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Suspects Beware: Silence in Response to Police Questioning Could Prove as Fatal as a Confession

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution[1] provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[2] The Fifth Amendment guarantees a right against government-compelled self-incrimination.[3] A person may invoke the right against self-incrimination when he believes he is being forced by a government official to implicate himself in any crime, and his belief is reasonable considering his situation.[4] If his belief is reasonable, he is not required to answer the incriminating question, and he cannot be punished for refusing to answer.[5]

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1. U.S. CONST. amend. V.
2. *Id.*
3. *See* Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013).
4. Hoffman v. United States, 341 U.S. 479, 486-87 (1951).
5. *See id.* at 485-86.

The right to remain silent, as declared in *Miranda v. Arizona*,[6] also protects a person's silence in response to questions posed by government officials from use by the government in criminal proceedings.[7] However, the right to remain silent is available only to those facing custodial interrogation, which is police questioning after a person has been arrested "or otherwise deprived of his freedom of action in any significant way."[8]

In its recent decision in *Salinas v. Texas*,[9] the United States Supreme Court upheld the prosecution's use of a defendant's precustodial silence as evidence of guilt in the prosecution's case-in-chief.[10] This is the Court's first decision on the matter.[11] Justice Alito, writing for a plurality of the Court, reasoned that the defendant had no right to remain silent under *Miranda*,[12] so he was required to explicitly invoke the Fifth Amendment when he refused to answer a question posed by police; according to Justice Alito, he failed to do so.[13] Therefore, nothing prevented the use of his silence by the prosecution.[14]

After providing the backdrop for *Salinas*, this Note will explain the requirements for a successful invocation of the right against self-incrimination, the two exceptions to the express-invocation requirement, and the Court's interpretation of the Fifth Amendment as it applies to precustodial silence. The Note will then examine the Court's decision in *Salinas* and conclude by exploring the possible implications of that decision.

II. FACTUAL BACKGROUND

Two brothers were shot dead in their Houston, Texas, home on December 18, 1992. Tips from witnesses led police to the home of Genovevo Salinas, who had attended the brothers' house party the night before the shooting. Salinas gave the officers permission to perform tests on his shotgun, and he also agreed to accompany the officers to the police station for questioning. The police did not arrest Salinas, and he

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6. 384 U.S. 436 (1966).
7. *Id.* at 444.
8. *Id.* at 477-78.
9. 133 S. Ct. 2174 (2013).
10. *See id.* at 2177-78, 2184.
11. The Court in *Jenkins v. Anderson*, 447 U.S. 231 (1980), held that the prosecution's use of a defendant's precustodial silence to impeach the defendant when he takes the stand does not violate the Fifth Amendment, but it never ruled on the use of precustodial silence as evidence of guilt in the prosecution's case-in-chief. *Id.* at 236 n.2, 237-38.
12. *Salinas*, 133 S. Ct. at 2180.
13. *Id.* at 2178.
14. *See id.*

was free to leave the station at any time. During the hour-long interview, Salinas answered all but one of the officers' questions: whether his shotgun would match the gun casings recovered at the victims' house.[15] The officers testified at trial that in response to that question, Salinas "[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."[16] The police did not arrest Salinas for murder because there was insufficient evidence to support a murder charge. Some days later, however, a man told police he heard Salinas confess to the killings. Salinas was subsequently arrested and tried for two counts of murder.[17] Over Salinas's objection, the prosecution used Salinas's silence against him, telling the jury that "'[a]n innocent person' would have said, 'What are you talking about? I didn't do that. I wasn't there.'"[18] The prosecutor argued that, contrary to the norm, Salinas "didn't respond that way," but instead "wouldn't answer that question."[19] With the help of that evidence, the jury convicted Salinas on both murder counts.[20]

On appeal to the Texas Court of Appeals, Salinas argued that the prosecution's use of his silence (in response to whether the shell casings found at the crime scene would match his gun) at trial violated his Fifth Amendment right against self-incrimination. The court of appeals affirmed the trial court's ruling, holding that the Fifth Amendment guards against a defendant's compelled, not volunteered, statements being admitted at trial to incriminate the defendant. According to the court of appeals, Salinas's statements were not forced because he voluntarily went to the police station for questioning. The Texas Court of Criminal Appeals affirmed the lower court's ruling on identical grounds. Similarly, it held that the Fifth Amendment does not protect a person's voluntary statement because, by definition, a voluntary statement is not a compelled one.[21] The United States Supreme Court granted Salinas's petition for certiorari to decide "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief."[22]

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15. *Id.* at 2178.
16. *Id.* (alterations in original).
17. *Id.*
18. *Id.* at 2185 (Breyer, J., dissenting) (alteration in original) (internal quotation marks omitted).
19. *Id.*
20. *Id.* at 2178 (plurality opinion).
21. *See id.* at 2178-79.
22. *Id.* at 2179.

III. LEGAL BACKGROUND

Hoffman v. United States[23] is the first Supreme Court case explaining the requirements for a valid right-against-self-incrimination claim.[24] In *Hoffman*, the Court held that the defendant—a grand-jury witness suspected of associating with the suspects of a criminal investigation—sufficiently responded to the prosecution's questions by "refus[ing] to answer."[25] The Court held that a person compelled by a government official to speak invokes the Fifth Amendment when he fears that his response could implicate him in any crime, he asserts the right not to answer the question posed, and his fear of self-incrimination is reasonable considering the question asked and his particular circumstance as shown by the evidence.[26] The question of reasonableness is one for the court, and the court should find the witness's fear unreasonable only if it is perfectly clear from the evidence that the witness cannot implicate himself in criminal activity by responding to the question posed.[27] The Court reasoned that such a liberal construction in favor of the right against self-incrimination is needed because the right was intended to safeguard freedom, the most fundamental right of all.[28]

Four years later, in *Quinn v. United States*,[29] the Court held that a defendant may invoke the right against self-incrimination by adopting a third party's grounds for invoking the right-against-self-incrimination claim.[30] *Quinn*, therefore, expounds on the first prong of the *Hoffman* test—whether the right against self-incrimination was asserted. In response to a government question that was probative of his involvement in illegal communist activity, the defendant stated, "I support the position taken by Brother Fitzpatrick yesterday . . . [i]n its entirety."[31] Because the lower court found that Fitzpatrick had invoked the right against self-incrimination, the Supreme Court determined that the defendant's right-against-self-incrimination claim, in which he repeated verbatim Fitzpatrick's claim, was similarly valid.[32] The Court empha-

23. 341 U.S. 479 (1951).
24. *See id.* at 485.
25. *Id.* at 481, 489-90.
26. *Id.* at 486-87.
27. *Id.*
28. *See id.* at 486.
29. 349 U.S. 155 (1955).
30. *Id.* at 163-64.
31. *Id.* at 158 n.8.
32. *Id.* at 158-59, 164.

sized that liberal construction is necessary, for the right is fundamentally a means of protecting the innocent.[33]

The Court applied an objectively reasonable standard to determine whether there was an invocation; that is, a claim is valid if the government official to whom it was addressed should have realized that the claimant was asserting the right against self-incrimination.[34] In other words, an invocation requires no "special combination of words," as long as it is reasonably sufficient to notify the government of the Fifth-Amendment claim.[35]

The Court has since applied two exceptions to the general rule that a witness must expressly invoke the Fifth Amendment when he relies on it.[36] The first exception stems from its decision in *Griffin v. California*.[37] The defendant in *Griffin* was indicted for first-degree murder. He did not testify at trial.[38] Clearly, the court could not "compel[] [him] in [his] criminal case to be a witness against himself,"[39] for the Fifth Amendment expressly forbids it.[40] The issue in *Griffin* was whether the prosecution's comment on the defendant's choice not to testify and the court's instructions to the jury—telling the jury that it may draw negative inferences from the defendant's refusal to testify—violated the defendant's Fifth-Amendment right against self-incrimination.[41]

The Court held that the prosecution's comment and the lower court's instructions violated the Fifth Amendment.[42] Although, as the Court conceded, a jury may well naturally draw negative inferences from a defendant's refusal to testify, neither the trial court nor the prosecution can aid the jury in that regard.[43] As the Court explained, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[44] The Court reasoned that allowing the government to comment on a defendant's assertion of the right against self-incrimination amounts to a penalty for asserting a constitutional

33. *Id.* at 161-62.
34. *Id.* at 162-63.
35. *Id.* at 162, 164.
36. *Salinas*, 133 S. Ct. at 2179.
37. 380 U.S. 609 (1965).
38. *Id.* at 609.
39. U.S. CONST. amend. V.
40. *Id.*
41. *Griffin*, 380 U.S. at 609-11.
42. *Id.* at 615.
43. *See id.* at 614.
44. *Id.*

right and, thereby, makes the assertion costly.[45] The Court's interpretation of the Fifth Amendment in *Griffin* thus gives defendants an absolute right not to testify as witnesses in their own trials.[46] For that reason, defendants need not take the stand and expressly assert their right against self-incrimination.[47] Instead, the right applies automatically when defendants choose not to testify on their own behalf.[48]

The second exception to the express-invocation requirement covers a broader range of cases. This exception applies in situations where some form of government compulsion deprives the person of his "free choice to admit, to deny, or to refuse to answer."[49] For example, the Court in *Miranda* held that police must warn persons facing custodial interrogation that they do not have to answer questions posed by police.[50] According to the Court, such a requirement ensures that any confession given by the person is voluntary.[51] If the warning is not given, the person's statements cannot be used against him in any criminal proceeding.[52] *Miranda* affords persons facing custodial interrogation and those "Mirandized" (regardless of whether or not they are interrogated) a right to remain silent, meaning the Fifth Amendment automatically applies and shields any silence from comment by the prosecution.[53]

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45. *See id.*

46. *Salinas*, 133 S. Ct. at 2179.

47. *See id.*

48. *See id.*

49. *Miranda*, 384 U.S. at 534 (White, J., dissenting) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).

50. *Miranda*, 384 U.S. at 467-68.

51. *See id.* at 469.

52. *Id.* at 476.

53. *See id.* at 467. The second exception also covers cases where a claim of the right against self-incrimination itself would tend to incriminate the claimant. *Salinas*, 133 S. Ct. at 2188-89. The Court in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), held that a federal law penalizing the refusal of members of the Communist Party of the United States of America to register their memberships with the United States Attorney General compelled members to implicate themselves in Communist activity and thus violated the Fifth Amendment. *Id.* at 77-78. The Court reasoned that admitting membership in the Communist Party would incriminate the member and refusing to answer as required by law would subject the member to harsh penalties. *Id.* at 75-77. Likewise, pleading the Fifth would do no good because the assumption is that by pleading the Fifth in response to the question of Communist affiliation, the defendant has something to hide. *See id.* at 79. Consequently, the defendant's only reasonable option was to not register at all (that is, remain silent), for he would have run the risk of incrimination had he registered as required or pled the Fifth. *See id.* at 75-76. The Court held that in such cases, silence or inaction suffices to raise Fifth-Amendment protection. *See id.* at 78-79.

Cases like *Garrity v. New Jersey*, 385 U.S. 493 (1967), are also included within the second exception. The defendants, New Jersey police officers, in *Garrity*, were under investigation for fixing traffic tickets. Before questioning the defendants, investigators

However, the Court has held that the Fifth Amendment does not preclude the prosecution from questioning a defendant about his precustodial silence when he voluntarily takes the stand in his own defense.[54] The Court held in *Jenkins v. Anderson*[55] that statements by a defendant against his own interest are not compelled when the defendant voluntarily takes the stand.[56] The defendant in *Jenkins* testified that he killed the victim in self-defense, but he had no explanation for why he waited two weeks to report the killing to police.[57] The Court held that "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial" and hence concluded that the prosecution's questioning of the defendant regarding the two weeks he waited before reporting the killing did not violate his right against self-incrimination.[58] However, the Court explicitly postponed deciding whether the Fifth Amendment forbids the use of such silence by the prosecution as evidence of guilt in its case-in-chief.[59]

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cautioned them that their responses could be used against them in court, that they had a right not to respond if answering could incriminate them, and that refusal to answer was grounds for termination from their offices. The defendants' answers implicated them in conspiracy to obstruct the administration of traffic laws, and they were later prosecuted and convicted of fixing tickets. *Id.* at 494-95. The Court saw little difference between the mental coercion exerted by investigators in *Garrity* and the mental coercion typical of police interrogations that led to its holding in *Miranda*. *Id.* at 497. Here, the defendants were forced to choose between losing their means of livelihood and implicating themselves in a conspiracy. *Id.* The Court reasoned that the pressure, though not a gun to the head, was enough to deprive the defendants of their "free choice to admit, to deny, or to refuse to answer," and such a denial of free will is definitive evidence of compulsion under the Fifth Amendment. *Id.* at 496-97 (quoting *Lisenba*, 314 U.S. at 241). Therefore, the defendants' statements, which were later used to convict them of the conspiracy, were not freely made and consequently could not rightfully be used as evidence against them. *Id.* at 497-98.

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

55. 447 U.S. 231 (1980).

56. *See id.* at 237-38.

57. *Id.* at 232-33.

58. *Id.* at 238. Note the following distinction between *Jenkins* and *Salinas*: Salinas never testified at his trial, so the prosecution had no opportunity to impeach him via cross-examination. Rather, the prosecution commented on his silence during closing arguments. *Salinas*, 133 S. Ct. at 2178. Jenkins, on the other hand, testified at trial, and the prosecution questioned him about the length of time it took him to turn himself over to the police. *Jenkins*, 447 U.S. at 232-33.

59. *Jenkins*, 447 U.S. at 236 n.2.

IV. COURT'S RATIONALE

A. *The Plurality*

The Court granted certiorari to decide whether the prosecution could use Salinas's precustodial silence in its case-in-chief (that is, for purposes other than impeachment).[60] Justice Alito, writing for a plurality of the Court, held that Salinas was not entitled to Fifth-Amendment protection because he never invoked the Fifth Amendment.[61] Hence, the prosecution's use of his silence to infer his guilt was constitutional.[62]

Absent an applicable exception,[63] a person relying on the right against self-incrimination must claim it when he relies on it.[64] Otherwise, the government will not know that he intends to rely on the Fifth Amendment.[65] No magic words are required to assert the right.[66] The plurality stressed that, because the government has an interest in securing testimony and prosecuting crime, it is important that the government knows that the witness is fearful of self-incrimination.[67] Once the government is notified, it may do one of two things in an effort to secure the testimony: (1) challenge the claim on the ground that the solicited testimony will not incriminate the claimant; or (2) placate the claimant with an offer of immunity from prosecution.[68]

The plurality then discussed the exceptions to the general express-invocation rule.[69] It began with the *Griffin* exception that a criminal defendant is not obligated to testify at his own trial.[70] According to the plurality, the Constitution explicitly gives defendants the right to refuse to testify,[71] and the Court has interpreted that right to mean that

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60. *Salinas*, 133 S. Ct. at 2179.
61. *Id.* at 2184.
62. *See id.*
63. *Id.* at 2179-80. For exceptions to the general express-invocation rule, see generally *Griffin*, 380 U.S. 609 (holding that a criminal defendant need not take the stand at his own trial and invoke his right against self-incrimination) and *Miranda*, 384 U.S. 436 (holding that persons in police custody have a right to remain silent and thus need not invoke their right against self-incrimination).
64. *Salinas*, 133 S. Ct. at 2179.
65. *Id.*
66. *Id.* at 2178.
67. *Id.* at 2179, 2181.
68. *Id.* at 2179.
69. *Id.* at 2179-80.
70. *Id.*
71. *Id.*

defendants can assert the right without repercussion.[72] The express-invocation requirement is inapplicable in such cases, and mere silence is enough to invoke the right against self-incrimination.[73] Also, in such situations, the government has no interest to claim because neither it nor the judge can force the defendant to testify, either via a grant of immunity or a determination that his statements would not be incriminating.[74] The plurality distinguished Salinas's case from *Griffin* on the basis that the silence used by the prosecution was Salinas's precustodial silence, not his silence during trial.[75]

The plurality held that the exception for cases of government coercion similarly did not apply in Salinas's case.[76] Salinas forfeited all possibility of a favorable decision under this exception when he stipulated that he was free to leave the police station at any time during his interview.[77] The government-coercion exception applies only in situations where the pressure exerted by government officials, particularly police officers, denies the person the free will to admit, deny, or to not respond at all.[78] Here, Salinas could have either said that he was refusing to answer the question whether his gun would match evidence found at the crime scene, or he could have simply ended the interview.[79] As such, the compulsion necessary to trigger the government-coercion exception was non-existent.[80]

Salinas suggested that the Court create a third exception to the general rule. He argued that a person's silence should be enough to invoke the Fifth Amendment when the investigating officer has reason to know that an answer would incriminate the person.[81] The plurality was not persuaded.[82] Such an exception, it reasoned, would make it more difficult for the government to secure testimony and prosecute crime because the government would first have to show that the officer had no reason to suspect that the person's silence was due to potential self-incrimination.[83] Further, no one but the person knows the reason

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72. *Id.* (citing *Griffin*, 380 U.S. at 615 (holding that the government cannot comment on a defendant's refusal to testify at trial)).
73. *See id.* at 2179.
74. *See id.*
75. *See id.* at 2179-80.
76. *Id.* at 2180.
77. *Id.*
78. *See id.*
79. *Id.*
80. *See id.*
81. *Id.* at 2180-81.
82. *Id.* at 2181.
83. *See id.* at 2182.

for his silence, for someone could be silent because "he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else."[84] Furthermore, the plurality cited another difficulty in allowing Salinas and those similarly situated to invoke the Fifth Amendment through silence. It reasoned that, arguably, Salinas was not silent during his interview because he made nervous movements with his feet and hands.[85] Thus, upholding the express-invocation requirement avoids litigation surrounding the point where silence ends and expression begins.[86]

Salinas also argued that requiring laypersons to expressly assert the Fifth Amendment is unfair because they will not know what to say, for they lack legal expertise.[87] The plurality conceded the possibility that its holding could be detrimental to those unfamiliar with the law.[88] Nevertheless, it placed the government's interest in securing testimony and prosecuting crime above the interest of persons unfamiliar with the law.[89] Justice Alito stated,

> [B]ut popular 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. A witness'[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.[90]

The plurality was similarly not convinced that an officer's warning that their silence may be used against them would lure witnesses into talking.[91] A warning ensures the witness is informed about the law, and it is up to the witness what he does in response.[92]

B. The Concurrence

Justice Thomas, with whom Justice Scalia joined, agreed with the plurality's judgment but not with its reasoning.[93] He reasoned that the prosecution's use of Salinas's silence in response to police questioning did not compel Salinas to give self-incriminating testimony because Salinas

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84. *Id.*
85. *Id.* at 2178, 2183.
86. *Id.* at 2183.
87. *Id.* at 2182.
88. *See id.* at 2182-83.
89. *See id.*
90. *Id.* (internal quotation marks omitted).
91. *Id.* at 2183.
92. *See id.*
93. *See id.* at 2184 (Thomas, J., concurring in judgment).

was not forced to testify against himself.[94] Justice Thomas narrowly read "compelled" to mean an absence of choice on the part of a defendant to testify against himself.[95] Thus, Justice Thomas would overrule *Griffin* and allow the jury to draw logical inferences from a defendant's decision not to testify at his own trial because he believed the threat of a negative inference does not compel a defendant to testify against himself.[96] His opinion stated, on the contrary, that in most cases "a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his cross-examined testimony."[97]

C. *The Dissent*

Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan joined, reasoned that the police should have suspected that Salinas was invoking his Fifth-Amendment right when he refused to answer their question.[98] According to Justice Breyer, analysis should focus on the witness's words, deeds, and the surrounding circumstances of the questioning.[99] Justice Breyer cited the *Griffin* rule and *Miranda*'s "right to remain silent" in support of his "circumstances" rationale.[100] Recall that in *Griffin*, the circumstance of trial, combined with the defendant's failure to testify, gave rise to the right against self-incrimination, so the defendant was not required to expressly invoke it.[101] Similarly, in instances where a defendant has been Mirandized, it is his "deeds (silence) and [the surrounding] circumstances (receipt of the warnings) that tie together silence and constitutional right."[102] Justice Breyer essentially argued that *Salinas* was analogous to *Griffin* and *Miranda*, cases in which the circumstances were sufficient to notify the government that the defendant's silence was intended as an invocation of the right against self-incrimination.[103] Justice Breyer distinguished *Salinas* from *Jenkins*, where, according to him, the government could not

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (internal quotation marks omitted) (quoting Mitchell v. United States, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting)).
98. *Id.* at 2189 (Breyer, J., dissenting).
99. *Id.* at 2186.
100. *Id.* at 2185-86.
101. *See id.* at 2179 (plurality opinion); *see also Griffin*, 380 U.S. at 613-15.
102. *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting).
103. *See id.* at 2189.

have known that the defendant's failure to report the killing was an assertion of the Fifth Amendment.[104]

Here, police told Salinas that he was a suspect in a murder investigation. Police questioned him at their station without counsel present. In addition, the question that Salinas refused to answer was asked to "ferret out whether Salinas was guilty of murder."[105] In response, Salinas did what any layperson unaware of technical legal requirements would most likely do—he remained silent.[106] Accordingly, under those circumstances, the police should have suspected that Salinas's refusal to answer was due to his fear of self-incrimination.[107]

To further support his reasoning, Justice Breyer echoed the plurality's proclamation that no prescribed language is needed to invoke the Fifth Amendment's protection.[108] He broadly read that requirement to mean that language is not required at all as long as the surrounding circumstances would lead a reasonable person to infer that the defendant was asserting the right against self-incrimination through his silence.[109] Because he would have held Salinas's Fifth-Amendment claim valid, Justice Breyer also would have held that the prosecution's comment on Salinas's silence was unconstitutional.[110] Under the plurality's holding, Salinas had no free choice to admit, deny, or refuse to answer, for several reasons: (1) the prosecution would have likely used an answer implicating him in the murder against him at trial; (2) his silence in response to their question that solicited an incriminating answer was used to infer his guilt; and (3) had Salinas testified, such silence would likely have been used to impeach his credibility.[111]

V. IMPLICATIONS

The plurality's decision in *Salinas* is problematic for the following reasons. First, it contradicts the traditional principles behind the right against self-incrimination—particularly society's "unwillingness to subject . . . suspect[s] . . . to the cruel trilemma of self-accusation, perjury or contempt" and society's "sense of fair play which dictates 'a fair state-individual balance . . . by requiring the government in its

104. *Id.* at 2188.
105. *Id.* at 2189.
106. *Id.* at 2190.
107. *Id.* at 2189.
108. *Id.*
109. *Id.*
110. *Id.* at 2190.
111. *Id.* at 2186.

contest with the individual to shoulder the entire load.'"[112] Second, the plurality's decision renders the Fifth Amendment incomprehensible to "[w]e the people,"[113] those whom it serves to protect.[114] And third, the decision will likely impede the government's interest in gaining testimony and prosecuting crime, an interest the plurality emphasizes as being of the utmost importance.[115]

A. Traditional Principles Behind the Fifth Amendment on Shaky Ground

The Fifth Amendment guards against a "cruel trilemma."[116] "The cruel trilemma is the decision a defendant would face if forced to choose between maintaining her silence and being held in contempt of court, or speaking and thereby either perjuring or incriminating herself."[117] Under the Fifth Amendment, the defendant may freely refuse to answer without fear of repercussion.[118] However, because the plurality upheld the use of a defendant's precustodial silence to prove guilt, defendants may implicate themselves in a crime for want of a reasonable alternative.[119] Such unreliable confessions are precisely what the Court in *Miranda* sought to prevent.[120] This scenario illustrates the point:

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112. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting 8 WIGMORE, EVIDENCE 317 (McNaughton rev. 1961)).

113. U.S. CONST. pmbl. The phrase "[w]e the people of the United States," the introductory words of the Preamble of the United States Constitution, supports the proposition that the Constitution was created by the people of the United States in order to protect the rights of those people. *See id.*

114. The Fifth Amendment commands that "[n]o *person* shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V (emphasis added). That is, the Fifth Amendment applies to everyone, not just those formerly accused of crime. Andrew J. M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 VA. L. REV. 897, 901 (2012) ("While the Sixth Amendment uses the word 'accused' in protecting certain trial rights, the Fifth Amendment uses the word 'person.' This deliberate contrast shows that the Fifth Amendment was meant to attach before someone became an 'accused.'" (internal citations omitted)).

115. The government's interest in gaining testimony and prosecuting crime is repeatedly emphasized in *Salinas*. *See Salinas*, 133 S. Ct. at 2181.

116. *Murphy*, 378 U.S. at 55.

117. Bentz, *supra* note 114, at 900.

118. *Id.*

119. Br. of Nat'l Ass'n of Criminal Def. Lawyers in Supp. of Pet. for a Writ of Cert., Salinas v. Texas, 133 S. Ct. 2174 (2013), 2013 U.S. S. Ct. Briefs LEXIS 1389.

120. *See generally Miranda*, 384 U.S. 436 (noting the inherent pressures present in police stations, the Court held that police must warn persons in custody that they have a right not to speak to police in order for any subsequent confession to be usable in court).

> A crime has been committed, and the police think they know who might have done it. They have some evidence but know that a confession would seal their case. So the officers go to the suspect's home, ask to speak with him, and confront him with difficult questions. He is not under arrest. The suspect, however, refuses to answer the questions. . . .
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> . . .
>
> [So the officer says,] "Joe, you don't have to answer my questions, but if you don't, then that's going to be used as evidence that you're guilty. The prosecutor is going to stand in front of that jury and tell them that an innocent man would answer my questions. So you don't need to talk to [a] lawyer, you need to answer my questions right now."[121]

The Court has also stated that the right against self-incrimination exists to safeguard citizens against abuse by government officials and to preserve the country's "accusatorial rather than an inquisitorial system of criminal justice,"[122] in which the government must prove guilt beyond a reasonable doubt by its own efforts, not simply through interrogating the accused.[123] Because of the Court's holding in *Salinas*, police may be tempted to use strategies that elicit silence, rather than a truthful answer, from a suspect.[124] For instance, police could question a suspect in a hostile manner, hoping that the terrified and flustered suspect will refuse to answer.[125] Police may also use a "strategy of surprise" to provoke silence.[126] Evidence of guilt via silence is easier to secure than evidence of guilt via a confession, especially given the fact that some persons are mistrusting of police and thus refuse to speak to police—not because they are guilty, but because they view the police as antagonists.[127]

Further, sanctioning the use of precustodial silence as evidence of guilt gives prosecutors greater leverage in the plea-bargaining process.[128] Recent studies show that about 90% of criminal cases are resolved with a defendant's plea.[129] Allowing the prosecution's use of precustodial silence arms the prosecution with a powerful tool to tip the scales in the

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121. Br. of Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 119, at *4-5 (citing *Miranda*, 384 U.S. at 454).

122. *Murphy*, 378 U.S. at 55.

123. *Id.*

124. *See* Br. of Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 119, at *8-9.

125. *Id.*

126. *Id.*

127. People v. De George, 541 N.E.2d 11, 13 (N.Y. 1989).

128. Br. of Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 119, at *13.

129. *Id.*

remaining 10% of cases, where its case may otherwise be weak.[130] Attorneys for the National Association of Criminal Defense Lawyers agree that defense lawyers may very well advise their clients to plea in such instances for fear that an inference of guilt from silence may be insuperable.[131]

Furthermore, as the plurality concedes, silence is "insolubly ambiguous,"[132] that is, in most cases, it is impossible to ascertain the meaning behind silence.[133] Innocent persons may refuse to talk to the police for "fear of police, threats from another person not to speak with police, embarrassment about a relationship or course of conduct that is not necessarily criminal, or the belief that explaining his or her conduct is futile."[134]

Because silence is insolubly ambiguous, Georgia courts prohibit the use of silence to impeach a defendant's credibility when he takes the stand and the use of silence in the prosecution's case-in-chief.[135] The defendant in *Reynolds v. State*[136] was convicted of aggravated battery stemming from a domestic quarrel. In its closing argument, the prosecution told the jury to consider the fact that rather than staying and giving his side of the story to police, the defendant fled the scene after the domestic dispute.[137] The Georgia Supreme Court held that the use of silence is more prejudicial than probative of a defendant's guilt because a defendant's "failure to speak or act will most often be judged as evidence of the admission of criminal responsibility."[138] The court indicated that Georgia was free to prohibit the use of precustodial silence, for the United States Supreme Court limited its holding in *Jenkins* when it noted at the end of the *Jenkins* opinion that states remained "free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."[139]

Justice Robert Jackson once stated that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to

130. *Id.* at *13-14.
131. *Id.* at *14.
132. *Salinas*, 133 S. Ct. at 2182 (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976)).
133. *See id.*
134. State v. Leach, 807 N.E.2d 335, 342 (Ohio 2004).
135. Reynolds v. State, 285 Ga. 70, 71, 673 S.E.2d 854, 855 (2009) (citing Mallory v. State, 261 Ga. 625, 630, 409 S.E.2d 839, 843 (1991)).
136. 285 Ga. 70, 673 S.E.2d 854 (2009).
137. *Id.*
138. *Id.* at 71, 673 S.E.2d at 855.
139. *Id.* (quoting *Jenkins*, 447 U.S. at 240).

police under any circumstances."[140] And defense attorneys generally follow that advice, finding that the surest way to protect their clients' constitutional rights is to advise them to say nothing to police.[141] Justice Jackson's words have since become an anachronism. In light of *Salinas*, defense attorneys should not advise their clients to remain silent; rather, they should advise them to explicitly invoke the Fifth Amendment whenever they wish to refuse to answer police questions.[142]

B. Ignorance of the Law is *Really* No Excuse

The decision in *Salinas* will most likely affect those who are least informed about the law.[143] Those suspected of crime generally have no constitutional right to an attorney.[144] A report of the National Right to Counsel Committee supports the theory that a substantial number of suspects cannot afford to hire private attorneys.[145] The study shows the large number of defendants who rely on government-appointed public defenders for representation in criminal matters; it further "documented instances in which public defenders carried as many as 500 active felony cases at a time (the American Bar Association recommends

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140. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

141. Br. of Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 119, at *2.

142. Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 367 (2013) (discussing the effects of the Court's decision in *Salinas*).

143. A 2009 study of the work of public defenders (government-appointed defense attorneys who represent indigent defendants) conducted by the National Right to Counsel Committee showed that some public defenders handle caseloads far in excess of the American Bar Association's recommendations. THE NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 65-70 (2009), *available at* http://www.opensocietyfoundations.org/sites/default/files/justice_20090511.pdf. The study shows that an alarming number of people who come in contact with the criminal-justice system cannot hire legal representation. *See id.*

144. "[T]he Fifth Amendment's [right] against self-incrimination entitles indigent [persons] to counsel during . . . custodial interrogation . . . ." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 984-85 (5th ed. 2008). The Sixth Amendment's right to counsel applies from the point when a person is formally charged with a crime to the point when he is sentenced by the court. *Id.* at 1005. Thus, suspects who are merely questioned by police have no constitutional right to a government-appointed attorney.

145. *See generally* THE NAT'L RIGHT TO COUNSEL COMM., *supra* note 143, at 65 (showing that some public defenders handle caseloads far in excess of the American Bar Association's recommendations, indicating that numerous individuals may be unable to acquire private representation).

150) and as many as 2,225 misdemeanor cases (the ABA recommends 400)."[146] It is likely that, much like defendants, suspects too are unable to secure private representation.

The plurality's failure to provide guidance as to what suffices as an invocation of the Fifth Amendment[147] poses a grave problem for criminal suspects who do not have access to legal representation. Because of the popularity of crime television shows and movies, most people believe they have an absolute right to remain silent when questioned by police.[148] However, as this Note illustrates, the availability of both the right to remain silent and the right against self-incrimination depends on the circumstances.[149] Thus, neither right is guaranteed. The plurality stated that an invocation of the Fifth Amendment does not require a set combination of words.[150] Apart from that basic guideline, it is unclear what is required for a proper invocation.[151] According to Justice Breyer, the plurality's decision gives no guidance as to what suffices to make a Fifth-Amendment claim; it is uncertain, he stated, whether "'[l]et's discuss something else,' or 'I'm not sure I want to answer that,'" or merely getting up and leaving the room is enough to raise Fifth-Amendment protection.[152] Consequently, *Salinas* will likely be an obstacle to suspects without legal representation who endeavor to assert their Fifth-Amendment right against self-incrimination. *Salinas* seemingly moves the law away from

146. Karen Houppert, *Indigent Clients Suffer As Public Defenders Struggle to Keep Up With Caseloads*, WASH. POST, Mar. 15, 2013, http://www.washingtonpost.com/opinions/legal-aid-for-indigent-clients-needs-help/2013/03/15/65dcbe56-8cc9-11e2-b63f-f53fb9f2fcb4_story.html.

147. *See generally Salinas*, 133 S. Ct. at 2183 (stating that the potential for "close cases" as to whether the Fifth Amendment was invoked does not render the express-invocation requirement unworkable in practice).

148. Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 181 (1997) (noting that the right to remain silent is one of the most widely known constitutional rights largely because of the popularity of television crime shows).

149. *See generally Salinas*, 133 S. Ct. 2174 (holding that the protection of the Fifth Amendment's right-against-self-incrimination clause is limited to circumstances under which a person is compelled by a government official to implicate himself in crime); *Miranda*, 384 U.S. 436 (holding that the police must warn a person facing custodial interrogation or similarly pressured circumstances where he is denied the free will to admit, deny, or refuse to answer that he has a right to remain silent under the Fifth Amendment).

150. *Salinas*, 133 S. Ct. at 2178 (citing *Quinn*, 349 U.S. at 164).

151. *See id.* at 2190 (Breyer, J., dissenting).

152. *Id.*

the longstanding notion that a person need not have the skill of a lawyer to claim the right against self-incrimination.[153]

C. Increasing Cynical Attitudes Towards Police

Lastly, the decision in *Salinas* will likely impede the government's interest in gaining testimony in order to prosecute crime. Cooperating with the police is already taboo in high-crime neighborhoods because of the view that police cannot be trusted.[154] Salinas's voluntary cooperation with the police led to his arrest and conviction for murder.[155] Because the use of silence as proof of guilt is permissible, witnesses to crime and suspects like Salinas may hesitate to cooperate with the police for fear of being deceived by them.

VI. CONCLUSION

The decision in *Salinas* comes at a cost. It contradicts the traditional principles behind the right against self-incrimination; makes the right against self-incrimination inaccessible to those whom it was meant to protect; and could very well impede the government's ability to safeguard citizens through the deterrent effect of the prosecution of crime. Moreover, the use of silence as evidence of guilt undermines the truth-seeking function of criminal trials because a defendant's silence in response to questions from government officials could reflect many feelings other than a guilty conscience.[156] In most cases, it is impossible to determine whether silence is more consistent with guilt than innocence.[157] A defendant's testimony that his silence was not the result of a guilty conscience may be insufficient to overcome the presumption that an innocent person will deny allegations of criminal responsibility rather than remain silent.

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153. *Quinn*, 349 U.S. at 162 (emphasizing that "[i]t is agreed by all that a claim of the privilege does not require any special combination of words . . . . [because] a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause").

154. Br. of Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 119, at *12-13.

155. *See generally Salinas*, 133 S. Ct. 2174 (affirming Salinas's murder conviction).

156. *See Leach*, 807 N.E.2d at 342.

157. *De George*, 541 N.E.2d at 13.

Table of Cases