The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 16 | Number 4 Article 5

1-1-2014

When Silence Requires Speech: Reviving the Right to Remain Silent in the Wake of Salinas v. Texas.

Brendan Villaneuva-Le

Follow this and additional works at: https://commons.stmarytx.edu/thescholar

Part of the Law Commons

Recommended Citation

Brendan Villaneuva-Le, *When Silence Requires Speech: Reviving the Right to Remain Silent in the Wake of Salinas v. Texas.*, 16 THE SCHOLAR (2014).
Available at: https://commons.stmarytx.edu/thescholar/vol16/iss4/5

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

WHEN SILENCE REQUIRES SPEECH: REVIVING THE RIGHT TO REMAIN SILENT IN THE WAKE OF *SALINAS V. TEXAS*

BRENDAN VILLANUEVA-LE*

I. Introduction 835
II. The Fifth Amendment: Past vs. Present 839
  A. The Undercard: Early Decisions on the Privilege Against Self-Incrimination 839
  B. Rolling with the Punches: Decisions of the 1940s and 1950s and the Requirement of Claiming the Privilege 843
  C. Silence as a Weapon: Griffin v. California and its Progeny 850
  D. Miranda v. Arizona and its Importance to the Decision in Salinas 852
III. Split Decision: Exploring the Plurality, Concurring, and Dissenting Opinions of Salinas v. Texas 855
  A. Salinas' Plurality Opinion: The Express Invocation Requirement 856
  B. Sparring against Silence: The Concurring Opinion's Disapproval of the Griffin Exception 860
  C. A Shield Against Silence: Salinas' Dissenting Opinion 861
IV. Salinas' Wake: Examining the Problems and Possible Solutions to Current Fifth Amendment Law 864
  A. On the Ropes: The Harms of an Unbalanced System 864
  B. Tipping the Scales: Possible Solutions to Competing Interests 867
V. Conclusion 869

I. INTRODUCTION

There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of

---

* Candidate for Juris Doctor, May 2015, St. Mary's University School of Law. I would like to thank Professors Schleuter and Reamey for their assistance in preparing this Comment.

Published by Digital Commons at St. Mary's University, 2022

that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.[1]

"No person . . . shall be compelled in any criminal case to be a witness against himself."[2] Embedded in the Fifth Amendment,[3] the privilege against self-incrimination reaches "to the roots of our concepts of American criminal jurisprudence."[4] Privilege against self-incrimination provides a rare constitutional exception to the historical principal that the public has a right to every man's evidence.[5]

The language of *Miranda v. Arizona* popularized the privilege's application against self-incrimination during police questioning as the "right to remain silent."[6] The U.S. Supreme Court's attempted balancing two contradictory interests in *Miranda*.[7] First, the Supreme Court sought to preserve law enforcement's interest in soliciting confessions through interrogation.[8] Second, the Court balanced this interest with an individual's Fifth Amendment right against self-incrimination.[9]

Some scholars consider *Miranda*'s effort in balancing the two interests a complete failure.[10] Since *Miranda*, the right to remain silent has continued to puzzle our judiciary, leading to conflicting decisions.[11] The right

---

1. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).
2. U.S. CONST. amend. V.
3. *Id.*
4. Miranda v. Arizona, 384 U.S. 436, 439 (1966).
5. *See* Branzburg v. Hayes, 408 U.S. 655, 674 (1972) (reinforcing the long-standing principle).
6. *See Miranda*, 384 U.S. at 479 (using the now-popular phrase "the right to remain silent").
7. *See* Mary Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 773 (2009) (identifying two interests the Supreme Court considered).
8. *Id.*
9. *Miranda*, 384 U.S. at 439 (acknowledging the need to afford an individual Fifth Amendment protection); Strauss, *supra* note 7.
10. *See* George C. Thomas, III, Miranda's *Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1091 (2003) (classifying the Court's decision as a "failure of liberal activism"); *see also* Strauss, *supra* note 7 (criticizing *Miranda* as a "spectacular failure").
11. *Compare* Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (narrowing the protection of the right to remain silent by requiring a defendant to "claim it"), *and* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2177–78 (2013) (allowing the prosecution to comment on a defendant's silence during questioning), *with* Griffin v. California, 380 U.S. 609, 615 (1965) (broadening the interpretation of the privilege by prohibiting the prosecution from commenting on a defendant's unwillingness to take the stand at trial), *and* Kastigar v. United States, 406 U.S 441, 461 (1972) (observing the privilege usually acts to allow an individual to remain silent when any question requires an incriminatory answer).

to remain silent persists as a topic of constant litigation fifty years after *Miranda*.[12] Differing legal interpretations concerning self-incrimination still haunt the Supreme Court.[13]

The decision in *Salinas v. Texas* divided nine Supreme Court Justices over the correct application of the right to remain silent.[14] Moreover, the Supreme Court's ruling in *Salinas* perplexed many respected scholars in the legal community.[15] The plurality held the right to remain silent could not be exercised by silence; thus, the plurality mandated that the individual "expressly invoke the privilege against self-incrimination in response to the officer's question."[16] Proposing to constrain the privilege even further, the concurring opinion called for abandoning the previous decision in *Griffin v. Minnesota*, which stood for nearly half a century.[17] The dissent argued defendants, by their silence, exercise their constitutional right against self-incrimination.[18] The plurality's seemingly counterintuitive holding has further muddied the already murky waters of our existing body of law on the right to remain silent.[19]

What remains after the decision in *Salinas* is a convoluted holding placing an undue burden on individuals, including certain groups already disadvantaged due to lack of mental capacity, education, and proficiency of the English language, instead of placing the burden on the government, which is better equipped to understand the nuances of the law.[20] Existing law only further cripples innocent defendants, while guilty defendants

---

12. *See* Joshua I. Hammack, Comment, *Turning* Miranda *Right Side Up: Post-Waiver Invocations and the Need to Update* Miranda *Warnings*, 87 NOTRE DAME L. REV. 421, 421 (2011) (detailing how the right to remain silent remains the subject of frequent litigation).

13. *See generally Salinas*, 563 U.S. __, 133 S. Ct. 2174 (2013) (illustrating an example of how the right to remain silent continues to be litigated with differing opinions).

14. *See generally id.* at __, 133 S. Ct. at 2174 (2013).

15. *See, e.g.*, Erwin Chemerinsky, *Chemerinsky: Silence is not Golden, Supreme Court Says*, ABA JOURNAL (June 25, 2013, 12:15 PM), http://www.abajournal.com/news/article/chemrinsky_silence_is_not_golden_supreme_court_says (criticizing the Supreme Court's holding as oxymoronic).

16. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013). The Supreme Court concluded the defendant's right to remain silent claim is meritless because the right to remain silent was not expressly invoked. *Id.* at __, 133 S. Ct. at 2178 (2013).

17. *Id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring); *see also* Griffin v. California, 380 U.S. 609, 615 (1965) (prohibiting the prosecution from commenting on a defendant not testifying at trial).

18. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2191 (2013) (Breyer, J., dissenting).

19. *See* Chemerinsky, *supra* note 15 (referring to the Court's holding as "oxymoronic"); *see also* Khaled Mowad, *The Right to Remain Silent After* Salinas v. Texas, HARV. C.R.-C.L. L. REV. (June 21, 2013), http://harvardcrcl.org/2013/06/21/the-right-to-remain-silent-after-salinas-v-texas (recognizing many commentators agree the holding in *Salinas* will only complicate existing case law).

20. *See* Tim Lynch, *Salinas v. Texas*, CATO INSTITUTE (June 17, 2013 11:46 PM), http://www.cato.org/blog/salinas-v-texas (identifying the glaring error in *Salinas* that places the

may still escape untethered.[21] Requiring specific invocation necessitating direct speech serves to single out and impair certain groups within society.[22]

This case is significant because certain groups are already disadvantaged by an unfavorable system,[23] and *Salinas* only exacerbates disadvantages facing these minorities.[24] The holding places the burden completely upon a person who is likely incompetent in navigating *Miranda*'s the intricacies.[25] The central problems with the holding in *Salinas* concern the lack of precision in identifying whether an individual is in a position to invoke the right and the language needed in order to invoke that right.

Current Fifth Amendment jurisprudence should be altered, clearing confusion and easing burdens disproportionately shifted to individual witnesses.[26] Clear and concise warnings allowing an individual to make an informed decision about whether to speak or remain silent ensures those with mental disabilities and other disadvantages are treated fairly and are not coerced into unwittingly providing evidence of guilt.[27] This serves the Fifth Amendment's original purpose.

Once an individual knows how to invoke this right, opportunity to do so without conjuring magical language.[28] Refined interrogation standards will also benefit the prosecution by ensuring statements obtained

---

burden on a person not the government); *see also* Mowad, *supra* note 19 (articulating the potential dangers to disadvantaged persons).

21. *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 860–61 (1995) (explaining under current interpretations of the Fifth Amendment Self-Incrimination Clause, innocent defendants are not helped but harmed).

22. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 261 (1994).

23. *See id.* (examining how *Miranda* rights serve to single out certain members of society).

24. *See* Lynch, *supra* note 20 (implying the holding will have dangerous impacts on disadvantaged persons). Classes of disadvantaged persons affected by the holding include those that are intoxicated, suffering from mental health issues, speak limited English, and lack education. *Id.*

25. *Id.*; *see also* Mowad, *supra* note 19 (articulating that a danger lies in creating a distinction between pre- and post-arrest interrogations when discussing the burden).

26. *See* Hammack, *supra* note 12 (proposing remedies to the current confusion of Miranda, such as, but not limited to, a reconsideration of the use of clarifying questions during interrogation).

27. Chambers v. Florida, 309 U.S. 227, 238–39 (1940) (recognizing testimony can be coerced not only through physical methods, but also through mental stresses such as protracted questioning without right to counsel). The Supreme Court discusses how methods of both physical and mental torture have historical roots in destroying the innocent. *Id.* at 237.

28. *See* Chemerinsky, *supra* note 15 (insinuating the *Salinas* holding requires an individual to utter magic words). Specifically, Chemerinsky states the holding is divorced from

will be admissible. The Supreme Court must reexamine *Miranda* warnings to restore the very principles *Miranda* sought to protect, and *Salinas* extinguished.[29]

II. The Fifth Amendment: Past vs. Present

> *There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes.*[30]

There are many articles recounting the Fifth Amendment's formulation, tracing its roots to the early 1500s.[31] A complete history and analysis of Fifth Amendment jurisprudence is outside the scope of this Comment. Rather, this Comment will look at specific Fifth Amendment principals and their relation to the multiple opinions in *Salinas*, while contrasting earlier, more liberal Fifth Amendment constructions with more recent decisions.

A. *The Undercard: Early Decisions on the Privilege Against Self-Incrimination*

Early Supreme Court cases attempting to resolve issues raised by the Fifth Amendment skewed in favor of the individual.[32] In this section, three Supreme Court decisions of the late 1800s—relied upon by *Mi-*

---

reality and is reinstating a policy the court expressly moved away from in previous opinions. *Id.*

29. *See* Hammack, *supra* note 12 (proposing remedies to the current confusion of *Miranda*, such as, but not limited to, a reconsideration of the use of clarifying questions during interrogation).

30. Bram v. United States, 168 U.S. 532, 545 (1897).

31. *See, e.g.*, Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (Oxford Univ. Press 1968) (providing an overview of the Fifth Amendment's origins by an examination of its foundations from Elizabethan times to the establishment of the American colonies); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2631 (1996) (noting, historically, this right may have arisen from the religious obligation of confession); John A. Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 Wm. & Mary L. Rev. 247, 247–48 (1958) (stating the right against self-incrimination developed from the fifteenth century's insistence the accused testify, which was a departure from medieval legal principles).

32. *See* Brown v. Walker, 161 U.S. 591, 599 (1896) (writing any possibility of legal peril is enough to warrant protection); *see also* United States v. White, 322 U.S. 694, 698, (1944) ("The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.").

randa—will be examined in providing context for current law concerning the right to remain silent.[33]

In *Counselman v. Hitchcock*, the Supreme Court dealt with a witness—not a named defendant—who refused to answer grand jury questions based on Fifth Amendment grounds.[34] The lower court ruled Counselman could only invoke Fifth Amendment protection in a criminal case against himself.[35] The Supreme Court rejected this argument, finding the Fifth Amendment should be broadly constructed broadly in preventing a person from being compelled to become a witness against himself in any criminal case.[36] Such broad construction arguably created a situation where any witness may claim silence if the answer would tend to incriminate or expose themselves to fines, penalties, or forfeitures, regardless of who the defendant is at trial.[37]

While limited to criminal matters, the privilege should be interpreted as broadly "as the mischief against which it seeks to guard."[38] Almost seventy years later in *Miranda*, the Supreme Court directly quoted *Counselman*, upholding its principles and retaining liberal construction favoring individuals.[39] In decisions like *Counselman*, the Supreme Court acknowledged the detriment imposed on a witness during interrogation, often siding in favor of protecting civil liberties.[40]

This conception survived into the next century. Justice Frankfurter noted, "the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social

---

33. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (citing several nineteenth century Supreme Court cases to support its holding); *see also Bram*, 168 U.S. at 532 (interpreting the Fifth Amendment's right to self-incrimination, thus providing a framework for the Supreme Court in *Miranda*); *Brown*, 161 U.S. at 591 (interpreting same); Counselman v. Hitchcock, 142 U.S. 547, 547 (1892) (interpreting the same).

34. *See Counselman*, 142 U.S. at 549–50 (elaborating Counselman declined answering to avoid incriminating himself for shipping grain below the required tariff on certain railways).

35. *Id.* at 550.

36. *Id.* at 562 (holding a witness may claim silence as to any question that may incriminate him, whether in a criminal proceeding or civil proceeding).

37. *Id.* at 563–64 (regarding the privilege as an ancient principle).

38. *Id.* at 562.

39. *See* Miranda v. Arizona, 384 U.S. 436, 459–60 (1966) (choosing not to depart from the noble heritage promulgated by the Supreme Court in *Counselman*).

40. *See id.* at 461 (implementing the Fifth Amendment standard as set forth in *Bram*); Bram v. United States, 168 U.S. 532, 565 (1897) (excluding a confession as evidence because it was involuntary and finding any doubt as to whether the confession was voluntary should be examined in favor of the accused); *Brown*, 161 U.S. at 600 (presupposing the legal detriment is placed upon those who are being questioned); *Counselman*, 142 U.S. at 562 (giving the Fifth Amendment a broad interpretation).

Villaneuva-Le: When Silence Requires Speech: Reviving the Right to Remain Silent

objects of a free society should not be sacrificed."[41] These early cases recognized when an individual is compelled to explain his alleged association with a crime, investigators may unfairly press the witness, paint the witness into a corner, and entrap the witness into fatal contradictions.[42] Because of this potential harm, our nation's founders directly incorporated the old English maxim *nemo tenetur seipsum accusare* ("no man is bound to accuse himself") into our Constitution by ratifying the Fifth Amendment.[43]

Unlike more recent cases, early American jurisprudence recognized broad Fifth Amendment interpretation.[44] Another case cited in *Miranda* was *Brown v. Walker*.[45] In *Brown*, the Supreme Court faced a conflict between a statute requiring all persons subpoenaed by the Interstate Commerce Commission to testify and the Fifth Amendment, which protects an individual from being a witness against himself.[46] The ultimate question before the Supreme Court was whether the statute adequately incorporated the Fifth Amendment's protection.[47]

Brown struggled with the proposition that, if construed literally, one might interpret the Fifth Amendment as meaning any witness could abstain from revealing any facts potentially leading to incriminating and unfavorable comments.[48] The majority speculated an overly broad interpretation of the Fifth Amendment would allow any witness to refuse

---

41. Feldman v. United States, 322 U.S. 487, 489 (1944). *Feldman's* central holding is its determination that the Fifth Amendment allows admissions made in a state court case to be used against an individual in a federal court, even if the admission was compelled under a state immunity statute and no federal officers participated in the testimony. *Id.* at 487.

42. *Brown*, 161 U.S. at 596 (detailing early concerns that prompted the need for the privilege against self-incrimination).

43. *Id.* (explaining the maxim originated in protest against inquisitional methods and had a stronger effect in England when the Stuarts left the throne).

44. *See* Quinn v. United States, 349 U.S. 155, 162 (1955) (declaring a liberal construction in Fifth Amendment cases is particularly warranted); *Brown*, 161 U.S. at 599 (noting great latitude is allotted to a witness when responding to questioning); *Counselman*, 142 U.S. at 562 (explaining the privilege must have a broad interpretation in favor of the right it is intended to protect). *But see* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178, 2183 (2013) (ruling express invocation is necessary and forfeiture can be made unknowingly); Berghuis v. Thompkins, 560 U.S. 370, 381, 384 (2010) (holding the invocation must be unambiguous and an implicit waiver is sufficient in denying individuals their Fifth Amendment rights).

45. *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (citing Brown v. Walker, 161 U.S. 591 (1896)).

46. *See* Brown v. Walker, 161 U.S. 591, 593–94 (1896) (discussing the need to balance the Fifth Amendment with an act of Congress).

47. *See id.* at 595 (asking whether the statute as applied in the case sufficiently satisfied the constitutional guarantee of protection).

48. *Id.*

Published by Digital Commons at St. Mary's University, 2022

to testify for any reason.[49] For this reason, the Majority used a more realistic interpretation, construing the clause for a practical and beneficent purpose.[50]

The Supreme Court was not attempting protection of an individual against every possible injury resulting from their testimony, but rather reconciling the statute with fundamental law basics.[51] Contrasting with current opinions, the Brown decision afforded great latitude to the witness in reasoning for himself the impact of the statements given.[52] Today, the government determines whether a witness's responses fall under Fifth Amendment protection.[53]

The *Counselman* and *Brown* decisions considered witness statements in grand jury proceedings.[54] However, another early decision, *Bram v. United States*,[55] extended privilege to statements made outside the courtroom.[56] The *Bram* holding extends Fifth Amendment protection regardless of where the interrogation occurs.[57] Bram was a seaman accused by his co-defendant of murdering his captain.[58] The prosecution construed statements made by Bram to an investigator as a confession because Bram did not specifically deny the allegations during questioning.[59]

49. *See id.* (discussing various interpretations of the Fifth Amendment).

50. *See id.* at 596 (1896) (applying the right against self-incrimination in a more useful and beneficial manner by harmonizing the law with the Constitution).

51. *See id.* (distinguishing the analysis and application of the statute with the Constitution).

52. *Compare Brown*, 161 U.S. at 599 (noting great latitude is afforded to a witness), *with* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178, 2183 (2013) (ruling express invocation is necessary and forfeiture can be made unknowingly), *and* Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250, 2259, 2261 (2010) (holding the invocation must be unambiguous and an implicit waiver is sufficient in denying individuals their Fifth Amendment rights).

53. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2183 (2013) ("A witness' 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.").

54. *See Brown*, 161 U.S. at 609 (dealing with statements made in a grand jury proceeding); Counselman v. Hitchcock, 142 U.S. 547, 548 (1892) (concerning statements by a witness in a grand jury proceeding, which were later excluded on Fifth Amendment grounds).

55. 168 U.S. 532 (1897).

56. *See* Miranda v. Arizona, 384 U.S. 436, 528 (1966) (citing *Bram*'s decision to reach the conclusion that statements made to police officers are covered under the Fifth Amendment).

57. *See* Bram v. United States, 168 U.S. 532, 542 (1897) ("[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the [F]ifth [A]mendment to the Constitution of the United States commanding that no person shall be compelled in any criminal case to be a witness against himself.").

58. *See id.* at 534–36 (reciting the factual background of the case).

59. *See id.* at 561–62 (recanting the prosecution's attempt to admit Bram's statements as evidence of a confession).

Rather, Bram answered, "He could not have seen me . . . he could not see me from there."[60] The Supreme Court—through a thorough analysis of English and American law—found Bram's statements were compelled and involuntary, thus inadmissible under the Fifth Amendment.[61]

Almost fifty years after the *Counselman*, *Brown*, and *Bram* decisions, the Supreme Court expanded these early principles, including not only answers directly supporting a potential conviction but also—in limited circumstances—any response which "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[62] In such instances, the Supreme Court has also ruled a witness should not be required to prove why certain answers would be hazardous.[63] The following section will more thoroughly examine these and other holdings involving the privilege's invocation.

B. *Rolling with the Punches: Decisions of the 1940s and 1950s and the Requirement of Claiming the Privilege*

Familiarity with 1940s and 1950s 5th Amendment jurisprudence is vital in understanding why the *Salinas* plurality held the privilege was not expressly invoked.[64] During the 1940s and 1950s, the Supreme Court began placing the burden of claiming the Fifth Amendment protection on the witness.[65] Some Supreme Court decisions continued application of a liberal interpretation,[66] but others limited the privilege.[67]

---

60. *Id.* at 539.

61. *See id.* at 565 (concluding Bram's statements were inadmissible because "the accused could not bring out, by way of cross-examination, everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him").

62. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) (reaffirming the principle that the privilege extends to any link in the chain of evidence, not just to answers themselves); *see also* Mason v. United States, 244 U.S. 362, 365 (1917) (limiting the protection to instances where there was reasonable cause to expect danger from a direct answer).

63. *See Hoffman*, 341 U.S. at 486 (rejecting the idea that a witness must disclose why they are claiming Fifth Amendment protection).

64. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (deciding that in response to a police officer's questions, the defendant did not expressly invoke the privilege against self-incrimination).

65. *See* Rogers v. United States, 340 U.S. 367, 370 (1951) ("If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it."); United States v. Monia, 317 U.S. 424, 427 (1943) (asserting that the privilege must be claimed).

66. *See* Quinn v. United States, 349 U.S. 155, 162 (1955) (continuing the liberal construction of the Fifth Amendment); *see also* Counselman v. Hitchcock, 142 U.S. 547, 582 (1892) (applying the liberal construction more than fifty years before *Quinn*).

The two main strategies employed by the judiciary in limiting a witness' use of the Fifth Amendment are narrowing the scope of the privilege itself and broadly applying the doctrine of waiver.[68] More commonly referred to as "failing to claim the privilege," the doctrine of waiver has been increasingly phased out since these cases.[69] Several of these Fifth Amendment cases occurred because of government inquiries into whether certain individuals held ties to the Communist Party.[70] Mostly involving federal grand jury proceedings, the same standards for determining Fifth Amendment privileges on the federal level have been selectively incorporated through the Fourteenth Amendment into state proceedings.[71] Although the 1940s and 1950s cases held one must claim the privilege, no standard or rule was promulgated for when the privilege must be claimed, or what actions must be undertaken to successfully invoke Fifth Amendment protections.[72]

United States v. Monia[73] dealt with claiming the privilege in conjunction with immunity granted by the Sherman Act.[74] The Supreme Court

67. *See Rogers*, 340 U.S. at 370 (holding if individuals desire the protection against self-incrimination, they must claim it); *see also Monia*, 317 U.S. at 427 (asserting the privilege must be claimed in order for the testimony to be viewed as compulsory).

68. *See Rogers*, 340 U.S. at 376 (Black, J., dissenting) (criticizing the majority's decision to apply the doctrine of waiver broadly and find the witness could not be afforded Fifth Amendment protection).

69. *See* Minnesota v. Murphy, 465 U. S. 420, 427 (1984) (writing the "vague term" of waiver has been abandoned and the witness instead is said to have failed to claim the privilege).

70. *See, e.g.*, *Rogers*, 340 U.S. at 368 (examining the case of an individual alleged to be the treasurer of the Communist Party of Denver); Blau v. United States, 340 U.S. 159, 159–60 (1950) (reversing a finding of contempt against Patricia Blau for refusing to answer questions regarding her employment by the Communist Party of Colorado); Blau v. United States, 340 U.S. 332, 333 (1951) (reversing a ruling of contempt against Irving Blau for refusing to answer questions regarding his wife's whereabouts and his employment by the Communist Party of Colorado); *Quinn*, 349 U.S. at 156–57 (examining Quinn's refusal to answer questions from a Congressional subcommittee in reference to the Communist Party).

71. *See* Malloy v. Hogan, 378 U.S. 1, 11 (1964) ("It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court."). The opinion continues by stating: "Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." Malloy v. Hogan, 378 U.S. 1, 11 (1964).

72. *See* Rogers v. United States, 340 U.S. 367, 370 (1951) (holding the privilege must be claimed, but failing to provide a proper method to claim the privilege); United States v. Monia, 317 U.S. 424, 427 (1943) (failing to set any clear standard for claiming the privilege, but ruling the privilege must be claimed).

73. 317 U.S. 424 (1943).

74. *See id.* at 425 (ruling the witness waived the privilege by testifying, but nonetheless granting witness immunity under the Sherman Act).

held the Fifth Amendment did not preclude a witness from testifying voluntarily as to matters that may incriminate, and, by volunteering otherwise privileged information, the witness waived the protections of the Fifth Amendment.[75] The Supreme Court stated, "If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."[76]

Several key Supreme Court cases, including *Salinas*, have cited *Monia*.[77] However, the facts in *Monia* are distinguished from *Salinas*.[78] In *Monia*, the witness already orally testified in a grand jury proceeding and was later granted immunity under the Sherman Act.[79] Alternatively, the facts in *Salinas* show the defendant simply remained silent in invoking his Fifth Amendment right.[80] Moreover, in *Monia*, the witness could rely on the Sherman Act when the Fifth Amendment did not justify a claim of privilege.[81] The Supreme Court in *Monia* held although the witness did not expressly claim Fifth Amendment privilege, because of the Sherman Act, prosecutors were precluded from bringing charges against the witness.[82]

The *Monia* decision and other cases—upon which the *Salinas* plurality relied—did not instruct how to claim the privilege because in each instance the witness already voluntarily testified in a grand jury proceed-

---

75. *See id.* at 427 (writing the Fifth Amendment offers no safeguards against voluntary testimony).

76. *Id.*

77. *See, e.g.*, *Rogers*, 340 U.S. at 371, 373 (quoting *Monia* in deeming a claim of the privilege insufficient because the claim was presented on the witness' second refusal to answer when she already revealed incriminating facts in her first examination and the witness used the privilege to protect others and not herself); Garner v. United States, 424 U.S. 648, 653–54 (1976) ("In the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."); Minnesota v. Murphy, 465 U. S. 420, 420 (1984) (reaffirming the principle in *Monia* and *Garner* by holding witnesses who failed to claim the privilege were once said to have "waived" it); Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2174 (2013) (stating that *Monia* is well-settled law).

78. *Compare* United States v. Monia, 317 U.S. 424, 424 (1943) (ruling on an issue involving a witness voluntarily testifying and later trying to claim immunity from the self-incriminating testimony), *with Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (examining an issue involving an individual attempting to claim his right at the onset of the incriminatory question by not answering).

79. *Monia*, 317 U.S. at 426.

80. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2177–78 (2013) (describing the incidents that gave rise to the issue).

81. *See Monia*, 317 U.S. at 430 (granting immunity under the Sherman Act).

82. *See id.* at 430–31 (ruling the witness has immunity from prosecution by stating, "[A]s the [Fifth] Amendment did not justify a claim of privilege against such remote contingencies, the immunity should be likewise construed not to reach them.").

ing.[83] In those instances, unlike *Salinas*, the Supreme Court was not charged with determining what happens when a witness neither waives the privilege by voluntary testimony nor expressly claims the privilege; therefore reliance on those cases could be limited to those instances.[84]

The decision in *Rogers v. United States*[85] follows *Monia* in concluding the witness failed to claim the privilege of the Fifth Amendment.[86] After the disclosing she had been the treasurer for a Communist Party, the witness refused to identify to whom she relinquished control over the books.[87] The Supreme Court decided an express claim of the privilege was warranted in determining whom the witness was trying to protect.[88]

Distinguishing *Rogers* from *Salinas*, the witness in *Rogers* attempted to avoid incriminating others, not herself, thus the Supreme Court held the Fifth Amendment would not have initially applied.[89] Therefore, the circumstances requiring an express claim of privilege in *Monia* was warranted, while circumstances in *Salinas* did not necessitate a need for express invocation.[90]

Unlike *Rogers*, the Supreme Court in the two *Blau v. United States*[91] opinions broadened the scope the privilege.[92] In *Blau*, if a court deter-

---

83. *See id.* at 425 (indicating the defendant had previously testified under oath before a grand jury); Rogers v. United States, 340 U.S. 367, 368 (1951) (concerning the claim of the privilege after the defendant previously testified before a grand jury); Minnesota v. Murphy, 465 U.S. 420, 422 (1984) (centering around statements already made and arguing the Fifth Amendment makes the statements inadmissible).

84. *See Monia*, 317 U.S. at 430–31 (differing from *Salinas* as the privilege was said to have been waived instead of not properly being claimed).

85. 340 U.S. 367 (1951).

86. *See* Rogers v. United States, 340 U.S. 367, 371 (1951) (quoting *Monia* in deeming a claim of the privilege insufficient because she already volunteered incriminating evidence and the witness was only attempting to protect others not herself).

87. *See id.* at 368 (recounting the facts of the case in which the individual refused to disclose another person related to the Communist Party).

88. *See id.* at 375 (requiring a claim of privilege in order to determine if real danger existed).

89. *See* United States v. Murdock, 284 U.S. 141, 148 (1931) (holding that the privilege against self-incrimination "is solely for the benefit of the witness"); United States v. White, 322 U.S. 694, 699 (1944) (regarding the Fifth Amendment privilege as a personal one that benefits only the person claiming the privilege).

90. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2182 (2013) (Breyer, J., dissenting) (writing no inference should be drawn in *Rogers*—as there should have been in *Salinas*—because of the need to ascertain who the witness was attempting protect).

91. 340 U.S. 159 (1950); 340 U.S. 332 (1951).

92. *See* Blau v. United States, 340 U.S. 159, 160 (1950) (sustaining the use of the Fifth Amendment to protect any testimony establishing a link to evidence used in prosecution of the individual testifying); Blau v. United States, 340 U.S. 332, 333 (1951) (reaffirming the same principle). *But see Rogers*, 340 U.S. at 372–73 (constricting the Fifth Amendment by using a broader view of the doctrine of waiver).

Villaneuva-Le: When Silence Requires Speech: Reviving the Right to Remain Silent

mines testimony furnishes a link in the chain of evidence against an individual, the Fifth Amendment should still apply.[93] The *Rogers* Court rejected this principle in the *Blau* cases because the witness already revealed a fact, thus waiving the privilege to any later facts that are related.[94] In *Rogers*, the Supreme Court used broad construction of the doctrine of waiver in circumventing the principle established in *Blau*.[95]

While other Constitutional protections must be knowingly waived and not merely inferred, as in the case of *Rogers*, broad view of the doctrine of waiver has reduced Fifth Amendment privilege to a second-rate position.[96] In broadening the doctrine of waiver, the Supreme Court constricted the Fifth Amendment privilege's applicability by holding admission of some facts automatically established waiver as to all related questions.[97] This Fifth Amendment interpretation does not conform to previous decisions on waiver of Constitutional rights.[98]

Unlike the more constricting *Rogers* interpretation, the Supreme Court chose a more liberal interpretation in *Hoffman v. United States*,[99] reinforcing principles of both *Blau* cases.[100] *Hoffman* was another Supreme Court case of the early 1950s that involving privilege against self-incrimination in federal grand jury proceedings.[101] In *Hoffman*, a witness re-

93. *See Blau*, 340 U.S. at 159 (setting forth the principle that testimony forming a link to incriminating evidence is still protected by the Fifth Amendment).

94. *Rogers*, 340 U.S. at 372–73 (deciding *Blau* was not on equal footing because "disclosure of a fact waives the privilege as to details").

95. *See id.* at 374 (determining the witness "had already 'waived' her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party").

96. *See id.* at 377–78 (Black, J., dissenting) (criticizing the broad construction of the doctrine of waiver concerning Constitutional amendments); *see also* Smith v. United States, 337 U.S. 137, 150 (1949) (construing the doctrine of waiver narrowly by holding, "waiver of constitutional rights, however, is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege and consequent immunity upon vague and uncertain evidence.").

97. *See Rogers*, 340 U.S. at 377–78 (Black, J., dissenting) (noting the slippery slope created by broadening the doctrine of waiver).

98. *See Smith*, 337 U.S. at 150 (holding Constitutional waivers should not lightly be inferred).

99. 341 U.S. 479 (1951).

100. *See* Rogers v. United States, 340 U.S. 367, 371 (1951) (applying a broad construction of the waiver to constrict a witness' use of privilege); *see also* Hoffman v. United States, 341 U.S. 479, 485 (1951) (liberalizing the interpretation of the Fifth Amendment by applying the protection to not only incriminating answers, but also to any answer creating a link to support a conviction); Blau v. United States, 340 U.S. 159, 160 (1950) (setting forth the principle that testimony forming a link to incriminating evidence is still protected by the Fifth Amendment).

101. *See, e.g.*, *Blau*, 340 U.S. at 159 (involving a witness who claimed Fifth Amendment protection during a federal grand jury proceeding); Blau v. United States, 340 U.S.

fused to answer any questions regarding affiliation with the defendant because he might incriminate himself.[102] The government challenged this assertion, arguing lack of real and substantial danger of self-incrimination.[103] The Supreme Court reversed the district and appellate courts which held such protection should not be afforded because possible admissions did not trigger Fifth Amendment protection.[104]

Quoting *Blau*, the Supreme Court held, "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant."[105] The Supreme Court reasonably limited broad interpretation of the privilege to instances in which the witness has reasonable cause to expect danger of prosecution by answering.[106]

Understanding the difficulty in ascertaining whether a defendant is reasonably apprehensive of answering, in *Hoffman,* the Supreme Court opined, "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[107] This language implies a court needs to consider the peculiar circumstances of the case—as told by the facts in evidence—in determining whether to sustain the privilege.[108] Applying this principle to the circum-

332, 333 (1951) (providing Fifth Amendment protection to a witness in a grand jury proceeding); *Rogers*, 340 U.S. at 371 (deciding a witness in a grand jury proceeding failed to claim the privilege of the Fifth Amendment).

102. *See Hoffman*, 341 U.S. at 481 (detailing the examination of the witness in which he refused to answer questions regarding his relationship with an individual who was being charged with various crimes, including violations of the customs, narcotics and internal revenue liquor laws of the United States, the White Slave Traffic Act, perjury, bribery, and other federal criminal laws, and conspiracy to commit all such offenses).

103. *Id.* at 482.

104. *See id.* at 484 (recanting the court of appeals' decision to affirm the conviction because the relationship between the possible admissions answering the questions and the proscription of the pertinent federal criminal statutes were not closely related enough to find a real danger in answering).

105. *See id.* at 486 (incorporating *Blau's* language, which expanded the scope of the Fifth Amendment to include answers furnishing a link in the chain of evidence); *see also Blau*, 340 U.S. at 160 (setting forth the principle that testimony forming a link to incriminating evidence is still protected by the Fifth Amendment).

106. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) (confining the privilege to instances in which there is reasonable cause to fear repercussions from answering directly).

107. *See id.* at 486–87 (looking to the implications of the questions to conclude whether to sustain the privilege by determining whether the answer might result in incrimination).

108. *See id.* at 487 (resolving that a trial judge in analyzing a claim of privilege under the Fifth Amendment should incorporate "his personal perception of the peculiarities of

stances in *Salinas*, it could be reasonably argued from the nature of the questions that the privilege should be sustained. However, the question of how the privilege needed to be claimed remained unanswered.

One of the more influential cases cited in *Salinas* and referred to throughout this Comment is *Quinn v. United States*.[109] *Quinn* is influential because it dealt directly with the question of whether an individual properly claimed the privilege against self-incrimination.[110] *Quinn* also involved questioning possible Communist Party affiliations.[111]

In *Quinn*, three witnesses refused to answer questions posed to them by a congressional committee.[112] The first witness expressly refused to answer on First and Fifth Amendment grounds,[113] while the last witness—Thomas Quinn—did not expressly invoke Fifth Amendment protection; rather, he adopted the same position as the first witness.[114] The district court did not find the claim of privilege sufficient for activating Quinn's Fifth Amendment protection.[115] The Supreme Court later upheld the claim's sufficiency, stating, "[N]o ritualistic formula is necessary in order to invoke the privilege."[116] This decision is cited in many cases[117] and was very influential to the Supreme Court's decision in *Salinas*.[118]

The privilege against self-incrimination is not construed as strictly in *Quinn* as it is in *Rogers*.[119] In *Quinn*, the Supreme Court called for lib-

---

the case as by the facts actually in evidence") (citing *Ex Parte* Irvine, 74 F. 954, 960 (C. C. S. D. Ohio 1896)).

109. Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013).

110. *See* Quinn v. United States, 349 U.S. 155, 160 (1955) (granting certiorari to determine whether a witness sufficiently claimed Fifth Amendment protection).

111. *See, e.g.*, Rogers v. United States, 340 U.S. 367, 368 (1951) (developing from an investigation into the Treasurer for the Communist Party of Denver); Blau v. United States, 340 U.S. 159, 159–60 (1950) (reversing a guilty of contempt judgment against Patricia Blau for refusing to answer questions regarding her employment with the Communist Party of Colorado); Blau v. U.S. 340 U.S. 332, 332–33 (1951) (overturning a finding against Irving Blau for refusing to answer questions regarding his wife's whereabouts and his employment with the Communist Party of Colorado).

112. *Quinn*, 349 U.S. at 157.

113. *Id.*

114. *Id.* at 158.

115. *Id.* at 159.

116. *Id.* at 164.

117. *E.g.*, Garner v. United States, 424 U.S. 648, 655 (citing *Quinn v. United States* throughout); Miranda v. Arizona, 384 U.S. 436, 461 n.30 (1966) (citing the same).

118. *See generally* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174 (2013) (referring to *Quinn v. United States* several times throughout the opinion).

119. *Compare Quinn*, 349 U.S. at 164 (extending Fifth Amendment protection even though Quinn used vague terms), *with* Rogers v. United States, 340 U.S. 367, 368 (1951) (declining to extend Roger's Fifth Amendment protection on grounds the privilege was not invoked and thus waived).

eral construction of the privilege as narrow construction would completely reject its original objective.[120] The Supreme Court went so far as to say that an express claim was unnecessary, holding "the fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his intention."[121]

The Supreme Court then placed the burden of deciphering an ambiguous claim of the privilege on the person conducting the questioning by instructing them to either accept the individual's claim of the privilege "as is" or further inquire as to whether the individual intended to invoke the privilege.[122] *Quinn* closely paralleled Justice Black's dissent in *Rogers* by taking a similar liberal view that the Fifth Amendment should be construed "broadly on the view that compelling a person to convict himself of a crime is contrary to the principles of a free government" and "abhorrent to the instincts of an American"[123] and not diminishing the Fifth Amendment by treating it as "merely a shield for the guilty[.]"[124]

C. *Silence as a Weapon: Griffin v. California and its Progeny*

While one aspect of the *Salinas* opinion focuses on claiming privilege, another question *Salinas* revisits is whether commenting on a defendant's silence should be used against them.[125] *Griffin v. California*[126] established the principle that a comment by the trial court or prosecution on a defendant exercising his right burdens the defendant's privilege under the Fifth Amendment by causing the jury to draw adverse inferences.[127]

In creating the no-adverse-inference rule, Justice Douglas wrote:

> It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natu-

120. *See Quinn*, 349 U.S. at 162 (declaring a liberal construction in Fifth Amendment cases is particularly warranted).

121. *Id.* at 164.

122. *See id.* at 164 (establishing it is "incumbent on the committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege").

123. *See* Rogers v. United States, 340 U.S. 367, 376 (1951) (Black, J., dissenting) (criticizing the majority's decision to apply the doctrine of waiver broadly to find the witness could not be afforded Fifth Amendment protection).

124. *See* Quinn v. United States, 349 U.S. 155, 164 (1955) (regarding the Fifth Amendment as more than just an armor for the guilty).

125. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (disagreeing with the principle that the prosecution or a trial judge cannot comment on a defendant's silence at trial).

126. 380 U.S. 609 (1965).

127. *See* Griffin v. California, 380 U.S. 609, 614 (1965) (highlighting how a defendant's silence may unfairly create "evidence" against them in the jury's eyes).

ral and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a Constitutional privilege.[128]

The Supreme Court later expanded *Griffin*, requiring that a judge—upon request of the defendant—must instruct the jury that it may not consider *sua sponte* the defendant's silence as evidence of guilt.[129] While the federal rules of privilege are mostly stated in common law, the no-adverse-inference rule is codified at the state level.[130]

However, the *Griffin* exception has been heavily criticized.[131] The *Salinas* concurrence resurrects disapproval of *Griffin* and argues the no-adverse-inference rule in irreconcilable with the Fifth Amendment.[132] While the plurality does not address this question, the concurring opinion would have rejected Salinas' claim, regardless of whether he properly claimed the privilege.[133] By eliminating aspects of the privilege entirely, this approach extends much further than the plurality in limiting the 5th amendment privilege.

However, *Miranda* would soon drastically alter the Fifth Amendment landscape.[134] Responding to *Miranda,* the Supreme Court held allowing counsel to comment on silence following *Miranda* warnings being provided is contrary to the principles *Miranda* sought to protect.[135] Some

---

128. *Id.*

129. *See* Carter v. Kentucky, 450 U.S. 288, 305 (1981) ("A state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.").

130. *See* TEX. R. EVID. 513 (codifying the rule that a claim of a privilege cannot be commented on by the judge or counsel).

131. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., dissenting) (opposing the Court's holding in *Griffin*); *see also* Mitchell v. United States, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting) (arguing the defendant did not have protection from adverse inferences that resulted from her refusal to testify). Justice Thomas, also dissenting, calls for the reexamination of *Griffin* and its progeny because it shows "cause enough to resist its extension." *Id.* at 341–42.

132. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., dissenting) (arguing an adverse inference made by the jury does not compel a defendant to testify within the meaning of the Fifth Amendment).

133. *See id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring) (denying Salinas' claim in spite of whether the privilege was successfully invoked).

134. *See* Miranda v. Arizona, 384 U.S. 436, 436 (1966) ("[S]tatements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination.").

135. *See* Wainwright v. Greenfield, 474 U.S. 284, 289–90 (1986) (determining that the use of defendant's post-arrest, post-*Miranda* silence by the prosecution violated due process); *see also* Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

courts have even expanded this Constitutional protection to include silence after arrest even before *Miranda* warnings had been provided.[136] These cases bolster those in favor of broadening *Griffin's* no-adverse-inference rule.

D. Miranda v. Arizona *and its Importance to the Decision in Salinas*

Before *Miranda,* the Supreme Court guaranteed an individual the right to have an attorney present during police questioning,[137] protected an individual against adverse inferences drawn from a refusal to testify,[138] and incorporated the Fifth Amendment through the Fourteenth Amendment.[139] The Supreme Court insisted *Miranda* did not create new jurisprudence but applied long-recognized principles in different settings.[140]

Miranda intended application of the Fifth Amendment principles to a custodial interrogation setting.[141] Briefly stated, *Miranda* ensures Fifth Amendment protection to statements made during a custodial interrogation by requiring the individual be warned of the right to counsel and the right to refrain from answering questions.[142] The burden is on the prosecution to demonstrate it has taken the necessary procedural safeguards in securing a defendant's privilege against self-incrimination by assuring the defendant was given full and effective warnings.[143] Chief Justice Warren wrote statements previously volunteered do not deprive an individual from the right to counsel or to refrain from answering other questions.[144]

---

136. *See* Sanchez v. State, 707 S.W.2d 575, 582 (Tex. Crim. App. 1986) ("[A] defendant may not be impeached through the use of post-arrest, pre-*Miranda* silence since such impeachment violates the defendant's right to be free from compelled self-incrimination, and also since such impeachment is improper from an evidentiary standpoint.").

137. *See* Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (holding an accused individual is permitted to consult an attorney when the investigation turns accusatory).

138. *See* Griffin v. California, 380 U.S. 609, 614 (1965) (innovating the no-adverse-inference rule).

139. *See* Malloy v. Hogan, 378 U.S. 1, 11 (1964) (holding the Fifth Amendment's Self–Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment, and thus applies to the states).

140. *See* Miranda v. Arizona, 384 U.S. 436, 442 (1966) (beginning with the premise that this holding is "not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings").

141. *See id.* at 461 ("[A]ll the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning.").

142. *See id.* at 444–45 (promulgating what would become known as *Miranda* warnings).

143. *See id.* at 444 (requiring the prosecution to demonstrate it has given full and complete warnings to the defendant in order to admit statements as evidence).

144. *See id.* at 445 ("The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter con-

This section examines *Miranda's* goals in determining whether such goals are still present in our jurisprudence today and how *Miranda* compares with the Supreme Court's *Salinas* decision.

In *Miranda*, the Supreme Court ensured the suspect was not at a significant disadvantage from the interrogator.[145] At the time of the *Miranda* decision, an environment existed in which abuse of suspects or witnesses by law enforcement in procuring information was commonplace.[146] Acknowledging the inherently threatening environment of custodial interrogation, the Supreme Court instituted safeguards ostensibly offsetting disadvantages placed on those subject to interrogation.[147]

Miranda warnings serve three purposes.[148] First, with the recitation of warnings, a suspect becomes more aware of his Constitutional rights.[149] Furthermore, the warnings remind the interrogator of the Constitutional rights the suspect retains.[150] Finally, the warnings ensure statements received by police are made voluntarily and without coercion, increasing likelihood of admission at trial.[151]

Miranda adopted a strict view of the doctrine of waiver by placing "a heavy burden . . . on the government to demonstrate the defendant knowingly and intelligently waived the privilege against self-incrimination and the right to retain or be appointed counsel."[152] By constricting the doctrine of waiver, the Supreme Court in turn broadened application of the

---

sents to be questioned."). *But see* Rogers v. United States, 340 U.S. 367, 374 (1951) ("[The witness] had already 'waived' her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party.").

145. *See Miranda*, 384 U.S. at 479 (instituting what are now known as the *Miranda* warnings); *see also* Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of* Miranda *and Why It Remains Vital Today,* 40 VAL. U. L. REV. 685, 685 (2006) (identifying the need for the *Miranda* warnings to place the interrogator and suspect on the same playing field).

146. *See* White v. Texas, 310 U.S. 530, 532 (1940) (recounting the nightly whipping of a defendant in order to procure a confession); *see also* Chambers v. Florida, 309 U.S. 227, 237 (1940) (asserting mental coercion violates the Fifth Amendment, as well as physical coercion); Brown v. Mississippi, 297 U.S. 278, 281–82 (1936) (detailing the whipping and abuse forced upon a defendant until he confessed to a crime).

147. *See Miranda*, 384 U.S. at 457 –58 (recognizing the effect of custodial interrogation).

148. *See* Hammack, *supra* note 12, at 425 (identifying the purpose of the *Miranda* holding).

149. *Id.*

150. *Id.* at 426.

151. *Id.* at 427.

152. *Miranda*, 384 U.S. at 475.

Fifth Amendment, thus continuing liberal interpretation of privilege from the 1800s.[153]

Appreciating *Miranda* is important in understanding *Salinas* because *Miranda* adopted previous law centered on a defendant's testimony at a judicial proceeding and extended the same privileges in the context of a police interrogation.[154] *Miranda* adhered to the Supreme Court's liberal interpretations of the past,[155] upholding liberal construction by broadly applying the privilege against self-incrimination.[156] Therefore, the burden of the *Miranda* warnings is considered by investigators while solving a crime. *Miranda* was promulgated because unclear holdings of the past must be reconciled against current interrogation tactics and persuasion.[157] *Miranda's* critics note the obvious controversy in the duty of investigators to gather information from individuals while contemporaneously being required to warn individuals of their right to remain silent.[158]

While Miranda invites criticism, the ruling was nevertheless necessary when considering routinely abusive and torturous interrogations.[159] *Miranda* offered solutions for those being interrogated by advising them of

---

153. *See* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (giving the Fifth Amendment a liberal interpretation); *see also* Quinn v. United States, 349 U.S. 155, 162 (1955) (continuing the liberal construction of the Fifth Amendment).

154. *See Miranda*, 384 U.S. at 479 ("We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning.").

155. *See, e.g.*, *Counselman*, 142 U.S. at 582 (applying the liberal construction); *Quinn*, 349 U.S. at 162 (continuing the liberal construction of the Fifth Amendment); *see also* Miranda v. Arizona, 384 U.S. 436, 460–61 (1966) (citing the liberal constructions by the Supreme Court).

156. *See Miranda*, 384 U.S. at 479 (instituting the previous constructions of the Fifth Amendment to apply to current interrogation settings).

157. *Compare* Rogers v. United States, 340 U.S. 367, 374 (1951) (determining the witness "had already 'waived' her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party"), *with Miranda*, 384 U.S. at 444 ("The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.").

158. *See* Thomas, *supra* note 10, at 1095 (scrutinizing *Miranda's* decision by pointing out the contradiction in having the police perform a function contrary to their wish that the suspect cooperate).

159. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 281–82 (1936) (describing the whipping and physical abuse performed on a defendant until he confessed to a crime); White v. Texas 310 U.S. 530, 531–32 (1940) (recounting the nightly whipping of a defendant in order to force his confession); Chambers v. Florida 309 U.S. 227 (1940) (stating mental coercion violates the Fifth Amendment in addition to physical coercion).

their rights.[160] The Supreme Court's implementation of this broadened view continued the liberal Fifth Amendment constructions of the past.[161] Whether *Miranda's* principles are still alive today is questionable and, if so, whether *Salinas* disproportionately shifted the burden back to the individual.

III. Split Decision: Exploring the Plurality, Concurring, and Dissenting Opinions of Salinas v. Texas

> *Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.*[162]

Drawn from the historical framework of the right against self-incrimination involving claiming the privilege,[163] use of silence against a defendant,[164] and the application of Fifth Amendment rights in custodial interrogations,[165] dissecting *Salinas* decision is ripe for dissection. *Salinas* is the latest in a recent line of cases departing from earlier, more liberal interpretations.[166] *Berghuis v. Thompkins*[167]—decided three years prior to *Salinas*—held an invocation of the right against self-incrimination

---

160. *See Miranda*, 384 U.S. at 446, 479 (recognizing abuse during custodial interrogation and instituting safeguards to protect individuals); *see also* Howard & Rich, *supra* note 145 (noting *Miranda* warnings can serve to equalize the interrogator and the suspect).

161. *See Miranda*, 384 U.S. at 446, 479 (continuing a liberal construction of the Fifth Amendment by writing, "in this Court, the privilege has consistently been accorded a liberal construction"); *see also* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (giving the Fifth Amendment a liberal interpretation).

162. Quinn v. United States, 349 U.S. 155, 162 (1955).

163. *See, e.g.*, Rogers v. United States, 340 U.S. 367, 370 (1951) (holding the privilege must be claimed, however, failing to outline the proper manner in which to claim the privilege); United States v. Monia, 317 U.S. 424, 427, (1943) (failing to set for any clear standard for claiming the privilege, but ruling the privilege must be claimed or it is waived); *Quinn*, 349 U.S. at 164 ("[N]o ritualistic formula is necessary in order to invoke the privilege.").

164. *See* Griffin v. California, 380 U.S. 609, 614 (1965) (holding the trial court's and the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment).

165. *See Miranda*, 384 U.S. at 461 (applying all principles inherent to the Fifth Amendment to compulsion exerted by investigators during custodial interrogations).

166. *See* Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (ruling a claim of Fifth Amendment protection must be unambiguous); United States v. Patane, 542 U.S. 630 (2004) (failing to give a suspect *Miranda* warnings does not require suppression of physical fruits of the suspect's unwarned but voluntary statements).

167. 560 U.S. 370 (2010).

should be unambiguous.[168] *Thompkins* established the standard for invoking the right to counsel and applied it to Fifth Amendment rights.[169] The Supreme Court determined the invocation of the Constitutional right against self-incrimination must be unambiguous, while alternatively ruling an implicit waiver is effective when admitting a suspect's statement into evidence.[170] Three years later, the *Salinas* plurality continued in disproportionately shifting the burden on the individual to claim Constitutional rights,[171] while significantly reducing the prosecution's burden of establishing waiver.[172]

A. *Salinas' Plurality Opinion: The Express Invocation Requirement*

Salinas started as an investigation into the deaths of two brothers in Houston, Texas.[173] Salinas agreed to allowing ballistics testing on his shotgun and agreed to non-custodial questioning.[174] Salinas remained silent when asked if his shotgun shells would match those found at the scene.[175] The officer then asked additional questions, which Salinas answered.[176] After subsequent conviction, Salinas appealed, asserting the use of his silence by the prosecutor as evidence against him violated the

168. *See Berghuis*, 560 U.S. at 381 (ruling a claim of Fifth Amendment protection must be unambiguous).

169. *See id.* ("[B]ut there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel."); *see also* Davis v. United States, 512 U.S. 452, 459 (1994) (instituting the standard for asserting the right to counsel).

170. *Berghuis*, 560 U.S. at 381, 384 (holding while claiming the privilege must be ambiguous, an implicit waiver of the right is effective to allow an individual's statement into evidence).

171. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (requiring a specific invocation of the Fifth Amendment).

172. *See, e.g.*, *id.* at __, 133 S. Ct. at 2183 (2013) (ruling knowledge of forfeiture is not an element of the forfeiture of the privilege); *Berghuis*, 560 U.S. at 384 (holding an implicit waiver is sufficient in denying an individual their Fifth Amendment rights). *But see* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."); Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964) (recognizing the need for a knowing and intelligent waiver); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("[I]t has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'").

173. *Salinas,* 563 U.S. __, 133 S. Ct. 2174, 2178 (2013).

174. *Id.* at __, 133 S. Ct. at 2178 (2013).

175. *Id.* at __, 133 S. Ct. at 2178 (2013) (describing the interrogation).

176. *Id.* at __, 133 S. Ct. at 2178 (2013). The fact the defendant answered all of the officer's questions except the one that would incriminate him was considered evidence that he may have been guilty. *See id.* at __, 133 S. Ct. at 2178 (2013).

Fifth Amendment.[177] The *Salinas* plurality held Salinas' "Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question."[178]

The plurality relied on the principle that those desiring the privilege "must claim it."[179] The plurality also recognized "no ritualistic formula is necessary in order to invoke the privilege."[180] However, by requiring express invocation of the Fifth Amendment, the plurality created a ritualistic formula.[181]

In reaching this contradictory conclusion, the plurality cited *Hoffman*, reasoning an express invocation is required by the government because the government must be able to affirm that the defendant's answers will not be self-incriminating.[182] Considering this foundational opinion, *Hoffman* further elaborated, "To sustain the privilege, it need only be evident from the implications of the question . . . ."[183] In *Hoffman*, the Supreme Court placed the burden of determining whether the privilege was invoked on the trial judge—not the individual.[184]

---

177. *Id.* at __, 133 S. Ct. at 2178 (2013).

178. Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013).

179. *Id.* at __, 133 S. Ct. at 2178 (2013) (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1983)). Myriad precedent requiring an invocation of the right against self-incrimination exists. *See, e.g.*, Rogers v. United States, 340 U.S. 367, 370 (1951) ("If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it."); United States v. Monia, 317 U.S. 424, 427 (1943) (asserting that the privilege must be claimed).

180. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

181. *See* Chemerinsky, *supra* note 15 (interpreting the plurality's opinion in *Quinn* by writing "[a] defendant must speak in order to claim that right and likely must do so with exactly the type of 'ritualistic formula' that the court has previously rejected").

182. *Salinas,* 563 U.S. __, 133 S. Ct. 2174, 2179 (2013) (citing Hoffman v. U. S., 341 U.S. 479, 486 (1951)); *see also* Kastigar v. United States, 406 U.S. 441, 448 (1972) (citing 18 U.S.C. § 6002 when stating: "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination . . . ."). Therefore, the government must be notified of why there is a refusal to comply. Kastigar v. United States, 406 U.S. 441, 448 (1972). *Kastigar* presents another unique circumstance in which express invocation may be warranted, but the circumstances that would invoke this principle lie outside of the facts of *Salinas* and outside of the scope of this comment. *Id.*

183. Hoffman v. United States 341 U.S. 479, 486 (1951).

184. *See id.* at 489 (easing the burden on the individual and stating, "[i]f this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty"). The Supreme Court also cites *United States v. White* in stating: "[t]he immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." United States v. White, 322 U.S. 694, 698 (1944).

The plurality also utilized *Roberts v. United States* in ruling silence alone does not claim the privilege.[185] However, *Roberts* is distinguishable from *Salinas*.[186] In *Roberts*, the defendant already voluntarily confessed to the allegations and received harsher sentencing because he withheld further cooperation in naming his heroin suppliers.[187] On appeal, the defendant justified his refusal to cooperate on the basis of physical intimidation and the right to remain silent.[188]

The *Roberts's* court held, "The Fifth Amendment privilege against compelled self-incrimination is not self-executing."[189] However, the Supreme Court did suggest an inference is permissible "[a]t least where the Government had no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion."[190] In *Salinas*, there was a substantial reason to believe the defendant's answer would be incriminating.[191] Contrary to this implication,[192] the plurality only recognized two such instances in which express invocation is unnecessary[193]—when the no-adverse-inference rule promulgated in *Griffin* applies[194] and when the individual is subjected to involuntary compulsion from governmental coercion.[195] The plurality determined neither applied under *Salinas'* facts.[196] The plurality held the *Griffin* exception did not apply because the privilege creating an unqualified right to refuse testifying *at trial* is not

185. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2181 (2013) (citing Roberts v. United States, 445 U.S. 552 (1980)).

186. *Compare id.* at __, 133 S. Ct. at 2178 (2013) (surrounding circumstances involving a suspect who was brought in for questioning in a murder), *with* Roberts v. U. S., 445 U.S. 552, 554–55 (1980) (revolving around an individual who had already voluntarily confessed but did not disclose the names of his suppliers).

187. Roberts v. United States, 445 U.S. 552, 554–55 (1980).

188. *Id.* at 559.

189. *Id.*

190. *See id.* (inferring if there is a substantial reason to believe the requested disclosures are likely to be incriminating, express invocation may then not be necessary).

191. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (recounting the facts of case). The nature of the question of whether Salinas' shotgun shells would match the shells recovered at the scene of the murder and the fact that Salinas' silence was eventually used against him establishes the question called for incriminating information.

192. *Roberts*, 445 U.S. at 559.

193. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2179–80 (2013) (acknowledging two specific exceptions to the requirement of specific invocation).

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

195. *See* Miranda v. Arizona, 384 U.S. 436, 467–68 (1966) (instituting proper safeguards to protect against involuntary coercion).

196. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2179 (2013) (concluding the two exceptions for express invocation did not apply).

Villaneuva-Le: When Silence Requires Speech: Reviving the Right to Remain Silent

equivalent to the right during *custodial interview*.[197] To wit, such distinction departs from *Miranda* where the Court was, "[S]atisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning."[198] Although *Miranda* stands for the proposition that Fifth Amendment privileges in the trial setting should be instituted into custodial interrogations,[199] Salinas was not subjected to traditional custodial interrogation because he voluntarily accompanied officers and was free to leave at any time.[200]

Another exception occurs where a witness fails to invoke the privilege because governmental coercion caused involuntary forfeiture and the witness is subjected to inherently compelling pressures.[201] However, stipulating Salinas was not subject to a custodial interrogation and he was free to leave at any time, the plurality held this exception did not apply either.[202]

Miranda was instituted specifically to protect persons under compulsory custodial interrogation; therefore, the plurality was correct in stressing *Miranda's* inapplicability.[203] However, *Miranda* did not form the primary basis for the Salinas ruling.[204] Rather than deciding the threshold issue of whether the Fifth Amendment protects pre-custodial

197. *See id.* at __, 133 S. Ct. at 2179–80 (2013) ("Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.").

198. *Miranda*, 384 U.S. at 461.

199. *See id.* (determining all the privileges applicable to formal settings should be applied to custodial questioning as well).

200. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2180 (2013) (illustrating how Salinas voluntarily accompanied the investigators to the station for questioning and "was free to leave at any time").

201. *See Miranda*, 384 U.S. at 467 (noting the inherently compelling pressures that work to undermine individuals' will to resist and to compel them to speak where they would not otherwise do so freely); *see, e.g.*, Brown v. Mississippi, 297 U.S. 278, 281–82 (1936) (describing the physical abuse forced upon a defendant until he confessed to a crime); White v. Texas 310 U.S. 530, 531–32 (1940) (recounting the nightly whipping of a defendant in order to procure a confession).

202. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2180 (2013) (holding petitioner cannot benefit from this principle because it is undisputed that his interview with police was voluntary).

203. *See Miranda*, 384 U.S. at 455 (describing how a custodial interrogation exacts a heavy toll on individual liberty); *see also* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (agreeing the interview was noncustodial and *Miranda* warnings were not given).

204. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (basing its holding on the determination of whether the claim was successful invoked, not on whether pre-*Miranda* silence can be used as evidence against a defendant).

The Scholar: St. Mary's Law Review on Race and Social Justice, Vol. 16 [2022], No. 4, Art. 5

silence,[205] the plurality decided the Fifth Amendment requires an express and unambiguous invocation of the rightwhile holding forfeiture of the right need not be made knowingly.[206]

B. *Sparring against Silence: The Concurring Opinion's Disapproval of the Griffin Exception*

"Silence is often evidence of the most persuasive character."[207]

With the plurality and dissent arguing over express invocations and inferences, the concurring decision attempts to simplify the issue.[208] The concurrence argued the Fifth Amendment protection does not extend to pre-custodial silence.[209] The concurrence alludes to the idea that it would vitiate the no-adverse-inference rule and allow silence in any situation.[210]

Justice Scalia and Justice Thomas staunchly oppose the no-adverse-inference rule.[211] In penning the concurrence, Justice Thomas criticized the *Griffin* exception by implying *Griffin* was merely a form of Lochnerism,[212]instituting a desirable policy decision.[213] Justice Scalia has previously ridiculed the *Griffin* exception as "a breathtaking act of sorcery," transforming policy into Constitutional mandate.[214] Moreover, the concurrence revives its disapproval of the exception as a whole,[215] finding no Fifth Amendment foundation because any adverse inference, which may

---

205. *See id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring) (recognizing the plurality avoided the issue of the admissibility of pre-custodial silence).

206. *See id.* at __, 133 S. Ct. at 2178, 2183 (2013) (ruling the invocation must be express and forfeiture need not be made knowingly).

207. Bilokumsky v. Tod, 263 U.S. 149, 154 (1923).

208. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (determining even if Salinas had invoked the privilege, the *Griffin* exception should not be extended to include pre-custodial silence).

209. *Id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring).

210. *See id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring) (writing the *Griffin* exception has no grounds in the Fifth Amendment); *see also* Chemerinsky, *supra* note 15 (describing the concurring justices' desire to overrule *Griffin*).

211. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (criticizing the *Griffin* exception); *see also* Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) (noting *Griffin's* history as dubious); *see also id.* at 343 (Thomas, J., dissenting) (lobbying for reconsideration of *Griffin*).

212. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (arguing the Fifth Amendment does not give a basis for the *Griffin* exception); *see generally* MICHAEL S. ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 377 (2012) (referring to the term "Lochnerizing" or "Lochnerism" as an attempt by a court to employ its personal values in its decisions).

213. *See Mitchell*, 526 U.S. at 343 (Thomas, J., dissenting) (seeing *Griffin* as a policy choice the Judiciary found desirable at the time).

214. *See id.* at 332 (Scalia, J., dissenting) (criticizing *Griffin*).

215. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (asserting the *Griffin* exception is not grounded in the Fifth Amendment).

be drawn from silence, is insufficient in compelling a defendant's testimony.[216] A staunch adherent to textual and historical interpretations of the Constitution, Justice Scalia has written: "[T]he text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence."[217]

Justice Thomas has argued commenting on silence does not compel a defendant to testify because adverse inferences do not penalize a defendant simply for exercising his Constitutional rights.[218] Comparing use of silence with other courtroom tactics, Justice Thomas wrote:

> Prosecutorial comments on a defendant's decision to remain silent at trial surely impose no greater "penalty" on a defendant than threats to indict him on more serious charges if he chooses not to enter into a plea bargain—a practice that this Court previously has validated.[219]

The concurrence's attempt at simplifying the issue merely contorts a fifty-year-old decision widely accepted by the legal community.[220]

C. *A Shield Against Silence: Salinas' Dissenting Opinion*

Writing for the dissent, Justice Breyer argued the Fifth Amendment should be interpreted to protect pre-arrest silence; thus, expressly invoking the privilege was unnecessary.[221] The dissenting opinion reasons that using a defendant's pre-arrest silence compels the individual to be a witness against himself, stating:

> To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent.[222]

---

216. *See id.* at __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring) (deciding the use of silence does not compel an individual to witness against himself); *see Mitchell*, 526 U.S. at 342 (Thomas, J., dissenting) ("[C]omments or inferences do not truly 'penalize' a defendant.").

217. *Mitchell*, 526 U.S. at 335 (Scalia, J., dissenting).

218. *See id.* at 342 (Thomas, J., dissenting) (agreeing with the dissent in *Griffin*, because making comments and drawing inferences does not harm the defendant).

219. *Id.*

220. *See id.* at 330 ("The rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.").

221. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2189 (2013) (Breyer, J., dissenting) (determining Salinas need not expressly invoke his privilege).

222. *Id.* at __, 133 S. Ct. at 2186 (2013) (Breyer, J., dissenting).

Proscribing use of silence by the prosecution, the dissent adhered to *Miranda's* original principle "prosecution may not . . . use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation."[223]

The dissent illustrates a perverse dichotomy in remaining silent.[224] If an individual remains silent, the prosecution may use that as a sign of guilt.[225] However, if a defendant "opens the door" in in justifying his silence, the prosecution can utilize the testimony as in inquiring upon other prejudicial information.[226] Based on this premise, the dissent believes using silence compels individuals to testify against themselves by forcing choice between incrimination through speech and incrimination through silence.[227] Juxtaposition with the plurality's determination, in which there are only two instances when express invocation *is not required*,[228] the dissenting opinion surmises there are only two instances *requiring* express invocation.[229]

Justice Breyer determined expressly mentioning the Fifth Amendment is only required when the facts involving the use of silence do not give rise to an inference of claiming Fifth Amendment protection, and when the questioner has a special need to know whether the defendant is relying solely on Fifth Amendment protection.[230] The dissent found support for its proposition that express invocation is not always required in a line of cases in which Fifth Amendment protection applied—even when a suspect answers some questions—but is silent as to others.[231] The dissent

223. *See id.* at __, 133 S. Ct. at 2189 (2013) (citing Miranda v. Arizona, 384 U.S. 436, 468, n.37 (1966)) (emphasis added).

224. *See id.* at __, 133 S. Ct. at 2189 (2013) (identifying the conundrum in using defendants' silence against them).

225. *Id.* at __, 133 S. Ct. at 2186 (2013).

226. *Id.* at __, 133 S. Ct. at 2186 (2013).

227. Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting).

228. *Id.* at __, 133 S. Ct. at 2176 (2013).

229. *See id.* at __, 133 S. Ct. at 2186–87 (2013) (identifying two instances in which an express invocation is required).

230. *Id.* at __, 133 S. Ct. at 2190 (2013) (outlining when invocation of the privilege is expressly required).

231. *See* Hurd v. Terhune, 619 F.3d 1080, 1087, 1091 (9th Cir. 2010) (holding a defendant's refusal to reenact his version of how his wife was shot could not be used as affirmative evidence of his guilt in his prosecution for first degree murder, even though the defendant spoke freely and voluntarily about the incident after police read the defendant his *Miranda* rights); United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995) ("If a suspect does speak, he has not forever waived his right to be silent."); United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993) ("This court has recognized that when a defendant answers some questions and refuses to answer others, or in other words is 'partially silent,' this partial silence does not preclude him from claiming a violation of his due process rights."); *see also* Doyle v. Ohio, 426 U.S. 610, 618 (1975) ("[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it

cited several cases in illustrating when a form of express invocation was necessary: due to ambiguous circumstances or because the privilege was used to protect others.[232] A line of cases was also cited in which the individual was not required to expressly invoke the Fifth Amendment even though the circumstances behind their refusal to testify were unclear.[233]

Because individual circumstances were dispositive in each case, the dissent concluded *circumstances* dictate use of the Fifth Amendment, not statements.[234] Following *Quinn*'s language, finding no ritualistic formula is necessary,[235] the dissent applied a relative standard in determining whether circumstances giving rise to a reasonable inference the silence stemmed from exercising the Fifth Amendment.[236] Weighing the dangers of both views of express invocation, the dissent concluded the problems with *Salinas's* bright-line express invocation rule outweigh problems associated with the more vague circumstances standard.[237]

---

would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

232. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 234, 240 (1980) (deciding the prosecution may use the fact that the defendant waited two weeks before coming forward to authorities to weaken the credibility of his self-defense claim); Rogers v. United States, 340 U.S. 367, 371, 373 (1951) (deeming a claim of the privilege insufficient because the witness was using the privilege to protect other individuals and not herself); Roberts v. United States, 445 U.S. 552, 554 (1980) (describing an individual who had already voluntarily confessed, but did not disclose the names of his suppliers).

233. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2188 (2013) (Breyer, J., dissenting) (describing a possible third set of cases in which no express invocation was required despite ambiguous circumstances); *see, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (upholding a Fifth Amendment claim that was not expressly invoked because the officers were faced with a decision to either forfeit their jobs or incriminate themselves); Leary v. United States, 395 U.S. 6, 28–29 (1969) (determining an express claim unnecessary when compliance with transfer tax provisions of Marijuana Tax Act would have exposed the defendant to prosecution under state narcotics laws); Lefkowitz v. Cunningham, 431 U.S. 801, 803–04 (1977) (refusing to sign a waiver form was sufficient to invoke a Fifth Amendment claim where the assertion would cause a political official to lose his job).

234. *Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2189 (2013) (Breyer, J., dissenting).

235. Quinn v. United States, 349 U.S. 155, 164 (1955).

236. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2189 (2013) (Breyer, J., dissenting) (calling for a standard that infers waiver from the circumstances surrounding the defendant's claim).

237. *See id.* at __, 133 S. Ct. at 2191 (2013) (Breyer, J., dissenting) (finding the administrative problems accompanying the plurality's approach are even worse).

IV. SALINAS' WAKE: EXAMINING THE PROBLEMS AND POSSIBLE SOLUTIONS TO CURRENT FIFTH AMENDMENT LAW

"The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."[238]

A woman matching a suspect's identity is brought in for questioning because her vehicle matches the description of one used in a crime. Knowing she is innocent and figuring she will just explain the mistake, the woman avoids the cost and hassle of an attorney. Following traditional interrogation methods, investigators initially create an ere of confidence the woman is guilty.[239] The investigators press, hoping the woman agrees with their own preconceived notion of what happened.[240]

Responding to the persuasive, perhaps intimidating environment, the woman relies on her lay knowledge of *Miranda* warnings and remains silent. Indeed, she "knows" whatever she "says" will be used against her. Instituting *Salinas'* plurality and concurrence view, the innocent suspect would have unwittingly waived her privilege, potentially exposing herself otherwise inadmissible evidence.[241]

The plurality's requirement of express invocation and the concurrence's refusal to extend the *Griffin* exception past the courtroom is incredibly problematic for laypersons. By requiring an express claim to the privilege, the plurality has squarely placed the onus on everyday individuals. Limiting the no-adverse-inference rule inflicts additional damage because not only will an individual fail to invoke the privilege through silence, he will also have such silence used against him.[242]

A. *On the Ropes: The Harms of an Unbalanced System*

Miranda admonishes individuals have the right to remain silent and anything they say can be used against them.[243] Consequently, by the language of the warnings in and of themselves, individuals do not know *how* to invoke the right to remain silent. Also, contrary to the statement's

---

238. United States v. White, 322 U.S. 694, 698 (1944).

239. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 450 (1966) (describing the interrogation techniques commonly employed by law enforcement officers).

240. *See, e.g.*, *id.* (illustrating techniques used by criminal investigators).

241. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2178 (2013) (requiring express invocation of the right); *id.* __, 133 S. Ct. at 2184 (2013) (Thomas, J., concurring) (disagreeing with the principle that the prosecution or trial judge cannot comment on a defendant's silence at trail).

242. *See id.* at __, 133 S. Ct. at 2177–78 (2013) (describing how silence was used against a defendant).

243. *See Miranda*, 384 U.S. at 479 (outlining a template for what are now known as the "*Miranda* warnings").

implication, there is no notice given that silence still may be used against individuals whether they say anything or not.[244]

Express invocation harms those already disadvantaged by an unfair system.[245] Requiring direct and assertive statements in an intentionally intimidating environment is unjustly discriminatory. For example, express invocation does not consider adverse effects it bears on female suspects.[246] Researchers conclude female speech patterns tend toward indirect and deferential speech.[247] If law enforcement utilizes this discrepancy to the disadvantage of female suspects, millions of women could be exposed to the standard's harmful effects.[248] The poor or uneducated are similarly disadvantaged, as more educated, affluent individuals may have a better understanding of how to expressly invoke their rights.[249] The same disadvantages also apply to non-English speaking suspects and those with mental disabilities.[250]

Informing suspects as to their rights but offering no guidance on how to claim those rights is a fundamental problem presented by *Salinas'* express invocation requirement.[251] Individuals are forced to rely on their often legally incompetent knowledge of the judicial system in exercising their basic Constitutional rights. Further exacerbating this problem is the fact most silence or other implicit claims are ignored, with no attempt at reas-

---

244. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2177–78, 2184 (2013) (detailing the manner in which the defendant's silence was used against him).

245. *See generally* Ainsworth, *supra* note 22, at 320 (detailing the disadvantages of express invocation on women).

246. *See id.* at 262 (exploring the manner in which "a legal doctrine preferring direct and unqualified assertions of the right to counsel takes into account the speech patterns of women as well as other powerless groups").

247. *See id.* (indicating women lean towards more indirect and deferential speech patterns); Robin Lakoff, *Language and Woman's Place*, 2 LANGUAGE IN SOC'Y 45, 56 (1973) (describing how women may lean towards politeness by writing, "An overt order (as in an imperative) expresses the (often impolite) assumption of the speaker's superior position to the addressee, carrying with it the right to enforce compliance, where as with a request the decision on the face of it is left up to the addressee.").

248. *See id.* (recognizing the potential disadvantage women face in interrogations).

249. *See* Strauss, *supra* note 7, at 824 (asserting the privilege should not just afforded to the educated); *see also* Hammack, *supra* note 12, at 435–36 (noting advantages to those who are educated).

250. *See* Davis v. United States, 512 U.S. 452, 460 (1994) ("Requiring a clear assertion of the right to counsel might disadvantage some suspects who because of fear, intimidation, lack of linguistic skills, or a variety of other reasons will not clearly articulate their right to counsel although they actually want to have a lawyer present."); Mowad, *supra* note 19 (recognizing the potential dangers to disadvantaged persons).

251. *See* Berghuis v. Thompkins, 560 U.S. 370, 409–14 (2010) (Sotomayor, J., dissenting) ("*Miranda* warnings give no hint that a suspect should use those magic words, and there is little reason to believe police—who have ample incentives to avoid invocation—will provide such guidance.").

serting the right.[252] In fact, suspects may see confession as the only way of the ending an interrogation.[253] Forcing an express requirement overly burdens normal, unsuspecting individuals; however, the savvy repeat offender, fully aware of the system's intricacies, remains unhindered.

Another significant flaw in the *Salinas* rule is as Supreme Court decisions increasingly constrict 5th Amendment rights, waiving these rights grows easier.[254] Again, the right to remain silent can be waived implicitly, unknowingly, and unintelligently.[255] This plurality view has been criticized as subordinating the Fifth Amendment relative to other Constitutional protections.[256] Of course, this shift greatly benefits the prosecution. By also requiring knowledge of which Constitutional amendment must be invoked, suspects must now contemporaneously tip toe through the judicial process for fear of relinquishing their rights without saying a single word.

When the privilege is not expressly invoked, and therefore implicitly waived, then a third strike is dealt to suspects when their silence is used against them.[257] As discussed, *Griffin's* progeny paved the way for denying use of silence during custodial interrogations; however, using silence in pre-custodial situations has still not been established.[258] *Miranda* pro-

252. Hammack, *supra* note 12, at 439.

253. *See Davis*, 512 U.S. at 472–73 (Souter, J., concurring) (noting a defendant may see further objection as futile and may view confession as the only way "out").

254. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2183 (2013) (ruling forfeiture of the privilege need not be done knowingly); *Berghuis*, 560 U.S. at 384 (holding an implicit waiver is sufficient in denying an individual their Fifth Amendment rights). *But see* Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."); Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964) (recognizing the need for a knowing and intelligent waiver); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'").

255. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2183 (2013) (ruling forfeiture of the privilege need not be done knowingly).

256. *See* Rogers v. United States, 340 U.S. 367, 377–78 (1951) (Black, J., dissenting) (criticizing the broad construction of the doctrine of waiver concerning Constitutional amendments); *see also* Smith v. United States, 337 U.S. 137 (1949) (construing the doctrine of waiver narrowly by holding, "Waiver of constitutional rights, however, is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege and consequent immunity upon vague and uncertain evidence.'").

257. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2174 (2013) (describing how silence was used against a defendant).

258. *See* Griffin v. California, 380 U.S. 609, 614 (1965) (holding the trial court's and the prosecutor's comments on the defendant's failure to testify violated the Self-Incrimination Clause of the Fifth Amendment); *see also* Wainwright v. Greenfield, 474 U.S. 284, 290 (1982) (determining the use of defendant's post-arrest, post-*Miranda* silence by the prose-

tects against the inherent compelling pressures of custodial interrogation, but when a witness freely submits to questioning, those pressures are not as compelling.[259] However, Salinas' circumstances changed drastically, compelling circumstantial analysis in determining whether the environment was inherently compelling.[260]

B. *Tipping the Scales: Possible Solutions to Competing Interests*

"If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty."[261]

Miranda presented a quintessentially traditional dilemma—resolving intrinsic conflict between protecting Constitutional rights and enabling proper investigation by law enforcement. The *Miranda* plurality warns allowing silence hinders the prosecution in determining whether such a claim is legitimate; others argue the most reasonable interpretation of silence is that suspects are invoking their right to do so.[262]

Investigators and prosecutors can easily claim statements as ambiguous. Judicial economy will be furthered reduced if the government continues splitting hairs and expending needless time guessing individual fact patterns. Better directing investigators, prosecutors, and suspects is the solution. Regardless of whether new standards are adopted, the problems presented in this Comment evidence need for updated *Miranda* warnings accurately reflecting both recent Supreme Court holdings and evolving interrogation and prosecution tactics. Such warnings should not only apprise individuals of the right to remain silent, but should also offer specific guidance in invoking the privilege. Accordingly, updated warn-

---

cution violated due process); Doyle v. Ohio, 426 U.S. 610, 618 (1976) (ruling "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"); Sanchez v. State, 707 S.W.2d 575 (Tex. Crim. App. 1986) ("A defendant may not be impeached through the use of post-arrest, pre-*Miranda* silence since such impeachment violates the defendant's right to be free from compelled self-incrimination, and also since such impeachment is improper from an evidentiary standpoint.").

259. *See Miranda*, 384 U.S. at 467 (noting the inherently compelling pressures in custodial interrogations, which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely).

260. *See Salinas*, 563 U.S. __, 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting) (arguing for an inference of the right to remain silent if the circumstances are unambiguous); Doyle v. Ohio 426 U.S. 619 (1975) ("[In] such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

261. Hoffman v. United States, 341 U.S. 479, 489–90 (1951).

262. *See* Strauss, *supra* note 7, at 803 (arguing invocation is the most reasonable interpretation of an ambiguous statement).

ings should notify individuals that silence, not just statements, could be used against them if they fail to properly invoke the privilege.

Guidance can be found in past Supreme Court precedent.[263] In *Quinn*, Justice Harlan wrote that an expression in vague terms is immaterial as long as questioners knew of their suspect's intentions.[264] Further, "It then became incumbent on the committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege."[265] *Quinn* suggests if suspects claim the right ambiguously, then questioners should specifically inquire whether or not the Fifth Amendment is being invoked, immediately notifying all parties whether or not the privilege has been successfully claimed. Therefore, if suspects remain silent to questioning or ambiguously imply they wish not to answer, investigators should ascertain at that moment whether suspects are invoking their Fifth Amendment rights. Congruent to *Miranda's* proposition, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[266] This practice clarifies whether to cease questioning or allow suspects time in formulating answers.

Hoffman is also instructive. Justice Clark wrote for the majority: "The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."[267] In instances where investigators do not ascertain whether suspects are invoking their right—either because they do not infer the ambiguous claim or simply refuse to further inquiry—trial judges should then have discretion handle the matter based on their perception of the particular facts of a case.[268] Instituting a bright line standard of express invocation removes judicial discretion from judges tasked with determining such issues and places the burden of deciphering legal nuances on common individuals. The *Salinas* plurality insists silence can merely be the result of suspects fashioning false stories.[269] Yet if suspects expressly

263. *See* Quinn v. United States, 349 U.S. 155, 164 (1955) (establishing it should become "incumbent on the committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege").

264. *See id.* (upholding Fifth Amendment protection even though it was claimed using vague terms).

265. *Id.*

266. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

267. Hoffman v. United States, 341 U.S. 479, 487 (1951).

268. *See id.* (finding a trial judge, in analyzing a claim of privilege of the Fifth Amendment, should incorporate "his personal perception of the peculiarities of the case as by the facts actually in evidence").

269. *See* Salinas v. Texas, 563 U.S. __, 133 S. Ct. 2174, 2183 (2013) (detailing alternative reasons justifying a suspect's silence).

Villanueva-Le: When Silence Requires Speech: Reviving the Right to Remain Silent

invoke the privilege, stalling while they concoct a believable story is still an option.

Consider again Hoffman's language: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result,"[270] and *Robert's* determination "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government had no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion."[271] Courts can sustain a privilege claim implicitly from the questions, considering whether the prosecution had a substantial reason to believe the disclosures are incriminatory.

V. Conclusion

Updated warnings are needed to not only inform suspects of their rights, but to guide them into properly exercising those rights. Suspects must be warned they can be penalized for their silence, and if they wish to claim the privilege against self-incrimination, they must do so expressly. While this places a heavier burden on law enforcement, it is the officers, investigators, and prosecutors who are specifically trained in our legal system, not the common individual. Past liberal constructions favoring the rights of individuals must be kept alive today, because if the Fifth Amendment can be jeopardized, so too could other Amendments.[272]

270. *See Hoffman*, 341 U.S. at 486–87 (looking to the implications of sustaining the privilege by determining whether the answer might be dangerous because it could result in incrimination).

271. Roberts v. United States, 445 U.S. 552, 559 (1980).

272.