

THE "SIBLING STATE" APPROACH TO THE VERMONT CONSTITUTION: POST-ARREST, PRE-MIRANDA SILENCE IN VERMONT

*We have an opportunity to develop a sound jurisprudence of state constitutional law that will serve not only this generation of Vermonters but those who will come after us in the decades yet to be.*¹

INTRODUCTION

State courts have recently rediscovered that their state constitutions can be used to address issues which in former years they would have left for the United States Supreme Court to resolve. Thus, the question in state courts has changed from whether to conduct state constitutional analysis to how.² This note seeks to answer the question of how by setting out an analytical framework for constructing an argument under the Vermont Constitution.

*State v. Byrne*³ raised the issue which will be the vehicle for this exercise. *Byrne* involved a defendant who was convicted of two violations of the state motor vehicle code.⁴ On appeal, the defendant argued that the trial court improperly allowed the arresting officer to comment on the defendant's post-arrest pre-*Miranda* silence.⁵ Because the federal Constitution allows the use of pre-*Miranda* silence for impeachment purposes,⁶ the defendant's argument boils down to a claim that chapter I, article 10 of the Vermont Constitution prohibits the use of post-arrest silence, whether or not *Miranda* warnings were given.⁷ Because the issue of

1. *State v. Jewett*, 146 Vt. 221, 229, 500 A.2d 233, 238, (1985).

2. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984).

3. No. 85-262, slip op. (Vt. Jan. 22, 1988).

4. *Id.* at 1.

5. *Id.* at 7-8.

6. See *Fletcher v. Weir*, 455 U.S. 603 (1982).

7. *Byrne* at 8. In *Byrne*, the defendant raised the issue of the protection of his post-arrest pre-*Miranda* silence on the basis of chapter I, article 10 of the Vermont Constitution. Thus, the analysis in this note is focused on the chapter I, article 10 right to silence. An analysis of this issue can also be conducted on the basis of a due process violation as well. See VT. CONST. ch. I, art. 10 ("Nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers."); *id.* ch. I, art. 9 ("That every member of society hath a right to be protected in the enjoyment of life, liberty . . ."). Nonetheless, the authors limit their discussion to the chapter I, article 10 right to silence.

post-arrest, pre-*Miranda* silence was not properly raised in the trial court, the Vermont Supreme Court did not resolve this question.

This note focuses on whether the Vermont Constitution prohibits the use of post-arrest, pre-*Miranda* silence. This issue is used to illustrate the application of various analytical frameworks set out in this note. While this note focuses on the "sibling state" approach, any of the methods discussed may well serve an argument made under the Vermont Constitution.

I. APPROACHING A CLAIM UNDER THE VERMONT CONSTITUTION

Two approaches commentators have referred to for analyzing and fashioning an argument under a state constitution are the "primacy"⁸ theory and the "sibling state"⁹ approach.¹⁰ The advo-

8. For purposes of analyzing a constitutional issue, the "primacy" theory requires consideration and analysis under a state constitution before turning to the federal Constitution. See Carson, "*Last Things Last*": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L. REV. 641, 647-49 (1983); see also Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 146 (1988). "In a state court, the state's own constitution should receive attention before that of any other constitution." *Id.* See generally Linde, *supra* note 2, at 173-79.

9. The "sibling state" approach requires examination of other states' identical or similar constitutional provisions. Such an examination would also require analysis of other state courts' decisions involving any analogous provisions. *State v. Jewett*, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985). See also Carson, *supra* note 8, at 656-58 (the "sibling state" approach is outlined in an appendix prepared by Ronald K. L. Collins). Thus, the "sibling state" approach is basically a comparative method of analysis.

10. Justice Stewart Pollock, of the New Jersey Supreme Court, has referred to two other approaches besides the "primacy" theory and the "sibling state" approach. See Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983). One alternative approach Justice Pollock discussed is the supplemental or interstitial approach. See *id.* at 718. This approach "requires a court to consider first the impingement on fundamental rights under the federal Constitution" before recourse to a state constitution. *Id.* "A state would diverge from federal law only in accordance with objective criteria. By employing identifiable criteria or factors, decisions should become more predictable." *Id.* Such an approach is essential to reaching a "principled" conclusion. Hence, a "principled" approach should always be employed in an analysis that will be presented in support of an argument before a state court, as well as by the court in its decision. Justice Pollock noted his concern that "[s]tate courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled." *Id.* at 717; see also *State v. Jewett*, 146 Vt. 221, 224-25, 500 A.2d 233, 235-36 (1985) (Vermont Supreme Court quoted Justice Pollock and reiterated the same concern).

Another approach Justice Pollock mentioned was "to tie decisions in all instances to both the state and federal constitutions." Pollock, *supra*, at 718. As noted by Pollock, such an approach was taken by the Vermont Supreme Court in *State v. Badger*, 141 Vt. 430, 450 A.2d 336 (1982). Pollock, *supra*, at 718. The wisdom of such an approach is now questiona-

cate, however, is not limited to these approaches. In *State v. Jewett*,¹¹ the late Justice Hayes suggested that there may be other acceptable methods of analysis, and noted "[t]he imaginative lawyer is still the fountainhead of our finest jurisprudence."¹² It is possible that a lawyer may decide to combine these two methods of analysis, along with other possible methods, when approaching a state constitutional claim.¹³ A lawyer may plan to bulwark his or her argument by relying in large part on one approach and buttressing the argument with the other approach.¹⁴ Alternatively, when a lawyer can not substantively establish an argument under

ble in light of the United States Supreme Court decision in *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, the Supreme Court held that a decision based on state law, including state constitutional grounds, should clearly set out the basis of state law as it is distinguished from federal law. *Id.* at 1041. In instances where the federal court reviews a state court's opinion, and concludes that the basis of that decision is a mistaken understanding of federal law, it is permissible for the federal court to reverse the state court's decision. *Id.* at 1040-41; see also Carson, *supra* note 8, at 651. As a result of the Supreme Court's decision in *Michigan v. Long*, it is essential that when a state court relies on its state constitution it does so on clear and adequate grounds distinctively independent of federal precedents. The approach the Vermont Supreme Court took in *Badger* has also been criticized by Judge Mahady. See Mahady, *supra* note 8, at 148. Judge Mahady commented:

However, the court lost sight of the primacy of state constitutional demands. In effect, the *Badger* court took a concurrent approach to the constitutional issues when it addressed the defendant's claim of right under both constitutions, resolving the claim in defendant's favor under both charters, but never clearly footing its decision on one constitution rather than the other. Having resolved the constitutional claim in favor of the claim under the state constitution, the court simply had no business going further. The state court had resolved a state claim; the federal claim became redundant.

Id. (citation omitted). Hence, tying federal and state law in instances where a state constitutional claim has been raised may cause confusion that will ultimately lead to reversal of a state court's decision. However, in some cases it may be necessary for an attorney or court to describe the federal backdrop so that a clear distinction may be drawn between federal and state law. See *infra* text accompanying notes 39-64.

11. 146 Vt. 221, 500 A.2d 233 (1985).

12. *Id.* at 228, 500 A.2d at 237.

13. *Id.* at 225, 500 A.2d at 236.

14. For example, a lawyer may decide to use the "primacy" theory as the principal basis upon which to build an argument. Assuming enough information (*e.g.*, judicial precedent and historical background) is found to support the advocate's state constitutional argument, the advocate may decide to bolster the argument with a discussion of similar cases in other states. Ideally, these cases would involve claims based on identical or similar provisions of the other states' constitutions. Hopefully, the states that are the subject of comparison will have similar historical experiences as well. Similarity in textual provisions is important because the text of a constitution provides a fundamental basis for interpretation. Thus, where the texts differ the foundation upon which a comparative analysis begins will be different. Therefore, some divergence in interpretation is likely to result. Likewise, similarity in historical experiences is a significant factor to consider because historical experiences motivate individuals and their state representatives to promulgate and amend various provisions within their state charters.

one approach, then recourse to the other approach would seem appropriate.¹⁵ In *Jewett*, the Vermont Supreme Court did not indicate a preference for one approach over another, but made it clear that any successful argument should be well-reasoned and principle-oriented.¹⁶

A. *State v. Jewett*

The Vermont Supreme Court in *Jewett* was faced with the question of whether the appellant had been legally stopped and arrested.¹⁷ The appellant argued that his rights under chapter I, article 11 of the Vermont Constitution had been violated.¹⁸ Unfortunately, the court could not immediately reach this question because of what it considered to be inadequate briefing by both sides.¹⁹ Consequently, the court ordered the parties to submit supplemental briefs on the state constitutional issue.²⁰

The court noted the steady rise nationwide in claims under state constitutions²¹ and declared: "This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow."²² Hence, the court

15. A truly difficult problem arises when an advocate or a state court is faced with a paucity of material to which the "primacy" theory can be applied. In Vermont, it is possible that an individual and his or her attorney will find themselves claiming protection under a particular provision of the state constitution, but will be unable to muster enough significant historical data and judicial precedent to support their argument. As noted by Judge Mahady, "state constitutional precedents are scarce and difficult to find." Mahady, *supra* note 8, at 146-47. As suggested in *Jewett*, there are other avenues of argument to pursue. *Jewett*, 146 Vt. at 227, 500 A.2d at 237 (citing P. BOBBITT, CONSTITUTIONAL FATE—THEORY OF THE CONSTITUTION (1982)). These other avenues of argument include doctrinal, structural, ethical, and prudential arguments. However, such arguments may not provide a sufficiently sound basis upon which to found a state constitutional argument. See Linde, *supra* note 2, at 180. It seems more likely given the volume of cases generated by 50 sister states that some basis of comparison can be established. Thus, recourse to the "sibling state" approach may be the wisest strategy for an advocate who faces a dearth of judicial precedent and historical material involving their own state constitution. See *infra* text accompanying notes 33-38. But see Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13 (1988).

16. *Jewett*, 146 Vt. at 224-25, 500 A.2d at 235-36.

17. *Id.* at 222, 500 A.2d at 234.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 224, 500 A.2d at 235.

thought it important to set-out some guidelines for briefing claims under the Vermont Constitution.²³

Justice Hayes, speaking for the court, described four approaches to arguing a state constitutional claim. First, the court described an historical approach to argument.²⁴ This approach might consist of "the legislative history of a particular provision, 'or on the social and political setting in which it originated, or on the fate of the [provision] in subsequent constitutions.'"²⁵ Second, the court discussed the textual approach.²⁶ Such an approach would perhaps begin with an analysis of the provision under review to determine how it differs from an analogous federal provision.²⁷ The historical and textual approaches are consistent with the "primacy" theory of state constitutional analysis. Both approaches may be elements of a method of examination that looks at a state constitution before engaging the federal constitution for the protection of rights.

A third approach discussed by the *Jewett* court, that may be consistent with the "primacy" theory, is "the use of economic and sociological materials."²⁸ Such data may be helpful in demonstrating why a particular provision of a state constitution was intended to protect a particular group or individual right.

The fourth approach mentioned, but not discussed in great detail, is the "sibling state" approach.²⁹ This approach is comparative. It involves examining the provision of the state constitution in question with similar provisions in other states. An examination of other states' constitutions may reveal reasoning developed in cases surrounding such provisions that does not exist in Vermont because of a lack of litigation regarding the related Vermont Constitution provision. Such reasoning may be quite helpful in determining whether a similar right exists under the Vermont Constitution. When there is congruity between the states being compared, and historical experiences and textual similarities between the con-

23. The court stated, "[o]n the subject of briefing, we have said many times what we are *against!* Now the hour has come to say what we are *for.* To put it another way, we who have the mind to criticize must have the heart to help." *Id.* at 222, 500 A.2d at 234.

24. *Id.* at 225-26, 500 A.2d at 236.

25. *Id.* at 226, 500 A.2d at 236 (quoting Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 183 (1984)).

26. *Id.*

27. *Id.*

28. *Id.* at 227, 500 A.2d at 237.

29. *Id.*

stitutions, the argument to adopt the reasoning of another state's court may acquire great force.³⁰ Nevertheless, historical and textual similarities of other state constitutions should not be determinative of whether a particular protection exists under the Vermont Constitution. It is important to remember, as one commentator noted, "*Jewett* is not a comprehensive indication of the scope and nature of the independent state grounds doctrine as it will develop in Vermont."³¹

B. *The "Primacy" Theory and the "State Sibling" Approach in Vermont*

Although the court in *Jewett* outlines several approaches to constructing an argument under the Vermont Constitution,³² there is some indication in recent decisions that the court may prefer the historical and textual approach that is consistent with the "primacy" theory.³³ Use of the "primacy" theory requires that the advocate turn to the state constitution first and construct an argument from sources pertaining to that charter.³⁴ Accordingly, a lawyer would need to discover necessary historical data, including judicial precedent, in order to build a strong principle-based argument in accordance with the "primacy" theory.

In Vermont, the advocate who attempts to construct an argu-

30. Another factor to consider is whether the states being compared have some common ancestry to their constitutions. For example, many portions of the Vermont Constitution were borrowed from the Pennsylvania Constitution. See Shaeffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania*, 43 VT. HIST. 33 (1975). Similarly, much of the Maine Constitution was borrowed from the Massachusetts Constitution. See Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61 (1988). Another example is the lineage of the Oregon Constitution. "Oregon copied the basic framework of its bill of rights in 1857 from Indiana which had borrowed its bill of rights from Ohio's version of Delaware's." Carson, *supra* note 8, at 648.

31. Note, *The Principle Problem: State v. Jewett and the New Judicial Federalism*, 10 VT. L. REV. 437, 445 (1985).

32. See *supra* text accompanying notes 17-31.

33. See *State v. Wood*, 148 Vt. 479, 487-90, 536 A.2d 902, 907-08 (1987) (the court employed the historical approach); *State v. Brunelle*, 148 Vt. 347, 351-52, 534 A.2d 198, 201-02 (1987) (the court used textual analysis); see also Mahady, *supra* note 8, at 146. But see *State v. Dean*, 148 Vt. 510, 515-16, 536, A.2d 909, 913 (1987) (the court took "sibling state" approach; *State v. Brunelle*, 148 Vt. 347, 358, 534 A.2d 198, 205 (1987) (Peck, J., dissenting)(Justice Peck criticizes the majority's opinion as being whim motivated). For an insightful critique of the Vermont Supreme Court's opinion in *State v. Brunelle* see Note, *Living Without Principles: State v. Brunelle and the Vermont Supreme Court*, 13 VT. L. REV. 347 (1988).

34. See *supra* note 8.

ment based on the "primacy" theory may encounter two impervious obstacles. These obstacles are a dearth of judicial precedents that explain the evolution of the Vermont Constitution's provisions, and likewise, a scarcity of historical background materials.³⁵ Consequently, reliance on the "sibling state" approach may be the wisest strategy. As discussed earlier, while the court may prefer the "primacy" theory, it is not ill disposed to "sibling state" approach arguments.³⁶ Indeed, the court itself suggested such an approach in *Jewett*.³⁷ Hence, a lawyer may decide to construct her argument on the basis of decisions of sibling states, with similar backgrounds, and bulwark such an argument with textual analysis and references to Vermont's constitutional history.³⁸

II. THE FEDERAL BACKDROP

A state court may expand upon rights that are provided by the federal Constitution through the use of its own state constitution, but a state court may never impinge on a competing federal guarantee.³⁹ Any expansion of rights must be founded on independent and adequate state grounds that are clearly distinguished from existing federal law.⁴⁰ Thus, it is essential to understand, for the purpose of distinction, the existing federal precedents concerning a particular constitutional right before establishing that a broader right is afforded by a state constitution. We are concerned here with post-arrest, pre-*Miranda*⁴¹ silence and its use to impeach a defendant at trial.

In *Fletcher v. Weir*,⁴² the United States Supreme Court addressed the use of post-arrest, pre-*Miranda* silence for impeach-

35. See Teachout, *supra* note 15, at 31-34.

36. See, e.g., *State v. Dean*, 148 Vt. 510, 515-16, 536 A.2d 909, 913 (1987); *State v. Jewett*, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985). See *supra* notes 33-34 and accompanying text.

37. 146 Vt. at 227, 500 A.2d at 237.

38. *Id.* at 225, 500 A.2d at 236.

39. U.S. CONST. art. VI, cl. 2; *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980); see also *State v. Badger*, 141 Vt. 430, 448, 450 A.2d 336, 346-47 (1982); *State v. Hunt*, 91 N.J. 338, 363, 450 A.2d 952, 964 (1982) (Handler, J., concurring). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 164 (2d ed. 1988).

40. See *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); see also *supra* note 10.

41. As some have noted, the fact that the protective device intended to inform arrestees of their rights is referred to as *Miranda* warnings is indicative of the single minded way many have viewed individual rights and protections as being derived solely from the federal Constitution. See *Jewett*, 146 Vt. at 223-24, 500 A.2d at 235; *Linde*, *supra* note 2, at 174-75.

42. 455 U.S. 603 (1982).

ment purposes.⁴³ The defendant, Fletcher, was found guilty of first-degree manslaughter.⁴⁴ During his trial Fletcher admitted stabbing the victim, but claimed the stabbing was accidental and that he acted in self-defense.⁴⁵ He did not offer an exculpatory statement at the time of his arrest.⁴⁶ In an attempt to impeach Fletcher's in-court statements, the prosecutor cross-examined him regarding his post-arrest silence concerning his exculpatory version of events.⁴⁷

After his conviction in state court, the United States District Court for the Western District of Kentucky granted Fletcher a writ of habeas corpus. Subsequently, the United States Court of Appeals for the Sixth Circuit affirmed the writ.⁴⁸ The court of appeals stated "that impeachment of a defendant with post-arrest silence is forbidden by the Constitution, regardless of whether *Miranda* warnings are given. . . . We think that it is inherently unfair to allow cross-examination concerning post-arrest silence."⁴⁹ The court of appeals' decision was based primarily on two premises. First, the court noted that post-arrest silence has little probative value.⁵⁰ Second, the court discussed the widespread knowledge that one is not required to speak to police after arrest.⁵¹ The court concluded:

We think that an arrest, by itself, is governmental action

43. The Supreme Court has reaffirmed its position regarding post-arrest, pre-*Miranda* silence. See *Greer v. Miller*, 107 S. Ct. 3102, 3107-08 (1987). There are two other cases worth mentioning in this context. In *Jenkins v. Anderson*, the Supreme Court examined the use of pre-arrest silence for impeachment purposes and held that neither the fifth nor the fourteenth amendments were violated by such use. 447 U.S. 231, 238-41 (1980). The Court, however, pointed out that its opinion did not "force any state court to allow impeachment through the use of pre-arrest silence." *Id.* at 240. In *Doyle v. Ohio*, the Supreme Court faced the question of post-arrest, post-*Miranda* silence. 426 U.S. 610 (1976). The Court held that the use of the defendant's post-arrest, post-*Miranda* silence for impeachment purposes would be fundamentally unfair and violative of due process. *Id.* at 618. The Court noted, "[s]ilence in the wake of these [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. For an excellent discussion of the *Fletcher* case and the use of silence for impeachment purposes, see generally Note, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572 (1982).

44. *Fletcher v. Weir*, 455 U.S. 603, 604 (1982).

45. *Id.* at 603.

46. *Id.*

47. *Id.* at 603-04.

48. *Weir v. Fletcher*, 658 F.2d 1126 (6th Cir. 1981), *rev'd*, 455 U.S. 603 (1982).

49. *Weir v. Fletcher*, 658 F.2d at 1130.

50. *Id.*

51. *Id.* at 1131.

which implicitly induces a defendant to remain silent. When one combines a suspect's fears and anxieties upon arrest with widespread knowledge of one's right to remain silent, the result is often just that—silence. Given these realities, we think it is fundamentally unfair to allow impeachment through the use of any post-arrest silence.⁵²

The United States Supreme Court concluded that the court of appeals had overextended the logic of the Court's decision in *Doyle v. Ohio*.⁵³ The Supreme Court determined that the essential difference between *Fletcher* and *Doyle* was that in *Doyle* the defendant had received the *Miranda* warnings, while in *Fletcher* the defendant had not.⁵⁴ The Court concluded that the *Miranda* warnings implicitly assured defendants that their silence would not be used to their detriment.⁵⁵ Therefore, the *Miranda* warning itself was an active inducement to remain silent and consequently it would violate due process to penalize a defendant for relying on the government's assurance.⁵⁶ Thus, where there is no affirmative government inducement to remain silent (i.e., no *Miranda* warnings), a defendant's post-arrest, pre-*Miranda* silence can be used to impeach his or her in-court testimony.⁵⁷

The Supreme Court's opinion in *Fletcher v. Weir* makes clear its belief that the right to remain silent is effective upon receipt of *Miranda* warnings.⁵⁸ The Court plainly rejected the court of appeals' opinion that the right is triggered at the moment of arrest.⁵⁹ However, the Supreme Court offered no reasoning to support its view that arrest was not the crucial point of accrual of the right to remain silent. Rather, the Court relied on its opinions in *Doyle* (post-*Miranda* silence) and *Jenkins* (pre-arrest silence),⁶⁰ instead of specifically addressing the distinctively different situation raised by *Fletcher*—post arrest, pre-*Miranda* silence.

52. *Id.*; cf. *Commonwealth v. Turner*, 499 Pa. 579, 584, 454 A.2d 537, 540 (1982); see also Note, *supra* note 43, at 1589. The court of appeals was also concerned about the possibility of the police postponing the *Miranda* warnings if post-arrest silence could be used for impeachment purposes. *Weir v. Fletcher*, 658 F.2d at 1132. But see Note, *supra* note 43, at 1590.

53. *Fletcher v. Weir*, 455 U.S. 603, 604 (1982); see also *supra* note 43.

54. *Id.* at 605-06; see *supra* note 43.

55. *Fletcher v. Weir*, 455 U.S. at 606.

56. *Id.* at 606.

57. *Id.* at 607.

58. *Id.*

59. *Id.* at 606.

60. *Id.* at 605-06. See also note 43 (summary of *Jenkins*).

Although the Court has opened the door to the use of post-arrest, pre-*Miranda* silence, there is no absolute barrier to state courts closing the door. All that is required is sound principle-based reasoning that clearly establishes independent state grounds for disallowing the use of silence for impeachment purposes.⁶¹ In fact, as in *Jenkins*,⁶² the Supreme Court has left an open invitation to states to determine under their "own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony."⁶³ Concomitantly, state courts are free to determine to what extent their own state constitutions permit the use of post-arrest silence for impeachment purposes.⁶⁴

III. THE SIBLING STATE APPROACH APPLIED

A. *Comparative Textual Method*

State v. Byrne raised, but did not answer, the issue of whether chapter I, article 10 of the Vermont Constitution prohibits the use of post-arrest, pre-*Miranda* silence for impeachment purposes.⁶⁵ The text of chapter I, article 10 of the Vermont Constitution states in pertinent part:

That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with the witnesses; to call for evidence in his favor, and a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; *nor can he be compelled to give evidence against himself . . .*⁶⁶

The advocate wishing to argue that chapter I, article 10 requires the suppression of any reference to post-arrest, pre-*Miranda* silence may be frustrated by a lack of cases addressing this issue as well as a lack of constitutional history.⁶⁷ When faced with such a

61. See *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

62. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

63. *Fletcher v. Weir*, 455 U.S. at 607.

64. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

65. *State v. Byrne*, No. 85-262, slip op. at 7-8 (Vt. Jan. 22, 1988).

66. VT. CONST. ch. I, art. 10 (emphasis added).

67. See *supra* note 35 and accompanying text.

situation the "sibling state" approach is the most viable approach open to the advocate.⁶⁸ The Vermont Supreme Court has commented favorably upon this comparative approach which involves examining what states with identical or similar constitutional provisions have done when faced with a similar issue.⁶⁹

An examination of the Pennsylvania Constitution is an obvious starting point for such an exercise because the Vermont Constitution is based largely on that charter.⁷⁰ Article I, section 9 of the Pennsylvania Constitution which deals with the rights of accused criminals states in pertinent part:

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; *he cannot be compelled to give evidence against himself . . .*⁷¹

This provision makes it clear that the accused cannot be made to testify against himself.

Similarly, the Vermont constitutional provision which sets out the rights of the accused states in part "nor can [the accused] be compelled to give evidence against himself . . ."⁷² Because these provisions are clearly similar the next step in applying the "sibling state" approach is to examine Pennsylvania case law addressing the issue of post-arrest, pre-*Miranda* silence.

B. The Comparative Case Method

The Pennsylvania Supreme Court addressed the issue of post-arrest, pre-*Miranda* silence in *Commonwealth v. Turner*.⁷³ In *Tur-*

68. See *supra* notes 35-36 and accompanying text.

69. See *supra* notes 8, 36-37 and accompanying text.

70. One commentator has stated: "The Windsor convention that wrote the first constitution for Vermont in the summer of 1777 relied heavily on the Pennsylvania constitution adopted in Philadelphia the previous September." Shaeffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania*, 43 VT. HIST. 33, 33 (1975).

71. PA. CONST. art. I, § 9 (emphasis added).

72. VT. CONST. ch. I, art. 10.

73. 499 Pa. 579, 454 A.2d 537 (1982).

ner, a jury convicted the defendant of voluntary manslaughter.⁷⁴ At trial the defendant testified that the victim pressed a gun to his shoulder, at which point he disarmed the victim. He then noticed a third party standing behind the victim with a gun.⁷⁵ The defendant then stated that he thought that the third party shot at him, so he returned fire, striking the victim once. The defendant then maintained that he fired the gun twice over his shoulder as he fled the scene.⁷⁶ All three shots hit and killed the victim.⁷⁷

On cross-examination the prosecutor asked the defendant if he ever told the police that someone shot at him. The defendant made no such statement to the police after being arrested.⁷⁸ Defense counsel objected to the question and moved for a mistrial. The trial judge sustained the objection, denied the motion, and instructed the jury to disregard the question.⁷⁹ The prosecution made no further reference to the defendant's silence.⁸⁰

On appeal the appellant maintained that the prosecution's reference to appellant's silence prior to trial constituted reversible error.⁸¹ The Pennsylvania Supreme Court agreed.⁸² The *Turner* court began its decision by setting out the applicable federal standard which the United States Supreme Court established in *Fletcher v. Weir*.⁸³ The *Fletcher* Court reasoned that the *Miranda* warning induces the accused to keep silent, and where the warning has not been given, no governmental inducement to remain silent exists.⁸⁴ Therefore, the *Fletcher* Court held that the federal Constitution does not bar the use of pre-*Miranda* silence to impeach the defendant.⁸⁵

In contrast, the *Turner* court adopted a more restrictive rule concerning the use of post-arrest, pre-*Miranda* silence than that required by *Fletcher*.⁸⁶ The *Turner* court stated that, "we have

74. *Id.* at 580, 454 A.2d at 538.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at n.2.

80. *Id.* at 581, 454 A.2d at 539.

81. *Id.* at 581, 454 A.2d at 538.

82. *Id.*

83. 455 U.S. 603 (1982).

84. *Id.* at 606. See *supra* text accompanying notes 53-58.

85. *Id.* at 607.

86. *Commonwealth v. Turner*, 499 Pa. 579, 584, 454 A.2d 537, 540 (1982).

traditionally viewed such references to the accused's silence as impermissible for a variety of reasons."⁸⁷ The first reason cited by the court was the tendency among lay jurors to interpret silence as an admission of guilt.⁸⁸ Furthermore, the court stated that the prejudice caused by a reference to the defendant's silence far outweighed any probative value the reference might have because of the inherent ambiguity of the defendant's silence.⁸⁹ Finally, after discussing article I, section 9 of the Pennsylvania Constitution, the court concluded, "we decline to hold, under the Pennsylvania Constitution, that the existence of *Miranda* warnings, or their absence, affects a person's legitimate expectation not to be penalized for exercising the right to remain silent."⁹⁰

While *Fletcher* established the minimum standard to be followed vis-a-vis post-arrest silence, *Turner* established a more protective rule based on the Pennsylvania Constitution. *Turner* stands for the proposition that under the Pennsylvania Constitution a person has a legitimate expectation not to be punished for utilizing the right to remain silent, whether or not *Miranda* warnings have been given.⁹¹

Hence, *Turner* provides the Vermont Supreme Court with a precedent upon which it can rely to hold that the right to remain silent under the Vermont Constitution is not contingent upon receipt of *Miranda* warnings. Because the Vermont Constitution is a direct descendant of the Pennsylvania Constitution, there is a substantial basis for applying the "sibling state" approach to Pennsylvania decisions interpreting their constitution in analogous situations. *Turner* properly separated the presence or absence of *Miranda* warnings from the right to remain silent.⁹² Therefore, under the Vermont Constitution the right of the accused to remain silent should in no way be viewed as being contingent upon the time that *Miranda* warnings are given. The right to remain silent should be viewed as stemming directly from the Vermont Constitution. At the time of arrest a person has the right to remain silent whether or not he or she is informed of the right. Thus, silence between the time of arrest and the point where *Miranda* warnings

87. *Id.* at 582, 454 A.2d at 539.

88. *Id.*

89. *Id.*

90. *Id.* at 584, 454 A.2d at 540.

91. *Id.*

92. *Id.*

are actually given should not be used to penalize a defendant for exercising the right to remain silent.⁹³ When viewed this way, the right to remain silent preexists *Miranda* warnings. As a result, the individual who remains silent should not be penalized for exercising his preexisting constitutional right to remain silent.⁹⁴

The *Turner* court also undertook a balancing test to determine if the probative value of the prosecutorial reference to the defendant's silence outweighed any undue prejudice.⁹⁵ The court concluded that the reference was substantially prejudicial because it was not "sufficiently probative of an inconsistency with [the defendant's] in-court testimony."⁹⁶

Under the Vermont Rules of Evidence, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury"⁹⁷ Due to the inherently ambiguous nature of silence on the part of an

93. See *State v. Davis*, 38 Wash. Ct. App. 600, 605, 686 P.2d 1143, 1145-46 (Wash. Ct. App. 1984). In *Davis*, the court considered whether post-arrest, pre-*Miranda* silence for impeachment purposes violated the due process clause of article I, section 3 of the Washington Constitution. The court discussed at what point the right to silence is triggered:

Limiting the exclusion of postarrest silence to instances where *Miranda* warnings are given would penalize the knowledgeable defendant who has not been advised of his rights. . . . There is no logic in protecting a defendant advised of his rights and not an unadvised defendant. Both defendants are exercising the same constitutional right. The arrest itself is governmental action which enshrouds a defendant with the constitutional right to remain silent. A suspect's fears upon arrest, combined with the widespread knowledge of the right to remain silent, will often result in the defendant remaining silent.

Id. The Washington court is not alone in this view. See also *Sanchez v. State*, 707 S.W.2d 575, 579-80 (Tex. Crim. App. 1986) (Texas Constitution protects right at the moment of arrest and the state may not "violate the defendant's right . . . by use of post-arrest silence.").

94. The giving of *Miranda* warnings does not create the right to remain silent. The warnings are simply a prophylactic measure to safeguard against compulsion during custodial interrogation. They thereby protect the fifth amendment right against compelled self-incrimination. The right to remain silent therefore stems from the federal Constitution. See *Jenkins v. Anderson*, 447 U.S. 231, 247 n.1 (1980) (Marshall, J., dissenting).

95. 499 Pa. 579, 583, 454 A.2d 537, 539 (1982). See *Fletcher v. Weir*, 455 U.S. 603 (1982). The *Fletcher* Court stated that state courts may establish the extent to which to allow pre-*Miranda* silence for impeachment under their own state rules of evidence. *Id.* at 607; see also *Sanchez v. State*, 707 S.W.2d 575, 580-82 (Tex. Crim. App. 1986) (where the court stated that post-arrest silence on the part of the defendant is presumed to be an exercise of his right against self-incrimination, and where the court conducted an evidentiary analysis and concluded that the use of post-arrest silence was more prejudicial than probative).

96. *Commonwealth v. Turner*, 499 Pa. 579, 583, 454 A.2d 537, 539 (1982).

97. Vt. R. Evid. 403.

arrestee,⁹⁸ the probative value of any reference to the silence would be outweighed by a very real danger of causing unfair prejudice to the arrestee.⁹⁹ Furthermore, it is possible that this prejudice would rise to the level of a violation of a fundamental right which the arrestee acquires upon arrest—the right to remain silent. Therefore, the Vermont Rules of Evidence would also bar the use of pre-*Miranda* silence.

C. Policy Considerations

In addition to the constitutional and evidentiary arguments that can be made, several policy arguments also cut against the allowance of pre-*Miranda* silence for impeachment purposes. If post-arrest silence is excluded only where *Miranda* warnings have been given to a defendant, the knowledgeable defendant would be penalized because he is more likely to remain silent on arrest due to the fact that he knows he has that right.¹⁰⁰ Because both defendants are entitled to the same constitutional right, there is no sound reason to protect a defendant who has been advised of his rights while not protecting the unadvised defendant.¹⁰¹

Secondly, if a court allows post-arrest, pre-*Miranda* silence to be used for impeachment purposes at trial, police may be encouraged to delay the reading of *Miranda* warnings.¹⁰² When a constitutional guarantee intended to protect citizens from improper police conduct may be frustrated by law enforcement officials that improperly withhold *Miranda* warnings, it would seem a rule has been adopted which puts the cart before the horse. Given the importance of the fundamental right involved, the Vermont Supreme Court should decline to hold that the Vermont Constitution allows the use of post-arrest, pre-*Miranda* silence for im-

98. See *Doyle v. Ohio*, 426 U.S. 610, 617 (1976).

99. It is unlikely that a limiting instruction to the jury ordering them to disregard the reference would cure this problem. As *Turner* points out, the jury may have reached a compromise verdict: "The jury may have decided that the Commonwealth's case was significantly bolstered by the reference to appellant's post-arrest silence and that it would be appropriate to impose a verdict more severe than acquittal but less severe than murder." *Turner*, 499 Pa. at 585, 454 A.2d at 540.

100. See cases cited *supra* note 93.

101. *Id.*

102. *Id.* But see Note, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572, 1589-90 (1982) (arguing that neither of these two concerns warrants prohibition of the impeachment use of post-arrest silence).

peachment purposes.

CONCLUSION

The Vermont Constitution provides a source of rights and protections separate from the federal Constitution. Recently, many advocates have resorted to arguments grounded in the state charter. However, the advocate often finds few precedents within Vermont and even less historical material necessary for building a sound argument. Although there are several possible approaches to a claim under the state constitution, the "sibling state" approach appears particularly well suited to Vermont.

The use of post-arrest, pre-*Miranda* silence for impeaching a defendant's in-court testimony is one issue that illustrates how the "sibling state" approach may be applied. There is a sound basis in chapter I, article 10 for concluding that post-arrest, pre-*Miranda* silence should be protected. Although strong policy considerations exist for affording protection to an arrestee's pre-*Miranda* silence, policy considerations alone are not enough. A decision based solely on what a court believes is sound policy would probably lead to a result-oriented decision and accusations of judicial legislating. Thus, the advocate faced with only the bare text of the state constitution is forced to look elsewhere for guidance. In the absence of precedents and well-recorded state constitutional history, the "sibling state" approach provides an important source of comparison. While other approaches to analyzing the state constitution should not be overlooked, and new approaches encouraged, until there is a sufficient amount of case law interpreting the various provisions of the Vermont Constitution, reliance on the "sibling state" approach will be a vital component of any analytical framework.

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