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## Silence is Not Golden, 48 J. Marshall L. Rev. 821 (2015)

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# SILENCE IS NOT GOLDEN

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## I. INTRODUCTION

Imagine that a murder is committed in your town. You are the next-door neighbor of the victim; so, the police come to your door and ask you to accompany them to the police station to clear your name. They explain that questioning neighbors is a routine procedure, and, naturally, you comply. During questioning, the police ask you, “By any chance do you own a Mossberg 500 shotgun?” It just so happens that you do. You purchased the shotgun for home protection when you had your first child. Before answering the question, however, you realize that the police are probably asking you about this particular type of gun because it was the murder weapon. As an avid Law and Order fan, you fear that revealing the truth might make you the lead suspect in the murder case. So you do not answer the question. Instead, you say nothing. You even pat yourself on the back for remembering that you have a Fifth Amendment right to remain silent and your silence cannot be used against you. Or can it?

The Supreme Court has insisted, time and again, that history defines our right against self-incrimination.<sup>1</sup> Justice Felix

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Frankfurter,<sup>2</sup> for instance, noted that the “privilege against self-incrimination is a specific provision of which it is peculiarly true that ‘a page of history is worth a volume of logic.’”<sup>3</sup> Similarly, Chief Justice Earl Warren stated that the “privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history.”<sup>4</sup> History, however, has not provided all of the answers.<sup>5</sup>

A recent Supreme Court decision, *Salinas v. Texas*,<sup>6</sup> has left many second-guessing what exactly is protected by the Fifth Amendment. This Comment details the recent holding in *Salinas* and the holding’s consequences for the privilege against self-incrimination. Part II summarizes how the right was created and constitutionalized in the Fifth Amendment. Part III dissects the

Thank you for everything you do.

This comment is dedicated to my wonderful family in Texas. “I love you night and day.”

1. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* xv (2d ed. 1986).

Professor Dick Helmholtz and his co-authors recognize that sometimes it is said the privilege “transcends its origins.” R. H. HELMHOLTZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 5 (1997). However, the history remains central for most interpreters. *Id.*

2. In *Ullmann v. United States*, Justice Frankfurter wrote that:

[I]t [were] better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.

*Ullmann v. United States*, 350 U.S. 422, 427 (1956).

3. *Id.* at 438 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). The Court explained that the privilege against self-incrimination is not a “vague, undefinable, admonitory provisions of the Constitution whose scope is inevitably addressed to changing circumstances.” *Id.* at 438. History, rather than circumstances, is key. *Id.* at 438–39. The court further emphasized that the privilege’s history shows that the clause should not be interpreted literally or rigidly define. *Id.* at 438.

4. *Quinn v. United States*, 349 U.S. 155, 161 (1955). Chief Justice Warren further noted that the privilege can only fulfill its intended purpose if applied liberally. *Id.* at 162.

5. See HELMHOLTZ ET AL., *supra* note 1, at 5 (explaining that although a look into the privilege’s origins may contribute to an understanding of the privilege’s contours, “the understanding has proved elusive”). There is no complete account of the history of the privilege. *Id.* And the privilege has been more controversial than might be expected. *Id.* at 16. Indeed, “the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect.” Harry Kalven, Jr., *Invoking the Fifth Amendment – Some Legal and Impractical Considerations*, 9 BULL. ATOMIC SCI. 181, 182 (1953). Seeking an accurate and relatively objective source, Helmholtz asserts “that the true history of the privilege should be based on an examination of its place in the procedure in . . . ordinary criminal trials.” HELMHOLTZ ET AL., *supra* note 1, at 16.

6. *Salinas v. Texas*, 133 S.Ct. 2174 (2013).

*Salinas* opinion and explains the practical implications of the holding for pre-*Miranda*, pre-arrest police questioning. Finally, Part IV proposes that the Court resolve the problems with the *Salinas* ruling by creating a new exception to the express invocation requirement.

## II. BACKGROUND

### A. *The English Origins of the Privilege against Self-Incrimination*

In the early 1200's, the English judicial system was divided into two parts: the ecclesiastical courts and the non-ecclesiastical courts.<sup>7</sup> The criminally accused usually faced trial by compurgation, which required the accused to simply take an oath and proclaim his guilt or innocence.<sup>8</sup> The oath was considered an appeal to the divine, and many believed the truth would be uncovered with God as a witness.<sup>9</sup> The oath forced the accused to choose among three evils: refuse to take the oath and be punished, declare his innocence under oath and be subject to both the natural and supernatural penalties for perjury, or declare his guilt under oath and incriminate himself. Eventually, though, trial by compurgation proved to be ineffective, and a more proactive procedure took its place.<sup>10</sup> The new method still involved the taking of an oath, called the inquisitional oath or the oath *ex officio*, to answer truthfully a series of questions about the accused's involvement in the crime.<sup>11</sup> Thus, the new method preserved the selection among three evils.<sup>12</sup> Under the oath *ex*

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7. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 260–61 (1988); see also HELMHOLZ ET AL., *supra* note 1, at 18 (discussing the “contest for control between rival court systems”).

8. MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 4 (1980). See also HELMHOLZ ET AL., *supra* note 1, at 33 (explaining that trial by compurgation called on the accused to swear under oath that they are innocent).

9. See BERGER, *supra* note 8, at 4 (noting that trial by compurgation often involved people other than the accused taking the oath and attesting to the trustworthiness of the accused).

10. See HELMHOLZ ET AL., *supra* note 1, at 18 (describing the ecclesiastical courts' adoption of the oath *ex officio*).

11. LEVY, *supra* note 1, at 46–47. The ensuing interrogation was intended to extract a confession from the accused person while he was unaware of the charges against him. *Id.* at 47. See also HELMHOLZ ET AL., *supra* note 1, at 32 (describing how the use of the oath *ex officio* was “standard procedure” in the ecclesiastical courts).

12. The oath *ex officio*'s “requirements [were] so easily met that challenging its legality would have required an exceptional situation.” HELMHOLZ ET AL., *supra* note 1, at 33. Indeed, the oath has been compared to a trap where the accused stands only a slim chance of escaping. BERGER, *supra* note 8, at 6. Refusing to take the oath resulted in imprisonment for

*officio* system, though, a new element was added. After taking the oath, the accused would be interrogated and then a judge would be the one to determine his guilt or innocence.<sup>13</sup>

The oath *ex officio* became fantastically unpopular<sup>14</sup> when the procedure played an intensified role in the ecclesiastical courts, which were becoming increasingly concerned with heresy.<sup>15</sup> Sometimes interrogators questioned on matters unrelated to the specific charge to secure any conviction or to make the accused give evidence against himself.<sup>16</sup> Ultimately, the mounting opposition to the oath *ex officio*<sup>17</sup> led to the elimination of the

contempt or other forms of punishment. HELMHOLZ ET AL., *supra* note 1, at 101. And, in practice, the oath almost always secured a conviction. *Id.*

13. BERGER, *supra* note 8, at 6; HELMHOLZ ET AL., *supra* note 1, at 32. The accused was often times not told of the charges or evidence against him. *Id.*

14. HELMHOLZ ET AL., *supra* note 1, at 39 (showing that the official records of the English ecclesiastical courts contained objections to the oath “as contrary to the law of the church”).

One particularly noteworthy objector is Richard Ramsford, who refused to take the oath because “he was not bound by the law to respond.” *Ex officio v. Udall*, 1 State Trials 1271, 1275 (1590). Another defendant also objected because “the offense wherewithal he is charged in this article is a capitall cryme and therefore he believeth he is not bound by lawe to answeare thereunto [sic].” *Id.*

15. BERGER, *supra* note 8, at 8 (explaining that the oath *ex officio* was an “important, if not dominant, procedural technique” for controlling heresy in England); HELMHOLZ ET AL., *supra* note 1, at 29 (stating that the oath was a means of eliminating heresy and prosecuting victims of the oath for their religious beliefs). See LEVY, *supra* note 1, at 54–56 (detailing the growing concern with heresy); see also Roy Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267, 269 (1956) (clarifying that a general probing procedure was the cause of intense opposition to the oath *ex officio*).

The followers of John Wycliffe, known as Lollards, were among those subjected to the oath in heresy trials. *Id.* Wycliffe was a pronounced heretic because he deviated from the Catholic authority that controlled much of England. *Id.* Wycliffe had powerful supporters, though, and was not burned to death for his heresy, which was the typical punishment at the time. *Id.* His followers still paid a price. *Id.* Archbishop William Courtney was determined to eliminate Wycliffe’s deviant, heretical influence. *Id.* Archbishop Courtney, with the approval of the king, called upon Wycliffe’s followers to take the oath *ex officio*. *Id.* One of the Lollards took the oath but refused to answer questions regarding his Catholic faith. *Id.* He was therefore presumed guilty and imprisoned. *Id.*

16. HELMHOLZ ET AL., *supra* note 1, at 35. Many people at this time were accustomed to questioning on the charge they were accused of. Moreland, *supra* note 15, at 269. It was the act of fishing for self-incriminating evidence by asking questions outside the scope of the charge that became strongly debated, eventually leading to the elimination of the Ecclesiastical courts in 1640. *Id.*

17. “[R]efusals to take the *ex officio* oath are easy to find among the act books from the years after 1560.” HELMHOLZ ET AL., *supra* note 1, at 35. The use of lawyers in criminal cases contributed to the intensity of objections. *Id.* at 41.

ecclesiastical judicial system in 1640.<sup>18</sup>

But the oath *ex officio* was not defeated but, rather, remained in the non-ecclesiastic courts.<sup>19</sup> Again, the procedure seemed to have few limits. Any person could be forced to take an oath and answer whatever the court inquired, sometimes without being told of the charge against him.<sup>20</sup> Resistance to the procedure began to build again and culminated after the trial of John Lilburne, who demanded an end to what he claimed was an unlawful practice.<sup>21</sup> In 1637, Lilburne was charged with heresy and tried in the Court of Star Chamber.<sup>22</sup> He asserted that he had a right to a formal accusation before interrogation and refused to answer any question that was outside the scope of that charge.<sup>23</sup> Because of this, the Court of Star Chamber had Lilburne whipped and imprisoned.<sup>24</sup> Even so, he continued to fight against the procedure.<sup>25</sup> Eventually, Parliament abolished the Court of Star Chamber and High Commission<sup>26</sup> after finding that the Star

18. See generally ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955) (reiterating that the Ecclesiastical courts were abolished in 1640 as a result of opposition to its procedures).

19. HELMHOLZ ET AL., *supra* note 1, at 18.

20. GRISWOLD, *supra* note 18, at 2. Those who refused to answer questions were often times tortured until they succumbed. *Id.*

21. LILBURNE'S TRIAL, 3 HOW. ST. TR. 1315 (1673); 8 J. WIGMORE, *EVIDENCE* 282, § 2250 (McNaughton Rev. 1961).

Lilburne's sought to challenge the court and the inquisitorial procedure, to paint the court as oppressors, and to open the juror's eyes to the unjust and invasive practice). LEVY, *supra* note 1, at 302–09. Lilburne's ultimate success was due in great part to all the fuss that he stirred up among the spectators by focusing their attention on how few individual liberties the court acknowledged when Lilburne's life was at stake. *Id.*; see also BERGER, *supra* note 8, at 15 (stating that Lilburne's triumph was the impact he had on the public opinion). "When Lilburne finally completed his defense with a long emotional appeal to the jury, the audience broke out in loud shouts of 'Amen, Amen.'" LEVY, *supra* note 1, at 309.

22. Wendy McElroy, *Was Freeborn John Tortured in Vain? The Importance of the Right against Self-Incrimination*, FOUND. FOR ECON. EDUC. (Aug. 16, 2011), <http://fee.org/freeman/detail/was-freeborn-john-tortured-in-vain>.

23. WILLIAM COBBETT, *COBBETT'S COMPLETE COLLECTION OF STATE TRIALS* 1332 (1809).

Lilburne objected only to questioning he believed was not probative of the charge. LEVY, *supra* note 1, at 273. And so he "demanded to know the reason for questions which did not seem relevant to the cause of his imprisonment." *Id.*

24. See HELMHOLZ ET AL., *supra* note 1, at 38 (discussing the consequences of refusing to take the oath or to answer the Court's questions under the oath). A defendant could be held "*pro confesso*," meaning that the court would presume a confession from the accused was made or, as in Lilburne's case, the Court could punish him "merely for contempt." *Id.*

25. Moreland, *supra* note 15, at 273.

26. See HELMHOLZ ET AL., *supra* note 1, at 102 (discussing Wigmore's opinion that John Lilburne and his persistent objections in the Star Chamber led to the eradication of the Court of Star Chamber and the High Commission); see also WIGMORE, *supra* note 21, at 289 (asserting that the oath

Chamber sentence was unlawful.<sup>27</sup> The oath *ex officio* died a belated death after a statute barring the oath was enacted in 1662.<sup>28</sup> The privilege against self-incrimination eventually became a fundamental part of the common law as a result of the oath *ex officio* being held as “against the liberty of the subject.”<sup>29</sup>

### *B. The Privilege against Self-Incrimination Follows Colonists to America*

When the British settled the American colonies, they brought the common law legal principles with which they were familiar.<sup>30</sup> But the colonists endured their own experiences that reinvigorated opposition to inquisitorial practices and contributed in part to the American recognition of the privilege against self-incrimination.<sup>31</sup> American colonists engaged in inquisitorial practices even though they knew of the criticism such practices attracted in England.<sup>32</sup> The Salem witch trials of the 1690s were the most egregious example of such inquisitions.<sup>33</sup> Mobs accused many women of witchcraft, a charge they were not able to refute.<sup>34</sup> Then the mobs interrogated the accused and either tortured them to elicit confessions or killed them for not complying.<sup>35</sup> Fortunately, such

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*ex officio* was “swept away” with the Star Chamber and High Commission Courts).

27. BERGER, *supra* note 8, at 18 (describing the results of Lilburne’s opposition to the practices of the Court of Star Chamber).

Some scholars believe that Lilburne was not a significant figure in the development of the privilege. HELMHOLZ ET AL., *supra* note 1, at 244–45. Helmholtz argues that Lilburne fought for the right to a defense counsel and claimed that the jury has the power to nullify or be the judge of the law. *Id.* Lilburne’s railings against self-incrimination were, in Helmholtz’s view, merely a consequential or side argument. *Id.* In support of this contention, Helmholtz notes that the issue was mentioned only twice in the trial reports. *Id.* In one instance, Lilburne asserted the privilege by saying he would not answer any question that concerned himself. *Id.* In the other instance, he refused to answer to or even look at incriminating papers the prosecution offers to him. *Id.* Even in these instances, Helmholtz claims, Lilburne’s main goal was not as much to fight for the privilege against self-incrimination as it was to get the prosecutor to bear the burden of proof. *Id.*

28. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (1883).

29. John H. Wigmore, *The Privilege Against Self-Crimination; Its History.*, 15 HARV. L. REV. 610, 625 (1902).

30. Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 J. CLEV. BAR ASS’N 91, 97 (1954).

31. Moreland, *supra* note 15, at 272–73.

32. R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

33. JEFFREY A. JENKINS, THE AMERICAN COURTS: A PROCEDURAL APPROACH 68 (2011).

34. BERGER, *supra* note 8, at 22.

35. *Id.*; Moreland, *supra* note 15, at 273.

inquisitional practices never made their way into colonial courts.<sup>36</sup> However, it seems almost indisputable that such instances are relevant to the development of the privilege against self-incrimination in the colonies.

In 1776, the delegates of the Continental Congress came together in Philadelphia to consider the need for independence.<sup>37</sup> In part because of their long disagreement with the British about what constitutional rights were essential to the common law tradition, the Colonists finally took action.<sup>38</sup> On July 4th, they adopted the Declaration of Independence and began the battle to freedom. Winning the war and gaining independence from Britain triggered a need for written constitutions that enshrined the principles of popular sovereignty and inalienable rights.<sup>39</sup> Virginia was the first state to enumerate its fundamental rights in a written constitution.<sup>40</sup> The Virginia Declaration of Rights, authored by George Mason, incorporated the principle against self-incrimination by providing that no man may “be compelled to give evidence against himself.”<sup>41</sup> Despite this broad language, the right’s scope was confined to the criminally accused during trial because the clause was placed in Section 8.<sup>42</sup> The provision, thus limited, offered far less protection than the common law equivalent provided.<sup>43</sup> Though the placement and resulting narrowing of the right was likely a mere slipup,<sup>44</sup> many of the

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36. Pittman, *supra* note 32 (explaining that although the colonies allowed inquisitorial practices, such as the Salem witch trials, “no lawyer participated in those trials. Torture was used to obtain confessions but it was not ‘judicial’ torture”).

37. ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791* 30 (1983).

38. HELMHOLZ ET AL., *supra* note 1, at 128.

39. BERGER, *supra* note 8, at 22.

40. LEVY, *supra* note 1, at 405 (recognizing that “Virginia blazed the trail with her celebrated Declaration of Rights as a preface to her constitution”). *Id.*

41. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 231–34 (1971). *See also* HELMHOLZ ET AL., *supra* note 1, at 134 (describing George Mason’s model for protecting the cluster of jury trial rights).

42. LEVY, *supra* note 1, at 406.

43. The common law privilege was crafted to end all torturous methods of questioning. *Id.* Consequently, the common law protected not only the criminal defendant but also witnesses in criminal proceedings. *Id.*

44. *See id.* (discussing the formulation of the Virginia Declaration of Rights).

“The provision against self-incrimination was the result of bad draftsmanship, which is not easily explained.” *Id.* at 407. Mason did not intend the clause to limit the scope of the privilege. *Id.* Indeed, the clause would have been meaningless if it only applied to criminal defendants because, at that time, the accused were not permitted to testify at their trial. *Id.* Thus, the most reasonable conclusion is that the contextual meaning was simply a product of “[t]houghtlessness, rather than indifference or purposeful narrowing.” *Id.* at 408.



states imitated Mason's formula in their own constitutions.<sup>45</sup> Fortunately, this textual narrowing proved largely irrelevant because most states understood that the enumeration of the right stood as a symbol for the well-known and broad common law privilege.<sup>46</sup> In practice, both witnesses and parties in both criminal and civil cases enjoyed protection.<sup>47</sup>

The most important step in constitutionalizing the privilege against self-incrimination occurred with the framing of the United States Bill of Rights.<sup>48</sup> Although the Constitutional Convention was called only to revise the Articles of Confederation, the delegates completed a much greater task, framing our Constitution.<sup>49</sup> In so doing, however, the Convention enumerated only a random selection of rights in the Constitution.<sup>50</sup> Perceived as insufficiently protective of individual rights, the Constitution was criticized by many.<sup>51</sup>

Throughout the ratification conventions, anti-federalists pressed for a bill of rights to protect the people from the federal government.<sup>52</sup> The anti-federalists succeeded, as "more than one-half of the ratifying states recommended amendments, and four recommended entire bills of rights."<sup>53</sup> Of particular importance, four states – Virginia, New York, North Carolina, and Rhode Island – hoped to constitutionalize the privilege against self-incrimination by proposing a version of section 8 of the Virginia Declaration of Rights.<sup>54</sup> In 1789, the First Congress recognized the

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45. RUTLAND, *supra* note 37, at 79; *see also* LEVY, *supra* note 1, at 410 (discussing the state constitutions that followed the formulation that Mason used in Virginia's Declaration of Rights); HELMHOLZ ET AL., *supra* note 1, at 134 (recognizing that the Virginia Declaration became a model for many of the other states' constitutions).

46. LEVY, *supra* note 1, at 409.

47. *Id.* (stating, "The practice of the courts was simply unaffected by the restrictions inadvertently or unknowingly inserted in Section 8.")

48. HELMHOLZ, ET AL., *supra* note 1, at 15.

49. J.W. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 11 (9th ed. 1982).

50. The writing of the constitutions and bills of rights was far from systematic. LEVY, *supra* note 1, at 411. After the Revolutionary war against Britain ended, the drafters of the first constitutions "tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles." *Id.*

51. BERGER, *supra* note 8, at 22.

In fact, some delegates mentioned the need for more enumerated rights before the convention adjourned. LEVY, *supra* note 1, at 414. Although many of the delegates were open to such a set of amendments, they were simply too eager to return home. *Id.* *See* HELMHOLZ, ET AL., *supra* note 1, at 136 (explaining that the convention ended without adopting a declaration of rights because of delegates' aversion to the Philadelphia weather).

52. HELMHOLZ, ET AL., *supra* note 1, at 136. Federalists were not necessarily opposed to the protection of individual liberties; rather, they believed a bill was not necessary to provide that protection. *Id.*

53. *Id.*

54. *Id.*

need for a Bill of Rights.<sup>55</sup> James Madison drafted a proposed set of protections that included the privilege against self-incrimination.<sup>56</sup> But Madison created a new formula not yet seen in any state constitution.<sup>57</sup>

Madison's privilege appeared in the Fifth Amendment and stated that no person shall "be compelled to be a witness against himself."<sup>58</sup> Importantly, Madison did not place the clause in a section specifically concerned with the criminally accused.<sup>59</sup> This meant that the provision extended to witnesses and parties in criminal and civil cases at any stage of the proceedings.<sup>60</sup> The specific language used, "witness against himself," when taken literally, included any evidence that would publicly humiliate the person, even if the information did not incriminate him.<sup>61</sup> Madison's proposal was sent to a committee where one speaker, John Laurence, moved to amend the privilege to limit its reach to criminal cases.<sup>62</sup> The committee approved the amendment and adopted a new clause stating that no person "shall be compelled in any criminal case to be a witness against himself."<sup>63</sup> This new wording still shielded both witnesses and parties in a criminal case but no longer offered protection to anyone in a civil case.<sup>64</sup> This amendment seemed to take into consideration the idea that the criminally accused, specifically, feel a sense of pressure that is not mirrored by a witness or defendant in a civil case. Thus, it purported to protect this criminal suspect from historical

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55. BERGER, *supra* note 9, at 22.

56. *Id.* at 23.

57. HELMHOLZ, ET AL., *supra* note 1, at 137 (discussing James Madison's deviation from any proposal presented by the states); LEVY, *supra* note 1, at 410 (discussing the different phraseologies used by colonial constitutions).

58. LEVY, *supra* note 1, at 410.

59. *Id.* at 423; *id.* at 427.

60. *Id.*

61. LEVY, *supra* note 1, at 423–24 (explaining that "[b]y its terms the clause could also apply to any testimony that fell short of making one vulnerable to criminal jeopardy or civil penalty or forfeiture, but that nevertheless exposed him to public disgrace or obloquy, or other injury to name and reputation").

62. *Id.* at 425. Laurence's proposed amendment was more reflective of the clause in Section 8 of the Virginia Declaration of Rights. *Id.* Laurence's amendment was accepted so quickly that it seems there was no debate over the restriction. *Id.* Interestingly, not even Madison debated Laurence's proposed amendment. *Id.*; see also HELMHOLZ ET AL., *supra* note 1, at 138 (discussing John Laurence's suggestion to limit the privilege to criminal cases and his argument that Madison's proposed amendment was "a general declaration in some degree contrary to laws passed").

63. U.S. CONST. amend. V.

64. LEVY, *supra* note 1, at 427. The self-incrimination clause was not placed in the Sixth Amendment, where rights of the criminally accused were located. *Id.* Instead, it was placed in the Fifth Amendment, which provided procedural rights in criminal cases, a much broader scope than the Sixth Amendment. *Id.* This manifests an intent to provide protection to not solely the criminal defendant but witnesses as well. *Id.*

compulsion by allowing them to stay silent in the face of a potential implicating question.

In the mid-1960s, the Supreme Court had two opportunities to interpret the scope of the Fifth Amendment right.<sup>65</sup> In the *Griffin* and *Miranda* cases, the Supreme Court clarified the right by explaining first that “the Fifth Amendment did not permit the government to comment on the defendant’s failure to testify at trial”<sup>66</sup> and then *Miranda*’s famous requirement “that before the police can admit a defendant’s statement during a custodial interrogation, the police must first inform him of his [right to remain silent] and then obtain a waiver of his rights.”<sup>67</sup> However, it has always been a bit of a mystery what it means to say that a person has a right to remain silent.<sup>68</sup> “*Miranda* doesn’t say. It requires the police to tell people that they have a right to remain silent, but it doesn’t tell us what that right means or when it is triggered.”<sup>69</sup>

### C. *The Supreme Court Speaks up in Salinas v. Texas*

When two brothers were murdered in their Houston, Texas home, an investigation led the police to Genovevo Salinas.<sup>70</sup> Salinas cooperated, agreeing to have his shotgun tested for ballistics and to accompany the police to the station for questioning.<sup>71</sup> Because Salinas was not in-custody, he was not read *Miranda* rights.<sup>72</sup> He voluntarily answered the officers’ questions until they asked a particularly incriminating question: if the shell casings they found at the crime scene would match his shotgun.<sup>73</sup> Then Salinas stayed quiet.<sup>74</sup> At his trial, prosecutors

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65. Orin Kerr, *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://www.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/>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Salinas*, 133 S. Ct. at 2178 (plurality opinion). Salinas attended a party at the victims’ house the night before the murder. *Id.*

71. *Id.* The questioning lasted for about an hour. *Id.*

72. *Id.*; see Timothy P. O’Neill, *Supreme Court Strikes a Blow Against the Right to Remain Silent*, CHI. DAILY L. BULL., July 17, 2013, available at <http://news.jmls.edu/wp-content/uploads/2013/07/ONeill-July-17.pdf> (explaining that “there was no problem with the police not reading him his *Miranda* rights” because he was not in custody).

73. *Salinas*, 133 S. Ct. at 2178 (plurality opinion).

74. *Id.* According to the officer’s testimony at trial, Salinas “looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up.” *Id.*

commented on his silence and urged the jury to infer his guilt.<sup>75</sup> The prosecutors effectively said that an innocent person would not react by simply remaining silent. Remaining silent, however, is precisely what Salinas argued the Fifth Amendment gave him the right to do in the face of an incriminating question.<sup>76</sup> The jury disagreed and Salinas was found guilty and sentenced to 20 years in prison.<sup>77</sup>

Both appellate courts affirmed the conviction because Salinas's "prearrest, pre-*Miranda* silence was not 'compelled' within the meaning of the Fifth Amendment."<sup>78</sup> The Supreme Court granted certiorari to resolve the unsettled issue of whether the Fifth Amendment prohibits prosecutors from using a defendant's pre-arrest, pre-*Miranda* silence as evidence of guilt.<sup>79</sup> However, the Court decided to "remain silent" on this big issue, holding instead that because Salinas failed to invoke the privilege, the scope of its protection need not be decided.<sup>80</sup>

### III. ANALYSIS

This Section of the Comment provides a detailed analysis of *Salinas* and its effects. Part A summarizes the Supreme Court's plurality opinion. Then Parts B and C explore the consequences of the ruling and, more importantly, the practical effect it will have on the rights of the average American citizen.

#### *A. The Plurality Decision*

In *Salinas*, the plurality held that Salinas's claim to Fifth Amendment protection failed because a suspect must expressly invoke his or her right against self-incrimination.<sup>81</sup> Crucially, the Court found that Salinas's mere silence failed to do so<sup>82</sup> and further, that he failed to satisfy the requirements for either of the two exceptions to this "express invocation requirement."<sup>83</sup> Under the *Griffin* exception, no invocation is needed when a criminal defendant exercises his absolute "right not to testify."<sup>84</sup> The Court concluded that this exception did not apply in *Salinas* because Salinas did not have such an absolute right in his voluntary

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75. *Id.*

76. *Id.*

77. *Id.* at 2178–79.

78. *Id.*

79. *Id.* at 2179.

80. See O'Neill, *supra* note 72 (explaining that the lack of resolution will lead to a "long-simmering division of authority in lower courts").

81. *Salinas*, 133 S.Ct. at 2178 (plurality opinion).

82. *Id.*

83. *Id.* at 2179.

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

interview with the police.<sup>85</sup>

For purposes of this analysis, the second exception is more important to dissect thoroughly. The *Miranda* exception “excuses” a witness who fails to invoke the privilege “where governmental coercion makes [the suspect’s] forfeiture of the privilege involuntary.”<sup>86</sup> Thus, in a situation the court deems coercive, the suspect is not required to expressly invoke the privilege.<sup>87</sup> The Court concluded, though, that Salinas was not subjected to a coercive interrogation.<sup>88</sup> Rather, his interview with the police was voluntary because he was not arrested before the police interrogation and was “free to leave at any time during the interview.”<sup>89</sup>

Although the Court admitted that “no ritualistic formula is necessary in order to invoke the privilege,” the plurality found that mere silence is not enough.<sup>90</sup> The plurality believed that Salinas could easily and simply have stated that he was remaining silent “on Fifth Amendment grounds.”<sup>91</sup> If he had, the Court concluded, he would have a proper Fifth Amendment claim.<sup>92</sup> Because Salinas simply stayed mute during a non-custodial interrogation, his Fifth Amendment claim failed and the Court affirmed his conviction.<sup>93</sup>

### B. People Are Unaware of the Express Invocation Rule

What does the *Salinas* decision mean? What should a suspect who agrees to talk with police before they read him his *Miranda* rights do when asked an incriminating question? Of course, he should not answer it; but now it appears that he should not remain silent either.<sup>94</sup> *Salinas* says this suspect must say something to invoke the Fifth Amendment – to put the police on notice that he intends to rely on the privilege<sup>95</sup> – and if he does successfully invoke it, hope that it affords him some protection.<sup>96</sup>

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85. *Salinas*, 133 S.Ct. at 2179 (plurality opinion).

86. *Id.* at 2176.

87. *Id.* at 2180.

88. *Id.*

89. *Id.*

90. *Id.* (quoting *Quinn v. United States*, 349 U.S. 155, 164 (1955)).

91. *Id.*

92. *Id.* at 2178.

93. *Id.* at 2176, 2178.

94. See Hank Asbill, Brian Murray & Andrew Pinson, *Salinas v. Texas: The Fifth Amendment During Pre-Arrest Interviews*, JURIST (July 9, 2013), <http://jurist.org/sidebar/2013/07/asbill-murray-pinson-salinas.php> (explaining that speaking risks self-incrimination but *Salinas* rules out staying silent).

95. See *Salinas*, 133 S.Ct. at 2179 (plurality opinion) (explaining that the government needs notice when a witness is relying on the Fifth Amendment privilege so that it can either make its case that the testimony was not self-incriminating or it can cure through immunity).

96. Remember that the Supreme Court did not decide whether, if the privilege were invoked, the witness would be protected from having his silence

For all practical purposes, the current interpretation of the Fifth Amendment will not provide adequate protection of citizens' rights for two basic reasons.

First, the current interpretation disadvantages the average suspect – the very person who the Fifth Amendment seeks to protect – because he is likely unaware of the express invocation requirement.<sup>97</sup> It is unrealistic to place the burden on the suspect, who has no more than a basic understanding of his constitutional rights, to inform a trained government official that he intends to rely on a right.<sup>98</sup> Even more, it is ignorant to expect that he can reference it by name.<sup>99</sup> This is precisely what the plurality expects of an average citizen without any constitutional or legal training. Further, the harm done will be more widespread than might be expected because the new rule “will . . . encourage more noncustodial interrogations” where police are not required to read *Miranda* warnings and express invocations are therefore required.<sup>100</sup>

As the four dissenting Justices in *Salinas* point out, “Salinas, not being represented by counsel, would not likely have used the precise words ‘Fifth Amendment’ to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.”<sup>101</sup> Even if a suspect were a well-trained lawyer, though, he may still be in trouble because the plurality failed to explain what exactly is required for an invocation.<sup>102</sup> The plurality requires that a suspect “expressly invoke the privilege against self-incrimination.”<sup>103</sup> Yet, this ignores the obvious truth that “an individual who is not a lawyer [likely does not know] that these particular words are legally magic[.]”<sup>104</sup> Justice Breyer and the Justices who joined him dissenting believed that the express-invocation rule undermines the very purpose of the Fifth Amendment protection and “poses a serious obstacle to those who, like Salinas, seek to assert their basic Fifth Amendment right to remain silent, for they are likely

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used against him by prosecutors at his trial. *Id.*

97. See O'Neill, *supra* note 72.

98. See Khaled Mowad, *The Right to Remain Silent After Salinas v. Texas*, HARV. CIV. RTS. (June 21, 2013), <http://harvardcrcl.org/2013/06/21/the-right-to-remain-silent-after-salinas-v-texas/> (stating that the new rule places a heavy burden on an individual rather than the government official).

99. See *id.* (noting that “unfortunately, not everyone is as conversant with the Fifth Amendment as Justice Alito might like”).

100. O'Neill, *supra* note 72.

101. *Salinas*, 133 S. Ct. at 2189–90 (plurality opinion) (Breyer, J., dissenting).

102. See *id.* at 2190 (Breyer, J., dissenting) (questioning what exactly the plurality opinion calls for in order to invoke the Fifth Amendment's protections).

103. *Id.* at 2178 (plurality opinion).

104. *Id.* at 2190 (Breyer, J., dissenting).

unaware of such linguistic detail.”<sup>105</sup>

The realistic perspective of the dissenting Justices recognizes that if the suspect is not well acquainted with this rule-based approach to invoking the Fifth Amendment’s protections, he forfeits his claim to them and his silence can be used against him in court. “Constitutional protections should not be just for those who have legal training and know what they need to say to the police to invoke their rights.”<sup>106</sup> The plurality’s ruling complicates the law for those who it is intended to benefit, those who are vulnerable to compulsion by government officials.<sup>107</sup> He, the citizen who the Fifth Amendment was put in place to protect, becomes a victim of it.<sup>108</sup>

### C. People Don’t Feel Free to Leave

The plurality’s decision is largely based upon a distinction between custodial and non-custodial settings.<sup>109</sup> According to the opinion, a witness who is not in custody is free to leave at any time and, thus, is not exposed to the coercive nature of a custodial interrogation.<sup>110</sup> This distinction is crucial because a witness who is in custody during the interrogation need not expressly invoke the Fifth Amendment.<sup>111</sup> In fact, in this situation, the officer is required to go a step further and read the witness his *Miranda* rights, which advise him of his right to remain silent.<sup>112</sup> All of this goes out the door, though, if the accused is not in “custody.”

To make sense of this drastic effect, one must understand how the Court defines “custody.” In *Miranda*, the Supreme Court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant

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105. *Id.* at 2191.

106. Erwin Chemerinsky, *Silence Is Not Golden, Supreme Court Says*, A.B.A. J. (June 25, 2013, 6:15 PM), [http://www.abajournal.com/news/article/chemerinsky\\_silence\\_is\\_not\\_golden\\_supreme\\_court\\_says/](http://www.abajournal.com/news/article/chemerinsky_silence_is_not_golden_supreme_court_says/).

107. Tim Lynch, *Salinas v. Texas*, CATO INST. (June 17, 2013), <http://www.cato.org/blog/salinas-v-texas>.

108. See Christopher Zara, *Supreme Court Self-Incrimination Ruling: No Right To Remain Silent Unless You Speak Up*, INT’L BUS. TIMES (June 26, 2013), <http://www.ibtimes.com/supreme-court-self-incrimination-ruling-no-right-remain-silent-unless-you-speak-1324515> (stating that “[f]rom a common sense perspective, Salinas was penalized for exercising his constitutional right to remain silent . . . [and] [t]his should not be tolerated under the Fifth Amendment”).

109. See Chemerinsky, *supra* note 106.

110. *Salinas*, 133 S.Ct. at 2180 (plurality opinion). The “inherently compelling pressures” of interrogation apply to custodial interrogations only. *Id.*

111. *Id.*

112. *Id.*

way.”<sup>113</sup> In assessing whether the interrogation is custodial, the Court uses a reasonable person standard.<sup>114</sup> Thus, the critical question becomes: does the reasonable person feel he has “freedom of action?”<sup>115</sup>

Put yourself in Salinas’ shoes. You, after all, are supposed to represent the “reasonable person.”<sup>116</sup> When a police officer shows up at your door because an investigation into a murder pointed to you as a suspect, and he asks you to accompany him to the police station for questioning, do you, the “reasonable person”, feel at liberty to refuse? When you are in an “interview room” at the police station, a police-dominated atmosphere, and you are being questioned as to your innocence, would you feel comfortable getting up and walking out? What happens if you choose to exercise that liberty after you are asked a potentially incriminating question? It is not difficult to predict that a prosecutor will use that reaction against you at trial if the Fifth Amendment allows him to do so. So, reasonable person, do you feel you have significant “freedom of action” now?

The reality is that a reasonable person might feel inherently compelled to cooperate in the presence of an authority figure who is asking for cooperation. Indeed, as Professor Dana Raigrodski has noted, it is inaccurate to say it is the rule, and not the exception, that an encounter with the police is non-coercive.<sup>117</sup> Another scholar, David A. Sklansky, agrees, stating that “anyone who has ever been stopped by the police knows this is nonsense: every encounter with a uniformed officer necessarily involves some amount of apprehension, and hence some amount of psychological if not physical coercion.”<sup>118</sup> Further, the results of a study done by David K. Kessler challenge the assumption that, in so-called “consensual encounters” with the police, a reasonable person feels free to refuse to comply or to leave at any time.<sup>119</sup> The study

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113. *Miranda*, 384 U.S. at 444 (emphasis added).

114. *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2402 (2011) (stating that the determination of whether the suspect is in custody involves an objective inquiry where it is essential to ask if “a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave”).

115. *Miranda*, 384 U.S. at 444. See Dana Raigrodski, *Breaking out of “Custody”: A Feminist Voice in Constitutional Criminal Procedure*, 36 AM. CRIM. L. REV. 1301, 1315 (1999) (noting that the custody inquiry involves asking if the reasonable person would feel free to leave the interrogation).

116. See Raigrodski, *supra* note 115, at 1318–19 (struggling to understand who the “infamous ‘reasonable person’” is, the author asks “[w]ho are you Reasonable Person? I would very much like to meet you since we are so much alike—behaving the same and all, I wonder if you and I could be friends”). The author emphasizes that the “reasonable person” is supposed to “manifest shared social views, values, and convictions.” *Id.*

117. See *id.* at 1319.

118. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 319 (1997).

119. See David K. Kessler, *Free to Leave? An Empirical Look at the Fourth*



involved a survey<sup>120</sup> that described two casual encounters with the police.<sup>121</sup> Most individuals answered that they would not have felt free to leave during either encounter.<sup>122</sup> In fact, the survey respondents, on average, did not even feel “somewhat free to leave.”<sup>123</sup>

To test Kessler’s results,<sup>124</sup> Alisa Smith, Erik Dolgoff, and Dana Speer designed an experiment during which they observed the actual reactions people have to encounters with police.<sup>125</sup> Researchers structured “real” encounters between officers and the eighty-three study participants and then observed the latter’s reactions.<sup>126</sup> The officers were instructed to approach the individuals, ask to speak with them, and request information, including their name, identification, and reason for being on campus.<sup>127</sup> All the participants complied; not one refused to

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*Amendment’s Seizure Standard*, 99 J. CRIM. L. CRIMINOLOGY 51 (2009) (showing results from a survey on consensual encounters with police).

120. *See id.* at 53 (explaining that the survey was the first to address how people actually feel in “simple encounters with law enforcement officers”). The purpose was to gauge people’s actual reaction to a police officer who asked them questions in a casual environment. *Id.* at 68. Respondents included 406 randomly selected residents of Boston, Massachusetts. *Id.* at 52. The survey was distributed in four locations of the Boston area and surveyors avoided favoring people of any particular demographic or socioeconomic status. *Id.* at 69. The questionnaire was one page and asked respondents to read the scenario and rate on a scale from one to five how “free to leave” they would feel. *Id.*

121. *Id.* at 52. One scenario was an encounter with the police on a public sidewalk and the other an encounter with the police on a bus. *Id.*

122. *Id.* at 73. The results of the survey showed that even those people who are aware of their legal right to leave or terminate the encounter with the police still did not feel free to leave. *Id.* Respondents reported that in both scenarios they would not feel free to leave when asked questions by the police officer. *Id.* at 74. On the “free to leave scale,” one represented “not free to leave or say no” and five represented “completely free to leave or say no.” *Id.* at 69. On average, respondents scored a 2.61 for the public sidewalk scenario and 2.52 for the bus scenario on the “free to leave” scale. *Id.* at 74.

123. *Id.* at 75.

124. Although David Kessler’s survey experiment was the “first set of empirical evidence that addresses whether or not actual people would feel free to terminate simple encounters with law enforcement officers,” it involved people answering a questionnaire about how they predict they would act in an encounter with a police. *Id.* at 53. The survey did not demonstrate how they would actually react. *Id.* And “research has demonstrated that people do not accurately predict their responses. Alisa M. Smith et al., *Testing Judicial Assumptions of the “Consensual” Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285, 290 (2013).

125. *See* Smith et al., *supra* note 124, at 291. This research “expands on Kessler’s” research by observing people’s reactions first-hand, as opposed to asking them how they think they would react. *Id.* at 289.

126. *Id.* at 300.

127. *Id.* at 301. The encounters were structured to involve either one, two, or four officers confronting both individual and group subjects. *Id.* at 300. The encounters took place during the day and the evening both inside and outside university buildings. *Id.*

answer a single question or walked away at any point.<sup>128</sup> When interviewed after the encounter,<sup>129</sup> 60% of the subjects said they complied because of the “authority, or the status of police in society.”<sup>130</sup> Also, many subjects reported that they viewed the encounter as nonconsensual due to the officer’s power over them.<sup>131</sup> The researchers concluded that “the untested judicial assumption that police-initiated encounters are consensual is flawed.”<sup>132</sup> According to their research, “[e]ven without physical restraint, force or commands, reasonable people are constrained to comply with authority.”<sup>133</sup>

This research strongly supports the contention of the dissenting Justices in *Salinas* that it is the circumstances surrounding an interrogation that should be pivotal.<sup>134</sup> In *Salinas*, “[t]he context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station.”<sup>135</sup> These factors make it obvious that the right to remain silent “was at issue at the critical moment here.”<sup>136</sup> Under circumstances such as those present in *Salinas*, requiring express invocation puts the reasonable suspect in “an impossible predicament.”<sup>137</sup> Thus, “to allow comment on silence directly or indirectly can compel an individual to act as ‘a witness against himself’ – very much what

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128. *Id.*

129. Immediately after the encounter with the officers, researchers asked each participant why he complied, whether he believed he could ignore the officers and walk away, and if he viewed the encounter as consensual. *Id.* at 301.

130. *Id.* at 308. Responses included: “[b]ecause he’s an officer”; “[h]e’s security . . . [h]e has authority”; “[i]t’s security . . . [y]ou do what they say”; “[t]hey are in charge”; “[h]e has authority over me”; and “[b]ecause it’s the cops.” *Id.* at 309.

131. *Id.* at 305. Even though some subjects knew they had a legal right to walk away or ignore the officer, they still complied. *Id.* at 292.

132. *Id.* at 320.

133. *Id.*

134. *See Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting) (stating that it is the “[c]ircumstances, not a defendant’s statement, [that] tie the defendant’s silence to the right [to remain silent]”).

135. *Id.* at 2189.

136. *Id.* at 2190.

137. *Id.* at 2186; *see also* O’Neill, *supra* note 72 (explaining that if the suspect remains silent, “this can be used against him . . . [a]nd if he takes the stand to explain his silence, the prosecutor may then be able to impeach him with prior convictions that would have been otherwise inadmissible”); The Editorial Board, *The Right to Remain Silent*, N.Y. TIMES, Apr. 20, 2013, at SR12, available at [http://www.nytimes.com/2013/04/21/opinion/sunday/the-right-to-remain-silent.html?\\_r=0](http://www.nytimes.com/2013/04/21/opinion/sunday/the-right-to-remain-silent.html?_r=0) (stating that this decision “gives police officers too much leverage to coerce or cajole a suspect into answering their questions – to compel incriminating testimony in direct contradiction of the Fifth Amendment – or, just as bad, into making a false confession when he is innocent”).

the Fifth Amendment forbids.”<sup>138</sup>

#### IV. PROPOSAL

This Section proposes a new exception to the express invocation requirement, an exception that balances the needs of police to efficiently and effectively fight crime with the right of suspects to remain silent.

##### A. *The New Exception to the Express Invocation Rule*

The *Salinas* decision aimed to “prevent the privilege [against self-incrimination] from shielding information not properly within its scope.”<sup>139</sup> However, the Fifth Amendment plainly guarantees that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>140</sup> *Salinas* leaves vulnerable to this very type of compulsion a category of suspects who find themselves in a particular set of circumstances. To fully achieve the Fifth Amendment’s intention to prevent a person from being compelled to be a witness against himself, while also permitting the use of information that falls outside the scope of the privilege, a new exception to the express invocation requirement should be recognized.

This new exception would excuse a suspect’s failure to expressly invoke the privilege where the police initiated contact with him, made it clear to him that he was a suspect in a criminal case, and interrogated him in or on police property, including a car or a station, respectively. This exception should apply only where each of these three circumstances are present and should only prevent the suspect’s silence – not words – from being used against him. Ultimately, this new exception would shield those innocent suspects who do not feel at liberty to refuse to comply with the police because they are aware that the police have evidence unfavorable to them and they see the police as authority figures who have power over them. This specific situation creates an undeniable sense of pressure which when combined with interrogation in a police-dominated environment is likely to lead to compulsion. Thus, under these specific circumstances, failure to expressly invoke the privilege should be excused.

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138. The Editorial Board, *supra* note 137. See also O’Neill, *supra* note 72 (stating that “the majority’s decision can be seen in the larger sense as ‘compelling’ an individual to act as ‘a witness against himself’”).

139. *Salinas*, 133 S. Ct. at 2176 (plurality opinion). The Court recognized that a suspect may remain silent “because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else” and declined to extend the protection to these ambiguous silences. *Id.* at 2176.

140. U.S. CONST. amend. V.

### B. Recognizing the Popular Misconception

One of the main practical issues that the *Salinas* Court recognized, but then blatantly disregarded,<sup>141</sup> is the fact that most Americans have long believed they have a fundamental “right to remain silent” and are unaware that they must expressly invoke it.<sup>142</sup> Although the Court says this is just a “misconception,”<sup>143</sup> that characterization does not change the fact that many Americans act in reliance on this erroneous belief.<sup>144</sup> The entire *Miranda* decision and warnings are premised on the idea that people must be aware of their rights to exercise or waive them.<sup>145</sup> The Court stated that “[f]or 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.”<sup>146</sup> This logic applies with the same force here. A person unaware of the requirement to expressly invoke the privilege cannot be said to have deliberately forfeited his right to it.

The proposed exception would take care of this practical issue by forbidding any silence from being used against certain suspects. It takes into account the fact that nearly all law-enforcement dramas on TV have convinced people that they have a right to remain silent and their silence will not be used against them.<sup>147</sup> It also reflects the reality that the typical suspect is “unlikely to formally assert his Fifth Amendment right” because he is not a lawyer and likely will not be thinking “in terms of legal formalities”<sup>148</sup> during interrogation. Finally, it does not ignore the fact that when the typical suspect fails to expressly invoke, he is not really forfeiting his right to remain silent, rather, he is merely

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141. See *Salinas*, 133 S. Ct. at 2182–83 (plurality opinion) (stating that Justice Alito believes that, “popular misconceptions notwithstanding,” the Fifth Amendment does not guarantee an unqualified “right to remain silent”).

142. The general public can recite by memory a version of the *Miranda* warnings starting with “[y]ou have the right to remain silent.” Matthew Bromund, *You Have The Right To Remain Silent, But Do You Have The Ability?*, BROMUND L. GROUP (Oct. 22, 2013), <http://www.bromundlaw.com/blog/2013/10/you-have-the-right-to-remain-silent-but-do-you-have-the-ability/>.

143. *Salinas*, 133 S. Ct. at 2182 (plurality opinion).

144. See *id.* at 2191 (Breyer, J., dissenting) (explaining that ignoring this misconception “poses a serious obstacle to those who, like *Salinas*, seek to assert their basic Fifth Amendment right to remain silent, for they are likely unaware of any such linguistic detail”).

145. See *Miranda*, 284 U.S. at 467–68 (explaining that a person must be informed of his right to remain silent).

146. *Id.* at 468.

147. See Amy Purpura, *Understanding Rights after Salinas v. Texas*, W. VA. WATCHDOG (July 16, 2013), <http://westvirginia.watchdog.org/4288/understanding-rights-after-salinas-v-texas/> (stating that “nearly everyone knows that one of our civil liberties is the right to remain silent” from popular law enforcement shows).

148. Kerr, *supra* note 65.

uninformed.<sup>149</sup>

### C. The Meaningless Distinction

The proposed exception takes care of the problem that the distinction between in-custody and not in-custody is often meaningless.<sup>150</sup> In *Miranda* the Court extended a layer of protection to those who are involved in a custodial interrogation.<sup>151</sup> In *Salinas*, the Court excused custodial suspects from the express invocation requirement and allowed them to exercise their right to remain silent by remaining silent.<sup>152</sup> Yet, when approached by a police officer, many people feel coerced solely because the police are authority figures.<sup>153</sup> No great leap of logic is required to conclude that this feeling of coercion would escalate if the person were told he was a suspect in a criminal case. Few people feel they can decline invitations to comply,<sup>154</sup> thus, they are in a situation that is the practical equivalent of being in-custody, experiencing the same kind of pressure as those in custodial interrogations.

Making the distinction between a person who is technically “in-custody” and one who is not is a semantic game that does not reflect the perceptions of the American nor work to protect him from governmental coercion, as the Fifth Amendment intends to do. As the Court explicitly recognized in *Miranda*, “coercion can be mental as well as physical.”<sup>155</sup> It is hard to imagine that a person who is aware that they are a suspect and who is asked to comply with police in their authoritative capacity, is not under the same kind of mental coercion as a person who has been placed under a formal arrest. Thus, the proposed exception aims to protect these

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149. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (stating that “even the intelligent and educated layman has small and sometimes no skill in the science of law”).

150. See Smith, et al., *supra* note 124, at 299 (explaining that although not technically “in custody,” a person who is approached by a police officer and who is told he is a suspect does not actually feel at liberty to refuse compliance or to leave at any time).

151. *Miranda*, 384 U.S. at 467.

152. See *Salinas*, 133 S. Ct. at 2180 (plurality opinion) (stating that “a suspect who is subjected to the ‘inherently compelling pressures’ of an unwarned custodial interrogation need not invoke the privilege”).

153. Smith et al., *supra* note 124, at 290 (stating that 60% of the subjects complied because of the “inherent authority of the officers”).

154. See Jan Hoffman, *Police Tactics Chipping Away at Suspects’ Rights*, N.Y. TIMES (Mar. 29, 1998), <http://www.nytimes.com/1998/03/29/nyregion/police-tactics-chipping-away-at-suspects-rights.html?pagewanted=all&src=pm>, (explaining that although people do not realize they have the power to say no, courts make a distinction between voluntary trips to the police station and ones that were made while handcuffed).

155. *Miranda*, 284 U.S. at 448 (quoting *Blackburn v. State of Alabama*, 261 U.S. 199, 206 (1960)).

suspects from being mentally compelled to become witnesses against themselves.

#### *D. Discouraging Manipulative Police Tactics*

Finally, the proposed exception considers the very real problem that police tactics are often used to circumvent a suspect's right to *Miranda* warnings and likewise his right to remain silent without express invocation.<sup>156</sup> A person in custody is informed of his rights via *Miranda* warnings and silence cannot be used against him.<sup>157</sup> A person not in custody is not informed of his rights and must invoke his right to remain silent in order to benefit from it.<sup>158</sup> The *Salinas* decision creates an incentive for police to choose the latter – to interrogate a suspect who does not get *Miranda* warnings and who must (and probably will not) expressly invoke his right to remain silent.<sup>159</sup> Police can simply refrain from placing the suspect in custody in order to take advantage of a non-custodial suspect's lesser rights. This “interrogate first, arrest later” tactic is an easy way for police to undermine the fundamental rights of a criminal suspect.<sup>160</sup> Making a suspect's silence off-limits under these circumstances will reduce the incentive to use these manipulative tactics.

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156. Officers are instructed to wait to arrest an uncooperative suspect to avoid giving the *Miranda* warnings. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1542–43 (2008). “If, however, the subject appears to be uncooperative and not likely to waive, consider taking the coerciveness (i.e., the ‘custody’) out of the interrogation by simply informing him that he is not under arrest . . . and interview the subject without a *Miranda* admonishment and waiver.” ROBERT C. PHILLIPS, FIFTH AMENDMENT; MIRANDA 3 (Oct. 2005), available at <http://files.leagueathletics.com/Images/Club/2515/MEMBERS%20ONLY/CONFERENCE%20NOTES/2006%20NDIA%20National%20Conference-San%20Francisco%20%20CA/Police%20Interrogation%20Techniques/Training%20Materials/Phillips%20Miranda%20Update%20Oct%202005.pdf>.

157. *Miranda*, 384 U.S. at 479.

158. See, e.g., *Salinas*, 133 S. Ct. at 2190 (Breyer, J., dissenting) (deciding that a non-custodial suspect must expressly invoke the right to remain silent in order to benefit from it).

159. See Alexandra Cowen & Chanwoo Park, *Salinas v. Texas*, LEGAL INFO. INST. (Apr. 17, 2013), <http://www.law.cornell.edu/supct/cert/12-246> (explaining that allowing prosecutors to comment on pre-arrest silence during a non-custodial interrogation creates a “‘perverse incentive’ for police officers to wait before giving *Miranda* warnings”).

160. See Michael D. Cicchini, *The New Miranda Warning*, 65 SMU L. REV. 911, 926 (2012) (stating that officers intending to formally arrest a suspect later can conduct a non-custodial interrogation without *Miranda* warnings and use the suspect's statements against them).

## V. CONCLUSION

*Salinas* poses practical problems that compromise the purpose of the Fifth Amendment privilege against self-incrimination. It is an area that, without modification, will weaken the basic rights of any citizen in the spotlight of a criminal investigation. This new exception to the express invocation requirement would take into consideration the fact that most people believe they have an absolute right to remain silent, it would eliminate an illusory distinction between in-custody and not in-custody interrogations with regards to compulsion, and it would discourage manipulative police tactics. Specifically, the exemption would excuse a suspect's failure to expressly invoke the privilege only where the police initiated contact with him, made it clear to him that he was a suspect in a criminal case, and interrogated him in or on police property. It would protect those innocent suspects who do not feel free to refuse to comply with the police because they are aware that the police have evidence unfavorable to them and they view the police as people with authority over them. Ultimately, this exception would ensure that the original intent of the Fifth Amendment – to protect a suspect from compulsion – is fully realized, without barring the use of information that falls outside the intended scope of the privilege.