marshall pointed out in his dissenting opinion, “the authority cited by the majority149 . . . makes it clear that the [impeachment by silence] rule cannot be invoked unless the facts affirmatively show that the witness was called on to speak. . . .”150 Indeed, it is hard to see why an individual's reluctance to hand himself over to the police and admit a stabbing, in self-defense or otherwise, is the kind of “silence” that the evidentiary rule was designed to cover.151 Anyone who believes that volunteering information to police is “natural”152 for a resident of Detroit's inner-city has an unusually optimistic view of human nature.

This evidentiary ambiguity inheres in any assertion of silence by a criminal suspect. If a suspect is read his Miranda warnings and chooses to remain silent, the Court has recognized, in Doyle v. Ohio,153 that this silence is “insolubly ambiguous” and hence may not be used for impeachment.154 And what of the defendant who due to police error does not receive Miranda warnings but nevertheless refuses to respond to accusations by the police? No “fair play” problem exists such as that in Doyle because the police have not told him he does not have to talk.155 Yet no one can say whether such a defendant was silent because he was aware of his rights or because he was tacitly admitting the accusation. It simply makes no sense to argue that it is “natural” to speak in circumstances where one has a right to do otherwise.

The Court's response to this problematic issue was to term it a matter of state evidentiary law not cognizable under due process, and thereby avoid discussing a difficult question.156 It does not seem appropriate, however, to allow the scope of constitutional rights to depend upon whether the protected person is informed of those rights by the police. Consequently, it is difficult to reconcile Jenkins with Doyle; the absence of any notice of a right to silence in Jenkins is the sole ground on which the Court distinguished the cases.

In any event, the very ambiguity of Jenkins's inaction made its impeachment value negligible.157 In fact, it appears that the prosecutor never formally "impeached" Jenkins's testimony,

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149. Wigmore, supra note 140, at § 1042.
151. The "common classes of cases" where impeachment by silence is appropriate are:

(1) Omissions in legal proceedings to assert what would naturally have been asserted under the circumstances. (2) Omissions to assert anything, or to speak with such detail or positiveness, when formerly narrating on the stand or elsewhere the matter now dealt with. (3) Failure to take the stand at all, when it would have been natural to do so.

3A Wigmore, supra note 140, at § 1042.
152. “[T]he underlying test is, would it have been natural for the person to make the assertion in question.” Id. at § 1042.
153. 426 U.S. 610, 617. Doyle, however, was not based upon a view rejecting the evidentiary value of silence but was attributable to concern about the “fundamental unfairness” of advising someone of a right to silence and then using it against him. See Jenkins v. Anderson, 100 S. Ct. at 2130.
154. Doyle, by remaining silent, may have been exercising his fifth amendment rights or may have been tacitly admitting the crime—the answer is unclear. Jenkins's silence was similarly "insolubly ambiguous." He may have been admitting guilt by avoiding the police or he may simply have preferred not to undergo the difficulties of attempting to exculpate himself.
155. The affirmative violation of the rights of such a defendant would be unlikely to move the Court even though Doyle was decided on facts not indicating such a violation. See Oregon v. Hass, 420 U.S. 714 (1975) (statements obtained in violation of Miranda allowed to be used for impeachment); Harris v. New York, 401 U.S. 222 (1971) (same).
156. Jenkins v. Anderson, 100 S. Ct. at 2129.
157. Had Jenkins been aggressively confronted with that “silence,” he could quite credibly have responded, for example, that he simply didn't want to get involved with the police if he could possibly avoid doing so.
but instead simply claimed that Jenkins used the two-week delay to collect witnesses favorable to the defense—a strategy that underscores the insoluble ambiguity of Jenkins's silence even for the prosecutor.

IV. UNITED STATES v. SALVUCCI

In United States v. Salvucci, the Court obliquely touched upon the issue of defendant's right to testify in its consideration of another related issue: "automatic standing." The automatic standing rule established in Jones v. United States allowed criminal defendants charged with possessing contraband that had been seized by the police in violation of the fourth amendment to move to suppress the contraband without asserting a possessory or privacy interest in the property seized or the premises searched. Prior to Jones, the defendant wishing to suppress evidence had been required to claim a possessory or privacy interest in that evidence; the claim could then be used against the defendant at trial.

The question presented in Salvucci was whether the automatic standing rule should be abandoned. The Court concluded that it should be, finding the justification for the rule advanced in Jones no longer compelling. Two factors primarily accounted for the Court's finding. First, Simmons v. United States, decided subsequently to Jones, had held that testimony offered by the defendant in support of his motion to suppress could not be used in the prosecution's case-in-chief. In consequence, defendants could more readily challenge illegal seizures with less risk of total self-incrimination. Second, a requirement of possessory interest seemed more workable now than before. The Court observed: "[d]evelopments in the principles of standing . . . clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure."

158. See text accompanying note 132 supra.
159. 100 S. Ct. 2547 (1980). Salvucci involved a charge of possession of stolen mail in violation of 18 U.S.C. § 1708 (1976). The mail had been seized during a search of the apartment of the mother of one of the respondents. Respondents prevailed on a motion to suppress without making any showing of standing to protest the search, relying on the "automatic standing" rule of Jones. The Court of Appeals affirmed the suppression order in United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979). 100 S. Ct. at 2549-50.
161. Id. at 264.
162. Id. at 260. The assertion of a possessory or privacy interest at a suppression hearing could be introduced into evidence as part of the prosecution's case-in-chief, at the time Jones was decided. See notes 165 through 168 infra, and accompanying text.
163. See note 159 supra.
164. United States v. Salvucci, 100 S. Ct. at 2551.
165. The Jones Court had expressed two related concerns in establishing the automatic standing rule. First, the possessory interest requirement as it existed prior to Jones forced the defendant to choose either to challenge an illegal seizure, risking self-incrimination in the process, or simply to forego assertion of his fourth amendment claim. The Court found that requiring such a choice between constitutional rights was impermissible. Jones v. United States, 362 U.S. 257, 262-63 (1960). Second, the Court noted that the standing requirement allowed the Government unfairly to benefit from contradictory assertions at trial. This was so because the Government would argue that the defendant had possessed contraband in attempting to convict him on the merits, while it would contend that the defendant had not shown a sufficient possessory interest in the contraband, in attempting to evade the exclusionary rule. The Court found that such an inconsistent position on the part of the prosecution belied the fair administration of criminal justice. Id.
167. See id.
168. United States v. Salvucci, 100 S. Ct. at 2551. This point countered the rationale of Jones as characterized by the Salvucci Court that "the government ought not to be allowed to assert that the defendant possessed [contraband] for the purposes of criminal liability, while simultaneously asserting that he did not possess [it] for the purposes of claiming the protections of the Fourth Amendment." Id.
Given the holding in Salvucci, that defendants wishing to suppress illegally seized evidence must once again assert a privacy or possessory interest in the evidence, the question of whether the defendant's testimony at the motion hearing may be used to impeach him at trial is of critical significance in its effect on the scope of the defendant's right to testify. The Court recognized the question, but expressly declined to resolve it. Some language in the Court's opinion, however, "broadly hints" that suppression hearing testimony would be properly used for impeachment. Because a more definitive statement endorsing that view may, as argued by the dissent, be imminent in light of Havens and Jenkins, it is appropriate to discuss the issue here.

To put the matter in more concrete form, a typical case would involve a defendant who, in order to establish standing for his motion to suppress, admits at the hearing that a suitcase containing heroin and found in the trunk of a friend's car was his. Suppose the motion is denied because the search was lawful, and the defendant is charged with possession of the heroin found in the suitcase and brought to trial. At trial he claims that he has never before seen the suitcase. Can the prosecution impeach the defendant by using his statement from the suppression hearing?

At first blush, this is a classic case of impeaching a witness with his prior inconsistent statements. Any other witness who testified inconsistently at a prior judicial proceeding could be so impeached. Therefore, the defendant could be also.

In two important ways, however, the defendant's position is different from that of the ordinary witness. First, no other witness is obliged to defend his constitutional rights at a hearing on a motion to suppress. Other witnesses might have testified there, but not in pursuit of any constitutional right. This first issue is simply a function of the scope of Simmons, as the Court recognized in Salvucci. The question is, to what extent does an impeachment exercise that takes special advantage of a defendant's decision to assert a constitutional right but later testify inconsistently with that assertion thereby impair the original exercise of the right? Simmons held that testimony could not be used by the prosecution "on the issue of guilt." But can it be used on the issue of credibility? Simmons was based upon the underlying fourth and fifth amendment rights. Whether or not those rights are unduly burdened by impeachment with suppression hearing testimony can only be determined by an analysis that is beyond the scope of this article.

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169. United States v. Salvucci, 100 S. Ct. at 2553-54.
170. This issue is not unique to the Salvucci holding. Salvucci abolished the automatic standing rule for possessory offenses. But in non-possessory offense cases, the defendant has always been required to assert a possessory interest at any hearing on a motion to suppress. Brown v. United States, 411 U.S. 223, 229 (1973); Jones v. United States, 362 U.S. 257, 261 (1960). As the Court noted in Salvucci, several state courts have held that testimony offered at such a motion hearing could be used to impeach the defendant's testimony at trial. 100 S. Ct. at 2554 n.8.
171. As indicated at the beginning of this article, any impeachment question like the one posited here involves two different kinds of rights: the right to testify and the underlying constitutional rights that pertain, for example, to the suppression of evidence.
172. 100 S. Ct. at 2554. "That issue . . . is not resolved here, for it is an issue which more aptly relates to the proper breadth of the Simmons privilege, and not to the need for retaining automatic standing." Id.
173. The phrase is from Justice Marshall's dissenting opinion, id. at 2555.
174. Id. The Court noted that it had held that "the protective shield of Simmons is not to be converted into a license for false representations. . . . United States v. Kahan, 415 U.S. 239, 243." Id. at n.9.
175. Id. at 2555.
176. McCormick, supra note 91, at §§ 34-36.
177. 100 S. Ct. at 2554. See note 172 supra, and accompanying text.
179. For a discussion of this issue, see Justice Marshall's dissent in Salvucci, 100 S. Ct. at 2555. Simmons held that "[i]t seems obvious that a defendant who knows that his testimony may be admissible
The second difference between the defendant and other witnesses is more pertinent to the present inquiry. It is the duality of purposes that impeachment may advance when the defendant is on the stand, as opposed to the unitary emphasis on credibility that pervades the impeachment of other witnesses. In the foregoing example, the suppression hearing evidence used to impeach the defendant is offered to challenge credibility, but also implies guilt. The example is like Havens, in that the exclusion of evidence probative of guilt from the prosecution's case-in-chief in both cases is circumvented through the device of impeachment.

But this example is unlike Havens in that the defendant in the latter case was led by cross-examination into a discussion inviting false assertions, which were then impeached by evidence primarily bearing upon guilt. In the suppression testimony hypothetical, by contrast, the defendant has lied about a major issue in his testimony on direct examination. The search for truth requires that these false statements be subject to challenge. Consequently, for reasons discussed more fully in part II of this article, impeachment of the defendant in that case would not impermissibly burden his right to testify.

The permissibility of impeachment in such a case is, however, subject to the same qualifications respecting impact that were developed above. If the impeachable testimony is such that the primary effect of the impeachment exercise would be to allow the prosecutor to present otherwise suppressed evidence to bolster the Government's case on the issue of guilt, then the proposed impeachment should be barred. Otherwise, the defendant is forced to trade one constitutional right for another, a bargain expressly prohibited by Simmons.

V. CONCLUSION

The three cases discussed above have rendered the job of the criminal defense attorney more difficult. The familiar admonition to the client to say nothing to the police must be tempered by the realization that refusal to speak might be used against the defendant at trial, if prior to Miranda warnings. It is likely, however, that the client can credibly rebut any inference of guilt that the jury might draw from his silence by simply pointing out that “I didn't say anything because my attorney told me not to” or that “I said nothing because I was aware of my right to silence.” Moreover, pre-arrest silence will normally be so ambiguous that it is unlikely that the prosecutor will be able to capitalize on it.

More troublesome is the attorney's decision whether to file a motion to suppress, which after Salvucci may require assertion of a possessory interest by his client. If he plans to put his client on the stand at trial, he may wish to forego the motion. If he loses the motion, the
Government will use the challenged evidence in its case-in-chief and impeach the defendant with his motion testimony. If he wins the motion and the trial goes forward anyway, his client is likely to be impeached with both suppressed material and motion testimony, even if the attorney is careful to avoid bringing the matter up on direct examination. Thus, it may be wise for the attorney not to file a suppression motion as a matter of course, but to do so only when he believes, first, that the motion has a reasonable chance of success, and second, that the case will likely be dismissed if the motion to dismiss is granted.

At trial, in deciding whether the client will testify, the attorney will be faced not only with the familiar reasons for keeping a client off the stand (poor witness, prior convictions, etc.) but also with the additional possibilities of impeachment with pre-arrest silence or with critically damaging evidence. In addition, it appears likely that the Supreme Court will soon allow impeachment that admits the defendant's testimony from the motion to suppress hearing.

The curious result of these holdings is that the defendant who has been subjected to an illegal search and has prevailed on the motion to suppress will almost certainly not take the stand at trial. Other defendants will face a difficult choice, balancing the value of their potential testimony against the harm that impeachment evidence might do in damaging credibility or implying culpability. One hopes, however, that the Court will eventually recognize that when the primary impact of "impeachment" evidence is to strengthen the prosecution's case respecting the issue of guilt, the impeachment should not be allowed.