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Mark A. Rucci
University of Maine School of Law

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STATE V. LOVEJOY: SHOULD PRE-ARREST, PRE-MIRANDA SILENCE BE ADMISSIBLE DURING THE STATE'S CASE-IN-CHIEF AS SUBSTANTIVE EVIDENCE OF GUILT?

Mark Rucci

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STATE V. LOVEJOY: SHOULD PRE-ARREST, PRE-MIRANDA SILENCE BE ADMISSIBLE DURING THE STATE'S CASE-IN-CHIEF AS SUBSTANTIVE EVIDENCE OF GUILT?

Mark Rucci*

I. INTRODUCTION

Article I, section 6 of the Maine Constitution reads in part that “[t]he accused shall not be compelled to give evidence against himself or herself, nor be deprived of life, liberty, property or privileges”¹ Further, the Law Court has held that “the State constitutional protection against self-incrimination is the equivalent of the Fifth Amendment.”² However, as with most provisions of the Constitution, the protection against self-incrimination is open to interpretation.³ While the Supreme Court has answered some questions surrounding the Fifth Amendment’s protections,⁴ it has left many decisions regarding its scope largely within the purview of the states.⁵ As a result, The Maine Supreme Judicial Court, like many courts across the United States, has struggled to qualify exactly how Maine’s codification of the Fifth Amendment applies outside of the courtroom.⁶

* J.D. Candidate, 2016, University of Maine School of Law. The author wishes to thank Professor Dmitry Bam and his colleagues on the *Maine Law Review* for their invaluable support and meaningful critique of this Note. The author would also like to thank his loving family and friends, whose support made the publication of this work possible. This note is dedicated in loving memory of Yvette Deabay, Mary Rucci, and Andrea Robinson, three amazing women who proved that nothing is insurmountable when approached with a positive attitude.

1. Me. Const. art I, § 6.

2. *State v. Vickers*, 309 A.2d 324, 326 (Me. 1973) (citing *State v. Castonguay*, 240 A.2d 747, 753 (Me. 1968)).

3. See generally Frank S. Ward, *Constitutional Law—United States v. McCann: Is the Fifth Amendment Violated when Pre-Arrest Silence is used as Substantive Evidence of a Criminal Defendant’s Guilt*, 28 AM. J. TRIAL ADVOC., 269 (2004); see *Fifth Amendment at Trial*, 40 GEO. L.J. 643, 645-49 (2011) (stating that in applying the Fifth Amendment, the Supreme Court has had to interpret the meaning of the terms “compulsion” and “testimony,” as well as decide what types of statements are incriminating).

4. See *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (holding that an individual’s privilege against self-incrimination is at risk any time he is “taken into custody or otherwise deprived of his freedom by the authorities . . . and is subjected to questioning” Thus, the Court found that unless certain procedural safeguards were adhered to, such statements would be inadmissible in court proceedings.).

5. See *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (stating that, despite its holding, each jurisdiction was free to limit or otherwise ban the use of silence for impeachment purposes); see *Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013) (declining to answer a question regarding the admissibility of pre-custodial silence because the defendant never invoked his privilege).

6. See *Jenkins*, 447 U.S. at 240 (limiting the Court’s holding to pre-arrest silence used for impeachment and stating that its decision is not binding on the states); see *State v. Millay*, 2001 ME 177, ¶¶ 15-16, 787 A.2d 129 (holding that Millay’s performance on a sobriety test was admissible as non-testimonial evidence, and that his statement that he had “been through it before” was testimonial, but was admissible because it was not coerced); see *United States v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997) (holding that the privilege against self-incrimination does not apply to resident aliens who face charges in other countries); see *Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013) (stating that a suspect in a voluntary interview needed to expressly state that he was asserting his Fifth Amendment

Specifically, the Supreme Court has never addressed the issue of whether pre-arrest, pre-*Miranda* silence can be used during the prosecution's case-in-chief as evidence of consciousness of guilt in a criminal trial.⁷ Further, the circuit courts that have addressed the issue are split.⁸ As a result, jurisdictions have been forced to fashion their own rules regarding the admissibility of pre-arrest, pre-*Miranda* silence as evidence of consciousness of guilt. It was against this backdrop that the Law Court decided *State v. Lovejoy*.⁹

The purpose of this case note is to analyze *Lovejoy* and how it fits into the existing body of case law regarding pre-arrest statements and their admissibility in court. Part II of this note briefly discusses the scope of the Fifth Amendment to help elucidate the rationale behind courts' decisions to either admit or exclude pre-arrest, pre-*Miranda* testimony at trial. Part III of this note discusses *Lovejoy* in some detail, explaining the facts, procedural posture, and holding of the case, including a detailed analysis of the Court's reasoning and the precedent upon which it relied. Part IV discusses how other courts have addressed the admissibility of pre-arrest, pre-*Miranda* silence. Finally, Part V argues that the Court's ruling in *Lovejoy* is the correct interpretation of the Fifth Amendment and article I, section 6 of the Maine Constitution as it applies to pre-arrest, pre-*Miranda* silence, as any comment on a defendant's pre-arrest, pre-*Miranda* decision to remain silent implicates the Fifth Amendment,¹⁰ has minimal probative value,¹¹ and should be precluded by a logical extension of the *Griffin* penalty doctrine.¹²

II. THE SCOPE OF THE FIFTH AMENDMENT

The Fifth Amendment is at the heart of the debate over the admissibility of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt during the prosecution's case-in-chief. Accordingly, it is helpful to understand a little bit about the Amendment's protections. The portion of the Fifth Amendment that is relevant to pre-arrest, pre-*Miranda* silence states that no person "shall be compelled in any criminal case to be a witness against himself."¹³ While on its face the

privilege, but not deciding whether the underlying basis for that assertion—his silence—would have been protected).

7. See *State v. Lovejoy*, 2014 ME 48, ¶ 21, 89 A.3d 1066 (citing *Salinas*, 133 S. Ct. at 2180).

8. See Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-Arrest Silence Have to do with Miranda, the Fifth Amendment, or Due Process?*, 28 *HAMLIN L. REV.* 277, 280 (2005).

9. 2014 ME 48, 89 A.3d 1066.

10. See Marcy Strauss, *Silence*, 35 *LOY. L.A. L. REV.* 101, 139 (2001) (quoting *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995)) ("[W]e discern no rational reason to limit the protection embracing the citizen's right to silence to the post-arrest or post-*Miranda* situation. The constitutional right to silence exists all the time—before arrest, at arrest, and after arrest; before a *Miranda* warning and after it. The right is self-executing.").

11. See *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

12. See *Griffin v. California*, 380 U.S. 609, 614-15 (1965) (holding that to allow a prosecutor to comment on a defendant's failure to testify is to attach a penalty to a defendant's assertion of a constitutional right).

13. Cornell University Law School, *Fifth Amendment: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/fifth_amendment (last visited Feb. 22, 2015); see *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (stating that the privilege against self-incrimination is "fixed in our Constitution . . . [and was] 'secured for ages to come and . . . designed to approach immortality as

Amendment arguably only pertains to the courtroom, the Supreme Court in *Miranda v. Arizona*¹⁴ extended the scope of the Amendment to any situation involving the inhibition of freedom, whether inside the courtroom or out.¹⁵ In that case, the Court held that a suspect must be warned of specific rights in clear terms in order for the mandates of the Sixth Amendment right to counsel and Fifth Amendment protection against self-incrimination to be satisfied.¹⁶ While the prophylactic tool adopted in *Miranda* was designed to curb police coercion and questionable practices in eliciting confessions, the questions then become when, whether, and how these warnings must be given.¹⁷

The Supreme Court has held that “the protection of the privilege reaches an accused’s communications, whatever form they might take, and the compulsion of responses which are also communications”¹⁸ In addition, the Court held in *Griffin v. California* that commenting on a defendant’s failure to testify at trial is impermissible, as it constitutes “a penalty imposed by courts for asserting a constitutional privilege.”¹⁹ However, prosecutors are permitted to use evidence of a defendant’s silence during cross-examination for impeachment purposes.²⁰ In addition, in order for the Fifth Amendment to be implicated, the accused’s statements must be both “testimonial”²¹ and the product of “compulsion” within the Amendment’s meaning.²² While the Supreme Court has not spelled out an exhaustive definition of what constitutes a testimonial statement, they have noted that, in the absence of an ongoing emergency, “[statements] are testimonial when the circumstances objectively indicate[] that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”²³ In addition, the Court has stated that the term interrogation “refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating

nearly as human institutions can approach it”) (quoting *Cohens v. Virginia*, 19 U.S. 264, 387 (1821)); see also *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating the protection against self-incrimination against the states).

14. 384 U.S. 436 (1966).

15. Cornell University Law School, *supra* note 13.

16. See Gordon L. Rockhill, *Custodial Interrogation under Miranda v. Arizona*, 23 AM. JUR. 2D 713 *Proof of Facts* § 2 (1980).

17. See *id.* §§ 1-2 (questions have arisen regarding what constitutes custodial interrogation and when the warnings must be given).

18. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966).

19. *Griffin v. California*, 380 U.S. 609, 614 (1965).

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

21. See *Schmerber*, 384 U.S. at 761 (holding that the privilege against self-incrimination protects only an individual’s right to not be “compelled to testify against himself”); see *Doe v. United States*, 487 U.S. 201, 210 (1988) (stating that in order to be testimonial, “an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.”); see *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (holding that a gunshot victim’s identification and description of a witness was non-testimonial when the primary purpose of the police’s investigation was to assist in an emergency).

22. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

23. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (dealing with testimonial statements in the context of the emergency doctrine).

response from the suspect.”²⁴ Finally, the focus of this inquiry is on the “perceptions of the suspect.”²⁵

In constructing a definition for compelled statements, the Court stated that in order for the government to satisfy the constitutional mandate laid forth in the Fifth Amendment, “[p]roof must be adequate to establish that . . . the making of the statement was voluntary.”²⁶ The import of this standard is that if a defendant should utter a statement that, but for “improper influence” he would not have made, that statement can neither be constitutionally permissible nor appropriate for admission.²⁷

In issuing its opinions, the Court has sought to clarify both the Fifth Amendment’s protections and how its requirements may be satisfied.²⁸ However, in light of the Court’s hesitance to address the issue of whether pre-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt,²⁹ a lower court’s definition of compulsion has often determined whether such evidence will be ruled admissible under the Fifth Amendment.³⁰ With this short synopsis of the scope of the Fifth Amendment in mind, the issues at play in *State v. Lovejoy* can be better understood.

III. *STATE V. LOVEJOY*³¹

A. *Background of Lovejoy*

In *State v. Lovejoy*, defendant Lovejoy’s daughter told a friend that Lovejoy had molested her.³² The Portland Police began an investigation and located Lovejoy, who was living in North Carolina.³³ A detective for the department called

24. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

25. *Id.*

26. *Miranda*, 384 U.S. at 462 (citing *Bram v. United States*, 168 U.S. 532, 549 (1897)).

27. *Id.* (citation omitted).

28. *See, e.g., Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (holding that it was error for the prosecutor to use defendant’s post-*Miranda* silence at trial as evidence to refute his claim of insanity); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (stating that a defendant’s post-arrest silence in the wake of receiving his *Miranda* rights is nothing more than his assertion that he intends to exercise his right, and that such silence cannot be used for impeachment on cross-examination); *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (“[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored.”) (internal quotations omitted).

29. In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), it looked as though the Supreme Court was primed to settle the issue of whether pre-arrest, pre-*Miranda* silence was admissible in court as substantive evidence of a defendant’s guilt. However, the Court sidestepped the issue, holding that in order to rely on the privilege against self-incrimination, the defendant had to invoke it. *Id.* at 2184. Since the defendant voluntarily accompanied police to the station and answered questions until “balk[ing]” at a question about the ballistics analysis of shotgun shells found at the scene of the crime, the Court held that the defendant did not specifically invoke the Fifth Amendment and was not entitled to its protection. *Id.* at 2177-79.

30. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (stating that the Fifth Amendment only prohibits “*compelled* self-incrimination”) (emphasis added).

31. 2014 ME 48, 89 A.3d 1066.

32. *Id.* ¶ 3.

33. *Id.*

Lovejoy one or two times, and Lovejoy denied the allegations, stating that he wanted to speak with his attorney.³⁴ Lovejoy thereafter ceased returning phone calls.³⁵ Ultimately, he was charged with two counts of gross sexual assault, a class A crime.³⁶ During the State's direct examination of the police detective who had contacted Lovejoy, defense counsel requested a sidebar conference and asked that the detective be instructed not to mention Lovejoy's statement, made during one of the detective's calls, that he would like to speak with his attorney.³⁷ The request was granted, but Lovejoy's counsel never sought to prevent testimony that Lovejoy thereafter refused to speak with the detective or return his phone calls.³⁸ The detective subsequently testified that Lovejoy did not return his calls.³⁹

At closing, the prosecutor again referenced Lovejoy's refusal to return phone calls, stating that the jury should consider this as evidence of Defendant's "consciousness of guilt."⁴⁰ At the end of the prosecutor's closing argument, Lovejoy moved for a mistrial.⁴¹ The motion was denied, and the judge instead issued a curative instruction.⁴² Lovejoy was convicted by the jury and raised two issues on appeal, including "the admissibility of evidence concerning Lovejoy's silence when approached by the police before his arrest"⁴³

In a unanimous decision, the Law Court held that Lovejoy's pre-arrest, pre-*Miranda* silence could not be used at trial as evidence of his consciousness of guilt without violating the Fifth Amendment of the United States Constitution and article I, section 6 of the Maine Constitution.⁴⁴

B. Discussion of the Fifth Amendment Implications of Lovejoy's Silence

At the outset, the Court in *Lovejoy* noted that the Fifth Amendment unquestionably prohibits a prosecutor from commenting on "a defendant's decision not to testify at his criminal trial."⁴⁵ With regard to police interaction outside of the courtroom, the Court noted that its decisions have long recognized that the Fifth Amendment protects individuals against "compelled self-incrimination both before and after arrest."⁴⁶ Specifically, the Court in *State v. Diaz* ruled inadmissible testimony from a police officer that when he questioned a defendant about his connection to a motor vehicle accident, the defendant stated that he thought it unwise to answer the officer's questions.⁴⁷ In that case, the Court relied on *Doyle*

34. *Id.*

35. *Id.*

36. *Id.* ¶ 2.

37. *Id.* ¶ 6.

38. *Id.*

39. *Id.* ¶ 7.

40. *Id.* ¶ 8.

41. *Id.* ¶ 10. Defense counsel's motion was based on the fact that the prosecutor had impermissibly spoken to the victim's credibility as a witness, an issue that was raised on appeal, but that we do not reach for the purposes of this case note. *Id.*

42. *See id.* ¶ 12.

43. *Id.* ¶¶ 12, 16.

44. *Id.* ¶ 27.

45. *Id.* ¶ 20 (quoting *State v. Patton*, 2012 ME 101, ¶ 15, 50 A.3d 544).

46. *Id.* ¶ 22 (citing *State v. Diaz*, 681 A.2d 466, 468 (Me. 1996)).

47. *Diaz*, 681 A.2d at 467.

v. *Ohio*,⁴⁸ in which the Supreme Court stated that the Due Process Clause prevents a state from introducing testimony which makes reference to a “[d]efendant’s invocation of the right to remain silent.”⁴⁹ While the Court still had to find that the error could not be considered harmless,⁵⁰ in that case the prosecutor twice emphasized Diaz’s failure to answer the trooper’s question.⁵¹

The issue in *Lovejoy* was slightly different than that raised in *Diaz*. In *Lovejoy*, it was the defendant’s silence, rather than a statement, that was used against him at trial. However, the Court noted that Lovejoy “specifically terminated communication by first telling the investigating detective that he wanted to speak with a lawyer and then remaining silent by not returning the detective’s telephone calls.”⁵² The Court stated that Lovejoy exercised his Fifth Amendment right by ending his telephone conversation with the detective, stating that he wanted to speak with his attorney, and refusing to answer subsequent phone calls.⁵³ Finally, as in *Diaz*:⁵⁴

Because the prosecutor . . . sought to capitalize on the improperly admitted testimony of Lovejoy’s failure to respond to the police detective by arguing that it demonstrated Lovejoy’s consciousness of guilt, the testimony and argument constituted a violation of the Fifth Amendment and article I, section 6 of the Maine Constitution.⁵⁵

In addition, while the claim in *Lovejoy* was reviewed only for obvious error,⁵⁶ the Court concluded that the error at issue in this case was “sufficiently prejudicial that it could have affected the outcome of the proceeding.”⁵⁷ The Court relied on its holding in *Diaz* to find plain error⁵⁸ and concluded that the error in this case “affect[ed] substantial rights.”⁵⁹ Specifically, the Court found that where the evidence impermissibly elicited from the detective at trial was emphasized in closing, and where there was no physical evidence linking Lovejoy to the crime,

48. 426 U.S. 610 (1976).

49. *Diaz*, 681 A.2d at 468 (citing *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976)).

50. *Id.* at 469 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)) (holding that an error can only be considered harmless if the court is satisfied beyond a reasonable doubt that “that the error did not affect the outcome of the trial”); *see also* *State v. Patton*, 2012 ME 101, ¶ 18, 50 A.3d 544 (Though the State conceded error regarding the admission of Patton’s pre-arrest statement that he would like to speak with his attorney, that error was harmless, as the prosecutor did not seek to capitalize on the testimony as establishing the defendant’s guilt. Indeed, it was never suggested that the statement should be viewed in any way as evidence of guilt.)

51. *Diaz*, 681 A.2d at 469.

52. *State v. Lovejoy*, 2014 ME 48, ¶ 24, 89 A.3d 1066.

53. *Id.* ¶ 26.

54. *Diaz*, 681 A.2d at 469.

55. *Lovejoy*, 2014 ME 48, ¶ 27, 89 A.3d 1066.

56. *Id.* ¶ 19. Lovejoy’s counsel failed to object to both the detective’s testimony and the prosecutor’s remarks at closing. Thus, the Court state that it would review only for obvious error.

57. *Id.* ¶ 28.

58. *Id.*; *see also Diaz*, 681 A.2d at 469 (holding that the court could not be satisfied beyond a reasonable doubt that the constitutional violation did not affect the outcome of the trial, when the prosecution twice relied on the inadmissible testimony of Diaz and when the Court refused to give an instruction that the jury “must not draw any adverse inference from the fact that a person has exercised [the right not to answer]”).

59. *Id.* ¶ 28.

the trial thus turned solely on the credibility of witnesses.⁶⁰ Finally, the Court stated that Lovejoy's assertion of the protection against self-incrimination, along with the improper admission of his silence at trial, "seriously affect[ed] the fairness and integrity . . . of judicial proceedings."⁶¹ Specifically, while the jury was instructed that Defendant's decision not to testify could not be used against him, no such instruction was issued regarding his pre-arrest silence, which was also implicated by the Fifth Amendment and article I, section 6 of the Maine Constitution.⁶² Thus, Lovejoy's convictions were vacated.⁶³

IV. APPROACHES

A. *The Rationale for Excluding Pre-Arrest, Pre-Miranda Silence*

In deciding *State v. Lovejoy*, the Maine Supreme Judicial Court seemed to subscribe to the analysis that:

Disclosing a defendant's choice to remain silent during the pre-arrest stage will lead the jury to infer guilt. As a result, . . . comments upon a defendant's silence compel an individual to speak or otherwise incriminate herself, which the Supreme Court prohibits.⁶⁴

The Court in *Lovejoy* was particularly concerned about the prejudice a defendant is likely to suffer when a prosecutor is allowed to rely on the accused's silence to state explicitly that such silence is probative of guilt.⁶⁵ This strategy is particularly prejudicial to the defendant, as the evidence is not simply admitted at trial, but will often be leaned on heavily as part of the State's case-in-chief, thereby eroding the values of the adversarial system.⁶⁶ Where the defendant has chosen not to testify, and thus has not exposed himself to the possibility of impeachment, it seems implicitly unfair to fashion his lack of testimony as substantive evidence of his guilt.⁶⁷ Allowing introduction of the testimony forces a defendant to make the impossible choice between having either his silence or his testimony used against him at trial.⁶⁸

60. *Id.*

61. *Id.* ¶ 29.

62. *Id.*

63. *Id.* ¶ 33.

64. Adam M. Stewart, Note, *The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda*, 37 SUFFOLK U. L. REV. 189, 199 (2004) (citing *Griffin v. California*, 380 U.S. 609, 613-15 (1965)).

65. *Lovejoy*, 2014 ME 48, ¶ 28, 89 A.3d 1066 ("[T]he evidence not only was offered at trial but also was emphasized in closing arguments in a case in which there was no physical evidence linking Lovejoy to the crime and the verdict turned entirely on the credibility of the witnesses.").

66. Jane Elinor Notz, Comment, *Prearrest Silence As Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009, 1034 (1997) (stating that a defendant is more likely to speak if he knows his silence will be used against him, thus creating something akin to an inquisitorial system of justice).

67. See Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 398 (2006) ("[P]ermitting the prosecution to use post-arrest, pre-Miranda silence as substantive evidence of guilt forces the defendant into [a] no-win situation . . .").

68. Skrapka, *supra* note 67, at 398.

An additional concern is that “the Fifth Amendment, in conjunction with *Miranda*, implies the government’s promise to respect the defendant’s decision to remain silent.”⁶⁹ The rationale here is that regardless of whether a defendant has been arrested, once he has exercised his constitutional right to remain silent, any comment on his silence at trial is violative of the Fifth Amendment.⁷⁰ Although that rationale arguably only applies to post-*Miranda* invocations of the right to remain silent, there are compelling reasons why *Miranda* should not serve as the arbitrary dividing line between those statements that may be used against a defendant in court and those that may not.⁷¹ Notably, allowing *Miranda* to serve as the dividing line would encourage police to wait on giving *Miranda* warnings for as long as possible so as to increase their chances of gathering incriminating statements.⁷² Another rationale is that allowing *Miranda* to serve as the dividing line undermines the function of our adversarial system of justice by encouraging police to rely on defendants as key sources of evidence.⁷³ If defendants know that their silence can be used against them in court, they are more likely to speak with police.⁷⁴

The final rationale for the exclusion of pre-arrest, pre-*Miranda* silence is that such evidence has minimal probative value.⁷⁵ This is because there are any number of reasons that a defendant might wish to remain silent before arrest that have nothing to do with guilt, including “fear that his story may not be believed,”⁷⁶ or simply not having heard the question.⁷⁷ Citing various rationales, the First,⁷⁸ Sixth,⁷⁹ Seventh,⁸⁰ and Tenth⁸¹ Circuits have ruled that pre-arrest, pre-*Miranda*

69. Stewart, *supra* note 64, at 199 (citing Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant’s Prearrest Silence*, 63 BROOK. L. REV. 897, 935 (1997)).

70. Stewart, *supra* note 64, at 199.

71. See Notz, *supra* note 66, at 1033-34; see also Griffin v. California 380 U.S. 609, 614 (1965) (stating that “comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws”) (quoting Murphy v. Waterfront Comm’n of New York Harbor, 378 U.S. 52, 55 (1964)).

72. Notz, *supra* note 66, at 1033.

73. Notz *supra* note 66, at 1034.

74. Notz, *supra* note 66, at 1034.

75. Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000).

76. *Id.*

77. Aaron R. Pettit, Comment, *Should the Prosecution be Allowed to Comment on a Defendant’s Pre-Arrest Silence in Its Case-In-Chief?*, 29 LOY. U. CHI. L.J. 181, 219 (1997) (citing United States v. Hale, 422 U.S. 171, 177 (1975)).

78. Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (relying on *Griffin* for the proposition that the defendant invoked his Fifth Amendment rights by stating that he would not confess and thereafter remaining silent).

79. Combs, 205 F.3d at 283 (stating that the Fifth Amendment has been given a broad scope and that, due to the potential damage to a defendant if his pre-arrest statements were admitted at trial, the privilege against self-incrimination applies).

80. United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (stating that *Griffin* covers pre-arrest silence, and that the Fifth Amendment privilege against self-incrimination attaches prior to “formal adversary proceedings”).

81. United States v. Burson, 952 F.2d 1196, 1201-02 (10th Cir. 1991) (stating that *Griffin* applies to pre-arrest interrogation, but holding that the admission of the violative testimony in this case constituted harmless error).

silence is not admissible as substantive evidence of guilt.⁸² While even in these jurisdictions the harmless error test can prove to be a significant hurdle to fully realizing the protections afforded by the Fifth Amendment,⁸³ these courts have recognized that allowing pre-arrest, pre-*Miranda* silence is potentially very damaging.⁸⁴

B. The Rationale for Allowing Pre-Arrest, Pre-Miranda Silence: Jenkins v. Anderson

While the Law Court's decision in *State v. Lovejoy* was unanimous in excluding evidence of Lovejoy's pre-arrest, pre-*Miranda* silence for use in the prosecution's case-in-chief, not all courts have taken this approach. In fact, the circuit courts that have addressed the issue are split.⁸⁵ After all, it would seem intuitive that refusal to cooperate with a police investigation is highly probative of guilt.⁸⁶ The temptation to use a defendant's silence against him at trial is nowhere more evident than in *State v. Lovejoy*. There, police informed Lovejoy that his daughter had accused him of molestation.⁸⁷ Intuitively, it would seem that if Lovejoy were innocent of the crime, he would want to assist the police, both to clear his name and to help his troubled daughter, who was at least potentially the victim of sexual abuse at the hands of another. Accordingly, there are a number of competing interests and rationales for admitting evidence of a defendant's silence during the prosecution's case-in-chief.⁸⁸

Many courts have relied on the Supreme Court's ruling in *Jenkins v. Anderson*⁸⁹ in determining that a defendant's pre-arrest statements are admissible during the prosecutor's case-in-chief.⁹⁰ In *Jenkins*, the defendant was accused of stabbing and killing Doyle Redding.⁹¹ He turned himself in to police and at trial contended that the stabbing had been in self-defense.⁹² During cross-examination, the prosecutor impeached Jenkins by eliciting testimony that he had not waited at the scene of the crime for the police to arrive after the stabbing occurred, and that he had waited two weeks before reporting the stabbing to anyone.⁹³ As in *Lovejoy*, the prosecutor referenced Jenkins' silence (again, in a closing argument), stating that the defendant waited two weeks before speaking with anyone about the stabbing.⁹⁴

82. See Stewart, *supra* note 64, at 197-98 n.80.

83. *Burson*, 952 F.2d at 1201 (stating that the impermissible testimony by two IRS agents regarding defendant's pre-arrest silence was harmless error because the evidence against the defendant was overwhelming and the testimony did not contribute to the guilty verdict).

84. See *Combs* 205 F.3d at 283 (noting the damaging evidence that could potentially be admitted if evidence of pre-arrest silence were admissible as substantive evidence of guilt).

85. Hunter, *supra* note 8, at 280.

86. See Hunter, *supra* note 8, at 279.

87. *State v. Lovejoy*, 2014 ME 48, ¶ 3, 89 A.3d 1066.

88. See Stewart, *supra* note 64, at 200-01.

89. 447 U.S. 231 (1980).

90. See Stewart, *supra* note 64, at 200.

91. *Jenkins v. Anderson*, 447 U.S. 231, 232 (1980).

92. *Id.*

93. *Id.* at 233.

94. *Id.* at 234.

The Court held that the prosecutor's use of defendant's silence during impeachment did not violate the Fifth Amendment privilege against self-incrimination.⁹⁵ In so holding, the Court reasoned that the "impeachment follow[ed] the defendant's own decision to cast aside his cloak of silence and advance[d] the truth-finding function of the criminal trial."⁹⁶ The Court further stated that, unlike in *Doyle v. Ohio*, where the defendant elected to remain silent after receiving his *Miranda* warnings, here "no governmental action induced petitioner to remain silent before arrest."⁹⁷ "Consequently, the fundamental unfairness present in *Doyle* [was] not present in this case."⁹⁸ However, the Court in *Jenkins* limited its holding to impeachment, stating that a prosecutor could use pre-arrest silence to impeach a defendant's credibility.⁹⁹ The Court did not address the issue of whether post-arrest, pre-*Miranda* silence could be used during the prosecution's case-in-chief, and that issue remains unresolved today.¹⁰⁰ This lack of guidance led to the split in the circuit courts with regard to the use of pre-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief.¹⁰¹

Writing a concurring opinion, Justice Stevens referenced his dissent in *Doyle* and stated that when a defendant chooses to remain silent in the pre-arrest context, his silence is probative and does not implicate the Fifth Amendment.¹⁰² Justice Stevens reasoned that the purpose of the Fifth Amendment is to "protect the defendant from being compelled to testify against himself at his own trial."¹⁰³ Thus, in an extension of the Court's holding, Justice Stevens reasoned that *Miranda* contains no implicit assurance that a defendant's silence will not be used against him at trial.¹⁰⁴ He further noted that where a defendant is under no compulsion to speak or to remain silent, his decision to do one or the other "[does not] raise any issue under the Fifth Amendment."¹⁰⁵ The question of admissibility instead turns on considerations of the evidence's probative value.¹⁰⁶ While Justice Stevens' rationale rested on a significantly limited view of the Fifth Amendment's protections outside of the courtroom, both his opinion and that of the majority seemed to focus to some extent on the lack of compulsion or government coercion.¹⁰⁷

Many lower courts have also founded their admission of such evidence on the fact that the Fifth Amendment functions only to prohibit the admission of

95. *Id.* at 240.

96. *Id.* at 238.

97. *Id.* at 239-40.

98. *Id.*; see *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (stating that the prosecutor's use of post-*Miranda* silence to impeach defendants who did not mention their exculpatory story until trial was impermissible. The Court reasoned that implicit in the *Miranda* warnings is the promise that a defendant's subsequent silence pursuant to the warning "will carry no penalty," such as use against that defendant in later proceedings.).

99. *Jenkins*, 447 U.S. at 240.

100. Skrapka, *supra* note 67, at 359-60.

101. See Hunter, *supra* note 8 at 280.

102. *Jenkins*, 447 U.S. at 243-44 (Stevens, J., concurring).

103. *Id.* at 242.

104. See *id.* at 244.

105. *Id.* at 243-44.

106. *Id.* at 244.

107. See *id.* at 235, 241 (stating that the defendant "voluntarily took the stand in his own defense").

“compelled” testimony.¹⁰⁸ If the Fifth Amendment only serves to protect against “compelled” or “coerced” testimony, proponents of admission argue that it would make no sense to exclude evidence of a defendant’s silence that may be probative of guilt and was not a response to government action.¹⁰⁹ For various reasons, the Fifth,¹¹⁰ Ninth,¹¹¹ and Eleventh¹¹² Circuits ruled that pre-arrest, pre-*Miranda* silence is admissible as evidence of guilt during the prosecution’s case-in-chief.¹¹³

V. THE MAINE SUPREME JUDICIAL COURT WAS CORRECT IN ITS APPLICATION OF THE FIFTH AMENDMENT TO THE FACTS OF *STATE V. LOVEJOY*

A. *Compulsion*

Many courts that have ruled evidence of pre-arrest, pre-*Miranda* silence admissible as substantive evidence of guilt have relied on the notion that the Fifth Amendment applies only to *government acts* that compel the defendant to incriminate himself.¹¹⁴ Read this way, the government agent must affirmatively compel the defendant in some way in order for the statements gained by such action to be excluded.¹¹⁵ While the Fifth Amendment does state that an individual shall not be “compelled” to incriminate himself,¹¹⁶ the notion that compulsion only exists in situations of police or other government action is myopic and undermines the protections of the Amendment by ignoring the inherent intimidating nature of any contact with police.¹¹⁷ Specifically, any court’s decision that compulsion only

108. See e.g., *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding that “the fifth amendment protects against compelled self-incrimination,” not simply any statement that a person being questioned makes to law enforcement. Where Defendant’s silence was “neither induced by nor a response to any action by a government agent” the Fifth Amendment does not apply.).

109. See Eric Steven O’Malley, Note, *Fifth Amendment at Trial*, 89 GEO. L.J. 1598, 1599 (2001) (stating that the Fifth Amendment only protects against compelled communications); see also David S. Romantz, 38 IND. L.R. 1, 53 (2005) (“A suspect’s responses made outside the context of an official interview . . . are immune from a Fifth Amendment challenge since they fall outside the coercive atmosphere inherent to a custodial interrogation.”).

110. See *Zanabria*, 74 F.3d at 593 (holding that the defendant’s silence was not protected under the Fifth Amendment, as it was not in response to any governmental action. The Fifth Amendment does not prevent prosecutorial comment on all silence or communication made by a defendant, but merely those instances which are in response to government compulsion.).

111. *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (“The use of a defendant’s pre-arrest, pre-*Miranda* silence is permissible as impeachment evidence and as evidence of substantive guilt.”).

112. *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (citing *Jenkins* for the proposition that the government may comment on a defendant’s pre-arrest, pre-*Miranda* silence, but making no distinction between the use of such silence for impeachment and its use during the prosecution’s case-in-chief).

113. Stewart, *supra* note 64, at 197-98.

114. See Stewart, *supra* note 64, at 201 n.108 (citing *United States v. Olinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998); *Zanabria*, 74 F.3d at 593).

115. See *Zanabria*, 74 F.3d at 593 (stating that in order for a defendant’s pre-arrest statement to be inadmissible, such a statement must be in “response to . . . action by a government agent”).

116. U.S. CONST. amend. V.

117. See Rachael A. Van Cleave, Note, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 214 (1988)

exists when an agent of the government affirmatively acts in such a way that the defendant would not have said anything had the agent not coerced the statement chips away at the protections offered by the Fifth Amendment and by *Miranda*.¹¹⁸ Any such doctrine encourages situations wherein a suspect with knowledge that his silence can be used against him in court feels compelled to speak with police and forfeit his constitutional protection even in the absence of explicit government misconduct.¹¹⁹ If a court does not recognize this as compulsion, then a defendant is forced to choose between the lesser of two evils, thus creating a compulsory environment even in the absence of government action.¹²⁰

In *Griffin v. California*, the Court held that a prosecutor violated the Fifth Amendment by improperly commenting on a defendant's failure to testify at trial.¹²¹ The Court issued what would come to be known as the "penalty doctrine," stating that comment[ing] on a defendant's exercise of his right to not testify at trial "is a penalty imposed by courts for exercising a constitutional privilege."¹²² While the asserted violation in *Griffin* occurred at trial, the doctrine should be extended to apply to the facts of *Lovejoy* and to pre-arrest, pre-*Miranda* silence in general. Knowledge on the part of the accused that exercising his right to remain silent in response to police questioning could be used at trial is every bit as coercive as "traditional" police coercion.¹²³ If the defendant knows that his silence can be used against him at trial, he is substantially more likely to forfeit his constitutional protection against self-incrimination.¹²⁴ Even if the defendant does not know that his silence can be used against him at trial, he is in essence still penalized for exercising the right to remain silent, thus leading to the same harm found in *Griffin*.¹²⁵

In addition, while there is some debate as to the wisdom of using *Miranda* as the dividing line for purposes of the admissibility of statements in all cases,¹²⁶ the *Miranda* warnings today are so "embedded in routine police practice" that they

(stating that when an officer approaches a citizen, the citizen is likely to comply because they feel that they cannot simply ignore the officer).

118. See e.g., Notz, *supra* note 66, at 1033 (stating that allowing the substantive use of pre-arrest silence will allow encourage "improper police behavior" and undercut the adversarial system); see also Skrapka, *supra* note 67, at 398 ("The essence of the privilege [against self-incrimination] is not to compel a criminal defendant to be a witness against himself, and the privilege is significantly impaired when the prosecution is permitted to use post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief.").

119. See Patrick, *supra* note 69, at 935-36; see also *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980).

120. See Patrick, *supra* note 69, at 935-36.

121. 380 U.S. 609, 614-15 (1965).

122. *Id.* at 614.

123. See Notz, *supra* note 66, at 1013 (arguing that in light of the Supreme Court's holdings that the Fifth Amendment's protections extend beyond the courtroom, its protections would become meaningless if they did not extend to the pre-arrest stage).

124. See Notz, *supra* note 66, at 1034.

125. *Griffin*, 380 U.S. at 614 (stating that comment on a defendant's failure to testify is an unconstitutional penalty imposed for "by courts for exercising a constitutional privilege").

126. See e.g., Marc Scott Hennes, Note, *Manipulating Miranda: United States v. Frazier and the Case-In-Chief Use of Post-Arrest, Pre-Miranda Silence*, 92 CORNELL L. REV. 1013, 1022 (2007) (contending that instead of "champion[ing] the idea that Fifth Amendment protections attach at the moment *Miranda* warnings are given, the Court could have focused on the "impeachment use of the testimony," which raises "fewer constitutional concerns than case-in-chief use").

“have become part of our national culture.”¹²⁷ Thus, it is probable that a defendant will know his rights before having been read them.¹²⁸ In light of this, and of the fact that *Miranda* warnings are a procedural safeguard meant to inform the accused of his rights and to give him a meaningful opportunity to exercise those rights,¹²⁹ to hold that the accused may have his pre-*Miranda* silence used against him at trial penalizes him for knowing the law well enough to invoke his privilege against self-incrimination before being read his rights. Further, it serves to make it more likely that he will forfeit this constitutionally guaranteed protection.¹³⁰ The Supreme Court would be acting arbitrarily in holding that implicit in the *Miranda* warnings is the expectation that one will not be punished for invoking one’s privilege against self-incrimination¹³¹ and that prior to the administration of the *Miranda* warnings any silence is fair game for admission at trial.¹³² To draw such an arbitrary line would be to scale back the protections afforded by the Fifth Amendment in favor of a prophylactic tool that came into existence largely to illuminate the Amendment’s scope and to protect the accused.¹³³ The circuit courts that have prohibited the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt in the prosecution’s case-in-chief have relied on an expansive interpretation of *Griffin* and have achieved the correct result.¹³⁴

Turning briefly to *Lovejoy*, had the Law Court ruled in favor of admission, it would have added a coercive element to every defendant’s exercise of his Fifth Amendment privilege against self-incrimination.¹³⁵ Specifically, a defendant would have to remain silent with the knowledge that the prosecution could put words in his mouth—or more accurately, thoughts in his head—during trial.¹³⁶

127. Skrapka, *supra* note 67, at 396 (citing *Dickerson v. United States*, 530 U.S. 428, 430 (2000)).

128. Hennes, *supra* note 126, at 1035 (noting that empirical evidence supports the notion that Americans by-in-large know their *Miranda* rights).

129. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

130. See Skrapka, *supra* note 67, at 397 (“[T]he *Miranda* warnings are not the source of the right to remain silent, but merely a means of protecting that right.”); see also Notz, *supra* note 66 at 1034 (stating that allowing police to comment on a defendant’s silence at trial will make the defendant more likely to forfeit that right).

131. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

132. See Skrapka, *supra* note 67, at 397. If the *Miranda* warnings are simply a means of protecting an already existing right, it makes no sense to hold that their application is a necessary vehicle for asserting that right.

133. See Christopher Macchiaroli, *To Speak or Not to Speak: Can Pre-Miranda Silence Be Used As Substantive Evidence of Guilt?*, 33 CHAMPION 14, 20 (2009).

134. But see Notz, *supra* note 66, at 1015, 1035 (noting that the Supreme Court’s recent precedent places *Griffin* on “shaky ground,” and that the proper analysis may now be under the *Jenkins* “impermissible burden” test, which held that government practices are only barred where they place an “impermissible burden” on the exercise of constitutional rights).

135. Notz, *supra* note 66, at 1034 (stating that a defendant who knows his silence will be used against him will be much more likely to speak with police than one who believes his communications are protected).

136. See Maria Noelle Berger, Note, *Defining the Scope of the Privilege Against Self-Incrimination: Should Pre-Arrest Silence be Admissible as Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015,

B. Concerns of Prejudice

While Justice Stevens argued in his concurring opinion in *Jenkins* that questions of admission of pre-arrest silence turn solely on evidentiary considerations,¹³⁷ there is a strong argument to be made that evidence of pre-arrest, pre-*Miranda* silence is never probative enough to overcome concerns of unfair prejudice to the defendant.¹³⁸ In fact, the Court in *Doyle v. Ohio* stated that “every post-arrest silence is insolubly ambiguous”¹³⁹ There are many reasons why a defendant might choose to remain silent, including knowledge of his *Miranda* rights, “fear that his story may not be believed,”¹⁴⁰ the desire to protect another,¹⁴¹ or simply not hearing the question.¹⁴² These concerns apply equally to pre-arrest silence. Thus, the probative value of offering evidence of silence at trial is very low.¹⁴³

In contrast, the potential for prejudice is significant. While there may be a perfectly reasonable explanation for a defendant’s silence, the Fifth Amendment protects a defendant in his decision not to give that reason, and when a prosecutor is allowed to comment on a defendant’s silence, a jury is likely to accept the prosecutor’s explanation for the silence and attach far more significance to it than it might otherwise be reasonably afforded.¹⁴⁴

Turning to the facts in *Lovejoy*, the prosecutor at closing told the jury that “Lovejoy ‘never kept in contact’ and ‘never chose to call’ or come ‘up to Maine to clear up the charges in person.’”¹⁴⁵ Under those circumstances, no reasonable juror could have been expected to conclude from Lovejoy’s silence anything other than the fact that he was guilty. However, one could easily imagine a situation wherein the defendant was innocent of the crime but still did not wish to talk to the police. For example, the defendant could reasonably believe that the police would not believe his side of the story even if he told them. However, once the evidence that Lovejoy did not return the detective’s phone calls was admitted at trial, it became highly unlikely that the jury would infer anything other than his guilt. In addition, there was no physical evidence connecting Lovejoy to the crime.¹⁴⁶ Thus, evidence of his pre-arrest silence was quite possibly the State’s most damning piece of evidence. While some courts have held that the admission of such evidence, while

1039-40 (1999) (stating that there are any number of reasons why a defendant would remain silent in response to police questioning, but that guilt is a very compelling option if offered at trial).

137. *Jenkins v. Anderson*, 447 U.S. 231, 244 (1980) (Stevens, J., concurring).

138. *See Combs v. Coyle*, 205 F.3d 269, 285 (1st Cir. 2000).

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

140. *Combs*, 205 F.3d at 285 (noting also that pressuring a defendant to explain himself or suffer the consequences at trial would increase the likelihood of a defendant perjuring himself).

141. *See Pettit*, *supra* note 77, at 219.

142. *See Pettit*, *supra* note 77, at 219.

143. *See Combs*, 205 F.3d at 285-86 (“[P]ermitt[ing] the use of a defendant’s prearrest silence as substantive evidence of guilt would greatly undermine the policies behind the privilege against self-incrimination while adding virtually nothing to the reliability of the criminal process.”).

144. *See id.*

145. *State v. Lovejoy*, 2014 ME 48, ¶ 8, 89 A.3d 1066.

146. *Id.* ¶ 28.

slightly prejudicial, is merely one part of a larger case,¹⁴⁷ in cases such as *Lovejoy*, where the State has relatively little evidence other than the witness testimony of a few people, evidence of silence is likely to play a larger role and is thus more likely to result in prejudice to a defendant. Thus, the probative value of the evidence was very low, and the evidence was extremely prejudicial.¹⁴⁸ Because this specter of ambiguity is present at every trial, and because nothing short of exclusion can sufficiently mitigate the inherent risks of presuming facts from silence, such evidence should be categorically excluded.

C. *The Case Against Using the Jenkins “Impermissible Burden” Test to Rule Pre-Arrest, Pre-Miranda Silence Admissible in the State’s Case-in-Chief*

As previously noted, many courts that have held pre-arrest, pre-*Miranda* silence to be admissible during the prosecution’s case-in-chief have done so using *Jenkins v. Anderson* as a conduit.¹⁴⁹ However, the *Jenkins* Court decided only that pre-arrest silence is available for use in impeachment at trial.¹⁵⁰ The Court noted that “while such use clearly burdened the exercise of the privilege, the extent of the burden was not impermissible under the dictates of the Fifth Amendment.”¹⁵¹ Rather than extending the *Griffin* “penalty doctrine” to cover silence used for impeachment purposes, the court in *Jenkins* stated that “the Constitution does not forbid ‘every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.’”¹⁵² Rather, the Constitution forbids only those practices which impermissibly burden a constitutional right.¹⁵³ In determining whether a practice “impermissibly burdens” a constitutional right, the *Jenkins* Court set forth a balancing test that weighs “whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved”¹⁵⁴ against “the legitimacy of the challenged government practice.”¹⁵⁵ Thus, the relevant inquiry as to whether a defendant’s pre-arrest, pre-*Miranda* silence is available as substantive evidence of guilt at trial is not whether a defendant’s exercise of his constitutional right results in a penalty at court,¹⁵⁶ but whether and to what extent the government’s practice of using a defendant’s silence against him in its case-in-chief “impairs . . . any of the policies behind the rights involved [in the Fifth Amendment].”¹⁵⁷

While it may appear a small step between allowing use of a defendant’s silence at trial for impeachment purposes to using it during the prosecution’s case-in-chief,

147. See e.g. *United States v. Rivera*, 944 F.2d 1563, 1569 (11th Cir. 1991) (stating that any error on the part of the prosecution in presenting evidence of defendant’s silence was harmless in light of the weight of evidence supporting his guilt).

148. See Pettit, *supra* note 77, at 196 (discussing *United States v. Hale*, 422 U.S. 171 (1975)).

149. See Stewart, *supra* note 64, at 200.

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

151. Notz, *supra* note 66, at 1017 (citing *Jenkins*, 447 U.S. at 238).

152. Notz, *supra* note 66, at 1018 (quoting *Jenkins*, 447 U.S. at 236).

153. Notz, *supra* note 66, at 1018 (citing *Jenkins*, 447 U.S. at 238).

154. *Jenkins*, 447 U.S. at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973)).

155. *Id.* at 238 (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973)).

156. See generally *Griffin v. California*, 380 U.S. 609 (1965).

157. *Jenkins*, 447 U.S. at 236.

the difference in the two applications is stark. In the first instance, the defendant has “cast aside his cloak of silence” by choosing to testify at trial.¹⁵⁸ Thus, it makes sense that the truth-seeking purpose of trial would allow his testimony to be called into question using evidence of his prior silence.¹⁵⁹ Under the *Jenkins* balancing test, the policies behind the Fifth Amendment are not abrogated when a defendant chooses to open himself up for cross-examination because the government has a legitimate interest in facilitating the purpose underlying all trials: to discern the truth.¹⁶⁰ But in a case where the defendant does not open himself up for cross-examination and yet is still subject to questioning about his pre-arrest silence, his Fifth Amendment privilege against self-incrimination is ripped from his hands, as the prosecutor is free to suggest that the defendant would have spoken were he not guilty.¹⁶¹

With regard to pre-arrest silence, the *Griffin* “penalty doctrine” is a more appropriate doctrine to apply than the *Jenkins* “impermissible burden” test because where a defendant has not testified at trial, “the justification for treating him as any other witness [is] absent.”¹⁶² In addition, as noted above, the leap between using silence as evidence of impeachment and using it in the state’s case-in-chief is stark.¹⁶³ In contrast, it would take but a small extension of *Griffin* to apply it to pre-arrest silence.¹⁶⁴ Since the right to remain silent attaches before formal proceedings have been initiated, it follows that a defendant’s decision to remain silent prior to trial should also be protected.¹⁶⁵ However, even under *Jenkins* a defendant’s choice to invoke his privilege against self-incrimination should never be available for the prosecution to use as substantive evidence of guilt during its case-in-chief. Such a twisting of the protections provided in the Fifth Amendment negates the privilege against self-incrimination by putting the defendant in the impossible position of having to choose between having his silence or his testimony used against him at trial.¹⁶⁶ Under *Jenkins*, an appropriate consideration in determining whether a constitutional right has been impermissibly burdened is “the legitimacy of the challenged governmental practice.”¹⁶⁷ Where a defendant has opened himself up to cross-examination the governmental interest in increasing the reliability of the practice is served. However, when a defendant has made the

158. *Id.* at 238.

159. See Notz, *supra* note 66, at 1027.

160. See Notz, *supra* note 66, at 1027.

161. See Stewart, *supra* note 64, at 199 (Stewart noted that one rationale for a prohibition on the use of pre-arrest silence as substantive evidence of guilt is that a defendant exercises his Fifth Amendment right by choosing to remain silent. If that right may later be used against him the choice may not be a meaningful one.); Berger, *supra* note 136, at 1040 (stating that the inference of guilt from silence is “quite compelling”).

162. Skrapka, *supra* note 67, at 371.

163. See Skrapka, *supra* note 67, at 371.

164. *Griffin v. California*, 380 U.S. 609, 614 (1965).

165. See *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987).

166. See Pettit, *supra* note 77, at 214 (“If the prosecution is allowed to imply guilt from a defendant’s silence in criminal trials, silence would essentially amount to an admission of guilt . . .”).

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

decision not to take the stand in his defense, the analysis shifts entirely.¹⁶⁸ In that instance, the Fifth Amendment's protections should control to protect against the potentially damaging evidence that could otherwise be introduced.¹⁶⁹

As stated above, in the context of *Lovejoy*, the relevant test should be the *Griffin* "penalty doctrine."¹⁷⁰ Under this test, the admission of Lovejoy's silence at trial during the prosecution's case-in-chief was an impermissible penalty connected with the assertion of the privilege against self-incrimination.¹⁷¹ However, even under *Jenkins*, evidence of Lovejoy's silence should not have been admitted, as admission of the silence would constitute an "impermissible burden" on the exercise of a constitutional right by undercutting the policies served by the Fifth Amendment, such as protection of the innocent and adherence to the adversarial system of justice.¹⁷²

VI. CONCLUSION

The issue of whether pre-arrest, pre-*Miranda* silence is admissible as evidence of consciousness of guilt in the state's case-in-chief is difficult indeed. There exist on both sides of the debate compelling reasons why such evidence should be admitted or excluded. On one hand, there are a number of reasons why a defendant might want to remain silent prior to his arrest.¹⁷³ On the other, there is an argument to be made that the Fifth Amendment simply does not attach to pre-arrest silence.¹⁷⁴ The issue is especially difficult in light of the fact that silence can "mean" any number of things; it can be highly probative of guilt and of introversion, of shame and of fear.¹⁷⁵ However, the Fifth Amendment of the United States Constitution provides that that no person "shall be compelled in any criminal case to be a witness against himself."¹⁷⁶ Because a defendant's invocation of the privilege against self-incrimination is a constitutionally mandated protection, and because that invocation comes implicitly with the understanding that a defendant's silence will not be used against him in any subsequent court proceedings,¹⁷⁷ the Law Court correctly decided *State v. Lovejoy*.

168. *Combs v. Coyle*, 205 F.3d 269, 281 (6th Cir. 1996) ("That use of a defendant's prearrest silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant's credibility on the stand is clear.").

169. *See id.* at 283 (noting that the Supreme Court has given the Fifth Amendment a broad scope and that the potentially damaging evidence that could be obtained in a pre-arrest setting compels the application of the privilege).

170. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (discussing the rationale behind the penalty doctrine).

171. *See id.*

172. *See Notz, supra* note 66, at 1019-20 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).

173. *Combs*, 205 F.3d at 285.

174. *See Jenkins v. Anderson*, 447 U.S. 231, 244 (Stevens, J., concurring).

175. *See Pettit, supra* note 77, at 219 (stating that silence is "ambiguous" and can mean any number of things).

176. U.S. CONST. amend. V.

177. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976).