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A Contextual Framework for the Admissibility of a Criminal Defendant's Pre-Arrest Silence: *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998)

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A Contextual Framework for the Admissibility of a Criminal Defendant's Pre-Arrest Silence: *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998)

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I would like to thank my family for their overall support, in particular, my wife Jen. I would also like to thank Dean Nancy Rapoport for her reviews.

1. This article received the University of Nebraska College of Law’s 1999 Robert G. Simmons Law Practice Award as the best student paper of significance to the general practice of law in Nebraska.
I. INTRODUCTION

Imagine that you are a federal prosecutor and the following case file is placed on your desk. Mayberry National Bank recently caught its security guard, Barney F., attempting to steal money from the back of an armored truck. Barney was caught by bank teller, Gomer P., who noticed Barney acting suspicious near the armored truck. Barney acted scared and agitated when confronted by Gomer. When Gomer asked Barney what he was doing, Barney never responded and maintained a deadpan reaction. Noticing money stuffed in Barney's slacks, Gomer immediately yelled "citizen's arrest, citizen's arrest!"

You intend to prosecute Barney for attempted bank robbery and would like to have Gomer testify regarding Barney's facial expression and response of silence when confronted. However, you happen to be a prosecutor in the Ninth Circuit and you have not read the recent Ninth Circuit case of United States v. Oplinger. You are concerned that Gomer's testimony regarding Barney's silence may be inadmissible because it is privileged under the Fifth Amendment.

Up until United States v. Oplinger, the Ninth Circuit had never squarely addressed whether pre-arrest silence could be used as substantive evidence of guilt. In United States v. Thompson, the Ninth Circuit faced the issue but ultimately concluded that the lack of any controlling authority on the matter rendered the point too unclear to permit a finding of plain error.

In Oplinger, however, the Ninth Circuit faced the issue again, this time reaching a decision on the merits. The Oplinger court held that "[n]either due process, fundamental fairness, or any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment in the face of accusations of criminal behavior." The Ninth Circuit's holding in Oplinger is significant for several reasons: (1) the decision deadlocked the federal circuits (i.e., three to three) with respect to the issue of pre-arrest silence as substantive evidence of guilt; (2) the court extensively analyzes the unique contextual surroundings of a defendant's pre-arrest silence; and (3) the court's decision pushes the divergent circuit opinions surrounding pre-arrest silence as evidence of guilt.

2. 150 F.3d 1061 (9th Cir. 1998).
3. See United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996); see also United States v. Calise, 996 F.2d 1019, 1022 (9th Cir. 1993)(stating that the appeals court need not address the issue since the trial court gave a curative instruction telling the jury not to consider silence as evidence of guilt).
4. 82 F.3d 849 (9th Cir. 1996).
5. See id. at 854-56.
6. Oplinger, 150 F.3d at 1067.
7. See infra Part II.C for a discussion on the split among the circuit courts.
8. See infra Part III for a discussion on the significance of context in asserting the Fifth Amendment privilege against self-incrimination.
arrest silence as substantive evidence to the point of "critical mass."\(^9\)
In other words, the *Oplinger* opinion undoubtedly makes this issue overly ripe for Supreme Court review.

Part II reviews the history of the Fifth Amendment privilege against self-incrimination, how "silence" may be used by the prosecution, and the current split in the circuits regarding pre-arrest silence. Part III.A of this Note argues that there is neither a complete prohibition nor absolute permission to use pre-arrest silence as substantive evidence. Part III.B argues that the minority circuits have erroneously interpreted the Supreme Court's ruling in *Jenkins v. Georgia* and, as such, incorrectly concluded that pre-arrest silence should not be allowed as substantive evidence. Finally, Part III.C maintains that *Oplinger* was correctly decided because it properly applied the Fifth Amendment based upon the context of the coercion faced by the defendant.

II. BACKGROUND

William Oplinger was employed as a supply coordinator for a bank where he was responsible for the purchase and distribution of supplies.\(^10\) Over a two-year period Oplinger engaged in a pattern of purchasing unnecessary office supplies and returning those supplies for cash refunds.\(^11\) Oplinger would keep the cash for his own purposes and, over two years, he accumulated a total of $22,700.05 in refunds.\(^12\)

On May 18, 1995, Oplinger's supervisor and another bank officer met with Oplinger and asked him what he had done with the money.\(^13\) In response, Oplinger leaned back in his chair, placed his hands over his eyes and said he did not know.\(^14\) Oplinger did not elaborate further even when he was informed that bank regulators and the Federal Bureau of Investigation (FBI) would have to be notified.\(^15\)

Oplinger was ultimately convicted on twenty-one counts of bank fraud.\(^16\) However, on appeal, Oplinger argued that the government violated his privilege against self-incrimination and his right to due process by unconstitutionally eliciting testimony regarding the May 18, 1995 meeting, and then by commenting on that testimony during

\(^9\) The "critical mass" has recently expanded with the Sixth Circuit's decision in *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000). Contrary to the holding in *Oplinger*, the Sixth Circuit held that the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. *See id.* at 283.

\(^10\) *See Oplinger*, 150 F.3d at 1063-64.

\(^11\) *See id.*

\(^12\) *See id.*

\(^13\) *See id.*

\(^14\) *See id.*

\(^15\) *See id.*

\(^16\) *See id.*
Oplinger claims that the prosecutor's reference to his "silence" was unconstitutional because "non-custodial, pre-arrest, and investigatory assertions" of the right to remain silent are protected by the Fifth Amendment privilege against self-incrimination and the right to due process.

The Ninth Circuit affirmed Oplinger's conviction and rejected his argument that his pre-arrest silence was constitutionally protected by the Fifth Amendment. In reaching its decision the Court noted that "the government made no effort to compel Oplinger to speak; he was free to act as he pleased."

A. The Privilege Against Self-Incrimination

The history of the modern privilege against self-incrimination can be divided roughly into three steps, each of them captured by its own distinctive formulation of the doctrine. At the earliest stage, the privilege against self-incrimination was expressed in maxims like nemo tenetur seipsum accusare ("no one shall be required to accuse himself") and nemo tenetur prodere seipsum ("no one shall be required to betray himself"). The United States Constitution embodies the second stage formulation: no person "shall be compelled in any criminal case to be a witness against himself." At the third stage (the modern stage), the warning mandated by Miranda v. Arizona expresses the general, though not universal, understanding of the privilege: you have the right to remain silent.

When judging the effect of state action on the Fifth Amendment's privilege against self-incrimination, it is important to understand the purposes underlying the clause. In Murphy v. Waterfront Commission, the Supreme Court listed a number of reasons for the privilege. Three of those reasons are particularly appropriate in the context of pre-arrest silence: (1) the need to deter improper police behavior; (2)
the need to protect the values of the adversary system; and (3) the need to protect the innocent from wrongful conviction.28

In 1966, the Supreme Court further interpreted the Fifth Amendment privilege against self-incrimination in *Miranda v. Arizona*.29 The *Miranda* Court clarified that the Fifth Amendment privilege against self-incrimination provided an accused person the right to refuse to answer questions and remain silent when being interrogated during the investigation of a crime.30 Specifically, the Court held that the prosecution could not use statements obtained during a custodial interrogation unless it demonstrated that certain procedural safeguards were present during questioning.31 The Court concluded that without these safeguards, the custodial interrogation process contains inherently coercive pressures that serve to weaken the accused's ability to resist and to force the accused to speak against his or her free will.32

B. The Prosecution's Use of Silence

Although the *Miranda* decision established that an accused has the right to remain silent, it did not address whether the prosecution may use silence to imply that the defendant is guilty. Although the Supreme Court has never explicitly decided whether pre-arrest silence may be used to imply guilt, it has ruled that pre-arrest silence may be used to impeach a defendant's testimony.33 However, the Supreme Court has also expressly held that the prosecution may not use post-arrest silence34 or the defendant's failure to take the stand to imply guilt.35

1. Impeachment

The Supreme Court has long justified impeachment on the ground that when a defendant chooses to testify, he waives his privilege

28. See id. at 55.
30. See id. at 444.
31. See id.
32. See id. at 467.
33. See Fletcher v. Weir, 455 U.S. 603 (1982)(holding that the prosecution may use a defendant's silence for impeachment purposes if the silence occurs after arrest but before *Miranda* warnings); Jenkins v. Anderson, 447 U.S. 231 (1980)(holding that a prosecutor may use pre-arrest silence for impeachment purposes).
34. See Doyle v. Ohio, 426 U.S. 610 (1976)(holding that the prosecution may not use a defendant's silence to impeach if it occurs after arrest and *Miranda* warnings).
35. See Griffin v. California, 380 U.S. 609 (1965)(holding that the Fifth Amendment forbids the prosecution in a criminal case from commenting on the defendant's failure to testify at trial and using such silence as evidence of the defendant's guilt).
against self-incrimination. For example, the Supreme Court has stated that if a defendant waives the right to remain silent at trial, he "cannot then claim the privilege against cross-examination on matters reasonably related to subject matter on his direct examination." Likewise, the Court has allowed impeachment of the defendant with illegally seized evidence if the defendant opens the door during direct examination, and, in some instances, even cross examination. Once a defendant testifies, his credibility is indisputably an issue. Finally, the availability of impeachment use is less likely to discourage a defendant from exercising his Fifth Amendment privilege than is the availability of the material's substantive use. Substantive use of pre-arrest silence is more likely to "chill" a defendant's decision to exercise his or her privilege against self-incrimination than is its impeachment use.

2. Substantive Evidence of Guilt

Although the Supreme Court did endorse the prosecutorial use of pre-arrest silence in Jenkins v. Anderson, the Court's holding restricted the use of such evidence to impeachment purposes only. The Jenkins Court explicitly left open the constitutionality of the substantive use of pre-arrest silence, and has not revisited the issue since.

The First, Seventh, and Tenth Circuits have acknowledged that Supreme Court precedent requires that courts distinguish between impeachment and substantive use of pre-arrest silence. In Coppola v. Powell, the defendant told the police, prior to his arrest, that he was not going to confess and was unwilling to speak further without his lawyer present. The First Circuit held that, because the defendant did not testify at trial, the prosecution could not use the pre-arrest silence for impeachment purposes because there was nothing to impeach.

37. See id.; infra Part II.C (discussing the circuit split).
38. 447 U.S. 231.
39. See id. at 238.
40. See id.; infra Part II.C (discussing the circuit split).
41. See id.; infra Part II.C (discussing the circuit split).
42. See id.; infra Part II.C (discussing the circuit split).
43. See id.; infra Part II.C (discussing the circuit split).
44. 878 F.2d 1562.
45. See id. at 1563-64.
46. See id. at 1567-68.
Likewise, in *United States ex rel. Savory v. Lane,* the Seventh Circuit did not allow the prosecution to use the defendant’s pre-arrest refusal to answer police inquiries as evidence of guilt, because he did not testify at trial. The *Savory* court distinguished between impeachment cases, in which the defendant “opens himself to impeachment by taking the stand,” and the case before it, in which the defendant chose not to take the stand.

Alternatively, the substantive use of pre-arrest silence is allowed in the Fifth and Eleventh Circuits. Citing *Jenkins,* the Eleventh Circuit ruled that the government may comment on a defendant’s silence if it occurred prior to the time he was arrested and given *Miranda* warnings. However, the Eleventh Circuit made no mention of the fact that the silence in *Jenkins* was used for impeachment purposes rather than substantive evidence of guilt. In *Jenkins,* the Court expressly refused to decide whether such use violated a defendant’s Fifth Amendment privilege.

**C. The Split in the Circuit Courts**

The Supreme Court has never addressed the use of pre-arrest, pre-Miranda silence in the prosecution’s case-in-chief as substantive evidence of guilt. The variation in treatment of comments on pre-arrest silence among the circuit courts and the absence of controlling Supreme Court precedent has resulted in significant confusion among the circuits. Several petitions for *certiorari* have been filed on the

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47. 832 F.2d 1011.
48. See id. at 1018-1020. Relying on *Griffin v. California,* 380 U.S. 609 (1965), the Tenth Circuit reached a similar conclusion in *Burson,* 852 F.2d at 1201.
49. 832 F.2d at 1017-1018.
50. See United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).
51. See Rivera, 944 F.2d at 1568.
52. See id.
53. See 447 U.S. at 236 n.2.
54. See United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996)(discussing this proposition).
55. See, e.g., Zanabria, 74 F.3d at 593 (holding that the defendant’s silence was not induced by a government agent and was not in response to a government agent’s questions); *Thompson,* 82 F.3d at 856 (holding that due to the lack of controlling authority and the current circuit court split on the issue, the court could not find “plain error” in the trial court’s failure to exclude evidence of pre-arrest silence); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991), *cert. denied,* 502 U.S. 1031 (1992) (holding that outside the coercive setting of custodial interrogation, willingness to answer some questions can be properly given greater weight in deciding whether the willingness forfeits the right to object to comment on a refusal to answer a particular question); *Rivera,* 944 F.2d at 1568 (holding that the government may comment on a defendant’s silence if it occurs before arrest and before Miranda warnings or after arrest but before Miranda warnings); United States v. Blankenship, 746 F.2d 233, 239 (5th Cir. 1984) (holding that the govern-
issue, but the Court has consistently denied them.\textsuperscript{56} This split has left the lower courts to fend for themselves, resulting in great inconsistency in the treatment of the issue.\textsuperscript{57}

1. \textit{Majority Opinion}

The majority of jurisdictions have held that the use of pre-arrest silence as substantive evidence of guilt is a violation of a person's Fifth Amendment privilege against self-incrimination. For example, the First, Seventh, Tenth, and most recently, Sixth Circuits prohibit a prosecutor's use of a defendant's decision to remain silent whenever such use could penalize the defendant from exercising his or her constitutional rights.\textsuperscript{58} These circuits' primary rationale for disallowing the use of pre-arrest silence as substantive evidence of guilt comes from the Supreme Court's decision in \textit{Griffin v. California}.\textsuperscript{59}

Under \textit{Griffin}, however, the Supreme Court merely prohibited comment on the accused's silence occurring at trial, not before arrest.\textsuperscript{60} Therefore, the First, Sixth, Seventh, and Tenth Circuits' protection of pre-arrest silence from the prosecution's case-in-chief is not actually required by the \textit{Griffin} holding.\textsuperscript{61}

2. \textit{Minority Opinion}

The Fifth and Eleventh Circuits favor the use of pre-arrest silence as evidence of guilt.\textsuperscript{62} Both circuits rely on the Court's holding in \textit{Jenkins v. Anderson}.\textsuperscript{63} The \textit{Jenkins} court, however, failed to follow the
view it had adopted in *Griffin* that the Fifth Amendment provides an absolute right to silence, holding instead that courts must employ an "impermissible burden" test to determine the constitutionality of impeachment use of pre-arrest silence.64 Notably missing from the *Jenkins* decision is any discussion on the use of pre-arrest silence as substantive evidence of guilt.

Regardless of *Jenkins*’ omission, the Fifth and Eleventh Circuits relied on *Jenkins* to justify their arguments favoring the use of pre-arrest silence as substantive evidence of guilt.65 In fact, the Eleventh Circuit put an end to any confusion over the constitutional status of an individual’s pre-arrest silence when it stated that “the law of this circuit is settled that evidence of pre-Miranda silence is admissible in the government’s case-in-chief as substantive proof of guilt.”66

To classify the Fifth and Eleventh Circuits as the only minority holdings is no longer accurate. The Ninth Circuit appears to have joined their camp with its decision in *Oplinger*.67 But unlike the Fifth and Eleventh Circuits, the Ninth Circuit expressed reservations about using *Jenkins* to reach its decision.68

### III. ANALYSIS

The Supreme Court has never explicitly stated "whether or to what extent pre-arrest silence may be protected by the Fifth Amendment."69 To assert that pre-arrest silence is clearly not allowed as substantive evidence of guilt70 or, on the other hand, that pre-arrest silence is clearly allowed as substantive evidence of guilt71 are both conceptually mistaken assertions. Simply put, the correct answer to the question is “... it depends.” What “it” depends on is the context of the situation leading to the defendant’s silence. Indeed, the unique context of *Oplinger* underscores the need for a more appropriate resolution of whether and to what extent pre-arrest silence is actually privileged under the Fifth Amendment.

#### A. Pre-Arrest Silence Is Not Completely Privileged

The *Oplinger* Court was correct to “respectfully disagree with the First, Seventh, and Tenth Circuits, which have all held that pre-arrest silence comes within the proscription against commenting on a defen-

64. See id. at 236.
67. See *Oplinger*, 150 F.3d at 1066-67.
68. See id.
69. See *Jenkins*, 447 U.S. at 236 n.2.
70. See infra Part II.A.
71. See infra Part II.B.
dant's privilege against self-incrimination." The fundamental weakness in these circuits' holding is that they each rely on the Supreme Court's decision in Griffin v. California to justify their prohibitions against the use of pre-arrest silence as evidence of guilt.

This reliance on Griffin produced suspect analysis. For example, in Savory, the Seventh Circuit found the reference to a defendant's pre-arrest silence "to be of constitutional magnitude." The Savory court commenced its constitutional analysis by reasoning that "because appellant [defendant] did not take the stand . . . the problem involves the application of Griffin v. California" rather than "Jenkins v. Anderson . . . [which] is distinguishable . . . [because in Jenkins] the government used the defendant's silence to impeach trial testimony." The court provided little analysis as to why Jenkins was not the controlling precedent, since Jenkins actually dealt with pre-arrest silence and Griffin did not. The Savory court merely assumed that pre-arrest silence is constitutionally privileged and simply applied the Griffin holding.

Like the Seventh Circuit in Savory, the First and Tenth Circuits relied on Griffin to protect pre-arrest silence but provided minimal justification for extending the Griffin holding to the pre-arrest setting. A more reasoned approach would have been to include an application of Jenkins' "impermissible burden" test. Under that framework, pre-arrest silence is not automatically privileged, but still may be inadmissible if the pre-arrest evidence impermissibly burdens the defendant's right to take the stand at trial. This test seems to appreciate the governmental coercion that, without a doubt, justifies a defendant's assertion of his or her privilege against self-incrimination.

Although the First, Seventh, and Tenth Circuits inevitably reached the correct decision in their respective cases, they create an incomplete precedent. These circuits improperly extend the holding in Griffin and imply a blanket rule that all pre-arrest silence is constitutionally privileged. Such a blanket rule does not provide a court with the flexibility to deal with situations such as Oplinger, where the defendant is not faced with the actual threat of governmental coercion. In essence, these circuits failed to provide a convincing groundwork for future decisions regarding pre-arrest silence.

72. Oplinger, 150 F.3d at 1067.
73. See Burson, 952 F.2d at 1201; Coppola, 878 F.2d at 1568; Savory, 832 F.2d at 1017.
74. Savory, 832 F.2d at 1018.
75. Id. at 1017.
76. See Burson, 952 F.2d at 1201; Coppola, 878 F.2d at 1568.
77. See infra Part III.C.
78. See Jenkins, 447 U.S. at 240.
79. See id.
B. The *Jenkins* Decision Improperly Extended

Although the Ninth Circuit concedes that the Supreme Court in *Jenkins v. Anderson* "[did not] rule on the constitutionality of the use of pre-arrest, pre-Miranda silence as substantive evidence of guilt,"\(^8\) it did fall in line with the Fifth and Eleventh Circuits by concluding that pre-arrest silence may indeed be used to *imply* a defendant's guilt.\(^8\) The thrust of these circuits' reasoning derives from *Jenkins*,\(^8\) but extending the *Jenkins* rule in this fashion could prove highly problematic.\(^8\)

The faulty logic of applying *Jenkins* was obvious in *United States v. Rivera*,\(^8\) where the prosecutor introduced evidence in its case-in-chief that the defendant had remained silent during the pre-arrest investigation. The prosecutor used the prior silence not to impeach the defendant's credibility -- the defendant failed to testify at trial -- but as substantive evidence of the defendant's guilt. On appeal, the Eleventh Circuit supported the lower court's decision with a reference to *Jenkins*, but failed to note that *Jenkins* applies specifically to impeachment use and leaves open the propriety of substantive use of pre-arrest silence.\(^8\) Despite these apparent misapplications of the *Jenkins* rule, the Eleventh Circuit in *Rivera* held fast and made clear that *Jenkins* extends to substantive use of pre-arrest silence.\(^8\)

Such an extension of *Jenkins* ignores the pervasive federal and state evidentiary rules that distinguish between comment on privileged silence to impeach a defendant's testimony and comment on a defendant's silence as substantive evidence of guilt in the prosecution's case-in-chief.\(^8\) These circuits fundamentally misconstrue the explicit reasoning behind the *Jenkins* Court's unwillingness to extend protection to a testifying defendant's pre-arrest silence: "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of criminal trial."\(^8\) *Jenkins* is limited to instances where a defendant chooses to testify; barring this step, the *Jenkins* holding should not apply.

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80. 150 F.3d at 1066. See *supra* Part II.B for a discussion on the *Jenkins* holding that the government may comment on a defendant's pre-arrest silence for impeachment purposes.

81. *See Oplinger*, 150 F.3d at 1066.

82. *See supra* Part II.B.

83. *See id.*

84. 944 F.2d 1563 (11th Cir. 1991).

85. *See id.* at 1568; *Jenkins*, 447 U.S. at 236 n.2.

86. *See Rivera*, 944 F.2d at 1568.


88. *Jenkins*, 447 U.S. at 239.
The Supreme Court has made careful distinctions between impeachment and substantive use of pre-arrest silence.\textsuperscript{89} Therefore, to the extent that the Eleventh and Fifth Circuits' holdings were the result of a mirror application of \textit{Jenkins} to circumstances where the defendant chose not to testify, these decisions were wrongly decided. Each of these courts should have recognized that impeachment use of silence presents a materially different issue from evidentiary use of such silence and that a reflexive extension of the \textit{Jenkins} holding to a non-testifying defendant is erroneous.\textsuperscript{90}

The policies that support the exclusion of pre-arrest silence as substantive evidence of guilt are first and foremost based upon Fifth Amendment privileges. Allowing the prosecution to use a defendant's silence to imply guilt may potentially violate the Fifth Amendment's function of protecting the innocent. Moreover, as New York's highest court has explained, "it is an unfortunate truth that many people in our society, especially those involved in the life of the street, view the police as antagonists rather than protectors and react to police contact with extreme suspicion, distrust, and lack of cooperation."\textsuperscript{91} Police interrogation is an intimidating prospect to both the guilty and the innocent and the presence of the police may shock, frighten, or confuse the defendant.

An instance where pre-arrest silence as evidence of guilt may run counter to the Fifth Amendment privilege occurs when an defendant charged with murder may have killed in justifiable self-defense.\textsuperscript{92} If the defendant is afraid that the police will not believe his story or feels morally responsible for the death, he may claim the Fifth Amendment privilege and refuse to answer questions prior to arrest. To allow this silence to be used to show the defendant's guilt may defeat the important Fifth Amendment purpose of protecting the innocent.\textsuperscript{93} Whenever the prosecution implies guilt from silence a jury may see guilt, which may be untrue, and it is inconsistent with the Fifth Amendment's policy of protecting the innocent.\textsuperscript{94}

Another policy concern regarding the evidentiary use of pre-arrest silence is deterrence of police misconduct. As one state supreme court has opined, if the police know that a defendant's pre-arrest silence is available for use at trial and the post-arrest silence is not, the police have incentives to manipulate the time of arrest and delivery of the

\textsuperscript{89} See \textit{supra} Part II.B for a discussion of the differences between the material's impeachment and substantive use.
\textsuperscript{90} Although the \textit{Zanabria} Court did not cite \textit{Jenkins}, the court was most likely influenced by the perjury-prevention rationale that guides the impeachment line of cases.
\textsuperscript{91} \textit{People v. Conyers}, 424 N.Y.S.2d 402, 408 (1980).
\textsuperscript{92} See \textit{Erwin Griswold, The Fifth Amendment Today} 3 (1955).
\textsuperscript{94} See \textit{id.}
Miranda warning to ensure that the defendant’s silence in the face of accusation is admissible.95

Use of pre-arrest silence to imply guilt cannot be justified without an understanding of legitimate Fifth Amendment policy concerns. Unfortunately, the Jenkins Court did not explain what it believed to be the policies behind the Fifth Amendment.96 A blind reliance on Jenkins to justify use of pre-arrest silence as evidence of guilt leads to improper results. For, just as a blanket rule for disallowing any use of pre-arrest silence is misguided, a similar blanket rule that allows the court to easily admit pre-arrest silence as evidence of guilt is similarly misguided.

C. Pre-Arrest Silence as Evidence of Guilt is Contextual

Even though “it depends” provides wobbly analysis,97 there is value in examining the context of when pre-arrest silence should receive Fifth Amendment privilege. The Supreme Court has indicated that it will apply general Fifth Amendment principles in order to determine whether a given statement is within the reach of the privilege against self-incrimination.98 To be within the scope of the privilege, two elements must be present: testimonial evidence and compulsion.99

Turning to the first element, treating a defendant’s prior silence as testimony has a long pedigree in the doctrine of “assenting silence.”100 The doctrine holds that an individual’s silence in the face of accusations of crime made in his hearing, provided that he had the opportunity to respond, may be used as a tacit admission of the truth of the facts contained in the statement.101 Therefore, silence in the face of police questioning clearly meets the threshold requirement that the act be testimonial in character.

The more critical element of asserting the privilege is the presence of physical or moral compulsion exerted on the person asserting the privilege.102 This coercion requirement comes directly from the language of the privilege, which commands that no person “shall be compelled in any criminal case to be a witness against himself.”103 Thus, the constitutional rule is that pre-arrest silence, not associated with government coercion, is not privileged because the pre-arrest choice to speak or remain silent is not compelled by a state actor. To be sure,
the United States Supreme Court has held that it is axiomatic that
the commands of the Constitution are directed at governmental enti-
ties and that state action is a prerequisite to the assertion of those
rights contained in the Fifth Amendment.104

Based upon this governmental coercion prerequisite, the Oplinger
court made a precise observation regarding the First, Seventh, and
Tenth Circuits. The Oplinger court noted that "in all three cases, the
party seeking to assert the privilege against self-incrimination was
questioned by a government official.105 This lack of governmental co-
ercion in Oplinger differentiated it from the First, Seventh, and Tenth
Circuit cases. The Oplinger court, therefore, was obliged to reject the
defendant's claim of privilege regarding his pre-arrest silence. The
problem with the First, Seventh and Tenth Circuits is that, though
decided correctly, they reached their holdings based upon an incorrect
analysis.106

Turning to the circuits with which the Ninth Circuit allied itself,
the Oplinger court did not recognize the fact that the defendants in
Zanabria and Rivera were also detained and questioned by govern-
ment officials.107 Ironically, although the Fifth and Eleventh Circuits
were correct in acknowledging that pre-arrest silence may be used as
substantive evidence of guilt, their conclusions inevitably collapse
under the weight of their specious analysis.108

The Fifth Circuit in Zanabria justified the use of the pre-arrest
silence because "the silence at issue was neither induced by nor a re-
sponse to any action by a government agent."109 The Fifth Circuit rea-
soned that the "compulsion" element did not exist in Zanabria.
However, to assert that Zanabria was under no official compulsion to
speak or remain silent completely ignores the context of Zanabria.
Ultimately, the Fifth Circuit provides no explanation as to why a drug
search does not qualify as express governmental coercion.110

Likewise, the Eleventh Circuit's analysis in Rivera fares no better
than the Fifth Circuit's analysis in Zanabria. Citing Jenkins, the Ri-
vera court held that "[t]he government may comment on a defendant's
silence if it occurred prior to the time he is arrested and given his
Miranda warnings."111 However, the court made no mention of the

105. See 150 F.3d at 1067 n.6.
106. See supra Part III.A.
107. See Zanabria, 74 F.3d at 592; Rivera, 944 F.2d at 1565. Both Zanabria and Ri-
vera were searched by U.S. Customs Inspectors.
108. See supra III.B for a discussion of the Fifth and Eleventh Circuits' questionable
analysis regarding the use of pre-arrest silence to infer guilt.
109. Zanabria, 74 F.3d at 593.
110. See infra Part III.C.1 for a discussion on how "coercion" relates to the Fifth
Amendment privilege against self-incrimination.
111. Rivera, 944 F.2d at 1568.
fact that the silence in Jenkins was used for impeachment purposes.\textsuperscript{112}

The context of governmental coercion must be examined in order to provide a framework for understanding to what extent pre-arrest silence may be protected by the Fifth Amendment privilege against self-incrimination. For example, one could label "express governmental coercion" as coercion resulting from actual contact with a government official.\textsuperscript{113} Coercion of this nature is privileged. On the other hand, "implied governmental coercion" results when a defendant merely presumes contact with a government official. Coercion of this nature is not privileged.

\textbf{1. Context One: Express Governmental Coercion}

The self-incrimination clause of the Fifth Amendment has virtually no legislative history.\textsuperscript{114} However, in \textit{Brown v. Walker}, the Supreme Court established a threshold test, where in order to claim protection of the Fifth Amendment, the witness must show that her fear of conviction is real and substantial rather than merely speculative.\textsuperscript{115} Hence, express governmental coercion is best understood as the traditional contact that a criminal defendant has with law enforcement.\textsuperscript{116} Simply put, whenever physical, moral, or psychological coercion has a real and substantial opportunity to be expressed between a defendant and a governmental official, express coercion may exist.\textsuperscript{117} Subsequently, prior to either arrest or a \textit{Miranda} warning, the privilege against self-incrimination may still apply.

The Tenth Circuit's decision in \textit{United States v. Burson} fits within the context of express governmental coercion even though the government agent was an IRS investigator and Burson was neither in custody during the attempted questioning nor advised of his privilege against self-incrimination.\textsuperscript{118} Burson had effectively invoked the privilege because "Mr. Burson knew he was being interrogated as part of a criminal investigation . . . (and) Mr. Burson was clearly not going to answer any of the IRS agent's questions."\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{112} See supra II.B for a discussion on the Eleventh Circuit's misapplication of Jenkins.
  \item \textsuperscript{113} The terms "express" and "implied" coercion are presented only as conceptual short-hands. Neither term is legally operative language.
  \item \textsuperscript{114} See United States v. Gecas, 830 F. Supp. 1403, 1414 (N.D. Fla. 1993).
  \item \textsuperscript{115} See Brown v. Walker, 161 U.S. 591, 599 (1896).
  \item \textsuperscript{116} Of course, this definition may extend beyond traditional law enforcement officers to encompass any governmental agent holding general criminal investigatory powers.
  \item \textsuperscript{117} See Connelly, 479 U.S. at 165.
  \item \textsuperscript{118} See Burson, 952 F.2d at 1200-01.
  \item \textsuperscript{119} Id.
\end{itemize}
On the other hand, the Ninth Circuit's decision in Oplinger does not fit within the context of express governmental coercion. No governmental agent was involved with the questioning and the only mention of potential governmental involvement was in the context of Oplinger's employer reporting his offense to the FBI.\(^{120}\) Therefore, the involvement of the FBI remained merely "speculative."\(^ {121}\) If, on the other hand, an FBI agent was waiting outside the door and entered the room, Oplinger could at that point invoke his Fifth Amendment privilege.

2. Context Two: Implied Governmental Coercion

Asserting a Fifth Amendment privilege based upon potential contact with law enforcement is clearly unwarranted under the Constitution.\(^ {122}\) In other words, the mere implication that a defendant may eventually face legal consequences does not trigger the privilege. For example, even if a defendant had no contact with law enforcement prior to his arrest, he might nevertheless argue that substantive use of his pre-arrest "failure to come forward" satisfies the state action requirement. Such a defendant might claim that the choice to come forward was induced by state action in the sense that he feared consequences that the state might impose on him if he volunteered information. Similarly, he might claim that he knew that state agents were investigating the crime in question and this investigation prevented him from coming forward because he was afraid to admit his knowledge, however innocent, of the crime.

Under these approaches, however, the defendant's reasons for not coming forward more likely result from his own actions or knowledge of facts relating to the crime rather than any intervening act on the part of the state. Any pressure to be silent under such circumstances is best characterized as "moral and psychological pressure to confess emanating from sources other than governmental coercion."\(^ {123}\)

If pre-arrest silence does not arise out of state contact, and is therefore non-privileged, the pre-arrest silence would be evaluated like any other piece of evidence. The United States Supreme Court has expressly rejected the notion that the mere force of evidence is compulsion of the sort forbidden by the privilege. If the pre-arrest silence is used by the prosecution as inculpatory evidence, then the burden on the right to trial silence is analytically equivalent to the burden that

\(^{120}\) See infra Part III.C.2 discussing "implied governmental coercion."
\(^{121}\) 150 F.3d at 1066.
\(^{122}\) See Jenkins, 447 U.S. at 241 (Justice Stevens's concurring opinion states that "[t]he fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police . . . ").
\(^{123}\) Connelly, 479 U.S. at 170.
always exists when the defendant decides not to testify in the face of inculpatory evidence against him. In essence, the fact that the defendant may be persuaded to speak at trial in order to counter the state's damning evidence is merely a function of the adversarial process.

As demonstrated by the Ninth Circuit in Oplinger, the context of a defendant's pre-arrest silence must be carefully examined. Pre-arrest silence not arising out of express governmental coercion is not privileged under the Fifth Amendment because the pre-arrest choice to speak or remain silent is not compelled by a state actor. However, if the pre-arrest silence is the result of express governmental coercion, the Fifth Amendment privilege attaches to the silence.

IV. CONCLUSION

The criminally accused possess the fundamental privilege against self-incrimination. Our Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." However, the Oplinger decision reminds us that "[t]he self-incrimination clause was intended as a limitation on the investigative techniques of government, not as an individual right against the world." In the end, Oplinger was correctly decided because it properly applied the Fifth Amendment to the context of the coercion faced by the defendant.

Because several circuits are split on the proper use of pre-arrest silence, the Supreme Court should grant certiorari and resolve the confusion. In settling this issue, the Supreme Court should look at the Ninth Circuit's decision in Oplinger in order to better understand the contextual nuances of pre-arrest silence.

Meanwhile, back in Mayberry, Gomer's testimony regarding Barney's silence may be used as substantive evidence at trial subject to federal evidentiary rules. As much as Gomer wants to make a "citizen's arrest," this is a far cry from filling the shoes of actual law enforcement. Had Sheriff Andy showed up instead of Gomer, the context would have been different and Barney's silence could not be used as evidence to imply his guilt.

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125. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1965). Indeed, preserving the values of adversarial system is one of the traditional justifications for Fifth Amendment protection.
126. U.S. Const. amend. V.
127. 150 F.3d at 1067 (quoting Gecas, 120 F.3d at 1456).