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AMENDMENT**

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THE RIGHT TO SILENCE V. THE FIFTH AMENDMENT

TRACEY MACLIN

“‘You have the right to remain silent.’ It’s probably the best known phrase to emanate from our Constitution.”

ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11* xvii (2008).

“Rather than being a ‘right of silence,’ the right, or better the privilege, is against being compelled to speak. This distinction is not mere semantics; it goes to the very core of the problem.”

HENRY FRIENDLY, *BENCHMARKS* 271 (1967).

INTRODUCTION

I want to thank Geoffrey Stone, Dean of the University of Chicago Law School and the editors of the University of Chicago Legal Forum for inviting me to participate in the Legal Forum’s 2015 Symposium on Policing the Police.¹ I will focus my discussion on one Supreme Court ruling because what the Court says in its opinions often, but not always, matters to the police. My topic concerns a well-known, but badly misunderstood, constitutional right. The Fifth Amendment to the Constitution guarantees, inter alia, that no person “shall be compelled in any criminal case to be a witness against himself.”²

For the nonlawyer, the Fifth Amendment protects an individual’s right to silence. I am confident that many Americans believe that the Constitution, pursuant to the Fifth Amendment, protects their right to remain silent when questioned by police officers or governmental officials.³ Countless television shows and movies have portrayed scenes where police inform suspects of their right to remain silent. Typically, cops on television are reciting the Miranda warnings to someone under

¹ ___ U. CHI. LEGAL F. ___ (2016).

² U.S. CONST. amend. V. The Supreme Court and legal scholars often describe the Self-Incrimination Clause of the Fifth Amendment as a “privilege.” See, e.g., *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013); *Mitchell v. United States*, 526 U.S. 314, 316 (1999); R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 1–2 (1997). “I call it a ‘right’ because it is one. Privileges are concessions granted by the government to its subjects and may be revoked.” LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* xv (2d ed. 1986). Levy explained that “[a]lthough the right against self-incrimination originated in England as a common-law privilege, the Fifth Amendment made it a constitutional right, clothing it with the same status as other rights, like freedom of religion, that we would never denigrate by describing them as mere privileges.” Id.

³ A survey conducted in 1991 found that eighty percent of Americans “said they were aware that if they were arrested they were not required to answer a police officer’s questions.” Poll Finds Only 33% Can Identify Bill of Rights, N.Y. TIMES, Dec. 15, 1991, at A33.

arrest. Those warnings require informing arrestees, among other things, of their right to remain silent.⁴ Perhaps, because of the impact of television and the movies, in 1974, Justice Rehnquist, who was no fan of the holding in *Miranda v. Arizona*, wrote that “[a]t this point in our history, virtually every schoolboy is familiar with the concept, if not the language” of the Fifth Amendment.⁵ Twenty-six years later, after he had been elevated to the position of Chief Justice, Rehnquist again spoke for a majority of the Court in a case that rejected a direct challenge to *Miranda* when he stated that the *Miranda* warnings “have become part of our national culture.”⁶ The “concept” that has “become part of our national culture” is the notion that individuals enjoy a right to remain silent when questioned by police officials.

Other Justices, including liberal and conservative members of the Court, have remarked on the ubiquity of the public’s familiarity with the right guaranteed by the Fifth Amendment. In a 1980 ruling addressing whether a defendant’s prearrest silence could be used for impeachment purposes at a later trial, Justice Marshall noted in a dissenting opinion that, even when a person has not been formally arrested, an individual may decide not to communicate with law enforcement officials believing that the Fifth Amendment protects his right not to do so.⁷ According to Marshall, the Court should not “assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights[.]”⁸ Even Justice Scalia, another well-known critic of *Miranda*, found it “implausible” that in “the modern age of frequently dramatized ‘Miranda’ warnings,” a “person under investigation may be unaware of his right to remain silent[.]”⁹

If every schoolboy is familiar with the Fifth Amendment and if knowledge of the right to remain silent is part of our national culture, it is understandable why many persons believe they have a right to refuse to answer a police officer’s question if answering that question is potentially incriminating. The flip-side of this national understanding is that much of the public also knows “that any statement made in the presence of police ‘can and will be used against you in a court of law.’”¹⁰ Accordingly, among the public, the right to remain silent is viewed as a fundamental freedom. One scholar has written that the expression “[y]ou have the right to remain

⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Professor Frederick Schauer has stated that the impact of American television and movies has made *Miranda* “the most famous appellate case in the world.” Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013). Moreover, according to Schauer, the influence of *Miranda* has been so pervasive “that Russian television cops give something like a *Miranda* warning to suspects even though no actual Russian law imposes such an obligation on real Russian cops.” *Id.* (footnote omitted).

⁵ *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

⁶ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

⁷ See *Jenkins v. Anderson*, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting).

⁸ *Id.*

⁹ *Brogan v. United States*, 522 U.S. 398, 405 (1998). Interestingly, Justice Scalia once remarked in an opinion that “[w]hile every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves.” *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting). Whether Justice Scalia was suggesting that everyone enjoys a constitutional right to remain silent is not clear.

¹⁰ *Weitzel v. State*, 863 A.2d 999, 1004 (Md. 2004).

silent,” is “the best-known phrase to emanate from the Constitution.”¹¹ Another scholar has opined that the “right to remain silent sounds like a bedrock principle, and everyone knows about it.”¹²

Hollywood screenwriters are not solely responsible for the perception among the public that there is a right to remain silent. Whether they are willing to admit it or not, the Justices also deserve some credit (or blame) for the popular view that people have a right to remain silent when confronted by police questioning. Even before the Court formally applied the Fifth Amendment’s Self-Incrimination Clause to the States, its Due Process rulings on whether a challenged confession was properly admitted at a state prosecution acknowledged a suspect’s constitutional right to remain silent during police interrogation.¹³ Indeed, in the case that applied the right against compelled self-incrimination to the States, the Court stated that the Fourteenth Amendment “secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to

¹¹ ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11* xvii (2008).

¹² Orin Kerr, [Do You Have A Right to Remain Silent? Thoughts on the “Sleeper” Criminal Procedure Case of the Term, *Salinas v. Texas*](http://volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-term-salinas-v-texas/), *THE VOLOKH CONSPIRACY*, June 17, 2013, <http://volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-term-salinas-v-texas/> [perma.cc/T7SH-EXNL].

¹³ See, e.g., *Turner v. Pennsylvania*, 338 U.S. 62, 64 (1949) (Opinion of Frankfurter, J.) (concluding that the suspect’s confession was involuntary under the Fourteenth Amendment because, *inter alia*, the police had “not informed [him] of his right to remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it”); *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (Opinion of Frankfurter, J.) (noting that the “very relentlessness of [police] interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right”); *Culombe v. Connecticut*, 367 U.S. 568, 610 (1961) (Opinion of Frankfurter, J.) (“There is no indication that at any time [the suspect] was warned of his right to keep silent [by the police].”); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (listing among the factors that showed the suspect’s confession was coerced and not an “expression of free choice,” the fact that he “was not advised of his right to remain silent or his right to counsel”) (footnote omitted); *Haynes v. Washington*, 373 U.S. 503, 516–17 (1963) (explaining that when the fact-finder is determining the voluntariness and admissibility of a confession, the accused is entitled to have the fact-finder know “that he [was] not cautioned [by police] that he may remain silent, that he [was] not warned that his answers may be used against him, or that he [was] not advised that he [was] entitled to counsel” while being questioned by police).

Of course, the substance of the right to remain silent was debatable prior to *Miranda*. Professor Yale Kamisar has noted, correctly in my view, that before *Miranda* was decided, “most suspects did not know they had such a right (or, to put it another way, did not realize that the police lacked any lawful authority to compel an answer). Moreover, the great majority of police officers did nothing to correct this misimpression.” Yale Kamisar, [A Rejoinder to Professor Schauer’s Commentary](#), 88 WASH. L. REV. 171, 172 (2013) (footnote omitted). According to Kamisar, practically speaking, prior to *Miranda* there was no right to remain silent during police interrogation:

I would maintain that in the years before the police were required to inform suspects that they had a right to remain silent—and the police did not have to do so until *Miranda* instructed them that . . . they must do so—such a right did not exist. To put it somewhat differently, I would say that requiring the police to warn custodial suspects that they had a right to remain silent—which *Miranda* did for the first time—established such a right.

Id. at 173 (emphasis added) (footnote omitted).

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remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”¹⁴

The public’s understanding of their right to remain silent has also developed from the Court’s rulings interpreting the Fifth Amendment during the 1960s. As Professor Albert Alschuler has explained in an influential law review article, the Court’s rulings have “vacillated between two incompatible readings of the Fifth Amendment[.]”¹⁵ One interpretation of the amendment affords individuals a right to remain silent.¹⁶ This view fuels the public’s perception that individuals enjoy a right to silence when interacting with the police.¹⁷ Under this “right to silence” interpretation of the Fifth Amendment, “governmental officials have no legitimate claim to testimonial evidence tending to incriminate the person who possesses it.”¹⁸ While police officials are not required to “encourage” a person to remain silent, “they must remain at least neutral toward her decision not to speak.”¹⁹

By contrast, the Court’s other interpretation of the Fifth Amendment, which is not known among much of the public, “does not protect an accused’s ability to remain silent but instead protects him only from improper methods of interrogation.”²⁰ Under this view, the word “compelled” from the amendment’s text is emphasized; to trigger Fifth Amendment protection, some form of governmental compulsion is necessary.²¹ If official questioning of an individual does not employ

¹⁴ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). One week after the announcement in *Malloy* that the Fifth Amendment’s Self-Incrimination Clause applied to the States, in a Sixth Amendment right to counsel case that concluded a suspect had been denied access to counsel during a police interrogation, the Court twice referenced a suspect’s “absolute right to remain silent” during police interrogation. *See Escobedo v. Illinois*, 378 U.S. 478, 485, 491 (1964) (noting as part of its holding that police did not effectively warn the suspect “of his absolute constitutional right to remain silent”). *Escobedo* also noted that the “Constitution . . . strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.” *Id.* at 488 (citation omitted).

¹⁵ Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625 (1996).

¹⁶ *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 181 (1997) (hereinafter *A Peculiar Privilege*). Professor Alschuler believes that *Griffin v. California*, 378 U.S. 609 (1965) “is the Supreme Court decision most clearly endorsing the ‘right to silence’ interpretation of the Fifth Amendment.” *Id.* at 274 n.5.

¹⁷ *See Kastigar v. United States*, 406 U.S. 441, 461 (1972) (“The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer.”).

¹⁸ Alschuler, *supra* note 15 at 2625.

¹⁹ Alschuler, *supra* note 15, at 2625.

²⁰ *Id.* at 2626 (footnote omitted).

²¹ For example, in *Fisher v. United States*, the Court ruled that compelled production of documents from the defendants’ attorneys did not implicate any Fifth Amendment rights the defendants might have enjoyed from being compelled to produce the documents themselves. *See Fisher v. United States*, 425 U.S. 391, 397 (1976) (“The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege.”) (citations omitted); *see also* JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 135 (1993) (explaining that “the Fifth Amendment, if properly applied to police interrogation at all, prohibits coerced or involuntary confessions. That is, in the context of police interrogation, to ‘compel’ a suspect to become a witness against himself can only mean to ‘coerce’ a suspect to become a witness against

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coercion or its equivalent, there is no right to remain silent and the government is permitted to use the individual's silence against him in later legal proceedings. In this article, I will refer to this view of the amendment as the Court's "textual" interpretation of the Fifth Amendment.

Shortly before the new millennium, Professor Alschuler remarked that the Court remained ambivalent regarding its interpretation of the Fifth Amendment, though the "right to silence" interpretation was dominant among the public.²² Sixteen years later, it is evident that the "right to remain silent" that most Americans think they possess does not exist. Three rulings from the Court over the past twelve years have made clear that the public's understanding of what the Fifth Amendment protects is deeply flawed. In the first case, Chavez v. Martinez,²³ a man is shot and severely wounded during a confrontation with police.²⁴ A patrol supervisor, who was not involved in the shooting, later questioned the man for forty-five minutes, who was then under arrest and receiving treatment for his wounds at a hospital.²⁵ The patrol supervisor did not provide Miranda warnings before questioning began and did not stop despite the man's requests to end the interrogation and protests that he

himself."). Professor Alschuler states that "Colorado v. Connelly" exemplifies the Court's other interpretation of the Fifth Amendment that focuses on whether police use improper interrogation methods. See A Peculiar Privilege, *supra* note 16, at 274 n.5. Connelly ruled that a constitutional challenge to the admission of a defendant's confession to police must establish coercive governmental activity. See Colorado v. Connelly, 479 U.S. 157, 167, 170 (1986) ("The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion.") (citations omitted).

While Hollywood's frequent depiction of the Miranda warning is probably most responsible for the public's perception that everyone enjoys a right to remain silent, Professor Alschuler cogently explains that Chief Justice Warren's majority opinion in Miranda "appeared to embrace both" interpretations of the Fifth Amendment:

The first Miranda warning—"You have a right to remain silent"—strongly indicated the Court's approval of the "right to silence" interpretation. So did the Court's expansive accusatorial rhetoric and its demand for a knowing and intelligent waiver of the privilege as a prerequisite to the admission of any statement made by a suspect at the stationhouse. The Court, however, did not direct law enforcement officers to provide the Miranda warnings whenever they asked a person suspected of crime to incriminate himself. Only suspects in custody were entitled to the warnings, and the Court referred repeatedly to the "inherently compelling nature" of custodial interrogation. This language and other aspects of the Miranda opinion (for example, the Court's discussion of the stratagems that interrogation manuals encouraged law enforcement officers to use while questioning suspects) suggested that the Court was still concerned with the quality and extent of the pressure brought to bear on a suspect and that the Fifth Amendment might not prohibit every inducement to speak. At the same time, much of the Court's discussion of stationhouse interrogation indicated that it was compelling only because it undercut the right to remain silent. A reader attempting to infer from Miranda whether the Fifth Amendment mandated neutrality toward a suspect's decision to speak or remain silent could have become confused.

A Peculiar Privilege, *supra* note 16, at 274–75 n.5.

²² See A Peculiar Privilege, *supra* note 16, at 182 ("Although the Supreme Court remains somewhat ambivalent about the issue, the 'right to silence' interpretation now seems dominant, at least in popular understanding of the privilege.") (footnote omitted).

²³ 538 U.S. 760 (2003).

²⁴ Chavez v. Martinez, 538 U.S. 760, 764 (2003).

²⁵ Id.

was in extreme pain.²⁶ The man made incriminating statements to the supervisor, but was not charged with a crime.²⁷ A federal civil-rights lawsuit was filed against the patrol supervisor, claiming that the coercive questioning violated the Fifth Amendment.²⁸ The Court rejected the claim.²⁹

In the second case, Berghuis v. Thompkins,³⁰ a person is arrested for murder.³¹ Police provide Miranda warnings to the suspect, but the suspect refuses to sign a form demonstrating that he understands his rights.³² Police interrogate the suspect, but the suspect “was ‘[I]argely’ silent.”³³ After nearly three hours of a one-sided interrogation, a detective asks the suspect whether he believed in God, the suspect answers “yes.”³⁴ The detective then asks: “Do you pray to God?”³⁵ Again, the suspect answers “yes.”³⁶ Finally, the detective asks: “Do you pray to God to forgive you for shooting that boy down?”³⁷ The suspect replies “yes.”³⁸ Fifteen minutes later, the suspect refuses to make a written confession, and the interrogation ends.³⁹ The suspect’s answers were admitted at trial and he was convicted of murder.⁴⁰ The Court rejected the suspect’s claim that he was exercising his Fifth Amendment right when he remained silent for nearly three hours of police interrogation.⁴¹

In the third case, Salinas v. Texas,⁴² a suspect agrees to speak with police about a double-murder.⁴³ Because he is not under arrest and came to the police station voluntarily, the suspect is not given Miranda warnings.⁴⁴ The suspect answers the officers’ questions, but remains silent when asked whether a ballistics test of the shotgun obtained from his home would match the shell casings found at the murder scene.⁴⁵ After a few moments of silence, the suspect answers other questions.⁴⁶ At trial, the prosecutor is allowed to use the suspect’s silence as substantive evidence of

²⁶ Martinez, 538 U.S. at 764.

²⁷ Id.

²⁸ Id. at 764–65.

²⁹ Id. at 766.

³⁰ 560 U.S. 370 (2010).

³¹ Berghuis v. Thompkins, 560 U.S. 370, 374 (2010).

³² Id. at 375.

³³ Id. (citations omitted).

³⁴ Id. at 376 (citations omitted).

³⁵ Id.

³⁶ Id. (citation omitted).

³⁷ Id. (citation omitted).

³⁸ Id. (citation omitted).

³⁹ Thompkins, 560 U.S. at 376 (citation omitted).

⁴⁰ Id. at 376–78.

⁴¹ Id. at 381–82 (“[The defendant] did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his ‘right to cut off questioning.’”) (citation omitted).

⁴² 133 S. Ct. 2174 (2013).

⁴³ Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

his guilt, and the jury convicts the man of murder.⁴⁷ The Court finds that using silence in these circumstances as evidence of guilt did not violate the Fifth Amendment.⁴⁸

Each of these rulings demonstrates that the Fifth Amendment does not protect all persons during their interactions or confrontations with police officials and does not always protect silence. In the first case, Martinez, a plurality of the Court concluded that the Fifth Amendment only protects a person from coercive and unwanted interrogation when the government seeks to admit that person's compelled statements in a subsequent criminal prosecution.⁴⁹ Thus, even when a person clearly indicates his desires to be free from coercive and persistent police questioning, he holds no right to silence.

The second case, Thompkins, demonstrates that remaining silent in the face of custodial police interrogation does not count for much.⁵⁰ While the Miranda warnings tell a person under arrest that he has a right to remain silent, to enjoy the benefit of that right (i.e., the termination of police interrogation), the arrestee must speak (and speak clearly) to ensure the right will be protected.⁵¹ Of course, the Miranda warnings themselves give no hint that a suspect must clearly invoke his right to remain silent, and police detectives are not going to inform a suspect of the need for an unambiguous statement either.

This article focuses on the third case, Salinas, because it demonstrates that the Fifth Amendment does not protect silence when persons, not under arrest, are confronted with questions requiring incriminating answers.⁵² The result and reasoning of Salinas raises some perplexing questions about the nature and scope of the Fifth Amendment and underscores the Court's opposing interpretations of the Fifth Amendment. A plurality of the Court ruled that Salinas' constitutional "claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question" about the shotgun.⁵³ The plurality explained that Salinas could have easily asserted that he was not answering the question "on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment."⁵⁴ Implicit in this

⁴⁷ Id.

⁴⁸ Id. (majority of Justices concluded that using a suspect's silence during a non-custodial police interrogation as substantive evidence of guilt did not violate the Fifth Amendment).

⁴⁹ See Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (Opinion of Thomas, J.) ("We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case. . . . The text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution.").

⁵⁰ See Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010).

⁵¹ Id. at 409 (Sotomayor, J., dissenting) (citing and quoting Soffar v. Cockrell, 300 F.3d 588, 603 (5th Cir. 2002) (en banc) (DeMoss, J., dissenting) ("What in the world must an individual do to exercise his constitutional right to remain silent beyond actually, in fact, remaining silent?")) ("Advising a suspect that he has a 'right to remain silent' is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected.").

⁵² See Salinas v. Texas, 133 S. Ct. 2174, 2177–78 (2013).

⁵³ Id. at 2178.

⁵⁴ Id. at 2180.

reasoning is that Salinas enjoyed Fifth Amendment protection during his interaction with the police.

As will be discussed below, under the “right to silence” interpretation of the Fifth Amendment, the Court’s rulings establish that when government officials subject an individual to official coercion or its equivalent, the individual holds a right to remain silent, and the government cannot penalize the exercise of that right. The Salinas plurality found that Genoveo Salinas could not rely on this principle because “his interview with police was voluntary.”⁵⁵ But this conclusion raises the question of why the Fifth Amendment is implicated during a voluntary police interrogation. To assume Salinas enjoyed Fifth Amendment protection in this situation contradicts the Court’s “textual” interpretation of the Fifth Amendment, which establishes that the “sole concern of the Fifth Amendment . . . is governmental coercion.”⁵⁶ If the focus of the privilege is on government compulsion, it would seem that the Fifth Amendment has no application to a voluntary police interview. Without explaining why the Fifth Amendment applies to voluntary police questioning, the plurality finds that Salinas had not properly asserted his rights. This conclusion, however, as explained below, penalizes members of the public who have understandably, but erroneously, relied on the Court’s “right to silence” interpretation of the Fifth Amendment, which supposedly grants a right to remain silent for persons confronted with incriminating police questioning.

The reasoning of the Salinas plurality raises another question about the nature and scope of the Fifth Amendment. The Fifth Amendment is stated in absolute terms; the government cannot require a person to be a witness against himself in any criminal case.⁵⁷ Examining the text, it appears that everyone enjoys the same Fifth Amendment protection. Unlike other provisions of the Bill of Rights which often require the Court to balance an individual’s constitutional interest against the government’s interests, the text of the Fifth Amendment leaves no room for judicial balancing of competing interests. Yet, the Salinas plurality contrasts the Fifth Amendment rights of an arrestee with the Fifth Amendment rights of someone who voluntarily comes to the police station. The arrestee enjoys a right to silence, but the citizen who freely appears at the police station does not. Relying on the text of the amendment, the Salinas plurality explains that the public’s understanding of their right to silence is mistaken; the amendment “does not establish an unqualified ‘right to remain silent.’”⁵⁸ But if the Fifth Amendment does not afford an absolute right to remain silent for someone like Salinas, why would an express invocation of the Fifth

⁵⁵ Salinas, 133 S. Ct. at 2180.

⁵⁶ Colorado v. Connelly, 479 U.S. 157, 170 (1986).

⁵⁷ See e.g., Miranda v. Arizona, 384 U.S. 436, 479 (1966) (“A recurrent argument made in these cases is that society’s need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.”) (citation omitted); Braswell v. United States, 487 U.S. 99, 128 (1988) (Kennedy, J., dissenting) (noting that “the privilege against self-incrimination does not permit balancing the convenience of the Government against the rights of a witness”); Kastigar v. United States, 406 U.S. 441, 467 (1972) (Marshall, J., dissenting) (“The Fifth Amendment gives an absolute right to resist interrogation, if the testimony sought would tend to incriminate him.”).

⁵⁸ Salinas, 133 S. Ct. at 2183.

Amendment matter? Invoking the words of the amendment, without more, would not change the voluntary nature of the interview. While the plurality opinion implies that an express invocation would make a constitutional difference, it never explains why.

Finally, even assuming that an explicit invocation of the Fifth Amendment provides more protection than merely remaining silent, if police are permitted to tell someone in Salinas' position that his silence can be used against him in a future prosecution, as the Court said they may do,⁵⁹ why would a person bother invoking the Fifth Amendment after being told by police that silence can be used against him? After all, most laymen, and many lawyers, believe the right to silence is just another way of referring to the Fifth Amendment.⁶⁰

Part I of this article describes Salinas and the reasoning behind the Court's judgment. Part II critiques the Salinas plurality opinion and discusses the implications it has for police interrogation practices and future Fifth Amendment cases. As the remainder of this article will show, the right to silence and the Fifth Amendment are not the same. Indeed, the result and reasoning of Salinas demonstrate that the Fifth Amendment does not afford an individual, who has neither been indicted, nor arrested, nor temporarily detained by police, a right to remain silent in the face of police interrogation. For this reason and other reasons explained below, Salinas was wrongly decided.

I. SALINAS V. TEXAS

On December 18, 1992, Houston, Texas police learned of the murders of two brothers, Juan and Hector Garza, who had been shot and killed in their home.⁶¹ Officers found shotgun shell casings at the crime scene. Police later learned that Genovevo Salinas had attended a party at the victims' home the night before the murders.⁶² Several weeks after the murders, police went to Salinas's home.⁶³ Salinas agreed to talk with police and told them that his father owned a shotgun.⁶⁴ Salinas's father gave police the weapon and Salinas agreed to come to the police station to discuss the murders.⁶⁵

At the police station, Salinas was taken to an interview room.⁶⁶ He did not receive Miranda warnings.⁶⁷ Salinas answered the officers' questions until an officer

⁵⁹ See Salinas, 133 S. Ct. at 2183–84.

⁶⁰ Cf. Richard F. Albert, The Supreme Court's Decision in Salinas v. Texas: Implications For White Collar Investigations, FORBES, June 19, 2013, <http://www.forbes.com/sites/insider/2013/06/19/the-supreme-courts-decision-in-salinas-v-texas-implications-for-white-collar-investigations/#5426d71451b1> [perma.cc/FHV9-G8EX] (noting that the result in Salinas “would seem to be contrary to the expectation of many lawyers, much less laypersons, that the government cannot comment at all on a suspect's silence or failure to respond to [police] questions”).

⁶¹ Salinas, 133 S. Ct. at 2178.

⁶² Id.

⁶³ Id.

⁶⁴ Salinas, 133 S. Ct. at 2178.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id. At the Supreme Court, the parties agreed that Salinas came to the station on a voluntary basis.

asked “whether his shotgun ‘would match the shells recovered at the scene of the murder.’”⁶⁸ Salinas declined to answer. Instead, he “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.”⁶⁹ After a few minutes of silence, the officer asked other questions, which Salinas answered.⁷⁰

Salinas was later prosecuted for the murders.⁷¹ At the trial, the prosecutor characterized Salinas’s silence during the police questioning as a “very important piece of evidence.”⁷² The trial judge permitted one of the officers who interviewed Salinas to testify about Salinas’s silence when asked whether the shell casings found at the murder scene would match his father’s shotgun.⁷³ The officer told the jury that Salinas “‘did not answer’ that question.”⁷⁴ During closing argument, the prosecutor told the jury, *inter alia*, that “[a]n innocent person” would have answered the officer’s question and said, “‘What are you talking about? I didn’t do that. I wasn’t there.’”⁷⁵ But Salinas, according to the prosecutor, “‘didn’t respond that way.’”⁷⁶ Rather, “‘he wouldn’t answer that question.’”⁷⁷ Salinas did not testify at trial.⁷⁸ The jury convicted Salinas.⁷⁹

On appeal, Salinas argued that the prosecution’s use of his silence as substantive evidence of guilt violated the Fifth Amendment, while the State contended that the Fifth Amendment did not apply in these circumstances because Salinas was not in custody, and thus, not subjected to government compulsion when questioned by the police.⁸⁰ The Texas courts agreed with the State’s view of the Fifth Amendment.⁸¹ Specifically, the Texas Court of Criminal Appeals ruled that using

⁶⁸ *Id.* (citation omitted).

⁶⁹ *Id.* (citation omitted).

⁷⁰ *Id.* (citation omitted).

⁷¹ There were two murder prosecutions of Salinas. At the first trial, the prosecution conceded to the jury that there was no apparent motive for Salinas to kill the Garza brothers. Nonetheless, the prosecution told the jury that a conviction was warranted based on a ballistics report matching the shotgun given by Salinas’ father to the shell casings found at the murder scene and other evidence linking Salinas to the murders. *See* Brief of Petitioner at 4–5, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246). During the first trial, the prosecutor “placed little emphasis on Salinas’ silence during police questioning.” *Id.* at 5. Salinas did not testify at the first trial. *Id.* The jury deadlocked and a mistrial was declared. *Id.* The State then decided to retry Salinas. *Id.*

⁷² Neal Davis & Dick Deguerin, *Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of Salinas v. Texas*, *THE CHAMPION* Jan./Feb. 2014, at 16, 17.

⁷³ Brief for Petitioner, *supra* note 71, at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 7.

⁸⁰ *See* State’s Reply Brief at 7–8, *Salinas v. Texas*, 369 S.W.3d 176 (Tex. Crim. App. 2012) (PD-0570-11) (“The Fifth Amendment privilege against compulsory self-incrimination is not implicated by the admission of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. . . . The Fifth Amendment privilege against compulsory self-incrimination is irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.”) (citation omitted).

⁸¹ The Court of Appeals of Texas ruled:

prearrest, pre-Miranda silence does not violate the Fifth Amendment because Salinas's silence was not "compelled" in these circumstances.⁸² In other words, because the interview was voluntary, Salinas was not facing compulsion within the meaning of the Fifth Amendment's Self-Incrimination Clause.⁸³

The Court originally granted certiorari to decide whether a prosecutor may use "a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief."⁸⁴ The lower courts were split on this issue. Rather than decide that question, however, a majority of the Court ultimately held that a person's silence during non-custodial police questioning can be used as substantive evidence of guilt.⁸⁵ In an opinion authored by Justice Alito, three Justices concluded that Salinas did not invoke his Fifth Amendment right during his interview with police, and thus, his constitutional claim must fail.⁸⁶ The plurality found that Salinas "was required to assert the privilege in order to benefit from it."⁸⁷ Justice Alito explained: "Although 'no ritualistic formula is necessary in order to invoke the privilege,' a witness does not do so by simply standing mute."⁸⁸ Two other Justices, Scalia and Thomas, concurred in the judgment. These Justices would have rejected Salinas's Fifth Amendment claim "even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incrimination testimony."⁸⁹

Justice Alito's plurality opinion begins by explaining that the Self-Incrimination Clause of the Fifth Amendment is an exception "to the general principle that the Government has the right to everyone's testimony."⁹⁰ Thus, to enjoy the amendment's protections, a person must claim it at the time he relies on it. The justifications for requiring invocation of one's Fifth Amendment right include giving the government notice that a witness will rely on the privilege so that the government may either argue that the testimony sought is not incriminating, or

Absent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of pre-arrest, pre-Miranda silence in the State's case-in-chief. We therefore hold the Fifth Amendment has no applicability to pre-arrest, pre-Miranda silence used as substantive evidence in cases in which the defendant does not testify.

Salinas v. State, 368 S.W.3d 550, 558 (Tex. App. Houston 14th Dist. 2011).

⁸² See Salinas v. State, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012).

⁸³ The Court of Criminal Appeals of Texas court stated:

The plain language of the Fifth Amendment protects a defendant from compelled self-incrimination. In pre-arrest, pre-Miranda circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."

Id. (emphasis added) (footnotes omitted).

⁸⁴ Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013).

⁸⁵ See id. at 2176. Five Justices did not agree on a specific rationale for affirming the ruling below. However, "[w]hat is definitive about the Salinas ruling, and what did garner five votes, is that silence during noncustodial questioning may draw an adverse inference at a trial." Brandon L. Garrett, Remaining Silent after Salinas, 80 U. CHI. L. REV. DIALOGUE 116, 121 (2013).

⁸⁶ See Salinas, 133 S. Ct. at 2176.

⁸⁷ Id. at 2178.

⁸⁸ Id. (citation omitted).

⁸⁹ Id. at 2184 (Thomas, J., concurring in the judgment).

⁹⁰ Id. at 2179 (quoting Garner v. United States, 424 U.S. 648, 658 n.11 (1976)).

provide a grant of immunity for the desired testimony.⁹¹ Also, the express invocation requirement “gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness’s reasons for refusing to answer.”⁹²

Justice Alito acknowledges, however, that the invocation requirement is not a hard-and-fast rule.⁹³ There are several instances where invocation is not necessary to benefit from the amendment’s protection. First, a defendant in a criminal trial is not required to invoke the privilege.⁹⁴ In Griffin v. California,⁹⁵ a defendant on trial for murder refused to testify.⁹⁶ Griffin had been seen with the victim on the evening of her death.⁹⁷ The prosecutor commented on Griffin’s failure to testify and the trial judge told the jury that it could draw an adverse inference from his failure to testify.⁹⁸ The Court ruled that the prosecutor’s comment and the judge’s instruction violated the Fifth Amendment because it is “a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”⁹⁹ In Salinas, Justice Alito observed that the exception to the invocation rule resulting from Griffin “reflects the fact that a criminal defendant has an ‘absolute right not to testify.’”¹⁰⁰ Because a criminal defendant’s motives for remaining silent at trial are “irrelevant to his constitutional right to do so,” invocation of the privilege serves no purpose.¹⁰¹ “[N]either a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak.”¹⁰² But Justice Alito explained that the exception to the invocation requirement created by Griffin was

⁹¹ See Id. (citations omitted).

⁹² Salinas, 133 S. Ct. at 2179 (citations omitted).

⁹³ See Id.

⁹⁴ See Id.

⁹⁵ 380 U.S. 609 (1965)

⁹⁶ Griffin v. California, 380 U.S. 609, 609 (1965).

⁹⁷ Id. at 610.

⁹⁸ See id. at 610–11.

⁹⁹ Id. at 614. I agree with Professor Alschuler that Griffin’s reliance on the doctrine of unconstitutional conditions was “unnecessary.” See Alschuler, supra note 15, at 2628 n.11. As Alschuler puts it: “Rather than contend that prosecutorial comment burdens the exercise of a right to remain silent, the majority might have argued that comment on a defendant’s silence violates the Fifth Amendment, pure and simple.” Id. It is fair to acknowledge that Griffin is not held in high esteem by some of the current Justices. Indeed, “the aftermath of Griffin is a spectacularly chaotic farrago of opinions of such complexity that only one practicing attorney in a thousand can accurately summarize all of them off the top of her head.” James J. Duane, *The Extraordinary Trajectory of Griffin v. California: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 STAN. J. CRIM. & POL’Y 1, 5 (2015) (footnote omitted). Professor Duane further asserts that “most of the controlling rules in [the Court’s post-Griffin progeny] were selected and announced by the Supreme Court with no logical basis whatsoever, solely because they were the *only* way the Court could straight-arm and pretend to be able to distinguish earlier Fifth Amendment rulings that more recent members of the Court really do not like but could not honestly distinguish and have not yet formally overruled.” Id. 14

¹⁰⁰ Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (quoting Turner v. United States, 396 U.S. 398, 433 (1970) (Black, J., dissenting)).

¹⁰¹ Id.

¹⁰² Id.

unavailable to Salinas because he “had no comparable unqualified right during his interview with police[.]”¹⁰³

The Court has also recognized an exception to the invocation requirement “where governmental coercion makes . . . forfeiture of the privilege involuntary.”¹⁰⁴ In Miranda v. Arizona,¹⁰⁵ the Court found that persons under arrest are subjected to “inherently compelling pressures[.]” and thus not required to invoke the privilege.¹⁰⁶ Because of the inherent compulsion associated with custodial interrogation, Miranda mandated that police inform suspects of their rights, including their “right to remain silent,” before initiating questioning.¹⁰⁷ And although the Miranda warnings contain no promise that a suspect’s silence cannot be used against him, the Miranda Court asserted, relying on Griffin and Malloy v. Hogan,¹⁰⁸ that “it is impermissible to penalize an individual for exercising his Fifth Amendment privilege” while under arrest.¹⁰⁹ Thus, the prosecution is barred from using at a later trial “the fact that [a suspect] stood mute or claimed his privilege in the face of accusation.”¹¹⁰

Similarly, “threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted.”¹¹¹ Also, if an explicit assertion of the Fifth Amendment would incriminate, the Court has recognized exercise of the privilege through silence.¹¹² In Salinas, Justice Alito explained that all of these cases are based on the premise that a person is not required to expressly invoke his Fifth Amendment right where governmental coercion prevents him from freely choosing to admit, deny, or refuse to answer potentially incriminating questions.¹¹³ Justice Alito concluded, however, that Salinas could not rely on these cases because “his interview with police was voluntary.”¹¹⁴ According to Alito, it would have been “a simple matter” for Salinas to tell the police he was not answering the question about the shotgun on “Fifth Amendment grounds.”¹¹⁵ Because Salinas did not do so, “the prosecution’s use of his noncustodial silence did not violate the Fifth Amendment.”¹¹⁶

¹⁰³ Id. at 2179–80.

¹⁰⁴ Id. at 2180.

¹⁰⁵ 384 U.S. 436 (1966).

¹⁰⁶ Miranda v. Arizona, 384 U.S. 436, 467 (1966).

¹⁰⁷ See Id. at 444.

¹⁰⁸ See Malloy v. Hogan, 378 U.S. 1 (1964) (applying the Self-Incrimination Clause to the States).

¹⁰⁹ Miranda, 384 U.S. at 468 n.37.

¹¹⁰ Id.

¹¹¹ Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (citations omitted).

¹¹² See, e.g., id.; Leary v. United States, 395 U.S. 6, 18, 28–29 (1969) (holding that there was no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities, and that Fifth Amendment privilege was not waived because defendant did not affirmatively invoke it); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77–79 (1965) (holding that members of the Communist Party were not required to complete registration form “where response to any of the form’s questions . . . might involve [them] in the admission of a crucial element of a crime”).

¹¹³ See Salinas, 133 S. Ct. at 2180 (citation omitted).

¹¹⁴ Salinas, 133 S. Ct. at 2180.

¹¹⁵ Id.

¹¹⁶ Id.

Justice Alito was unwilling to recognize a new exception to the invocation rule for situations where a person “stands mute and thereby declines to give an answer that officials suspect would be incriminating.”¹¹⁷ Justice Alito stated that the Court’s prior precedents “foreclose such an exception, which would needlessly burden the Government’s interests in obtaining testimony and prosecuting criminal activity.”¹¹⁸ Further, the fact that law enforcement officials expect incriminating responses to their questions does not excuse a person from invoking his Fifth Amendment privilege.¹¹⁹ Thus, remaining silent in response to official questioning is not protected by the Fifth Amendment, unless the government employs coercion or its equivalent.¹²⁰

Moreover, Justice Alito believed that a new exception to the invocation requirement—remaining silent when confronted by questions police know are potentially incriminating—was inconsistent with the rule announced in Thompkins.¹²¹ As noted above, Thompkins held that remaining silent during a police interrogation, even after receiving Miranda warnings, did not invoke the privilege or require the termination of police interrogation.¹²² If the two hours and forty-five minutes of silence in Thompkins did not constitute invocation, “then surely [Salinas’] momentary silence . . . did not do so either.”¹²³ That Thompkins involved the admission of Thompkins’s statements, rather than the use of his silence as substantive evidence of guilt, did not negate the logic of Thompkins’s holding.¹²⁴ “A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.”¹²⁵

Justice Alito was not persuaded by the argument that Salinas was relying on the well-known “right to remain silent,” and that it was “unfair” to expect a layperson “un schooled in the particulars of legal doctrine to do anything more than remain silent” to count on Fifth Amendment protection in these circumstances.¹²⁶ Justice Alito’s reply is telling and worthy of emphasis: “[P]opular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be ‘compelled in any criminal case to be a witness against himself’; it does not establish an unqualified ‘right to remain silent.’”¹²⁷ A person’s right to refuse to answer questions, Justice Alito reiterated, “depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.”¹²⁸

¹¹⁷ Id. at 2180–81.

¹¹⁸ Id. at 2181.

¹¹⁹ See id.

¹²⁰ See id. (“A witness does not expressly invoke the privilege by standing mute.”). The plurality saw no constitutional merit to the distinction urged by the dissent between “silence” and “failure to invoke the privilege before making incriminating statements.” See id. at 2181 n.2.

¹²¹ See Salinas, 133 S. Ct. at 2182.

¹²² See Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010).

¹²³ Salinas, 133 S. Ct. at 2182.

¹²⁴ See id. (“[R]egardless of whether prosecutors seek to use silence or a confession that follows, the logic of [Thompkins] applies with equal force.”).

¹²⁵ Id. (footnote omitted).

¹²⁶ See Salinas, 133 S. Ct. at 2182–83.

¹²⁷ Id.

¹²⁸ Id. at 2183. (citation omitted).

Finally, Justice Alito saw no cause for concern in Salinas's argument that a ruling in favor of the government would encourage police to unfairly trick suspects into cooperating and providing confessions by telling them that their silence could be later used against them.¹²⁹ Justice Alito responded by explaining that police officers do nothing wrong "when they 'accurately stat[e] the law'" to someone in Salinas' position.¹³⁰

II. THE FIFTH AMENDMENT AFTER SALINAS

Shortly after Salinas was decided, Professor Orin Kerr predicted that the ruling "probably won't get much attention in the press," and "is likely to have a significant impact on police [interrogation] practices."¹³¹ Professor Kerr was right about the former,¹³² and I am confident, if the past is prologue, that Salinas will enhance the power and leverage police possess during non-custodial interrogation sessions.¹³³ Professor Kerr also thought that Salinas was a "fascinating case for legal

¹²⁹ See id.

¹³⁰ Id. (citation omitted).

¹³¹ Kerr, supra note 12.

¹³² The New York Times and the Los Angeles Times published a summary description of the ruling in Salinas. See Adam Liptak, A 5-4 Ruling, One of Three, Limits Silence's Protection, N.Y. TIMES, June 17, 2013, http://www.nytimes.com/2013/06/18/us/supreme-court-hands-down-three-decisions-that-are-5-to-4.html?_r=0 [perma.cc/KR6M-7SX5]; David G. Savage, In Miranda case, Supreme Court rules on the limits of silence, L.A. TIMES, June 17, 2013, <http://articles.latimes.com/2013/jun/17/nation/la-na-court-miranda-20130618> [perma.cc/Q3EQ-FJP2]. I could not find a story from The Washington Post on the announcement of Salinas, although the Post did publish an editorial by Professor David Cole that briefly mentioned (and subtly criticized) Salinas. See David Cole, Don't let DOMA fool you – the Supreme Court is restricting your rights, THE WASHINGTON POST, June 28, 2013, https://www.washingtonpost.com/opinions/dont-let-doma-fool-you--the-supreme-court-is-restricting-your-rights/2013/06/28/cd0afa1c-de85-11e2-b94a-452948b95ca8_story.html [perma.cc/P6FA-63VZ]. Finally, the New York Times published an editorial criticizing Salinas. See Editorial Board, The Court: Right and Wrong on Criminal Justice, N.Y. TIMES, June 17, 2013, <http://www.nytimes.com/2013/06/18/opinion/the-court-right-and-wrong-on-criminal-justice.html> [perma.cc/M6AE-R3U9].

The result in Salinas did not go unnoticed by the criminal defense bar. See, e.g., Arnold & Porter LLP, Advisory, Silence as Evidence: U.S. Supreme Court Holds That the Fifth Amendment Does Not Bar Using a Suspect's Silence as Evidence of Guilt, ARNOLDPORTER.COM, June 2013; Neal Davis & Dick Deguerin, supra note 72; Larry J. Ritchie & Jennifer L. Read, Silence When Questioned By Police: Evidentiary and Constitutional Confusion, THE CHAMPION July/Aug. 2014, at 44.

¹³³ As Professor Richard Leo has described, police interrogators are committed to obtaining confessions. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 11 (2008). Interrogators pursue that goal by utilizing various tactics, including convincing a suspect that he is "better off by admitting some version of guilt than by denying culpability or terminating the interrogation." Id. As I hope to demonstrate, Salinas will enhance the ability of police interrogators to achieve their goal of obtaining incriminating statements from suspects. There is also reason to think that Salinas will impact future police interrogation practices. Professor Brandon Garrett believes that Salinas "encourages police to question suspects in informal settings that not only lack clear rules, but are not documented and therefore prone to the dangers of confession contamination." Garrett, supra note 85, at 118 (footnote omitted); Id. at 118 (noting that cases like Salinas encourage police to interrogate suspects "without the protections that more and more departments have adopted precisely to prevent false and contaminated confessions").

nerds[.]”¹³⁴ I would add that Salinas is an important case for the public as well. Salinas is significant because it undercuts the popular notion that Americans possess a right to remain silent when questioned by law enforcement officials.

A. Is the Fifth Amendment Implicated During a Voluntary Police Interrogation?

Every law student enrolled in a constitutional criminal procedure course eventually learns that there are three elements to a valid Fifth Amendment claim: the challenged evidence must (1) implicate the claimant in criminal conduct, (2) contain testimonial or communicative evidence from the claimant, and (3) be the product of governmental compulsion directed against the claimant.¹³⁵ The Texas Court of Criminal Appeals concluded that Salinas’s silence was not protected by the Fifth Amendment because there was no compulsion aimed at him during the interrogation.¹³⁶ In light of this ruling, Justice Alito’s plurality opinion is noticeably vague on the Fifth Amendment’s applicability to the facts.¹³⁷ Ultimately, Justice

¹³⁴ Kerr, *supra* note 12.

¹³⁵ See Fisher v. United States, 425 U.S. 391, 408 (1976) (stating that the Fifth Amendment applies only when the accused is compelled to make a testimonial communication that is incriminating); In re N.D.N.Y. Grand Jury Subpoena, 811 F.2d 114, 116 (2d Cir. 1987) (“[T]o establish a fifth amendment violation, [the witness] must demonstrate all three elements, namely, compulsion, a testimonial communication, and the incriminat[ing] nature of that communication”).

¹³⁶ See Salinas v. State, 369 S.W.3d. 176, 179 (Tex. Crim. App. 2012) (“The plain language of the Fifth Amendment protects a defendant from compelled self-incrimination. In pre-arrest, pre-Miranda circumstances, a suspect’s interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is ‘simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.’”) (emphasis added) (footnotes omitted).

¹³⁷ Salinas argued that the compulsion needed to trigger the Fifth Amendment arose when the police asked the incriminating question about the shotgun and the ballistics test. At that moment, “Salinas had no option when questioned by police but to become a witness against himself. Regardless of whether he responded to their questions or remained silent, he was creating evidence the prosecution could use against him at trial.” See Brief of Petitioner, *supra* note 71, at 17. Thus, the defense believed that compulsion could arise even in a non-custodial setting. One commentator has noted that “the Court has never suggested that there cannot be compulsion before Miranda warnings have been issued.” Andrew J. M. Bentz, The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence, 98 VA. L. REV. 897, 929 (2012) (footnote omitted). The commentator then asserted:

[T]here is compulsion when a person stands mute in the face of police questioning. . . . [T]he government cannot argue both that the person’s silence is relevant and therefore admissible because a normal person would feel compelled to speak, but also argue that the Fifth Amendment does not apply because the person is not compelled. Such an argument is specious. A person questioned by the police is compelled to speak because of the cruel choices she faces: incriminate herself, lie, or stay silent and give the prosecutor evidence of her guilt.

Id. at 929–30 (footnote omitted). Prior to Salinas, at least one member of the Salinas plurality made clear his view that the Fifth Amendment is “a present right” and thus protects a person before coerced statements are introduced in a criminal trial and prior to the provision of Miranda warnings. See Chavez v. Martinez, 538 U.S. 760, 791 (2003) (Opinion of Kennedy, J.) (“The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits.”). Justice Kennedy went

Alito's opinion does not say that the Fifth Amendment was inapplicable during Salinas' interview with the police. Justice Alito does not make that assertion because the Court has repeatedly ruled that the Fifth Amendment applies in myriad settings that do not involve police custody or a criminal trial.¹³⁸ Indeed, it is settled law that the privilege "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal prosecutions."¹³⁹ Long before the Warren Court allegedly disfigured the meaning of the Fifth Amendment in Miranda, the Court explained that the application of the Fifth Amendment is not "dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."¹⁴⁰

The unstated premise of Justice Alito's opinion in Salinas is that the Fifth Amendment applied in theory to Salinas's interaction with police.¹⁴¹ Yet, the

on to state that the Fifth Amendment is "applicable at the time and place police use compulsion to extract a statement from a suspect." Id. at 795.

¹³⁸ Two examples should suffice: In Emspak v. United States, 349 U.S. 190, 194 (1955) and Quinn v. United States, 349 U.S. 155, 163 (1955), the Court ruled that the Fifth Amendment was properly invoked by persons who refused to answer questions asked by a congressional investigative committee. As Professor Kamisar has remarked, "not even the dissenting justices paused to consider whether a congressional investigation is 'a criminal case.'" Yale Kamisar, A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, 65 MICH L. REV. 59, 64 n.33 (1966). In McCarthy v. Arndstein, 266 U.S. 34, 40 (1924), the Court rejected the government's argument that the Fifth Amendment "does not apply in any civil proceeding." See also Susan R. Klein, No Time For Silence, 81 TEXAS L. REV. 1337, 1341 (2003) (explaining that the privilege applies in any pretrial setting where questioning may elicit an incriminating reply; "the Court has, on numerous occasions, found the Constitution violated and ordered injunctive and other relief, even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated"). For the view that as originally understood during the Framers' era the right to silence was available outside of the courthouse, see Bentz, supra note 137, at 901 ("[A]s originally understood the right to remain silent first attached, not upon the reading of a Miranda-like incantation, but when the defendant reasonably believed that her statement might be used against her at a criminal trial or lead the investigator to inculpatory evidence"); Id. at 920 (concluding that "in order for the Fifth Amendment to have meant anything at the time of its ratification, it must have meant that one had the right to remain silent outside the courtroom").

¹³⁹ Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

¹⁴⁰ Arndstein, 266 U.S. at 40.

¹⁴¹ Put differently, the Salinas plurality merely assumed for purposes of deciding the case that Salinas was protected by the Fifth Amendment during his voluntary interrogation. Of course, that assumption would carry no substantive weight if the question the Court originally granted certiorari to decide—whether the prosecution may use a defendant's assertion of the Fifth Amendment privilege during a voluntary police interview as substantive evidence of guilt—were actually addressed by the Court. I am convinced that four Justices of the current Court (Chief Justice Roberts and Justices Scalia, Thomas and Alito) agree with Justices Thomas and Scalia's conclusion in Salinas that even an express invocation of the Fifth Amendment can be used as substantive evidence of guilt. That result would be based on the following logic: Although an explicit invocation of the privilege might be considered both incriminating and testimonial, invocation of the privilege was not the product of government

plurality would not afford constitutional protection to Salinas's silence and refused to recognize his silence as invoking the privilege because "his interview with police was voluntary."¹⁴² But if this is a "voluntary" interview, where is the compulsion that triggers Fifth Amendment protection? Justice Alito's plurality opinion offers no answer to this question. As discussed previously, under the Court's "textual" interpretation of the privilege, a showing of government coercion is necessary to trigger Fifth Amendment protection. Because it was undisputed that Salinas agreed to come to the police station for questioning and there was no evidence that police subjected Salinas to coercion or its equivalent, it would seem that the Fifth Amendment had no application to this voluntary interview. After all, "[i]t is difficult to see how a voluntary interview could 'compel' [a person] to speak."¹⁴³ As Justice Stevens remarked about a similar context, "[w]hen a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment."¹⁴⁴ Put simply, because "the ingredient of personal compulsion against [Salinas] is lacking[,]" the Fifth Amendment is irrelevant.¹⁴⁵

If the interview was "voluntary," then the Fifth Amendment did not apply and Salinas's silence was not protected by the Constitution. On the other hand, if the Fifth Amendment applies to this setting like it applies to other formal or informal proceedings, as the Court's precedents establish and as the plurality assumes without saying so, why was Salinas's silence not protected? Having it both ways creates confusion for both police and judges, not to mention causes uncertainty in the minds of citizens confronted with police questioning. I suspect Justice Kennedy, a member of the Salinas plurality, may be partially responsible for this dilemma. During oral argument, Justice Kennedy asked counsel for Salinas whether a person can invoke the Fifth Amendment before receiving Miranda warnings, indicating his understanding that a person could do so.¹⁴⁶ Counsel replied that there were two separate rights being discussed—the "prophylactic right under Miranda to have police cease asking you questions[,]" which "has to be expressly invoked[,]" and the

compulsion. Justice Kennedy's position on this issue, as is often the case, is the crucial vote. As will be described below, I suspect that Justice Kennedy believes that someone agreeing to attend a voluntary police interrogation is still protected by the Fifth Amendment, notwithstanding the voluntary nature of the interview. See Martinez, 538 U.S. at 791 (Opinion of Kennedy, J.) ("The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future."). Indeed, Justice Kennedy has stated that "the exercise of the privilege depends on what the witness reasonably believes will be the future use of a statement [or invocation of the privilege]." Id. If that reasoning is applied to someone in Salinas's position, then Salinas was entitled to Fifth Amendment protection during his voluntary interrogation by the police because someone in his predicament could have reasonably believed that an incriminating statement could have been used in a later prosecution.

¹⁴² Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013).

¹⁴³ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (ruling that an adverse inference is permissible from silence in a clemency proceeding, which is a non-judicial post-conviction process and not part of the criminal case).

¹⁴⁴ Jenkins v. Anderson, 447 U.S. 231, 243–44 (1980) (Stevens, J., concurring in the judgment) (footnote omitted).

¹⁴⁵ Couch v. United States, 409 U.S. 322, 329 (1973).

¹⁴⁶ See Transcript of Oral Argument at 11, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246).

“genuine Fifth Amendment right to remain silent[,]” which counsel claimed did not have to be invoked.¹⁴⁷ Justice Kennedy then replied:

Well, but it can be invoked, and that might make a big difference. In your -- in your brief, you acknowledge that most citizens know they have a Fifth Amendment right. . . . And so if there's -- if questions are somehow troublesome, you say, I'm invoking my Fifth Amendment right; go away, even if you're not in custody, even if Miranda doesn't apply. . . . And your client didn't do that here.¹⁴⁸

Eleven years earlier in United States v. Drayton,¹⁴⁹ which addressed whether police must inform persons of their right to refuse to cooperate with police during consensual encounters on a bus,¹⁵⁰ Justice Kennedy asked the government's counsel the following during oral argument:

Would it be appropriate in your view for this Court to write an opinion in which we say that citizens have certain obligations to know their rights and to assert their rights? That's what makes for a strong democracy. . . . And people have a certain obligation to assert their rights. If they don't want to be searched, they say I don't want to be searched. Should we write that in an opinion?¹⁵¹

When he questioned the defendants' counsel in Drayton, Kennedy asked, “[a]n American citizen has to protect his rights once in a while. That's -- that's a very bad thing?”¹⁵² When defense counsel replied that requiring citizens to assert their rights improperly shifts the government's burden to prove that the encounter was consensual and that the consent search was voluntary, Justice Kennedy stated: “The question is whether or not the Government also has the burden to educate citizens as to their rights in every encounter, whether or not there isn't some obligation on the part of the citizen to know and to exercise his rights or her rights.”¹⁵³ A few moments later, Justice Kennedy told defense counsel:

It -- it seems to me this world you're creating for us is -- is not strong for the Constitution. It seems to me a strong world is when officers respect people's rights and -- and people know what their rights are and -- and assert their rights. [And say to the police,] I don't want to be searched. . . . I don't want to be searched. Leave me alone.¹⁵⁴

¹⁴⁷ Id. at 11–12.

¹⁴⁸ Id. at 12–13.

¹⁴⁹ 536 U.S. 194 (2002).

¹⁵⁰ United States v. Drayton, 536 U.S. 194, 197 (2002). In an opinion authored by Justice Kennedy, the Court held that police are not required to inform bus passengers of their right to refuse to cooperate with police asking questions or seeking consent to search their luggage. See id. at 203–04.

¹⁵¹ Transcript of Oral Argument at 10, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631).

¹⁵² Id. at 34.

¹⁵³ Id. at 35.

¹⁵⁴ Id. at 44.

Later, during the oral argument in Salinas, the assistant to the Solicitor General, Ginger Anders, supporting Texas's position, invoked Drayton and Justice Kennedy's belief that citizens should know and assert their rights (without explicitly mentioning Justice Kennedy's name). Ms. Anders told the Court:

[T]he Court has repeatedly recognized that, when a citizen is voluntarily interacting with police and there -- there is no coercion because it's not a custodial situation, we expect that person to be treated as fully capable of deciding whether or not to assert his rights. This is what the Court said in United States v. Drayton in an analogous context, which is whether someone has voluntarily consented to a search. The person, even if he is not told that -- that he can refuse to -- to consent, we still assume that he knew that he could refuse to consent, and, therefore, it was a voluntary choice.

And I think you can draw the same inference here, that, when someone -- we -- I think we all agree that most people know -- people know what their Fifth Amendment rights are, and, therefore, they can assert them when they don't face any coercive pressure.¹⁵⁵

I suspect that for Justice Kennedy, Salinas was a flashback to Drayton. Although Justice Kennedy certainly knows, as he explained in another case, that the Fifth Amendment is directed against governmental compulsion "and the Court has insisted . . . 'that the witness not be compelled to give self-incriminating testimony[.]'"¹⁵⁶ Justice Kennedy and the other members of the Salinas plurality did not rest their reasoning on the inapplicability of the Fifth Amendment to this setting. There were too many precedents opposing that conclusion, and Justice Kennedy is no fan of overruling the Court's precedents. Without explaining why the Fifth Amendment applies to a voluntary police interrogation, it was easier for the plurality to announce that Salinas had not properly asserted his rights.

But when the Salinas plurality concluded that silence is not sufficient to invoke the Fifth Amendment during a voluntary police interrogation, three members of the Court were doing more than requiring citizens to understand and assert their rights, as Justice Kennedy expects citizens to know and do, when interacting with police. The plurality was also drawing a fine, formalistic line that few citizens are likely to recognize. Counsel for Texas conceded that if Salinas had told the police "I plead the Fifth" or "I don't want to talk any more," a prosecutor could not use such statements as evidence of guilt because it would violate the Fifth Amendment.¹⁵⁷ Counsel saw a distinction between Salinas "just not answering" or his mere silence, and Salinas saying, "I don't want to answer."¹⁵⁸ Constructing a constitutional

¹⁵⁵ Transcript of Oral Argument, supra note 146, at 49–50.

¹⁵⁶ McKune v. Lile, 536 U.S. 24, 35–36 (2002) (emphasis added) (citation omitted).

¹⁵⁷ Transcript of Oral Argument, supra note 146, at 34–35. Of course, this argument was a bit of shift from the State's position in the Texas courts where it argued that the Fifth Amendment had no application because Salinas voluntarily came to the police interrogation. See supra notes 80–83 and accompanying text.

¹⁵⁸ Id. at 34–35:

Justice Scalia: That's the line you're drawing, between his -- just not answering and his saying, I don't want to answer?

distinction between a person’s silence and a person saying “I don’t want to talk any more,” however, is not a principled distinction. Justice Scalia did not seem persuaded by the distinction. Scalia asked: “Doesn’t the mere silence suggest ‘I don’t want to talk any more?’”¹⁵⁹ Counsel conceded “[i]t might.”¹⁶⁰

Without admitting it, the Salinas plurality appeared to accept the principle that the Fifth Amendment was applicable to the interrogation of Salinas, notwithstanding its “voluntary” nature. And Justice Kennedy and the Salinas plurality appeared willing to accept the notion that most people know their Fifth Amendment rights. For the public, the Fifth Amendment means that an individual has a right to remain silent when confronted with police interrogation. But the Salinas plurality expects people to know more, and, more importantly, expects people to tell police that they are asserting the right expressly embodied in the Constitution—the Fifth Amendment.¹⁶¹ That is a lot to expect, even for Americans who are justly proud of their constitutional freedoms, especially when police control the atmosphere and surroundings, and can manipulate the dialogue of a voluntary interrogation session.¹⁶²

B. The Fifth Amendment “Does Not Establish An Unqualified ‘Right to Remain Silent’”

When Salinas argued that using his silence as substantive evidence of guilt was “terribly unfair and terribly misleading” because most Americans know they have a right to remain silent,¹⁶³ the plurality responded by citing the text of the amendment—“no person . . . shall . . . be ‘compelled in any criminal case to be a witness against himself.’”¹⁶⁴ That text, the plurality opined, “does not establish an unqualified ‘right to remain silent.’”¹⁶⁵ The plurality’s reliance on constitutional text is a bit curious. If the amendment’s text, read literally, is determinative, then Justice

[Counsel for Texas]: Correct, if I understand your question.

Justice Scalia: The latter can’t be introduce[d] to the jury, but the former can?

[Counsel for Texas]: Correct.

¹⁵⁹ Transcript for Oral Argument, supra note 146, at 35.

¹⁶⁰ Id. at 3.

¹⁶¹ Earlier in his opinion, Justice Alito stated that “[a]lthough ‘no ritualistic formula is necessary to invoke the privilege,’ a witness does not do so by simply standing mute.” Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (citation omitted). Later, Justice Alito dismissed the concern that an express invocation requirement would cause confusion and line-drawing problems regarding what a person must say to invoke the privilege with the ipse dixit that “our cases have long required that a witness assert the privilege to subsequently benefit from it.” Id. at 2183.

¹⁶² As Professor Kerr has noted:

[A]s a practical matter, it seems unlikely that a person questioned by police officer outside of custody is going to formally assert his Fifth Amendment right. Most people are not lawyers, and they don’t think in terms of legal formalities. And outside of custody, the police don’t have to give warnings or talk about the law. They don’t have to mention the right to remain silent and ask a suspect to waive it, knowing that the suspect can later change his mind. They don’t need to bring it up at all. And that means that they can construct the conversation in the kind of way that makes it extraordinarily awkward for a person to play lawyer and assert his Fifth Amendment privilege.

Kerr, supra note 12 .

¹⁶³ Transcript of oral argument, supra note 146, at 27.

¹⁶⁴ Salinas, 133 S. Ct. at 2182–83 (quoting U.S. CONST. amend. V.).

¹⁶⁵ Id. at 2183.

Alito is certainly correct that the Fifth Amendment does not grant a right to remain silent. Indeed, a literal interpretation of the text would mean that the amendment is implicated only when the government compels a person to testify against himself in a criminal case.¹⁶⁶ But the Court disavowed a literal reading of the text over one hundred years ago, when the government claimed that a grand jury proceeding is not a “criminal case” within the meaning of the Fifth Amendment. In Counselman v. Hitchcock,¹⁶⁷ the Court explained that the protection afforded by the Fifth Amendment extended beyond its literal words.¹⁶⁸ The goal of the amendment “was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.”¹⁶⁹

It is not obvious why the text of the amendment resolves the issue raised in Salinas. After referencing the text, Justice Alito notes that a person’s constitutional right to refuse to answer questions “depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.”¹⁷⁰ The “notice” argument is equally curious. There was no need to provide

¹⁶⁶ As one scholar has recognized, a literal reading of the Fifth Amendment would allow the prosecution to introduce “evidence obtained prior to trial by police or judicial coercion” because the words of the amendment “say nothing about evidence[.]” DERSHOWITZ, supra note 11, at 29 (emphasis added). A strict reading of the text:

[P]rohibits the government only from compelling a person to testify—that’s what ‘a witness’ does—‘against himself’ in ‘any criminal case.’ Its words do not prohibit the police from testifying about—or playing a recording of—what the defendant said when he was merely a suspect and not yet a witness, after the police compelled him to speak but before the criminal trial began. Nor does it prohibit a clerk from reading the transcript of testimony the person was compelled by a judge to give in a noncriminal case. So long as the defendant himself is not called as an actual witness by the prosecution and compelled to give live testimony against himself at the criminal trial itself, the text of the Constitution—literally read . . . is not violated.

Id. at 29–30 (emphasis added).

¹⁶⁷ 142 U.S. 547 (1892).

¹⁶⁸ Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). But cf. Kastigar v. United States, 406 U.S. 441, 453–54 (1972) (upholding a federal immunity statute that granted “use and derivative use” immunity, but not “transactional” immunity, and explaining that “the conceptual basis of Counselman” is consistent with the holding in Kastigar, but noting that some of the broad language from Counselman that suggested that an immunity statute must grant full transactional immunity in order to be coextensive with the scope of the Fifth Amendment privilege was unnecessary to the Counselman’s holding).

¹⁶⁹ Id. Even Justice White, who issued a strong dissent in Miranda acknowledged, a year after Miranda was decided, that the text of the Fifth Amendment was not determinative of the result in Miranda. See

YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 669 (14th ed. 2015) (quoting Justice Byron R. White, Address before the Conference of Chief Justices: Recent Developments in Criminal Law (Aug. 3, 1967)) (“Is the arrested suspect, alone with police in the station house, being ‘compelled’ to incriminate himself when he is interrogated without proper warnings? . . . No ready answer to [the question raised in] Miranda can be found by reference to the text of the Constitution alone. The answer lies in the purpose and history of the self-incrimination clause and in our accumulated experience.”).

¹⁷⁰ Salinas, 133 S. Ct. at 2183 (citation omitted).

governmental officials “notice” that Salinas was relying on the Fifth Amendment. The police knew that Salinas’s answer to the question regarding the ballistics test of the shotgun would be incriminating; that is why they asked the question. Nor was this a context where a prosecutor would seek a grant of immunity for incriminating testimony. The investigation of the murders was still ongoing, and there was no judge in the police station to evaluate the merits of Salinas’ Fifth Amendment claim.

While the Salinas plurality may have thought that it was self-evident that the Fifth Amendment does not grant “an unqualified ‘right to remain silent,’”¹⁷¹ the plurality’s description of the protection afforded by the amendment raises some other questions. If the plurality is right that the amendment’s text does not grant “an unqualified ‘right to remain silent,’”¹⁷² why would an express invocation of the Fifth Amendment matter? Although the plurality implies that an express invocation would make a constitutional difference, it never explains why. Interestingly, both Texas and the Solicitor General, participating as amicus curiae supporting Texas, conceded that an express invocation might change the result. Texas’s brief acknowledged that “introduction into evidence of an affirmative assertion of the privilege against self-incrimination may raise due process concerns[.]”¹⁷³ The Solicitor General’s brief went further when it noted that Salinas “could have invoked his Fifth Amendment right not to answer the question without being subject to any penalty (including the use of that invocation at trial), but he chose to be silent instead.”¹⁷⁴ And the Solicitor General added that someone like Salinas could invoke the privilege “by expressly declining to be questioned in the first place[.]” noting that lower courts “have generally treated an explicit, blanket refusal as sufficient to invoke the Fifth Amendment.”¹⁷⁵ Interestingly, the Salinas plurality does not acknowledge these concessions.

As a textual matter, it is not obvious why express invocation would protect Salinas. An affirmative assertion of the Fifth Amendment’s words or a statement from Salinas that he is “pleading the Fifth” would not alter the “voluntary” nature of the interrogation.¹⁷⁶ To be sure, an express invocation signals that the person undergoing police interrogation no longer wishes to talk with police. Thus, if police persist in questioning after someone affirmatively pleads the Fifth, a strong argument can be made that further questioning after pleading the Fifth amounted to coercion and thus triggered the amendment’s requirement of government compulsion. If that scenario occurred, the government should not be free to use or penalize the person’s subsequent silence or refusal to answer after pleading the Fifth.

¹⁷¹ Salinas, 133 S. Ct. at 2183 (citation omitted).

¹⁷² Id.

¹⁷³ Brief of Respondent at 35, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246) (emphasis added). In the Texas courts, the State took the position that a suspect has no Fifth Amendment protection during a non-custodial interrogation with the police. See supra note 80 and accompanying text.

¹⁷⁴ Brief for the United States as Amicus Curiae Supporting Respondent at 9, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246).

¹⁷⁵ Id. at 28 n.5 (citation omitted).

¹⁷⁶ Cf. Kerr, supra note 12 (“If the defendant doesn’t actually have a Fifth Amendment right not to answer a question because an answer would not be ‘compelled’ as it is understood in Fifth Amendment caselaw, what difference does it make if the defendant asserts his Fifth Amendment privilege? . . . What are courts supposed to do when a suspect asserts a privilege he doesn’t actually have? And what are the police supposed to do when that happens?”).

But an express invocation, by itself, does not transform what was a “voluntary” setting into a coercive setting. Put another way, when police are seeking incriminating responses from a suspect during a voluntary interview, what is the neutral principle that distinguishes mere silence from a verbal statement “I don’t want to speak any more” or refusing to attend a police invitation to talk about the investigation at the police station? Consulting the amendment’s text does not provide an answer, and asserting that the amendment does not provide “an unqualified ‘right to silence’”¹⁷⁷ does not help either.

Furthermore, Justice Alito asserts Salinas’s situation is distinguishable from Griffin because Salinas “had no comparable unqualified right during his interview with police[.]”¹⁷⁸ What does this statement mean? Declaring that Salinas did not enjoy a “comparable unqualified right” appears to contradict what was implicit in the plurality’s opinion—that Salinas would have been fully protected by the Fifth Amendment had he expressly invoked his right. Perhaps this statement simply means that, unlike Griffin, who was not required to take the witness stand at his criminal prosecution and plead the Fifth, someone in Salinas’s situation has less Fifth Amendment protection because he is required to expressly invoke his Fifth Amendment rights. But why does someone in Griffin’s position possess greater Fifth Amendment protection than Salinas? The text of the amendment does not support this legal conclusion. If the text is determinative, then Salinas is not entitled to Fifth Amendment protection because there was no police compulsion during his voluntary questioning.

Finally, why does a person, who has neither been indicted, nor arrested, nor temporarily detained by police, not have the same unqualified Fifth Amendment right as someone in Griffin’s predicament? A person who initially agrees to speak with police is certainly free to change his mind about cooperating. That person, albeit not in custody nor subject to government compulsion, is free to decline answering an incriminating question from the police. To paraphrase from Justice Alito’s opinion, the person has “an ‘absolute right not to [answer a police question],” and his “reasons for remaining silent at [the police station] are irrelevant to his constitutional right to do so[.]”¹⁷⁹

Indeed, why does someone in Salinas’s position not enjoy the same Fifth Amendment protection as someone under arrest?¹⁸⁰ The fact that an arrestee received Miranda warnings should not diminish the Fifth Amendment rights of someone who the police have not arrested and who chooses to remain silent when confronted with

¹⁷⁷ Salinas v. Texas 133 S. Ct. 2174, 2183 (2013) (citation omitted).

¹⁷⁸ Id. at 2179–80.

¹⁷⁹ See Salinas, 133 S. Ct. at 2179 (citations omitted).

¹⁸⁰ If an arrestee remains silent during a police interrogation, his silence cannot be used as evidence of guilt at a later trial. See Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1996) (“[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.”) (citations omitted). Even Justice Kennedy appears to accept this principle. In Berghuis v. Thompkins, Justice Kennedy stated: “If [a suspect under arrest] wanted to remain silent, he could have said nothing in response to [police] questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation.” Berghuis v. Thompkins, 560 U.S. 370, 386 (2010).

an incriminating question.¹⁸¹ In other words, why does the presumptively innocent person not enjoy the same Fifth Amendment right as someone being prosecuted for a crime or in police custody?¹⁸²

The text of the amendment does not support distinguishing between someone facing criminal prosecution or placed under arrest, on the one hand, and someone in Salinas's position, on the other hand. A plain-meaning reading of the Fifth Amendment means the government cannot require a person to be a witness against himself in any criminal case.¹⁸³ Unlike the Fourth Amendment, which protects people from unreasonable governmental searches and seizures and often requires the judiciary to balance an individual's interests against the government's interests in effective law enforcement, the text of the Fifth Amendment leaves no room for judicial balancing of competing interests.¹⁸⁴ Yet, that is exactly what Justice Alito did when he declared that a person's "constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim."¹⁸⁵ In any event, the validity or "merits" of Salinas's Fifth Amendment claim were strong. Police asked him an incriminating question that called for a testimonial response. At that point, Salinas had essentially two choices: answer the question or remain silent. Either way, he was providing testimonial evidence the prosecution could use against him at trial. Salinas remained silent, which indicated his unwillingness to answer the question.

The Solicitor General disagreed with this analysis. He argued that Salinas actually had three choices: "answering, invoking the Fifth Amendment privilege, or simply remaining mute. The latter two courses are distinct."¹⁸⁶ But how was Salinas supposed to know of his Fifth Amendment rights, let alone know that invoking the Fifth Amendment was necessary to protect his rights in these circumstances, if he had never been informed about his rights by police nor told that invocation was

¹⁸¹ See *Jenkins v. Anderson*, 447 U.S. 231, 247 n.1 (1980) (Marshall, J., dissenting) ("I have no doubt that if an accused were interrogated in police custody without receiving the *Miranda* warnings and remained silent, that silence would be inadmissible despite the lack of warnings.").

¹⁸² While Justice Alito distinguished Salinas's situation from the arrestee who remains silent because the arrestee is subjected to the inherent compulsion of police custody, Salinas 133 S.Ct. at ___, one scholar has described the plurality's distinction as "absurd."

[T]hat distinction is absurd in this context, because footnote 37 in *Miranda* was *only* talking about the rare suspect who does *not* submit to police pressure to talk, and has the wisdom and temerity to remain silent; it is ludicrous to suggest that she somehow requires (much less deserves) more legal protection or a more generous legal standard than a suspect like Mr. Salinas, who remained mute in a noncustodial interrogation, merely because she was subjected to greater coercive pressure *that she successfully resisted!* But Justice Alito had no choice but to say this, because there was no other way to straight-arm footnote 37 from *Miranda*.

Duane, *supra* note 99 at 10, n 52.

¹⁸³ See note 57 *supra*.

¹⁸⁴ See *Braswell v. United States*, 487 U.S. at 129 (Kennedy, J., dissenting) (explaining that "the text of the Fifth Amendment does not authorize exceptions premised on [the government's interest in law enforcement]").

¹⁸⁵ *Salinas*, 133 S. Ct. at 2183 (citation omitted).

¹⁸⁶ Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 174, at 22.

necessary, prior to questioning?¹⁸⁷ What most Americans know is that they have a right to remain silent when confronted with incriminating questions. They are unfamiliar with the text of the Fifth Amendment, and certainly are unaware of an invocation requirement to protect their rights. The Solicitor General conceded that “expressly declining to be questioned in the first place” was the equivalent of invoking the privilege during questioning.¹⁸⁸ But what is the difference between silence and “declining to be questioned in the first place”? The fact that the person answers one or a few questions? The Solicitor General did not take that position because the Court has permitted persons to selectively exercise their Fifth Amendment rights in other contexts,¹⁸⁹ including grand jury proceedings,¹⁹⁰ congressional hearings¹⁹¹ and custodial interrogation.¹⁹² There is no neutral reason to treat voluntary police interviews differently.

Moreover, in “declining to be questioned in the first place,” does a person have to utter the words “the Fifth Amendment” or its text? If Salinas had risen from his chair and moved toward the door after the first question about the murders, would that have been enough? What if he said “I need to speak with my lawyer before answering that question”? Is that sufficient for invocation? While it may be true that after being provided Miranda warnings, “[a] man need not have the understanding of a lawyer to waive one[.]” and that the Fifth Amendment is not offended when the police exploit a suspect’s ignorance or stupidity during an interrogation,¹⁹³ it is an entirely different matter to require a person to not only know that he can remain silent when confronted with an incriminating question from the police, but also know the

¹⁸⁷ Cf. Miranda, 384 U.S. at 467–68 (“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.”).

¹⁸⁸ See Brief for the United States as Amicus Curiae Supporting Respondent, supra note 174, at 28 n.5 (“In addition to invoking the privilege during questioning, a suspect could do so by expressly declining to be questioned in the first place. Courts have generally treated an explicit, blanket refusal as sufficient to invoke the Fifth Amendment.”) (citation omitted).

¹⁸⁹ See Reply Brief of Petitioner at 22 n.4, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246) (noting that the “Solicitor General does not go so far as to argue that once a person begins participating in a noncustodial interview, he may not invoke the Fifth Amendment to refuse to answer selected questions”).

¹⁹⁰ See, e.g., Hoffman v. United States, 341 U.S. 479, 481, 486–88 (1951).

¹⁹¹ See, e.g., Quinn v. United States, 349 U.S. 155, 158 & n.8 (1955).

¹⁹² See, e.g., Miranda, 384 U.S. at 445 (“The mere fact that [a person] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.”).

¹⁹³ State v. McKnight, 243 A.2d 240, 251 (N.J. 1968). See also Minnick v. Mississippi, 498 U.S. 146, 166–67 (1990) (Scalia, J., dissenting) (“[E]ven if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected.”); Gerald M. Caplan, Questioning Miranda, 38 VAND. L. REV. 1417, 1457 (1985) (“But guilt is personal. That another, equally guilty, person got away with murder because of some fortuitous factor—he was more experienced in dealing with the police, he had a poorly developed sense of guilt, he had a smart lawyer, he knew his rights—or even because of discrimination, does not make the more vulnerable murderer less guilty. To hold otherwise is to confuse justice with equality.”) (footnote omitted).

intricacies of the Court's Fifth Amendment doctrine. Although Professor James Tomkovicz was discussing what was necessary to show a valid waiver of one's Fifth Amendment rights, what he stated about waiving one's Fifth Amendment rights is apropos here: "The policies of the [F]ifth [A]mendment privilege do not demand rationality, intelligence, or knowledge, but only a voluntary choice not to remain silent."¹⁹⁴ Salinas remained silent when asked an incriminating question. That action was consistent with the "policies of the [F]ifth [A]mendment" and should have been sufficient to ensure Fifth Amendment protection.

Furthermore, if the Fifth Amendment does not grant "an unqualified 'right to remain silent'"¹⁹⁵ during a voluntary interrogation, there is no principled reason to confine that judgment to the police station. Governmental officials and police officers question people in a variety of settings. One prominent example that impacts many innocent people is when police, without suspicion of criminal activity, interrogate motorists stopped for ordinary traffic offenses about drugs, guns, and other criminal activity unrelated to the traffic stop. Without addressing the issue directly, the Court recently gave its imprimatur to such activity.¹⁹⁶ If Salinas did not have "an unqualified 'right to remain silent'" during his interview with police, certainly a motorist stopped for a traffic offense lacks a similar right. A unanimous Court in Berkemer v. McCarty,¹⁹⁷ ruled that motorists stopped for traffic offenses are not entitled to Miranda warnings.¹⁹⁸ The Court explained that traffic stops, like other investigative detentions, are constitutionally distinct from questioning at the police station.¹⁹⁹ Although temporarily detained and subjected to police interrogation, a motorist stopped for a traffic offense is not under arrest or its functional equivalent, and thus not subjected to the coercion associated with custodial interrogation that requires informing an arrestee of his Fifth Amendment rights.²⁰⁰

If a prosecutor is free to use Salinas's silence as evidence of guilt, a police officer should be equally free to penalize or draw an adverse inference from a motorist's silence or refusal to cooperate.²⁰¹ Just as Salinas did not possess "an unqualified 'right to silence'"²⁰² when confronted with police questions, the motorist stopped for a traffic offense has no absolute right to silence either. Of course, when

¹⁹⁴ James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975, 1049 (1986) (footnote omitted).

¹⁹⁵ Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013).

¹⁹⁶ See Rodriguez v. United States, No. 13-9972, slip op. at 5 (Apr. 21, 2015) (explaining that the Fourth Amendment tolerates "certain unrelated investigations that [do] not lengthen the roadside detention"). For a discussion and critique of this phenomenon, see Tracey Maclin, Anthony Amsterdam's Perspectives On The Fourth Amendment, and What It Teaches About the Good and Bad in Rodriguez v. United States, MINN. L. REV. (forthcoming 2016).

¹⁹⁷ 468 U.S. 420 (1984).

¹⁹⁸ Berkemer v. McCarty, 468 U.S. 420, 435–42 (1984).

¹⁹⁹ See id. at 437–38.

²⁰⁰ See id. at 437–38, 440.

²⁰¹ Some police do draw negative inferences from a motorist's refusal to cooperate. See Gary Webb, DWB [Driving While Black], 131 ESQUIRE, no. 4, Apr. 1999, at 125 (explaining that California Highway Patrol officers view a driver's refusal to consent to a search of their vehicle as an indication of drug trafficking and that the vehicle contains illegal drugs).

²⁰² Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013).

interpreting the Fourth Amendment, the Court has suggested that persons, whether involved with consensual encounters with police, or subject to Terry investigative detentions, do enjoy an absolute right of silence, or at least a right to refuse to cooperate with police. Florida v. Bostick²⁰³ explained that a person not subject to detention “may decline an officer’s request [for identification or to permit a consent search] without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”²⁰⁴ Bostick’s pronouncement was a reaffirmation of the Court’s admonition in Florida v. Royer²⁰⁵ that a person approached by police:

[N]eed not answer any question put to him; indeed, he may decline to listen to the questions at all and he may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.²⁰⁶

Similarly, when police are permitted to detain persons for criminal investigation, the Court has been adamant that suspicious persons have a right to refuse to respond to police questions, and police cannot use that evidence of refusal to justify longer detentions or an arrest.²⁰⁷

²⁰³ 501 U.S. 429 (1991).

²⁰⁴ Florida v. Bostick, 501 U.S. 429, 437 (1991) (citation omitted). Even the Solicitor General’s brief in Bostick recognized that “it is clear that law enforcement officers may draw no [adverse] inference justifying a search or seizure from a refusal to cooperate.” Brief for the United States as Amicus Curiae Supporting Petitioner at 25, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89-1717) (cited approvingly in Bostick, 501 U.S. at 437).

²⁰⁵ 460 U.S. 491 (1983).

²⁰⁶ Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) (citations omitted). See also Rachel Karen Laser, Unreasonable Suspicion: Relying on Refusals to Support Terry Stops, 62 U. CHI. L. REV. 1161, 1161 (1995) (explaining that the Court “has repeatedly held that a person’s refusal to consent to a police request during a noncoercive police encounter cannot, by itself, provide the basis for a stop or search[.]” but acknowledging that the Court has not decided “whether a refusal to consent to a police request can constitute a part of the basis for [an investigative] stop”) (footnote omitted).

²⁰⁷ See Berkemer v. McCarty, 468 U.S. 420, 439–40 (1984) (“[T]he detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.”) (footnote omitted); Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (“Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest[.]”). Some have argued that the “most troubling [aspect] about Salinas is that it places into the hands of law enforcement officials the ability to make judgments and draw inferences from silence. The mere shock of hearing accusatory questions from a police officer or federal agent could leave a lay person stunned and wordless.” Silence as Evidence, *supra* note 132, at 5 (emphasis added). Notwithstanding what the Court has said about the right of persons to refuse to cooperate with police during consensual encounters or investigative detentions, Professor Alschuler notes that the Court has not ruled on whether a refusal to cooperate can give rise to an adverse inference of guilt and be considered along with other evidence to prove a defendant’s guilt at trial. See E-mail from Albert W. Alschuler, Professor of Law, Northwestern Law and The University of Chicago Law School, to Tracey Maclin, Professor of Law, Boston University School of Law (Jan. 6, 2016, 01:15 EST) (on file with author).

To be sure, these statements suggesting that persons have an unqualified right to silence (or right to refuse to cooperate) come from the Court's interpretation of the Fourth Amendment, whereas Salinas addresses the meaning of the Fifth Amendment. Thus, one could distinguish such acknowledgements of a right to silence by noting that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."²⁰⁸ That "is true but supremely unhelpful."²⁰⁹

C. "Police Officers 'have done nothing wrong' when they 'accurately stat[e] the law.'"

During the oral argument in Salinas, Justice Sotomayor queried counsel for Texas about the defense concern that if Salinas's silence was not protected, in future cases the police would tell people who remain silent during voluntary interrogation that their silence could be used against them.²¹⁰ Counsel replied: "I could perceive then, Your Honor, the -- the trial court upholding a claim by the defendant that he was coerced at that point[.]"²¹¹ Why would a prosecutor concede that it is coercive to inform a suspect his silence can be used against him? Probably because even prosecutors acknowledge the pressure on a suspect to talk or cooperate with the police after being told that their silence could be used against them.

Imagine a person, without formal legal training, who works for a corporation or business is being "interviewed" by the police or federal officers. Perhaps the topic of the interview is a civil Securities and Exchange Commission investigation into accounting fraud.²¹² An officer asks a potentially incriminating question. The person thinks, "I probably should not answer that question, at least not without the advice of counsel." So he remains silent. The officer then tells the person that his silence can be used against him in a future prosecution.

²⁰⁸ Dickerson v. United States, 530 U.S. 428, 441 (2000).

²⁰⁹ Id. at 455 (Scalia, J., dissenting).

²¹⁰ See Transcript of Oral Argument, supra note 146, at 45–46.

²¹¹ Id. at 46. A few moments later, counsel stated:

So when an officer says -- you know, I'm going to hold -- hold against you your failure to answer a question -- you know, that can be something where the court might utilize as -- as -- for some sort of penalties flown [sic]. . . . However, if an officer says, I'm necessarily going to use this against you, the adverse consequence may become more -- more tangible at that point. That isn't the facts of this particular case.

Id. at 46–47.

²¹² Sometimes a person may think he is being questioned about a civil matter and may not realize that he is the target of a criminal investigation. Criminal defense lawyers have noted that prosecutors are "increasingly using so-called parallel investigations to insert criminal investigators into what their targets thought were civil proceedings." See James B. Stewart, A Dagnet at Dewey & LeBoeuf Snares a Minnow, N.Y. TIMES, Mar. 14, 2014, <http://www.nytimes.com/2014/03/15/business/an-underling-among-the-officials-accused-of-fraud-at-dewey.html> [perma.cc/W3R3-VECB] (describing the indictment of a former low-level employee at a major New York City law firm for accounting fraud). See also Silence as Evidence, supra note 132, at 4 ("Accordingly, after Salinas, potential targets of white collar investigations should be especially sensitive to the risks of cooperating with any governmental inquiry without counsel, because the prospect of criminal charges is not always immediately apparent, particularly where liability rests on a complex statutory or regulatory analysis.") (emphasis added).

What is he going to do? His first reaction is probably confusion and then fear. Is this person going to have the legal sophistication to invoke the Fifth Amendment? Indeed, why would a person in this situation bother invoking the Fifth Amendment after being told by law enforcement officials that his silence can be used against him? After all, most laymen, and many lawyers, believe that the right to remain silent is just another way of referring to the Fifth Amendment. And even assuming that the person understands the difference between the right to remain silent and the substantive protections afforded by the Fifth Amendment, why would that person not think to himself: “If my silence can be used against me, I guess that means invoking the Fifth Amendment can be used against me as well.” At this point, the person will probably look for an “exit strategy”—how can I get out of this predicament? Perhaps the person will consider leaving the interrogation. But if his silence can be used against him, as the police have told him, then leaving might be used against him as well. Confused, and likely intimidated, the person is now vulnerable to the illusion created by the police that he “is better off by admitting some version of guilt than by denying culpability or terminating the interrogation.”²¹³

Despite the prosecutor’s concession that police telling a suspect his silence can be used against him at a later trial is likely coercive, the Salinas plurality saw things differently. The plurality rejected the argument that an express invocation requirement would encourage police to illegally trick suspects into cooperating by telling them that their silence could be used in a future prosecution.²¹⁴ The plurality explained that police officers do nothing wrong when they “accurately stat[e] the law” to someone in Salinas’s position by telling them that their silence can be used against him at a later prosecution. The plurality saw no danger in this type of interview tactic.²¹⁵

While the Salinas plurality disagreed that police are coercing suspects when they accurately describe the law in these circumstances, there should not be much disagreement over the practical effects of the plurality’s dicta. Allowing police to tell someone in Salinas’s situation that his silence can be used against him encourages a “question first, arrest later” approach to interrogation.²¹⁶ After Salinas, police can “conduct noncustodial questioning of a suspect—even when probable cause exists to arrest him—knowing that he will rarely assert the privilege and that anything else he does, whether he speaks or remains silent, can be used against him.”²¹⁷ If the suspect remains silent when confronted with an incriminating question, the police can “accurately stat[e] the law”²¹⁸ and tell him his silence can be used against him. That may produce cooperation or an incriminating statement for the reasons described above. On the other hand, if the suspect remains silent, the silence can be used as substantive evidence of guilt at a later trial, as authorized by Salinas.²¹⁹ Either way, the police win.

²¹³ LEO, supra note 133, at 11.

²¹⁴ See Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013).

²¹⁵ See id.

²¹⁶ See Davis & Deguerin, supra note 72, at 19.

²¹⁷ Id.

²¹⁸ Salinas, 133 S. Ct. at 2183.

²¹⁹ See id. at 2180 (“Because he failed to [invoke the privilege], the prosecution’s use of his non-custodial silence did not violate the Fifth Amendment.”).

III. CONCLUSION

Justice Thurgood Marshall once remarked: “The furnishing of the Miranda warnings does not create the right to remain silent; that right is conferred by the Constitution.”²²⁰ The result in Salinas, however, teaches that the right to silence and the Fifth Amendment are not the same. In fact, Salinas clarifies that the Fifth Amendment does not confer a right to silence.

There was a time when lawyers would advise their clients “to make no statement to police under any circumstances.”²²¹ After Salinas, that guidance is no longer competent legal advice. Lawyers must now tell their clients to expressly invoke the Fifth Amendment.²²² The Salinas plurality concludes that someone who agrees to speak with police must “expressly invoke the privilege against self-incrimination” when confronted by police questioning in order to be protected by the Fifth Amendment.²²³ Does this mean that the person must use the words “Fifth Amendment”? How will most Americans, who are not lawyers, know which particular words are legally magic? What if the person says: “Let’s discuss something else,” or “I’m not sure I want to answer that [question.]” or the person simply leaves the room?²²⁴

Salinas was wrongly decided. I say this not because I want someone like Salinas, a convicted murderer, to be freed from prison. Nor do I romanticize noncooperation with the government. There is nothing wrong with law enforcement officials questioning a person about whether he has been involved with criminal conduct. But there are many legitimate reasons why a person, innocent or guilty,²²⁵

²²⁰ Jenkins v. Anderson, 447 U.S. 231, 247 n.1 (1980) (Marshall, J., dissenting).

²²¹ See Watts v. Indiana, 338 U.S. 49, 59 (1949) (Opinion of Jackson, J.) (noting that under our adversarial system, “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances”).

²²² Cf. Davis & Deguerin, supra note 72, at 19 (“It is no longer sufficient for defense attorneys to tell suspects to keep their mouths shut or ignore messages and letters from the police. The defense must tell suspects to expressly invoke their right against self-incrimination if governmental agents try to question them. Counsel should explain to the suspect that, even when the police or a prosecutor tells the suspect his silence can be used against him, he can—and should—invoke his right against self-incrimination.”).

²²³ See Salinas, 133 S. Ct. at 2178.

²²⁴ See id. at 2190 (Breyer, J., dissenting) (citations omitted).

²²⁵ Not too long ago, the Court cautioned against viewing a person’s silence as the equivalent of a confession. “The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant’s individual rights.” Mitchell v. United States, 526 U.S. 314, 330 (1999). See also Ullmann v. United States, 350 U.S. 422, 426 (1956) (quoted approvingly in Mitchell, 526 U.S. at 329) (“Too many, even those who should be better advised, view th[e] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.”). It is an open question whether a majority of Justices on today’s Court believes that an innocent person has a good reason for remaining silent or asserting the privilege when confronted with an incriminating question from a law enforcement official. Cf. Duane, supra note 99 at 6-7 (explaining that while Griffin “was based on the fact that the privilege protects the innocent as well as the guilty because even *innocent* people have ‘many reasons’ for asserting the privilege,” the Court has also stated “in complete contradiction [of Griffin and its progeny] that a person’s decision to assert the privilege logically and naturally supports

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will remain silent when confronted by police interrogation. Perhaps he is confused about the topic. Or, the person may be scared or intimidated by police. Finally, the person may be simply following the advice of his lawyer. Salinas was wrongly decided because many persons, relying on what they perceive to be their constitutional right, would respond to police interrogation exactly the way Salinas responded—by remaining silent.

the inference that he is guilty, because only guilty people have anything to fear from telling the truth”).