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# Remaining Silent While Police Get Frisky: After Salinas, Can Silence During a Terry Stop Be Used as an Admission of Guilt?

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## REMAINING SILENT WHILE POLICE GET FRISKY: AFTER *SALINAS*, CAN SILENCE DURING A *TERRY* STOP BE USED AS AN ADMISSION OF GUILT?

### I. INTRODUCTION

Genovevo Salinas is at home watching a football game when there is a knock at his door.<sup>1</sup> The police are outside and request to come in to ask him some questions.<sup>2</sup> Mr. Salinas is cooperative, admits that he owns a gun, and surrenders it to the officers.<sup>3</sup> The officers then ask him to come down to the station to answer a few more questions, and he goes to the station voluntarily.<sup>4</sup> The officers do not place Mr. Salinas in custody, and therefore, they do not read him his *Miranda* rights.<sup>5</sup>

After an hour, the officers ask Mr. Salinas if the gun that was turned over at his house would match a ballistics test on the bullet from a murder.<sup>6</sup> Mr. Salinas does not want to answer that question, so he does not say anything.<sup>7</sup> The officers do not know why Mr. Salinas does not answer the question, although, they have their suspicions.<sup>8</sup> Mr. Salinas is nervous, he starts to shuffle his feet, looks down, and wrings his hands from the anxiety.<sup>9</sup> Mr. Salinas' actions, along with his silence, are now evidence for the prosecution to use against him in a criminal case.<sup>10</sup>

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<sup>1</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (discussing a similar situation where the police went to the Salinas' home with a search warrant believing Salinas to be the shooter in a death at a party he attended the previous night). This hypothetical is based off the facts of *Salinas*, but has been generalized by the author to provide a brief understanding.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2177.

<sup>6</sup> See *id.* (noting that the petitioner voluntarily answered the questions asked by the officers until he felt that he should no longer answer questions that might incriminate him).

<sup>7</sup> *Salinas*, 133 S. Ct. at 2178. The Court mentions that Salinas "balked" when he was asked by the officers if the shotgun recovered at the Salinas' home would make a positive match to the shell casings found at the murder scene. *Id.* at 2177.

<sup>8</sup> See *id.* at 2185 (Breyer, J., dissenting) (indicating that the prosecution believed that an innocent person would have denied partaking in the crime or being at the scene).

<sup>9</sup> See *id.* at 2178 (describing how Salinas behaved during the silence of the interrogation). "[P]etitioner declined to answer. Instead, petitioner '[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.'" *Id.* (internal citations omitted).

<sup>10</sup> See *id.* at 2183 (explaining that Salinas did not just remain silent, but that he made movements). These movements suggested to the Court that Salinas felt surprised and anxious. *Salinas*, 133 S. Ct. at 2183. The Court further questioned "[a]t precisely what point such reactions transform 'silence' into expressive conduct" is a difficult decision to have to make, and that the Court would not have to rule on that at this time. *Id.*

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An officer finds a group of young men on the sidewalk in front of the victim's apartment.<sup>11</sup> The officer believes one of the men, Gerry, matches the description of a suspect whom police previously identified as a possible perpetrator. Therefore, the officer has reasonable suspicion to stop and frisk him.<sup>12</sup> Gerry remains silent when the officer questions him because he does not want to incriminate himself, nor does he want any trouble with the police. He thinks that he is making less trouble for himself by remaining silent. However, because he did not tell the officer he intended to invoke his right to remain silent, Gerry may have lost his privilege.<sup>13</sup>

In *Salinas v. Texas*, the Court determined that silence is considered tantamount to taking time to think of a lie.<sup>14</sup> Silence is not seen as invoking one's Fifth Amendment right to remain silent.<sup>15</sup> To protect *Salinas'* right against self-incrimination, the Court held he must expressly invoke that

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<sup>11</sup> This part of the hypothetical is created by the author in an attempt to show how the holding in *Salinas v. Texas*, 133 S. Ct. 2174 (2013), would be applied to *Terry* stops and the need for a model code that has a pre-arrest warning similar to a *Miranda* warning.

<sup>12</sup> See *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (holding that police officers may briefly detain and pat-down suspects believed to be armed and a danger to themselves or others). See also Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 328–29 (1994) (detailing the reasonable articulable suspicion standard of a *Terry* stop). Officers may stop and frisk a suspect without first obtaining a warrant; however, the stop must be brief and justified by reasonable articulable suspicion. *Id.* The suspect is not under arrest, but is detained nonetheless. *Id.* at 329. The stop must be minimally intrusive and last no longer than needed to “effectuate the purpose of the stop.” See *id.* (holding that if the stop is too lengthy or if the search is too intrusive, it is considered an arrest). Reasonable articulable suspicion is more than a hunch and requires an officer to be able to point to “specific and articulable facts, which when taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” *Id.*

<sup>13</sup> See *Salinas*, 133 S. Ct. at 2178 (holding that the petitioner failed to assert the privilege, and, therefore, his Fifth Amendment claim was rejected). See also *Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010) (finding that prolonged silence after being given the *Miranda* warnings was also not sufficient to invoke their protection); *Minnesota v. Murphy*, 465 U.S. 420, 425, 427 (1984) (holding that a witness who desires protection of the privilege must claim it); *Roberts v. United States*, 445 U.S. 552, 560 (1980) (determining that a defendant usually does not invoke privilege by remaining silent). “[A]n express invocation requirement ensures the prosecution is put on notice whether a suspect is claiming the privilege so that it may either challenge the claim that the testimony is self-incriminating to a judge, or, if it agrees, offer immunity to the suspect.” Robin B. Murphy, *Silence as Self-Incrimination After Salinas v. Texas*, 102 ILL. BAR J. 184, 186 (2014).

<sup>14</sup> *Salinas*, 133 S. Ct. at 2182.

<sup>15</sup> *Id.* The Court found that *Salinas* “might [have] decline[d] to answer [the] police officer’s question in reliance on his constitutional privilege. But he also might [have done] so because he [was] trying to think of a good lie, because he [was] embarrassed, or because he was protecting someone else.” *Id.*

right.<sup>16</sup> In other words, he must assert the Fifth Amendment privilege, or none is given.<sup>17</sup> This presents a problem for non-custodial suspects.<sup>18</sup> This Note will apply *Salinas* to another example of a non-custodial interrogation, a *Terry* stop, to demonstrate how suspects can unknowingly have their silence used against them.<sup>19</sup> A *Terry* stop is when a police officer has reasonable suspicion to briefly stop a suspect whom the officer believes to be participating in criminal activity.<sup>20</sup> If the same rule of law applies to a *Terry* stop, individuals like Gerry will not know how to protect themselves or guarantee their constitutional right against self-incrimination.<sup>21</sup>

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<sup>16</sup> *Id.* at 2178. The Court identified that for a long period of time, it has recognized that the privilege “generally is not self-executing’ and that [if] a witness . . . desires its protection [he]’ must claim it.” *Id.*

<sup>17</sup> *Id.* The Court found that because *Salinas* was “required to assert the privilege to benefit from it,” the Court of Criminal Appeals of Texas denying his Fifth Amendment claim was affirmed. *Salinas*, 133 S. Ct. at 2178.

<sup>18</sup> See *infra* Part III.B (describing how the Court leaves non-custodial silence as admissible evidence during the prosecution’s case).

<sup>19</sup> See *infra* Part III.B (explaining how a suspect’s silence is now able to be used as incriminating evidence).

<sup>20</sup> See *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (holding that the investigating officer did not violate the rights of the suspect because the officer had the right to pat down the outer clothing of the man). The officer had “reasonable cause to believe” that the suspect may have been armed. *Id.* The Court “distinguished between an investigatory ‘stop’ and an arrest, and between a ‘frisk’ of the outer clothing for weapons and a full-blown search for evidence of crime.” *Id.* It further held that it was a necessity in the “officer’s investigatory duties,” because had he not, the police officer could have been a victim. *Id.* It found that a loaded pistol discovered during a reasonable frisk is therefore admissible. *Id.* See Eugene L. Shapiro, *Miranda Warnings and Terry Stops: Another Perspective*, 15 BARRY L. REV. 1, 4 (2010) (explaining that an officer who does not have probable cause, but whose “observations lead him reasonably to suspect’ that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly so that the officer may investigate the circumstances that provoke suspicion”). The stop and frisk must be “reasonably related in scope to the justification for their initiation.” *Id.* The officer is allowed to ask the suspect questions to determine his identity and “to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.* However, the suspect is not required to respond. *Id.* If the answers do not “provide the officer with probable cause to arrest him,” the officer must release the suspect. *Id.* See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (concluding that *Terry* stops are non-coercive, thus are not subject to the dictates of *Miranda*). The Court likened *Terry* stops to ordinary traffic stops and held that “persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.” *Id.*

<sup>21</sup> See *Salinas*, 133 S. Ct. at 2184 (holding that before *Salinas* “could rely on the privilege against self-incrimination, he was required to invoke it”). See also Transcript of Oral Argument at 19, *Salinas v. United States*, 133 S. Ct. 2174 (2013) (No. 12-246) (arguing how unfair it is to enforce a rule in which the person does not possess the “magic words” that are required to invoke the right).

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Many Americans are aware they have the right to remain silent, but are unaware that they must expressly claim their right.<sup>22</sup> The Court has held that a person is obligated to let his intentions be known if he plans to invoke his *Miranda* right during an interrogation.<sup>23</sup> Following *Salinas*, the recent Court decision on which the first part of the hypothetical is based, this Note will evaluate the following: (1) what the *Miranda* warning actually says; (2) what it means; and (3) when the *Miranda* warning is necessary.<sup>24</sup> This Note will provide a solution that will help inform Americans that their silence can be used against them at the time of questioning, similar to the way the *Miranda* warning is currently utilized.<sup>25</sup>

The problem now is whether a suspect may remain silent during a *Terry* stop if he does not invoke the self-incrimination privilege, and if he does remain silent, whether that silence equates to guilt.<sup>26</sup> This Note examines how *Salinas v. Texas* blurs the manner in which the privilege against self-incrimination is to be applied to suspects in pre-arrest, non-custodial situations.<sup>27</sup> First, Part II details the Fifth Amendment, the inception of the *Miranda* warnings, the holding in *Salinas*, and the non-custodial interrogation during a *Terry* stop.<sup>28</sup> Next, Part III analyzes how the holding of the Court in *Salinas*, when applied to a *Terry* stop interrogation, will infringe upon the fundamental rights of suspects to remain silent.<sup>29</sup> Finally, Part IV proposes a model act, requiring that

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<sup>22</sup> See LAWRENCE S. WRIGHTSMAN & MARY L. PITMAN, *THE MIRANDA RULING: ITS PAST, PRESENT, AND FUTURE* 86 (2010) (finding that even casual television watchers recognize, and may have memorized, the lines of the *Miranda* rights). See also Meaghan Elizabeth Ryan, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903, 903 (2007) (explaining that television police and law dramas have made the right to remain silent as probably the most well-known constitutional right).

<sup>23</sup> See *Salinas*, 133 S. Ct. at 2178 (illustrating that the Fifth Amendment privilege is not self-executing; it must actually be claimed to invoke privilege, and when it is not claimed, the privilege is rejected).

<sup>24</sup> See *infra* Part II.A.2 (elaborating on the narrowing of the decision in *Miranda v. Arizona*).

<sup>25</sup> See David W. Schultz, *Anything You Say, Officer*, 6 SCRIBES J. LEGAL WRITING 165, 165 (1996-97) (explaining that the language which officers read is mass produced on *Miranda* cards and used as "crib sheets" that officers carry for when they make arrests).

<sup>26</sup> See *infra* Part III.A (analyzing the problem that *Salinas* creates for *Terry* stops). See also *infra* Part III.B (addressing how *Salinas* narrows the protections of the right against self-incrimination).

<sup>27</sup> See *infra* Parts II-IV (discussing the decision in *Salinas v. Texas* and using the *Terry* stop as a common non-custodial interrogation example to discuss how the decision in *Salinas* will infringe upon the fundamental right to remain silent for suspects in a *Terry* stop).

<sup>28</sup> See *infra* Part II (elaborating on the history of the Fifth Amendment privilege, the inception of the *Miranda* warning, the decision of the Court in *Salinas v. Texas*, and the *Terry* stop as a common non-custodial interrogation with the police).

<sup>29</sup> See *infra* Part III (analyzing the use of a suspect's silence in a non-custodial interrogation such as the *Terry* stop, and how it will infringe on the fundamental right to remain silent that

suspects be informed of their rights in non-custodial situations, but more specifically in *Terry* stops.<sup>30</sup> In turn, the model act clarifies how *Salinas* is to be applied during *Terry* stops.<sup>31</sup>

## II. BACKGROUND

The Constitution provides protections for the people of the United States.<sup>32</sup> The courts are granted the power of judicial review to interpret the law by *Marbury v. Madison*, and it is with that power that the Supreme Court has stripped away constitutional protections.<sup>33</sup> Part II.A will first explain the foundation of the Fifth Amendment and discuss how the Court laid the foundation for applying the *Miranda* warning.<sup>34</sup> Next, Part II.B will show the Court's use of *Miranda* in *Salinas* to determine that a suspect in a non-custodial context does not need to be read the *Miranda* warning.<sup>35</sup> Further, Part II.C will explain how *Terry* stops became normal police procedure and acceptable by the Supreme Court.<sup>36</sup>

### A. *The Fifth Amendment Grants Protections, Which Remain Fundamental Rights*

The Constitution gives people the right to protect themselves against self-incrimination in a criminal case.<sup>37</sup> However, the Bill of Rights was

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has come to be understood by Americans to mean that they may just remain silent to invoke the Fifth Amendment privilege).

<sup>30</sup> See *infra* Part IV (proposing a model code that can be adopted by the states outlining verbiage to be used before interrogating a suspect to inform them of their rights, and how to invoke those rights).

<sup>31</sup> See *infra* Part IV (illustrating how the model code will explain a suspect's rights during a non-custodial interrogation).

<sup>32</sup> See *infra* Part II.A (providing a background to the fundamental rights provided in the Fifth Amendment against self-incrimination).

<sup>33</sup> See *Marbury v. Madison*, 1 Cranch 137, 138 (1803) (holding that the Court has the power of judicial review). See also Michael Stokes Paulson, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2709 (2003) (explaining that the Constitution granted the power to the courts, and not the other branches of government, to interpret and apply the Constitution to the cases a court reviews); *infra* Part II.A (discussing the narrowing of the application of the Fifth Amendment).

<sup>34</sup> See *infra* Part II.A (explaining the foundation of the Fifth Amendment and its exceptions formed by a two prong test).

<sup>35</sup> See *infra* Part II.B (detailing the use of *Miranda* to determine the holding in *Salinas*, and how that decision led to an infringement of rights).

<sup>36</sup> See *infra* Part II.C (providing depth into *Terry* stops and reasonable suspicion, high crime areas, and flight as factors in a stop and frisk).

<sup>37</sup> U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . .").

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written to include only the federal government, not the individual states.<sup>38</sup> Since the founding fathers drafted the Constitution, it has been a fundamental right for an accused person to remain silent.<sup>39</sup> Under this right, suspects are treated differently than witnesses and are not legally required to answer questions from police.<sup>40</sup> In 1963, there were no legal consequences for suspects who refused to answer police questioning.<sup>41</sup> Suspects being interrogated, therefore, were not protected under the Fifth Amendment, but were only protected under the due process right not to be forced to give a coercive confession.<sup>42</sup> The right changed in 1966 by applying the self-incrimination clause to police investigations as a direct result of case law.<sup>43</sup> A suspect's false confession, which sometimes leads to an conviction as a result of coercive police actions, is one reason for the Court's decision in *Miranda v. Arizona*.<sup>44</sup>

The Court struck a balance of powers between the police and suspects when it required police to provide warnings to suspects indicating the difference between voluntary and involuntary statements.<sup>45</sup> Part II.A.1

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<sup>38</sup> See Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74, 74 (1963) (explaining that the Court had held in *Twining v. New Jersey* that the Fourteenth Amendment did not apply to the states).

<sup>39</sup> See ALLEN M. GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS 11 (2010) (elaborating on the Fifth Amendment incorporated British common law on the right to silence). The book stated the following:

So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law . . . became clothed in this country with the impregnability of a constitutional enactment.

*Id.*

<sup>40</sup> THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 2 (Richard A. Leo & George C. Thomas III eds., 1998).

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* (explaining the development of parallel doctrines by the Court). Due Process prohibits the police from using coercion, and it is also called the "voluntariness doctrine" to differentiate from the Fifth Amendment privilege, which protects against self-incrimination. *Id.*

<sup>43</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the Fifth Amendment right against self-incrimination is applicable to the states through the Fourteenth Amendment). See also WRIGHTSMAN & PITMAN, *supra* note 22, at 4 (explaining how *Miranda* extended the Fifth Amendment to permit the termination of questioning during police interrogations); THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 35 (illustrating how the use of the self-incrimination clause kept legislatures from adding language to the Sixth Amendment to regulate police interrogation).

<sup>44</sup> See WRIGHTSMAN & PITMAN, *supra* note 22, at 4 (stating that the majority of justices feared the actions of the police against suspects of a crime). See also *Miranda*, 384 U.S. at 467-68 (finding the right to remain silent applies to in-custody interrogations).

<sup>45</sup> See GOLDSTEIN & SEVIN GOLDSTEIN, *supra* note 39, at 10 (providing an explanation of the Court's opinion that there needed to be a level playing field between police and suspects in *Miranda*). See also Roscoe C. Howard Jr. & Lisa A. Rich, *A History of Miranda and Why it*

will focus on the creation of the *Miranda* warning and explain the holdings of cases implementing *Miranda* that define how to claim the Fifth Amendment privilege.<sup>46</sup> Part II.A.2 will detail the two exceptions to express invocation of the Fifth Amendment privilege: self-incrimination on the stand and government coercion.<sup>47</sup> Further, Part II.A.2 will provide insight into how the subsequent Court holdings in the 1980's have created a narrower application of the *Miranda* warning.<sup>48</sup>

### 1. The Creation of the *Miranda* Warning

*Miranda*, similar to the three other defendants in the companion cases to *Miranda*, was held in an interrogation room without access to his attorney.<sup>49</sup> *Miranda* denied committing any crime, but was interrogated for so long that he was coerced into giving a confession.<sup>50</sup> He was never advised that he was allowed to have an attorney present.<sup>51</sup> The Court had the task of deciding if statements obtained from a defendant who was interrogated while in custody or “otherwise deprived of his freedom of action in any significant way” were admissible.<sup>52</sup>

The Court held that statements *Miranda* made in the custodial interview could not be used against him.<sup>53</sup> It further held that the prosecution may not address the fact that a suspect remained silent or

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*Remains Vital*, 40 VAL. U. L. REV. 685, 687 (2006) (explaining that the Supreme Court has not offered a “talismatic” definition of voluntary confessions to help determine if a question arises; rather, the Court will use the totality of the circumstances surrounding the confession).

<sup>46</sup> *Miranda*, 384 U.S. at 467–68 (providing the warning as part of case law for suspects during an interrogation). The Court stated that the warning was necessary to make suspects aware of their rights. *Id.* at 468. The warning was required as a prerequisite to prevent the inherent pressures that interrogation gives. *Id.* See *infra* Part II.A.1 (noting the creation of the *Miranda* warning).

<sup>47</sup> See *infra* Part II.A.2 (detailing the two exceptions carved out by the Court in *Griffin v. California*, and *Minnesota v. Murphy*).

<sup>48</sup> See *infra* Part II.A.2 (explaining that the Fifth Amendment is not self-executing, and those that wish to use its protections, must claim it). See also THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 116–17 (explaining the “code like rules” that require a suspect receive warnings of his rights upon being taken into custody).

<sup>49</sup> See *Miranda*, 384 U.S. at 440 (discussing the cases before the Court, which included: *Vignera v. New York*, 382 U.S. 925 (1965); *Westover v. United States*, 382 U.S. 924 (1965); *California v. Stewart*, 382 U.S. 937 (1965)). The Supreme Court consolidated the companion cases into one holding in *Miranda*. *Miranda*, 384 U.S. at 440.

<sup>50</sup> *Miranda*, 384 U.S. at 491–92. *Miranda* was arrested at his home and taken in custody to a police station where he was identified by the complaining witness. *Id.* at 491.

<sup>51</sup> *Id.* at 440.

<sup>52</sup> See *id.* at 445 (discussing the constitutional issue that must be decided before the Court).

<sup>53</sup> See *id.* at 492. See also *Murphy*, *supra* note 13, at 185 (explaining that prosecutors are not allowed to use statements obtained during a custodial interview if the suspect has not been advised of his rights).



chose to invoke his privilege during an interrogation at the trial.<sup>54</sup> The Court was then faced with how to determine when an answer was voluntary or compelled.<sup>55</sup> It assumed “compulsion is ‘inherent in custodial surroundings.’”<sup>56</sup>

In *Miranda*, the Court further created new safeguards.<sup>57</sup> “[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”<sup>58</sup> Further, the warning must include an explanation that “anything said can and will be used against the individual in court.”<sup>59</sup> This does not prohibit police from questioning suspects, but “level[s] the playing field” by requiring officers to remind suspects of their constitutional rights.<sup>60</sup> There

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<sup>54</sup> See Murphy, *supra* note 13, at 185 (stating that protection of the right to self-incrimination was violated if it could be used against you in a Court). This will prove to be a vital holding in the analysis of how suspects in custody are afforded greater protections than suspects who are not in custody. The Court held in *Salinas* that because the suspect was in a non-custodial context, he was unable to stand mute. *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013). He must also expressly invoke his privilege, and silence during interrogation may be used as evidence against him during his trial. See *id.* at 2178, 2182 (“A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.”).

<sup>55</sup> See THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 36 (explaining that the *Miranda* Court “faced the formidable challenge of developing an account of compulsion that overcame the conceptual and practical difficulties of the voluntariness doctrine”).

<sup>56</sup> See *id.* (speculating that this “bold assumption was a reasonable accommodation to the realities of both police interrogation and the process of judging which confessions to suppress”).

<sup>57</sup> See *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (acknowledging that “the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves”); THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 43 (providing an edited version of *Miranda* as an excerpt).

<sup>58</sup> *Miranda*, 384 U.S. at 467–68. See THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 43 (furnishing the reasoning of the Court). The Court reasoned that this warning was for those that were unaware of the privilege; they would be made aware through this warning. *Id.* It further reasoned that the suspect being interrogated will then know that his “interrogators are prepared to recognize his privilege should he choose to exercise it . . .” *Id.*

<sup>59</sup> See *Miranda*, 384 U.S. at 469 (explaining that this added explanation was “needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it”); THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 40, at 43 (providing the case to readers in a text that provides other authors commentary on *Miranda*).

<sup>60</sup> See GOLDSTEIN & SEVIN GOLDSTEIN, *supra* note 39, at 20–21 (elaborating on the effects of *Miranda* on police questioning). The Court ruled that:

[A] suspect taken into custody must be warned before questioning that: “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he can’t afford an attorney one will be appointed for him prior to any questioning if he so desires.”

are many approaches to the *Miranda* warning because it is case law.<sup>61</sup> There is not a universal code in the language, but the concepts are the same.<sup>62</sup> The Court has created exceptions beyond *Miranda* that are incorporated into the application of the Fifth Amendment.<sup>63</sup>

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*Id.* at 21.

<sup>61</sup> See *Miranda*, 384 U.S. at 478–79 (providing case law that requires suspects in custody be warned of their constitutional rights); WRIGHTSMAN & PITMAN, *supra* note 22, at 86 (detailing the numerous versions of *Miranda* warnings). A fifty state survey found a staggering 866 different written *Miranda* warnings in federal, state, and county jurisdictions. WRIGHTSMAN & PITMAN, *supra* note 22, at 86. The warnings range in length from forty-nine words to 547 words. *Id.* at 87. An example of a relatively simple *Miranda* warning is:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and have him present before and during questioning. If you cannot afford an attorney, one will be appointed free of charge before or during any questioning, if you so desire. Do you understand each of these rights I have explained to you, yes or no? Having these rights in mind do you wish to speak to me now, yes or no?

*Id.* at 86. This sample *Miranda* even asks the suspect if he wishes to speak to the officer, so that “no” will be sufficient to invoke his rights. *Id.* This sample provided by Wrightsman is only ninety-two words. *Id.* He also provides a sample that is 172 words and more complex:

Under the law, you cannot be compelled to answer, and you have the right to refuse to answer any questions asked of you while you are in custody. If you do answer any such questions, the answers given by you will be used against you in a trial in a court of law at some later date. You are also entitled to talk to a lawyer and to have him/her present before you decide whether or not to answer questions and while you are answering questions. If you do not have the money to hire a lawyer, you are entitled to have a lawyer appointed without cost to consult with you and to have him/her present before you decide whether or not you will answer questions and while you are answering questions. You can decide at any time, before or during the questioning, to exercise these rights by not answering any further questions or making further statements. Knowing these rights, are you willing to answer questions without the presence of a lawyer?

*Id.* at 86–87. This sample is so long that the suspect may have forgotten what the first half said by the time the officer read the second half. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 651 (1996) (explaining that in a national poll in 1984, statistics showed that ninety-three percent of people surveyed “knew they had a right to an attorney if arrested,” and in a national poll in 1991, statistics showed that eighty percent “knew they had a right to remain silent if arrested”).

<sup>62</sup> See WRIGHTSMAN & PITMAN, *supra* note 22, at 86 (explaining there is not one universal *Miranda* warning).

<sup>63</sup> See *infra* Part II.B.2 (describing the exceptions to the express invocation rule and the specific rules the Court requires for express invocation to claim the right, as well as, explaining non-custodial interrogations not requiring the provisions of *Miranda*).

## 2. The Exceptions to Express Invocation and the Narrower Application of the Fifth Amendment

The Court has recognized two exceptions to express invocation of the Fifth Amendment: (1) the protection against self-incrimination; and (2) the right against government coercion.<sup>64</sup> Before *Miranda*, the Court in *Griffin v. California* held that “a criminal defendant need not take the stand and assert the privilege at his own trial.”<sup>65</sup> The Court found that the prosecutor’s comments on the defendant’s failure to take the stand were in violation of his Fifth Amendment right against self-incrimination.<sup>66</sup> The Court further expressed that “[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”<sup>67</sup> *Griffin* provided greater protections of the Fifth Amendment by prohibiting the prosecution from commenting on the right against self-incrimination during trials.<sup>68</sup>

Additionally, the Court has held that when a witness fails to invoke the privilege against self-incrimination, the failure must be excused if there was any government coercion.<sup>69</sup> In *Minnesota v. Murphy*, the Court held that because of the “uniquely coercive nature of custodial

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<sup>64</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2179–80 (2013) (discussing the two exceptions in which witnesses are not required to invoke the Fifth Amendment privilege).

<sup>65</sup> *Id.* at 2179. The Court went on to further discuss that the criminal defendant has an “absolute right not to testify.” *Id.*

<sup>66</sup> See *Griffin v. California*, 380 U.S. 609, 615 (1965) (finding that a criminal defendant has the fundamental right not to take the stand in a criminal prosecution, and the exercise of that right may not be used against him by the prosecutor during the trial). In *Griffin*, the defendant was convicted of murder. *Id.* at 609. The Court reversed *Griffin*’s conviction because it felt the trial judge’s silence in regard to the prosecutor’s comments that *Griffin* failed to take the stand in his own defense was a penalty for exercising his constitutional right: commenting on defendant’s silence at trial “cuts down on the privilege by making its assertion costly.” *Id.* at 614. See *Murphy*, *supra* note 13, at 185 (explaining *Griffin* as a violation of the Fifth Amendment privilege).

<sup>67</sup> *Griffin*, 380 U.S. at 614. This case was actually decided before *Miranda*; however, it was used in *Salinas* as one exception to *Miranda*. *Salinas*, 133 S. Ct. at 2179.

<sup>68</sup> *Griffin*, 380 U.S. at 614 (“The inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege.”).

<sup>69</sup> *Salinas*, 133 S. Ct. at 2180. The Court discussed that *Miranda* held “that a suspect who is subjected to the ‘inherently compelling pressures’ of an unwarned custodial interrogation need not invoke the privilege.” *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966)). See also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 57 n.6 (1964) (“The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements . . . and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.”).

interrogations,” an in-custody suspect cannot voluntarily waive his privilege unless he does not claim it, but only after being given the *Miranda*.<sup>70</sup> Murphy was not in custody, but rather at a probation meeting; therefore, the Court found that his admission to a prior rape and murder was not coercive.<sup>71</sup>

In the 1980’s, before *Salinas*, there were two specific rules affecting the *Miranda* warning for a defendant in a criminal case: (1) the Fifth Amendment is not self-executing; and (2) those who wish to have the protection of the Fifth Amendment, must claim it.<sup>72</sup> The Court addressed the first rule, self-execution, in *Roberts v. United States* when it held that the right against self-incrimination is not self-invoking; the right must be expressed and in a timely fashion.<sup>73</sup> The other rule, a witness who desired

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<sup>70</sup> *Salinas*, 133 S. Ct. at 2180. See *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (holding that a person is protected if they assert their Fifth Amendment privilege when there is a rational basis against self-incrimination). In *Murphy*, the defendant was on probation and made statements that incriminated himself to his court appointed counselor. *Id.* at 422. While on probation, Murphy was told that if he did not comply with all the court mandated counseling meetings and answer truthfully during his sexual counseling, that they would revoke his probation. *Id.* During counseling, Murphy admitted to rape and murder. *Id.* at 423. The counselor informed the probation officer of Murphy’s confession during their counseling sessions. *Id.* at 424. Murphy was arrested and his statements made at the counseling and during the meeting with his probation officer were used against him in prosecution. *Id.* at 425.

*Salinas* had urged the Court in his case to adopt a third exception to the express invocation of the Fifth Amendment privilege. *Salinas*, 133 S. Ct. at 2180. However, the Court found that precedent has held that a suspect does not invoke privilege by remaining silent. *Id.* at 2181.

<sup>71</sup> See *Murphy*, 465 U.S. at 430 (explaining that the Court rejected that Murphy was entitled to *Miranda* warnings). The Court used four factors: (1) Murphy was not prohibited from asserting his Fifth Amendment privilege simply because he was on probation, in front of the probation officer, and required to tell the truth; (2) the probation officer was entitled to ask incriminating questions, which did not in turn make the privilege self-executing; (3) taking Murphy by surprise, by asking about prior criminal conduct, was insufficient to expect the *Miranda* warning; and (4) there was no evidence of abuse or trickery from the probation officer. *Id.* at 431–32.

<sup>72</sup> See *Murphy*, 465 U.S. at 429 (articulating that a suspect must claim the Fifth Amendment privilege). See *Berghuis v. Thompkins*, 560 U.S. 370, 388–89 (2010) (explaining that silence was not sufficient to invoke the Fifth Amendment privilege).

<sup>73</sup> *Roberts v. United States*, 445 U.S. 552, 559 (1980). *Roberts*, the defendant, voluntarily went with a woman to the United States District Attorney. *Id.* at 553. The woman was a known heroin trafficker. *Id.* Investigators asked *Roberts* if he would answer some questions. *Id.* The investigators gave *Roberts* the *Miranda* warning before they questioned him, even though he was not in custody. *Id.* They also told *Roberts* that he was free to leave at any time. *Id.* at 553–54. *Roberts* admitted to knowing Boo Thornton, a known heroin dealer, and even delivering heroin to Boo. *Roberts*, 445 U.S. at 554. *Roberts* made several incriminating statements, but ultimately refused to name any suppliers of heroin during the interrogation. *Id.* He also did not expressly invoke the Fifth Amendment. *Id.* Investigators made it known to *Roberts* that if he did not comply, it would affect the charges brought against him. *Id.* *Roberts* argued that he had a constitutional right to remain silent and that the investigators

the protection of the Fifth Amendment must claim it, was applied in *Murphy* when the Court noted that only the accused knows which questions are incriminating; therefore, he must assert his privilege.<sup>74</sup> More recently, in *Berghuis v. Thompkins*, the Court applied the second rule holding that prolonged silence, even after being given the *Miranda* warning, was not sufficient expression to invoke the Fifth Amendment privilege of protection against self-incrimination.<sup>75</sup>

The Court determined that during non-custodial interrogations, the *Miranda* warning is not required; however, once a suspect invoked those privileges, the interrogations would end.<sup>76</sup> In *Mitchell v. United States*, the defendant was not in custody when he made incriminating statements.<sup>77</sup>

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brought negative recourse as a result of his silence. *Id.* at 559. The Court has held that the Fifth Amendment privilege is not self-executing and must be invoked in a timely fashion. *Id.* Roberts was never in custody and volunteered his statements to the investigators. *Roberts*, 445 U.S. at 561. The Court concluded that there was no error. *Id.*

<sup>74</sup> See *Murphy*, 465 U.S. at 429 (providing reasoning for its holding that a suspect must claim the privilege); Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. CHI. L. REV. DIALOGUE 116, 123 (2013) (stating that few will have the “moxie” to speak up against the police). If the suspect wants the protection of the Fifth Amendment privilege, “he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the Amendment.” *Murphy*, 465 U.S. at 427. However, very few people feel like they can assert themselves to officers.

<sup>75</sup> See *Berghuis*, 560 U.S. at 382 (noting that Thompkins was silent for an extended period of time during questioning; he never asked for a lawyer nor stated he wished to remain silent). After a shooting at a local mall in Michigan, the suspect fled. *Id.* at 374. One year later, Thompkins was arrested in Ohio. *Id.* The Michigan authorities travelled to Ohio to interrogate Thompkins. *Id.* The officers placed Thompkins in an 8’x10’ cell and gave him a paper to read his *Miranda* rights aloud. *Id.* at 374–75. During the interrogation that followed, at no point did Thompkins say he wished to remain silent. *Id.* at 375. After three hours of limited responses, the officers started asking if he believed in God, prayed to God, and finally, if he prayed to God for shooting that boy. *Berghuis*, 560 U.S. at 376. Thompkins answered yes to all of them. *Id.* He refused to sign a confession. *Id.* Thompkins claimed his statements were made involuntarily because he invoked his Fifth Amendment privilege. *Id.*

<sup>76</sup> See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (explaining that a *Terry* stop is no different than a traffic stop in regard to custody). See also *Mitchell v. United States*, 746 A.2d 877, 890 (D.C. 2000) (finding that once a suspect has invoked his right, the officers must curtail the questioning). The Court has held that a formal arrest is necessary before the police are required to read the *Miranda* warning. *Berkemer*, 468 U.S. at 441–42.

<sup>77</sup> *Mitchell*, 746 A.2d at 882. In *Mitchell v. United States*, the defendant was sleeping where no overnight parking was allowed. *Id.* The officer woke Mitchell after seeing a partially empty liquor bottle and patted him down. *Id.* The officer asked Mitchell if he had any weapons. *Id.* at 883. Mitchell said that he did not. *Id.* The officer did another pat down of Mitchell and found a weapon in his waistband. *Id.* Mitchell claimed that the officer then became angry for lying to the officer, and further claimed the officer yelled at him. *Mitchell*, 746 A.2d at 883. After searching the vehicle, the officer found a clip to a .380 semiautomatic pistol. *Id.* Mitchell was not in custody yet and did not receive his *Miranda* warnings when he made incriminating statements. *Id.* Mitchell was overly talkative with officers, without being questioned, at the police station during booking for alcohol and marijuana charges. *Id.* Some would like to say that Mitchell had diarrhea of the mouth. Mitchell told the officers

The Court found questioning during a traffic stop was similar to a *Terry* stop, therefore, the holding in *Berkemer v. McCarty* applied here.<sup>78</sup> *Berkemer* found a usual traffic stop analogous to a *Terry* stop.<sup>79</sup> In a *Terry* stop, unless the question posed leads to an arrest, the detainee is free to leave.<sup>80</sup> The Court held that because *Berkemer* was in a noncoercive traffic stop and not in custody, the officer was not required to provide *Berkemer* with a reading of the *Miranda* warning.<sup>81</sup> However, the Court did acknowledge that no bright line rule for custody during a traffic stop could be formed at that time.<sup>82</sup> The exceptions to the Fifth Amendment and the cases

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that they only searched him because they found the clip in his car. *Id.* at 884. Mitchell, while being fingerprinted, said, “[D]amn I looked for that clip, I looked for that clip for four days now. Where’d you find it at?” *Id.* at 883. Mitchell told officers the gun belonged to a friend. *Mitchell*, 746 A.2d at 884. He also admitted to being charged with first degree murder back in 1989, and to serving time. *Id.* The officer testified that as Mitchell was talking, he might have responded with a head nod or “uh huh,” but that he was not interrogating Mitchell. *Id.*  
<sup>78</sup> See *id.* at 890 (finding that because the officer was performing a normal traffic stop, which have been found to be viewed similar to *Terry* stops, the officer was not required to read the suspect the *Miranda* warning since he was not viewed to be in custody). Once a suspect invokes his privilege after he has been *Mirandized*, the police must respect his decision and curtail the questioning. *Id.* “The Supreme Court has held that for Fifth Amendment purposes, ordinary traffic stops are like *Terry* stops—though ‘significantly curtail[ing] the ‘freedom of action’ of the driver,’ they do not constitute ‘custody’ requiring *Miranda* warnings prior to moderate questioning of the detainee.” *Id.* *Berkemer* was decided in 1984 and held that the defendant was not in custody, therefore, his statements were not exempt from being used against him. *Berkemer*, 468 U.S. at 429.

<sup>79</sup> *Berkemer*, 468 U.S. at 439.

<sup>80</sup> *Id.* at 439–40. The following is an explanation of what an officer may do:

Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.

*Id.* See also *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (providing that unless there are “special circumstances,” the person may “refuse to cooperate” and leave).

<sup>81</sup> See *Berkemer*, 468 U.S. at 440 (holding that because ordinary traffic stops are non-coercive, temporarily detaining people in these stops is not considered “in custody” for the purposes of the *Miranda* warning).

<sup>82</sup> See *id.* at 441 (discussing that there are difficulties in “deciding exactly when a suspect has been taken into custody”). The Court found there should be a rule that *Miranda* either “applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line.” *Id.* However, the Court also explained that there would be drawbacks for each of these scenarios. *Id.* The first drawback “substantially impede[s]” enforcing traffic laws such that it would force the officer to either waste his time warning every single stopped driver of their constitutional rights while also causing the officer to no longer be able to use self-incriminating statements they inadvertently provided. *Id.* The justices also believed that this would do “little to protect citizens’ Fifth Amendment rights.” *Id.* The second drawback the

mentioned are used in both the defendant's argument and the Court's reasoning in *Salinas*.

B. *Salinas v. Texas*

*Salinas* is the beginning of a change in the application of the Fifth Amendment to non-custodial suspects.<sup>83</sup> The Court allowed the prosecution to comment on pre-arrest silence as substantive evidence of Mr. Salinas's guilt in a murder trial.<sup>84</sup> First, Part II.B.1 will detail the per curiam decision in *Salinas*.<sup>85</sup> Then, Part II.B.2 will explain how the decision in *Salinas* will be implemented in the future for non-custodial suspects.<sup>86</sup>

1. *Salinas*: A Decision on Pre-Arrest Silence

As partially explained in the hypothetical in *Salinas*, the police were investigating a murder.<sup>87</sup> Although there were no witnesses to this murder, a neighbor heard the gun shots and was able to see a man running out of the victim's home into a dark car.<sup>88</sup> In addition, the police were able to recover shot gun casings.<sup>89</sup> The police knew that Genovevo Salinas was at a party at the victim's residence the night before.<sup>90</sup> The police paid Mr. Salinas a visit, he answered the door and gave them consent to search his home.<sup>91</sup> Mr. Salinas was neither placed in custody, nor was he given the *Miranda* warning while officers questioned him for nearly an hour.<sup>92</sup>

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Court noted was that it would provide a way for officers to "circumvent the constraints on custodial interrogations" which have been created by *Miranda*. *Berkemer*, 468 U.S. at 441.

<sup>83</sup> See Jesse J. Holland, *Court Says Pre-Miranda Silence Can Be Used*, ASSOCIATED PRESS (June 17, 2013), <http://news.yahoo.com/court-says-pre-miranda-silence-used-142855241.html> [<http://perma.cc/95SP-ZMJZ>] (providing commentary on the *Salinas* case); *infra* Part II.B.1-3 (providing details of the facts, plurality opinion, concurring opinion, and dissent, and where *Salinas* leaves Fifth Amendment privilege for non-custodial suspects).

<sup>84</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (allowing the prosecutor to use Salinas' reactions to questions about the ballistics of the gun turned over from his possession as evidence of his guilt).

<sup>85</sup> See *infra* Part II.B.1 (illustrating the facts of the *Salinas* case).

<sup>86</sup> See *infra* Part II.B.2 (articulating the reality of the holding in *Salinas* as it will apply to non-custodial suspects choosing to invoke their Fifth Amendment right).

<sup>87</sup> See *supra* Part I (providing a brief description of the facts through a hypothetical).

<sup>88</sup> *Salinas*, 133 S. Ct. at 2178.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Salinas v. State of Texas*, 368 S.W.3d 550, 552 (Tex. Ct. App. 2011). "The investigators told the Salinas family about the murder investigation and obtained consent to search the home. Salinas's father tendered a shotgun to the police." *Id.* Salinas voluntarily went to the police station for questioning with the officers. *Id.*

<sup>92</sup> *Id.* at 553.

During the hour of questioning, Mr. Salinas complied and answered questions regarding other people who were present at the apartment where the shooting occurred, whether those people were gun owners, and how many times he had previously visited the apartment.<sup>93</sup> Eventually, Mr. Salinas refused to answer the question of whether or not the ballistics of the shell casing would match the gun that was surrendered at his home.<sup>94</sup> He instead, “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.”<sup>95</sup> During the trial, the prosecution used both Salinas’ silence and his actions against him.<sup>96</sup>

The premise of Salinas’ appeal was that the Court should adopt a third exception to the general rule of express invocation.<sup>97</sup> Salinas wanted the Court to recognize that a person’s silence is enough to invoke the Fifth Amendment if the officer has reason to know that the answer could be

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<sup>93</sup> *Id.* at 552. Specifically the facts reveal that:

During the questioning, Salinas told Sergeant Elliott he knew the Garza brothers through Mike Provazek and had visited the apartment three or four times before the shooting. According to Sergeant Elliott’s testimony, Salinas said he had no disagreement with either of the Garza brothers and did not own any weapons aside from the shotgun police took into custody.

*Id.*

<sup>94</sup> *See Salinas*, 133 S. Ct. at 2177 (explaining that the “petitioner balked when . . . asked whether a ballistics test would show that the shell casings found at the crime scene would match petitioner’s shotgun”).

<sup>95</sup> *Id.* at 2178.

<sup>96</sup> *See id.* at 2179 (explaining the Court had to decide “whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief”). The ballistics of the bullet matched the same gun Salinas relinquished to the officers. *Salinas*, 368 S.W.3d at 554. The prosecution would not have needed to comment on Salinas’ silence or conduct during the interview to provide evidence of his guilt. *See Salinas*, 133 S. Ct. at 2178 (mentioning that the prosecution used Salinas’s reaction to the questions during the interrogation as evidence). *See also* Brian Donovan, *Why Salinas v. Texas Blurs the Line Between Voluntary Interviews and Custodial Interrogations*, 100 CORNELL L. REV. 213, 219 (2014) (providing the law for what is and is not allowed to be commented at trial).

<sup>97</sup> *Salinas*, 133 S. Ct. at 2180. “Petitioner urges us to adopt a third exception to the invocation requirement for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating.” *Id.* at 2180–81.



incriminating.<sup>98</sup> The Court ultimately did not have a majority opinion in this case.<sup>99</sup>

The plurality opinion held that Salinas' claim failed because a witness must assert the Fifth Amendment privilege to then be able to benefit from that privilege.<sup>100</sup> The Justices made specific reference to the fact that Salinas "did not merely remain silent; he made movements that suggested surprise and anxiety."<sup>101</sup> The Justices then formed the opinion that they could avoid deciding at "precisely what point such reactions transform 'silence' into expressive conduct[.]"<sup>102</sup>

The plurality found that as long as the officers did not deprive the suspect of his ability to invoke the privilege, then Salinas' constitutional

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<sup>98</sup> *Id.* at 2180 (discussing that Salinas asked the court to "adopt a third exception to the invocation requirement": when a witness stands mute, thereby declining to provide an answer). The Court addressed this notion by saying that the defendant is the only person that can know if something is self-incriminating; therefore, he needs to say that. *Id.* at 2181. *See also* *Roberts v. United States*, 445 U.S. 552, 559 (1980) (holding that if the defendant wanted privilege, he should have said so).

<sup>99</sup> *See Salinas*, 133 S. Ct. at 2185 (explaining the holding of the plurality opinion and beginning the discussion of the dissenting opinion of the Justices).

<sup>100</sup> *See id.* at 2183 ("[W]e are not persuaded by petitioner's arguments that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice."). *Id.* Justice Alito wrote the opinion and the Chief Justice and Justice Kennedy joined; Justices Scalia and Thomas concurred. *Id.* at 2174. Traditionally, only plurality opinions carry authority. Mark Allen Thurman, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992). *Marks v. United States* provided guidance for the first time in how much authority a plurality decision held. *See id.* ("With no guidance from the Supreme Court, . . . plurality decisions frequently gave rise to 'collective confusion as to what was held by the Supreme Court.'"). The finding in *Marks* was that in a plurality decision the holding can be determined to be the position of the judges that concurred on the "narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). The reasoning behind this holding is that no single opinion receives the backing of five justices. Thurman, *supra* note 100, at 420. The *Marks* rule is intended to be limiting to the precedential power of a case that has not received a majority view. *Id.* at 421. *See also* Larissa K. Ollivierre, Note, *Suspects Beware: Silence in Response to Police Questioning Could Prove as Fatal as a Confession*, 65 MERCER L. REV. 579, 591 (2014) (explaining that the plurality found the government interest to be securing testimony).

<sup>101</sup> *Salinas*, 133 S. Ct. at 2183.

<sup>102</sup> *Id.* The Justices decided that would be a "difficult and recurring question" and their decision allowed them to avoid that question. *Id.* *See also* *Wilson v. Martin*, 549 F. App'x 309, 310 (6th Cir. 2013) (finding that probable cause did not exist when an eleven year-old girl raised her middle finger, and failed to stop walking away when told to stop); *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (holding that a reasonable police officer would not have mistaken being given the middle finger by a passenger as the car passed for a signal to the officer that he was in need of assistance, nor would the officer be able to have been concerned for the driver of vehicle simply because the passenger had "giv[en] the finger" to the officer as she drove past him). These cases are examples of when the courts have ruled that conduct directed at an officer, for example flipping them off, does not satisfy probable cause; therefore, lesser conduct should also be protected. *Wilson*, 549 F. App'x at 310.

rights were not violated.<sup>103</sup> The Court reasoned that an express invocation made sure the prosecution was put on notice as to whether the suspect was claiming his Fifth Amendment privilege.<sup>104</sup> The government would then be able to challenge the claim of privilege to a judge or offer immunity to the suspect.<sup>105</sup>

In Justice Thomas' concurring opinion, joined by Justice Scalia, he stated that he felt the decision in *Salinas* had a simple answer: "Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony."<sup>106</sup> The Court reasoned that the Fifth Amendment provided that no person shall be compelled to testify against himself, and that just because a jury was told it could make an inference from the silence of the defendant, that alone did not compel the defendant to make self-incriminating statements.<sup>107</sup>

A strongly written dissent penned by Justice Breyer opened with, "[i]n my view the Fifth Amendment here prohibits the prosecution from commenting on the petitioner's silence in response to police questioning."<sup>108</sup> Justice Breyer pointed to facts not mentioned in the plurality opinion and referred to *Griffin* and *Miranda* to demonstrate that

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<sup>103</sup> *Salinas*, 133 S. Ct. at 2185. As long as police do not take away the witness's ability to voluntarily invoke the privilege, the Court finds no Fifth Amendment violation. *Id.* See Neal Davis, *Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of Salinas v. Texas*, 38 FEB CHAMPION 16, 20 (2014) (explaining that *Salinas* thinned America's Fifth Amendment rights, but did not destroy them).

<sup>104</sup> See *Salinas*, 133 S. Ct. at 2179 ("That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating.")

<sup>105</sup> See *id.* (explaining that the government requires the knowledge of invocation of the Fifth Amendment). The case said the following:

Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.

*Id.* at 2179–80.

<sup>106</sup> *Id.* at 2184. "I think there is a simpler way to resolve this case." *Id.*

<sup>107</sup> See *Salinas*, 133 S. Ct. at 2184 (Scalia, J., dissenting) (arguing that people are not compelled to testify because of an adverse inference). Justice Scalia goes on to write that he thinks if a defendant was guilty, he will remain silent regardless of the adverse inference, because it would be less damaging than a cross-examination. *Id.* See Peg Green, *Pre-Arrest, Pre-Miranda Silence: Questions Left Unanswered by Salinas v. Texas*, 7 PHOENIX L. REV. 395, 406–07 (2013) (explaining how a witness would be compelled to testify against himself following the holding in *Salinas*).

<sup>108</sup> *Salinas*, 133 S. Ct. at 2185.

the plurality decision was inconsistent with Court precedent.<sup>109</sup> Justice Breyer concluded that “where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as ‘a witness against himself’ – very much what the Fifth Amendment forbids.”<sup>110</sup> The Court further provided reasoning from *Miranda* that “an individual, when silent, need not expressly invoke the Fifth Amendment if there are ‘inherently compelling pressures’ not to do so.”<sup>111</sup> The holding in *Salinas* created the ability for police officers to infringe on the right to remain silent for non-custodial suspects.<sup>112</sup>

## 2. How *Salinas* Leaves Fifth Amendment Privilege for Non-Custodial Suspects

Based on the holding in *Salinas*, suspects must tell officers explicitly that they plan to invoke the Fifth Amendment privilege, or risk having their silence and nervous actions used in court.<sup>113</sup> The Court reasoned that *Salinas* “might have declined to answer the officer’s question in reliance on his constitutional privilege. But he also might have done so because he was trying to think of a good lie, because he was embarrassed, or because

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<sup>109</sup> See *id.* (providing Justice Breyer’s discussion citing to the petitioner’s brief). *Salinas* was asked to come to the police station to clear him as a suspect. *Id.* Once at the station, he was taken into an interview room. *Id.* The prosecution claimed because he was free to leave at any time, he was not Mirandized. *Id.* The prosecutor told the jury, among other things, that “[a]n innocent person” would have said, “What are you talking about? I didn’t do that. I wasn’t there.” *Id.* The prosecutor went on to tell the jury, “[b]ut *Salinas*, the prosecutor said, ‘didn’t respond that way.’” *Salinas*, 133 S. Ct. at 2185. “Rather, [h]e wouldn’t answer that question.” *Id.* The court said the following:

The plurality believes that the Amendment does not bar the evidence and comments because *Salinas* “did not expressly invoke the privilege against self-incrimination” when he fell silent during the questioning at the police station. But, in my view, that conclusion is inconsistent with this Court’s case law and its underlying practical rationale.

*Id.* “This Court has specified that ‘a rule of evidence’ permitting ‘commen[t] . . . by counsel’ in a criminal case upon a defendant’s failure to testify ‘violates the Fifth Amendment.’” *Id.* “[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.” *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

<sup>110</sup> *Salinas*, 133 S. Ct. at 2186.

<sup>111</sup> *Id.* at 2188.

<sup>112</sup> See *infra* Part II.B.2 (discussing the implications of *Salinas* for non-custodial suspects).

<sup>113</sup> See *Salinas*, 133 S. Ct. at 2183 (finding that the Court precedent has held express invocation is required by suspects wishing to utilize the Fifth Amendment privilege). It found that the requirement of express invocation allowed the government to be aware of the suspect’s intention. *Id.* at 2179.

he was protecting someone else.”<sup>114</sup> However, the Court did not expressly affirm the use of silence as evidence of guilt.<sup>115</sup> Rather, the majority declined to address the prosecution’s allegations, “that ‘[a]n innocent person’ would have said, ‘What are you talking about? I didn’t do that. I wasn’t there.’”<sup>116</sup> The dissent questioned what a suspect would have to say to invoke the Fifth Amendment privilege against self-incrimination.<sup>117</sup> Therefore, the issue left open after *Salinas* is how a suspect involved in a *Terry* stop effectively invokes the Fifth Amendment right against self-incrimination.<sup>118</sup>

### C. Terry Stops

A *Terry* stop is a brief detention of a suspect based on a reasonable suspicion to pat him down for weapons.<sup>119</sup> The purpose of *Terry* is to

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<sup>114</sup> *Id.* at 2176. The Court determined that there are many other reasons to remain silent. *Id.* It only needed to determine that the officers did not deprive the suspect of his right to express his wishes to invoke the Fifth Amendment privilege. *Id.* at 2185.

<sup>115</sup> See Harvey Gee, *Salinas v. Texas: Pre-Miranda Silence Can be Used Against a Defendant*, 47 SUFFOLK U.L. REV. 727, 747 (2014) (discussing the implications of *Marks v. United States*, 430 U.S. 188 (1977), and coming to the conclusion that one can argue that there was no majority opinion). The concurring opinion did not hold a common rationale or reasoning as the plurality, which according to *Marks*, would mean that *Salinas* only has persuasive authority. *Id.*

<sup>116</sup> *Salinas*, 133 S. Ct. at 2185.

<sup>117</sup> See *id.* at 2190 (Breyer, J., dissenting) (questioning the plurality decision that a suspect must “expressly invoke the privilege against self-incrimination” and whether there are magic words that must be used).

<sup>118</sup> See *id.* (asking the question: “How is simple silence in the present context any different?”). “[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

<sup>119</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that where an “officer observes unusual conduct [leading] him reasonably to conclude [based on] his experience that criminal activity may be afoot and . . . the persons . . . may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons . . . to discover weapons”); *infra* Part II.C.1 (explaining the holding in *Terry*, the meaning of reasonable suspicion, the narrowing of the Fifth Amendment privilege in *Terry* stops, and the new standard of reasonable suspicion). The Court granted certiorari to determine if an officer was justified in his seizure and search of a suspect to determine if the suspect was in fact carrying a weapon and a threat to others. *Terry*, 392 U.S. at 8. The facts of the case were as follows: Chilton and Terry were standing on a corner. *Id.* at 5. An officer observed them. *Id.* at 6. The officer had never seen them before. *Id.* He was a veteran officer of thirty-nine years and worked that area checking for shoplifters and pickpockets. *Id.* at 5. As he was observing the two men, he saw one leave, walk down the street, pause, and look in a store window, walk a little further, turn around, and on the way back, stop and look in the window again. *Id.* at 6. Then the man rejoined the other man, and they talked for a few minutes. *Terry*, 392 U.S. at 6. After that, the other man proceeded to do the exact same maneuvers. *Id.* Officer McFadden watched them do this for five or six more times. *Id.* Then a third man met

protect the officer and the public from the potentially armed and dangerous suspect.<sup>120</sup> Part II.C.1 will explain reasonable suspicion and how it is applied to *Terry*.<sup>121</sup> Part II.C.2 will look at the new factors for a stop and frisk, or *Terry* stop: high crime area and evasive behavior.<sup>122</sup>

### 1. *Terry v. Ohio*

The Court held in *Terry* that an officer no longer needs probable cause, but only a reasonable suspicion that a suspect is armed and dangerous, as the threshold to constitutionally seize and search a suspect.<sup>123</sup> The

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up with them on the corner, and they spoke briefly. *Id.* Chilton and Terry continued pacing and looking for about ten more minutes and then left. *Id.* Officer McFadden believed they had been casing the place. *Id.* He felt that they may be carrying a gun. *Terry*, 392 U.S. at 6. He stopped the gentlemen, asked them their names, and when they only mumbled back, he grabbed Terry by the arm and patted him down. *Id.* at 6-7. He felt a gun inside the man's coat. *Id.* at 7. He pulled the men into the store, removed Terry's coat, and pulled out a .38 caliber revolver. *Id.* He also patted down Chilton and the third man. *Id.* Chilton had a revolver in his coat as well, but no weapons were found on the third man. *Id.* The officer arrested the men. *Terry*, 392 U.S. at 7. The men argued that there was no probable cause. *Id.* at 7-8.

<sup>120</sup> See *Terry*, 392 U.S. at 24 (discussing that it would be unreasonable not to allow the stop to "neutralize the threat of physical harm").

<sup>121</sup> See *infra* Part II.C.1 (elaborating on the balance test that the Court used to determine reasonable suspicion in a *Terry* stop).

<sup>122</sup> See *infra* Part II.C.2 (noting the new factors, crime prone and evasive behavior, and how they have replaced reasonable suspicion). In addressing where suspects are left after *Salinas*, the Pennsylvania Supreme Court case, *Commonwealth v. Molina*, addressed that issue for its citizens. See *Commonwealth v. Molina*, 104 A.3d 430, 432 (Pa. 2014) (determining "whether a defendant's right against self-incrimination . . . is violated when the prosecution utilizes a non-testifying defendant's pre-arrest silence as substantive evidence of guilt"). The Justices argue the plurality and concurring decision in *Salinas* never actually addressed pre-arrest silence. *Id.* at 437. Justice Baer designated an entire section to *Salinas* in his opinion. *Id.* at 437-39. He identifies that the U.S. Supreme Court granted certiorari to address a circuit "split between the lower courts regarding the applicability of the Fifth Amendment to the use of a non-testifying defendant's precustodial silence as a substantive evidence of guilt . . ." *Id.* at 437-38. However, the Court resolved the case not based on a decision about the pre-arrest silence, but rather on the fact that *Salinas* "did not expressly invoke his privilege against self-incrimination in response to the officer's question." *Id.* at 438 (quoting *Salinas*, 133 S. Ct. at 2178). Justice Baer continued to critique the concurring opinion, finding that the concurring Justices also did not address the issue. *Id.* He concluded that the case "fail[ed] to provide guidance as to whether pre-arrest silence is ever protected under the Fifth Amendment if sufficiently invoked or what constitutes sufficient invocation of the right." *Molina*, 104 A.3d at 438. The case in front of the Pennsylvania Supreme Court relied instead on state precedent, which found itself to be aligned with the dissenting opinion in *Salinas*. *Id.* See R. Patrick Link, *To Talk or Not to Talk? Pre-Arrest Silence in Pennsylvania*, LINK LAW, LLC, <http://linklawphilly.com/talk-talk-pre-arrest-silence-pennsylvania/> [<http://perma.cc/DSQ3-JDS3>] (providing advice from a local attorney to citizens of Pennsylvania regarding their pre-arrest rights in light of *Molina*).

<sup>123</sup> *Terry*, 392 U.S. at 24. The Court held:

Supreme Court does not consider a suspect to be in custody during this detention because *Terry* stops require only reasonable suspicion.<sup>124</sup> For example, the Court in *Berkemer*, a case that addressed *Terry* stops and whether a suspect was entitled to the *Miranda* warning, held that *Miranda* warnings were unnecessary, specifically because the detention was noncoercive and temporary.<sup>125</sup>

However, the application of this decision has not been applied uniformly.<sup>126</sup> The Circuit Courts are divided about custody in *Terry* stops.<sup>127</sup> The circuit split hinges on the reasonableness standard for

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When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

*Id.* Before *Terry*, the Court held that according to the Fourth Amendment, the police must show probable cause before interfering with the liberty or privacy interests of citizens. Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 884 (2013). The Court in *Terry* found justification in a reasonable suspicion search. *Id.* at 884–85. The Court applied a reasonableness balancing test to protect both the police and the citizen. *Id.* at 885. This permitted a very limited exchange between the two. *Id.* The reasonableness of the stop has slowly deteriorated by no longer requiring police to only apply just a pat down. See *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 192 (2004) (holding that an officer may demand identification from a stop and frisk suspect).

<sup>124</sup> See Katherine M. Swift, *Drawing a Line Between Terry and Miranda: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1077 (2006) (explaining that police are unable to take suspects into custody without probable cause and *Terry* requires only reasonable suspicion).

<sup>125</sup> *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The Court reasoned:

The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*.

*Id.* See Daniel R. Dinger, *Is There a Seat for Miranda at Terry's Table?: An Analysis of the Federal Circuit Court Split Over the Need for Miranda Warnings During Coercive Terry Detentions*, 36 WM. MITCHELL L. REV. 1467, 1469–70 (2010) (illustrating that in *Terry* stops, *Miranda* warnings are not required).

<sup>126</sup> See Brooke Shapiro, *The Invisible Prison: Reconciling the Constitutional Doctrines of Coercive Terry Stops and Miranda Custody*, 26 J. CIV. RTS. & ECON. DEV. 479, 480 (2012) (elaborating on the circuit split among the federal court system in regards to custody in a stop and frisk).

<sup>127</sup> See *id.* at 481–82 (analyzing the difficulty courts have in determining when a *Terry* stop is considered in custody, thus requiring a *Miranda* warning). Cases provided as examples include: *United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004) (rejecting the reasonableness standard of the Fourth Amendment as applied to *Miranda* custody claims); *United States v. Pelayo-Ruelas*, 345 F.3d 589, 590 (8th Cir. 2003) (finding there was no custody

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determining whether suspects are given *Miranda* warnings in a *Terry* stop.<sup>128</sup> In three circuits, reasonable *Terry* stops are not considered custody: the First, Fourth, and Eighth Circuits.<sup>129</sup> In four circuits, a reasonableness standard is irrelevant to determining custody: the Second, Seventh, Ninth, and Tenth Circuits.<sup>130</sup> This split in the approaches of determining custody affects the procedural safeguards to protect the right against self-incrimination.<sup>131</sup> Defining custody for a suspect in a *Terry* stop is vital to determining whether his rights are protected.<sup>132</sup>

There is “no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”<sup>133</sup> *Terry* held that if the officers have reasonable suspicion, and they believe that the frisk will prevent harm to

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in regards to *Miranda* purposes when an suspect is detained and interrogated by police); *United States v. Kim*, 292 F.3d 969, 976–77 (9th Cir. 2002) (determining reasonableness of a search and seizure as it relates to the Fourth Amendment and the custody issue under the Fifth Amendment).

<sup>128</sup> See *Swift*, *supra* note 124, at 1084 (explaining the Court’s reasoning for finding *Terry* either in custody or not is reasonableness of the search and seizure). *Swift* concluded in her note that both sides were wrong. *Id.* *Swift* suggested a new rule for determining custody where the courts would balance the duration and degree of restraint rather than the reasonableness. *Id.* at 1089. Under duration, *Swift* called for a clock to start at the exact same time for all cases. *Id.* at 1090. During the degree of restraint analysis, the court should look at the actual frisk. *Id.* at 1091. Did the officer just pat down the suspect, or did he forcefully grab him or hold him with restraint? *Id.* at 1091–92. The suspect being refrained from leaving is the threshold that *Swift* asserted “best comports with the cases.” *Swift*, *supra* note 124, at 1091–92.

<sup>129</sup> See *id.* at 1085. (“[R]easonable *Terry* stops [by definition] are non[-]custodial.”). See also *Shapiro*, *supra* note 126, at 492–94 (explaining that there were different approaches the courts took to determine the reasonableness of a *Terry* stop, which was the threshold in some circuits for determining custody).

<sup>130</sup> See *Swift*, *supra* note 124, at 1084 (providing the courts that determine custody as opposed to the courts that do not). See also *Shapiro*, *supra* note 126, at 494 (elaborating on the second approach courts used to determine the reasonableness of the search, and how it was irrelevant to the determination of custody).

<sup>131</sup> See *Shapiro*, *supra* note 126, at 491 (stating that the difference between the two approaches was significant because of the resulting effects on Fifth Amendment privilege).

<sup>132</sup> See Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 952 (1987) (reasoning that the Fifth Amendment “provides more protection in custodial interrogation than elsewhere”). In noncustodial interviews, or stop and frisk, the suspect may assert the Fifth Amendment to prevent further questioning and simply walk away. *Id.* at 952–53.

<sup>133</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968). It is most likely that *Terry* did not change police procedure all that much, since they were already “conducting preventive stops and frisks long before that decision.” Christopher Slobogin, *Let’s not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053, 1095 (1998). The decision only gave a rationale to keep performing the stop and frisk procedures. *Id.*

themselves or others, they may stop and frisk.<sup>134</sup> The Court lowered the required standard – probable cause – based on the idea that a pat-down is less invasive than a full search.<sup>135</sup> The Court used a balancing test and explained that “the loss of individual liberty was not too great, since [the officer was allowed only] a brief stop and a limited, pat-down search of the outer clothing to find weapons.”<sup>136</sup> Therefore, according to *Terry*, the new standard was whether there was “reasonable suspicion that criminal activity was afoot.”<sup>137</sup>

In *Terry*, Justice White wrote the concurring opinion in which he stated that a suspect was “not obliged to answer [police questions], answers may not be compelled, and refusal to answer furnishes no basis for an arrest.”<sup>138</sup> *Hiibel* is the most recent notable case in which the reasonableness of the *Terry* stop has been changed.<sup>139</sup> In *Hiibel*, Justice Stevens opined in his dissent that the Fifth Amendment right was broad enough to include a right to refuse even to state your own name.<sup>140</sup> The majority in *Hiibel* held that it was not yet necessary to decide whether answering the question “What is your name?” to an officer is giving

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<sup>134</sup> *Terry*, 392 U.S. at 21. See Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 431 (2006) (explaining that the *Terry* decision was very limited). The only issue for review was whether the officer could frisk the men for weapons after observing suspicious behavior. *Id.* at 431–32. The Court did not express an opinion as to what the officer would have been able to do if the men had said they were looking for gifts for their wives. *Id.* at 432. *Terry* only allowed police to frisk a suspect they reasonably believed was a harm to them or anyone else’s safety. *Id.* at 431–32.

<sup>135</sup> See *Terry*, 392 U.S. at 25–26 (finding that searching for weapons without probable cause must “be strictly circumscribed by the exigencies which justify its initiation”).

<sup>136</sup> David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994). It is arguable that what seemed like a small infringement has grown into something more. *Id.* Harris articulated that many Americans were now stopped for doing nothing. *Id.* at 659 (citing Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991)).

<sup>137</sup> *Id.* at 659–60. Rather than the standard of probable cause, a stop and frisk could now require only “‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion.” *Id.* at 662.

<sup>138</sup> *Terry*, 392 U.S. at 34; *The Supreme Court – Leading Cases*, 118 HARV. L. REV. 248, 289–90 (2004).

<sup>139</sup> See Harris, *supra* note 136, at 660 (explaining that a substantial part of the law has been changed to provide officers with the authority to stop and frisk on two factors: mere presence in a high crime area and moving away from the police).

<sup>140</sup> See *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 192 (2004) (“[T]he Fifth Amendment’s guarantee that ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself,’ is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.”). “Under the Nevada law, a member of the targeted class ‘may not be compelled to answer’ any inquiry except a command that he ‘identify himself.’ Refusal to identify oneself upon request is punishable as a crime.” *Id.*



incriminating evidence.<sup>141</sup> Therefore, the Court determined that it was not a violation of the Fifth Amendment to have a law that demands suspects give their name to an officer.<sup>142</sup>

The decision in *Hiibel* allowed police officers to demand a person's name upon interrogation by the police.<sup>143</sup> During the oral argument in *Hiibel*, the State argued that there is not actually a limitation related to the answers of a police interrogation.<sup>144</sup> Since the stop in *Terry* was held to be constitutional, the Court held in *Hiibel* that the *Miranda* holding did not include a suspect's right to deny a police officer his identification upon request.<sup>145</sup> This case, along with *Salinas*, deprived citizens of part of their Fifth Amendment right.<sup>146</sup> Other decisions have broadened the scope of *Terry*, expanding reasonableness factors to include searches and seizures based on location and behavior.<sup>147</sup>

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<sup>141</sup> See *id.* at 190-91 (discussing the implications of disclosing one's identity as incriminating or not).

<sup>142</sup> See *id.* at 190 (finding that the defendant had no fear that identifying himself would be incriminating). "While we recognize petitioner's strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him." *Id.* at 190-91. "Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." *Id.* at 191. If a case were to arise "where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense[, i]n that case, the court can then consider whether the privilege applies." *Hiibel*, 542 U.S. at 191. The Court would then decide if the Fifth Amendment had been violated, and what remedy it would make. *Id.* However, it does not need to resolve those questions here. *Id.*

<sup>143</sup> See *id.* at 190 (deciding that the defendant refused to identify himself to the officers just because he thought it was none of their business to know his name, not out of fear of self-incrimination). See also M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2003-2004 CATO S. CT. REV. 357, 361 (2003-2004) (analyzing the decision in *Hiibel* will be interpreted as opening the flood gate for officers to demand more than a person's name).

<sup>144</sup> See Klein, *supra* note 143, at 361 (providing background to the oral argument at the Court hearing); Transcript of Oral Argument at 55, *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451 (2004) (No. 03-5553), 2004 WL 72099 (argument of Sri Srinivasan), available at 2004 WL 72099 (providing the response that there is likely no limitation in regards to answering questions).

<sup>145</sup> See *Hiibel*, 542 U.S. at 192 (explaining the principle that police have the authority to request citizens to answer questions related to unsolved crimes).

<sup>146</sup> See Klein, *supra* note 143, at 361 (arguing that it is only a matter of time before "one of the many state statutes that provide broader authority for police to compel responses winds its way to the Supreme Court"). It will soon be that an officer will be able to demand more than the mere name of a suspect, and a response must be provided. *Id.*

<sup>147</sup> See *infra* Part II.C.2 (explaining the new factors that officers use in determining reasonableness of a *Terry* stop).

## 2. The New Factors: Crime Prone Area and Evasive Behavior

The new factors for stopping an individual are: (1) being present in an area of high crime activity; and (2) evasive behavior.<sup>148</sup> The cases that led to these factors are known as “location plus evasion” cases.<sup>149</sup> Location alone has been held to be insufficient, however, when coupled with evasion, courts have found that the combination of these two factors is sufficient to stop and frisk.<sup>150</sup> Unfortunately, the shift from reasonable suspicion to crime areas and police evasion has led to the result of a disproportionate number of stop and frisks to inner city, primarily poor, African Americans and Hispanic Americans.<sup>151</sup> Some likely reasons for the lack of knowledge regarding how one would expressly invoke privilege are poverty and limited or no access to basic education, which are present in inner-city neighborhoods.<sup>152</sup>

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<sup>148</sup> See Harris, *supra* note 136, at 660 (discussing that cases stemming from *Terry* have generally required less evidence to perform a stop and frisk). Harris further explains that many courts find reasonable suspicion with the combination of being involved in a high crime location and moving away from officers. *Id.*

<sup>149</sup> See Harris, *supra* note 136, at 660, 674–75 n.139 (citing to cases throughout the Note that hold when both location and evasion are present, which is enough for reasonable suspicion and providing cases in which the Court has found location plus evasion equal to reasonable suspicion). The cases are as follows: *State v. Jones*, 450 So.2d 692, 694–95 (La. Ct. App. 1984) (presence in a high crime area at night and “walking briskly away from the scene” when the police approached was sufficient to amount to reasonable suspicion), *rev'd in part on other grounds*, 456 So.2d 162 (La. 1984); *State v. Belton*, 441 So.2d 1195 (La. 1983) (reasonable suspicion existed to stop a defendant who fled when the police approached a bar where narcotics were sold), *cert. denied*, 466 U.S. 953 (1984); *State v. Williams*, 416 So. 2d 91 (La. 1982) (leaving the location upon seeing the police in a high crime area amounts to reasonable suspicion); *State v. Wade*, 390 So.2d 1309, 1311–12 (La. 1980) (the defendant’s presence in a high crime area plus flight upon observing the police amounted to reasonable suspicion); *State v. Taylor*, 363 So.2d 699, 703 (La. 1978) (presence in a high crime area plus change in speed of movement amounted to reasonable suspicion); *State v. Stinnett*, 760 P.2d 124, 127 (Nev. 1988) (the defendant’s presence in a group of men “huddled” in a drug area and his running away upon seeing a police car were sufficient to support reasonable suspicion for the stop). *Id.*

<sup>150</sup> See *id.* at 672–75, 672 n.133 (detailing the Court’s findings in cases that have a high crime location alone, and then cases which have the location and evasion and providing these cases: “*Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that an individual’s presence in a high crime area, such as a narcotics trafficking area, is insufficient to support reasonable suspicion); . . . *Sibron v. New York*, 392 U.S. 40, 64 (1968) (associating with known drug addicts was not sufficient for a stop and frisk)”).

<sup>151</sup> See Harris, *supra* note 136, at 677 (describing the resulting effects of *Terry* stops in inner city neighborhoods to be concentrated in primarily low income, African and Hispanic Americans).

<sup>152</sup> See Christopher Totten, *Criminal Law Commentary Salinas v Texas: Guilt by Silence and the Disappearing Fifth Amendment Privilege Against Self-Incrimination*, 49 No. 6 CRIM. LAW BULLETIN 1501, 1509 (2013) (indicating that the poor or minorities will most likely be affected). The following discusses how to invoke the privilege:

Critics of *Terry* predicted that the Court was “taking its first step toward the slow erosion of Fourth Amendment rights.”<sup>153</sup> Justice Douglas wrote in his dissent that police would be able to pick up a suspect “whenever they do not like the cut of his jib . . . .”<sup>154</sup> As a result, in New York alone, hundreds of thousands of innocent people are stopped and frisked each year by the police as they implement *Terry*.<sup>155</sup> This may have a negative impact on racial minorities who are generally seen by police officers as dangerous, violent, and criminals.<sup>156</sup>

As such, the evasion of the police happens for many reasons.<sup>157</sup> The evasion typically comes from avoidance of “harassment, baseless stop and frisks, and even more extreme actions, such as beatings, at the hands of police.”<sup>158</sup> Statistically, the criminal justice system treats minorities differently.<sup>159</sup> *Terry* stops are more likely to occur in areas where the

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Perhaps some of the lack of knowledge regarding how to invoke the privilege in the aftermath of *Salinas* will stem from macro-level sources such as poverty and limited or no access to a basic education; however, its source may just as likely lie in the popularization of the *Miranda* rights or the difficulty, even for those Americans who are well-educated, of mastering the complexities of constitutional criminal procedure law.

*Id.* See also WRIGHTSMAN & PITMAN, *supra* note 22, at 3 (explaining how television dramas have influenced the increased knowledge of the Fifth Amendment and the *Miranda* warning).

<sup>153</sup> See Hutchins, *supra* note 123, at 885 (illustrating the warnings by critics of the *Terry* doctrine).

<sup>154</sup> *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). See Hutchins, *supra* note 123, at 885 (analyzing Douglas’ statement to mean that the police may harass without any limitations “the less favored, the less fortunate, and the less protected”).

<sup>155</sup> See Hutchins, *supra* note 123, at 907 (explaining that a certain percentage of *Terry* stops are done without any reasonable suspicion). See also Joseph Goldstein, *Trial to Start in Class Suit on Stop-and-Frisk Tactic*, N.Y. TIMES, March 17, 2013, at A15 (providing that in New York, the actual recorded stops by police since 2004, eighty-eight percent of the citizens involved were released without arrest).

<sup>156</sup> See Hutchins, *supra* note 123, at 908 (articulating that Historian Michael Klarman suggested a negative impact on African Americans in the criminal justice system based on the decisions of the Supreme Court’s criminal procedure cases because of the façade they provide to a racially corrupt process). Studies have shown that an officer bases his decision to stop a person on his perception of the individual as “disrespectful toward the police.” *Id.* at 901. Officers are in a “cultural atmosphere where stereotypes of young black men . . . are prevalent.” *Id.* at 902. Bias against African Americans has been documented as well. *Id.* One such stereotype is that African American neighborhoods are more readily seen as chaotic and in turmoil than comparable white neighborhoods. *Id.*

<sup>157</sup> See Harris, *supra* note 136, at 679 (providing a list of reasons in avoidance of the police).

<sup>158</sup> See *id.* at 679–80 (stating that the disparate treatment of minorities is no doubt the reason for evasion from police).

<sup>159</sup> See *id.* at 679 (explaining that the disparate treatment of African American and Hispanic American individuals has been proven through the overrepresentation of African Americans in the population in prisons and jails, the likelihood of African Americans to be stopped and frisked, and the beatings at the hands of law enforcement officers). See also Hutchins, *supra*

education and poverty level are below the average standard.<sup>160</sup> More African Americans and Hispanics are likely to find themselves in such areas deemed as high crime areas, therefore making their neighborhood suspect.<sup>161</sup> Out of fear of being harassed or worse, beaten, many African Americans choose to avoid the police, especially in more recent months due to high profile cases.<sup>162</sup> Unfortunately, in those high crime areas, the residents avoid police for fear of being treated like a criminal.<sup>163</sup>

The intention of the Fifth Amendment was the protection of citizen's rights.<sup>164</sup> The *Miranda* warning was designed to help further that protection during in-custody interrogations or trial.<sup>165</sup> The Court provided provisions in *Miranda* that a suspect must expressly invoke the right to remain silent to protect that same right.<sup>166</sup> *Salinas* used those narrow holdings provided by the Court in *Murphy*, *Griffin*, *Roberts*, and *Berghuis* to decide that Mr. Salinas' rights were not violated because he

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note 123, at 902 (providing statistics that the New York City Police Department stopped more than 700,000 people in 2012, and the vast majority (almost eighty-five percent) "were young black or Latino men").

<sup>160</sup> See Harris, *supra* note 136, at 677 (articulating that the areas where the high crime and high levels of drug activity were located are not evenly distributed in the urban areas in America). "The unfortunate fact is that *Terry* and its progeny have resulted in stops and frisks of residents of inner cities – primarily poor persons, African Americans, and Hispanic Americans – far out of proportion to their numbers, and often without justification." *Id.*

<sup>161</sup> See *id.* at 680 (comparing the disproportionate value of minorities living in the poorer high crime areas because they live and work there).

<sup>162</sup> See *id.* at 681 (explaining that the fear of police leads to evasive behavior by minorities in their own neighborhoods). The combination of the two is enough to survive a constitutional challenge to a *Terry* stop. *Id.* at 686. Charles Bradley, a middle-aged African American security guard was in the Bronx in front of his fiancée's apartment building. See Hutchins, *supra* note 123, at 904 (explaining a situation in which a man of color was a target of an abusive stop and frisk). His fiancée, who is deaf in one ear, did not respond when Bradley rang the bell. *Id.* As Bradley was waiting on the sidewalk, an officer approached him. *Id.* The officer frisked Bradley, finding only a cell phone, keys, and a wallet. *Id.* Regardless of a fruitless search, the officer arrested Bradley for trespass. *Id.* At the police precinct, Bradley was strip searched and instructed to appear in criminal court several months later. *Id.* The officer explained that he approached Bradley because he thought Bradley was engaged in suspicious behavior. Hutchins, *supra* note 123, at 904.

<sup>163</sup> See Harris, *supra* note 136, at 679 ("Even stops and frisks that do not result in charges carry a cost, however, albeit one that remains largely invisible: Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be."). "Many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process." *Id.* at 680.

<sup>164</sup> See *supra* Part II.A (explaining that the Constitution gives people, not just citizens, the right against self-incrimination in a criminal case).

<sup>165</sup> See *supra* Part II.A.1 (illustrating the inception of the *Miranda* warning and the safeguards created for custodial suspects).

<sup>166</sup> See *supra* Part II.A.2 (elaborating on how the Court has held even narrower holdings regarding *Miranda*).

could have expressly invoked them, rather than remain silent.<sup>167</sup> As such, it was not a violation for the prosecutor to comment on that silence during the trial.<sup>168</sup> As a result, *Salinas* will infringe further on people's rights during *Terry* stops by exploiting the already unfavorable realities behind the stop and frisk.<sup>169</sup>

### III. ANALYSIS

The Court created a problem when it decided in *Salinas* that silence may be used against a criminal defendant at trial.<sup>170</sup> First, Part III.A discusses the problem with implementing *Salinas* during *Terry* stops.<sup>171</sup> Second, Part III.B evaluates how *Salinas* narrows the Fifth Amendment privilege.<sup>172</sup> Third, Part III.C explores the mistrust formed between the police and citizens in minority and lower socio-economic status neighborhoods.<sup>173</sup> Fourth, Part III.D explains why the *Miranda* warning is no longer effective.<sup>174</sup> Finally, Part III.E analyzes the result that *Miranda* does not protect suspects before interrogation, including *Terry* stops.<sup>175</sup>

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<sup>167</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (examining the holding of these cases in determining that *Salinas* did not invoke his Fifth Amendment privilege by remaining mute); *supra* note 13 (providing the holdings of these cases). See also Charles D. Weisselberg, *DNA, Dogs, the Nickel, and Other Curiosities: Criminal Law Cases in the Supreme Court's 2012–2013 Term*, 49 COURT REV. 178, 182 (2013) (discussing how any rule contrary to *Berghuis v. Thompkins* would be hard for the *Salinas*' Court to reconcile).

<sup>168</sup> See *supra* Part II.B (explaining the *Salinas* case and the implications of its holding).

<sup>169</sup> See Vivian Deborah Wilson, *Shifting Burdens in Criminal Law: A Burden on Due Process*, 8 HASTINGS CONST. L. Q. 731, 732 (1981) (discussing burden shifting); *supra* Part II.D (giving a brief overview of *Terry*, defining reasonable suspicion, narrowing *Terry* stops, and finally explaining the new factors for a stop and frisk). See also Richard F. Albert, *The Supreme Court's Decision in Salinas v. Texas: Implications for White Collar Investigation*, FORBES (June 19, 2003), <http://onforb.es/17mOnJT> [<http://perma.cc/QP6V-9VJQ>] (explaining the implications of remaining silent during an interrogation, despite the intentions of the suspect). "[I]f the witness does not expressly refer to the Fifth Amendment the government would appear to be free to argue at a later trial that refusal to answer the questions was an indication of guilt." *Id.*

<sup>170</sup> *Salinas*, 133 S. Ct. at 2178.

<sup>171</sup> See *infra* Part III.A (elaborating on how the Fifth Amendment as a right to remain silent is almost a misnomer after *Salinas*).

<sup>172</sup> See *infra* Part III.B (analyzing how *Salinas* narrowed the Fifth Amendment rights for citizens).

<sup>173</sup> See *infra* Part III.C (explaining the mistrust and fears generated within neighborhoods against the police).

<sup>174</sup> See *infra* Part III.D (analyzing the understanding of the Fifth Amendment privilege and the usefulness of the *Miranda* warning).

<sup>175</sup> See *infra* Part III.E (discussing the need for new verbiage for a better understanding of a suspect's rights).

A. *The Problems with Salinas*

The Court in *Salinas* intended to allow officers to conduct investigations without fear of their discoveries being inadmissible in court.<sup>176</sup> Although the Court's decision accomplished this, it also led to consequences the Court may not have intended.<sup>177</sup> The problem with imposing this newly-held idea is that the right protected by the Fifth Amendment is now incomprehensible to the people it is meant to protect.<sup>178</sup> To avoid having one's silence used against him at trial, the privilege against self-incrimination must be asserted.<sup>179</sup> During a police investigation, a majority of suspects do not know to expressly invoke the Fifth Amendment privilege, but in reality, very few people have the courage or education to expressly "assert their . . . rights in the face of authority[.]"<sup>180</sup>

*Salinas* encourages police to actively violate the protection of the Fifth Amendment.<sup>181</sup> Once a suspect is in an interrogation setting, he may

<sup>176</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2181 (2013) (stating that the exception "needlessly burden[s] the Government's interests in obtaining testimony and prosecuting criminal activity" to allow a suspect to remain mute during an interrogation).

<sup>177</sup> See *infra* Part III.A (explaining that the protections will be harder to be implemented by suspects because they are unaware that they must expressly invoke their Fifth Amendment right).

<sup>178</sup> See Ollivierre, *supra* note 100, at 591 (explaining the implications of *Salinas*). But see Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 20-21 (2006) (stating that the words included in the *Miranda* warning are wrong because the inculpatory statements may be used against a suspect at trial, and more importantly, exculpatory statements benefiting the suspect are more likely to be used eliminating the need for a trial).

<sup>179</sup> See Totten, *supra* note 152, at 1522-23 (expounding on the dangers of remaining silent during police questioning). The silence in the context of the questioning might not be indicative of the person's guilt. *Id.* at 1508-09. It is then possible that juries will overvalue the significance of that silence and vote guilty. *Id.* at 1509.

<sup>180</sup> See Harris, *supra* note 136, at 674 n.138. Harris states:

Perhaps one of the most troubling issue[s] from the plurality's opinion in *Salinas* is that most police suspects subjected to non-custodial police interrogation, regardless of whether they are actually guilty of the suspected crime, will most likely not know to expressly invoke the Fifth Amendment privilege against self-incrimination in order to attempt to prevent their silence from being used against them as evidence of guilt at a future trial.

Totten, *supra* note 152, at 1508. (internal citations omitted). One uncomfortable look or, heaven forbid, remaining silent, can be interpreted to mean guilt. See Garrett, *supra* note 74, at 124 (speculating that *Salinas* could actually make communities more fearful of police).

<sup>181</sup> See Murphy, *supra* note 13, at 201 (explaining the implications of *Salinas* on suspects). The following discusses the implications on the public after *Salinas*:

After *Salinas*, savvy law enforcement officers may be more inclined to track suspects in public and confront them with accusatory questions. Police officers and detectives may now spring incriminating ("gotcha")

falsely believe that he has the right to remain silent.<sup>182</sup> The constitutional right to remain silent is not invoked or provided for without the suspect giving voice to his intent to invoke his privilege.<sup>183</sup> However, the plurality in *Salinas* failed to address what is sufficient to invoke the Fifth Amendment.<sup>184</sup> This failure poses a problem for those suspects who are not able to obtain counsel without the help of the court.<sup>185</sup> If the suspect remains silent, without expressly invoking the privilege, regardless of his intent for that silence to be exculpatory, it could still be used against him during a trial.<sup>186</sup> The implications can subject the suspect to self-accusation, perjury, or contempt.<sup>187</sup> The Court did not indicate particular wording that would be sufficient to indicate invocation, rather an idea of express invocation, without definition.<sup>188</sup> In other words, the Court never came out and said what is required; therefore, people do not know.<sup>189</sup> There may be some who know to say, "I expressly invoke my right to remain silent," but also others who would only utter, "Don't talk to me."<sup>190</sup> This is why the need for officers to carry the pre-arrest statement is so great.<sup>191</sup>

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questions on suspects throughout an interview and record any non-verbal tells, pauses, or silences, all of which can be used at trial as evidence of guilt.

*Id.*

<sup>182</sup> See Ryan, *supra* note 22, at 917 (finding there is a popular belief that remaining silent is a right and protects against self-incrimination).

<sup>183</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2181 (2013) ("[A] defendant normally does not invoke the privilege by remaining silent.").

<sup>184</sup> *Id.* See Ollivierre, *supra* note 100, at 594 (stating that ignorance of the law is no excuse).

<sup>185</sup> See Ollivierre, *supra* note 100, at 591 (articulating that suspects are more likely to implicate themselves in a crime they did not commit). The decision also gives prosecutors leverage in the plea bargaining process. *Id.* at 592.

<sup>186</sup> See Ryan, *supra* note 22, at 917 (explaining that the suspect may have a belief that he has the right to remain silent without having been read his *Miranda* warnings and could be intending the silence to be exculpatory).

<sup>187</sup> See Ollivierre, *supra* note 100, at 591 (illustrating that defendants may implicate themselves by merely trying to be compliant without an alternative option to remaining silent).

<sup>188</sup> See *Salinas*, 133 S. Ct. at 2179 (explaining that an express invocation requirement allows officers to know the reasoning behind the silence). The Court did not clarify what constitutes express invocation. *Id.* However, the plurality did say that the suspect is the only one who can know if a question is self-incriminating. *Id.* at 2182.

<sup>189</sup> See Green, *supra* note 107, at 407 (indicating that possibly the next issue for courts to address is "whether a person's choice of words, meant to invoke his right to remain silent, are sufficient to meet the Supreme Court's requirement of 'express invocation'").

<sup>190</sup> *Id.* at 407. The suspects must then play "word games" to meet the holding in *Salinas*. *Id.* at 407-08.

<sup>191</sup> See Schultz, *supra* note 25, at 165 (discussing the *Miranda* card that officers carry, to have on hand, the language needed to protect suspects in custody against a violation of their Fifth Amendment rights). See also *infra* Part IV (indicating that officers would carry pre-arrest

The *Salinas* decision will achieve the opposite of what the plurality claimed as its interest.<sup>192</sup> It stands to obstruct obtaining testimony and prosecuting criminals.<sup>193</sup> *Salinas* provides officers engaged in non-custodial interrogation with authority to use a suspect's silence as evidence of guilt.<sup>194</sup> This might compel suspects to speak only so that the silence is not misinterpreted.<sup>195</sup> Ironically, the plurality held its interest to be of utmost importance, but it failed to see that its repercussions would contrast with its interest.<sup>196</sup>

*B. Salinas Narrows the Fifth Amendment Privilege by Using Silence as Incrimination*

The Court in *Salinas* extended the Fifth Amendment standard that was created in *Berghuis* to allow a suspect's silence to be used if it comes before the *Miranda* warning.<sup>197</sup> If a suspect remains silent, the prosecution may use that silence in his trial to imply guilt.<sup>198</sup> This implication creates an

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cards similar to those carried by officers for the *Miranda* warning and read the statement to suspects not in custody before interrogation).

<sup>192</sup> See Ollivierre, *supra* note 100, at 591 (explaining that the plurality holding will most likely not help the government gain testimony nor will it further the support of prosecuting criminals); *Salinas*, 133 S. Ct. at 2181 (emphasizing the government's interest in gaining testimony and prosecuting crime).

<sup>193</sup> See Ollivierre, *supra* note 100, at 586 (illustrating that the plurality emphasized that the government's interest in securing testimony and prosecuting crime makes it vital that the government "knows that the witness is fearful of self-incrimination"). The use of silence in *Salinas* as proof of guilt gives witnesses to crimes and suspects, similar to *Salinas*, qualms about cooperating with police because they are afraid to be tricked or deceived. *Id.* at 596.

<sup>194</sup> *Salinas*, 133 S. Ct. at 2180.

<sup>195</sup> See *id.* at 2186 (Breyer, J. dissenting) (arguing that if the prosecution is allowed to comment on the silence, the defendant might feel compelled to take the stand to explain that silence).

<sup>196</sup> See Ollivierre, *supra* note 100, at 596 (explaining that it is taboo to cooperate with the police in many high crime areas, and the holding in *Salinas* does nothing to help that fear of trickery or abuse).

<sup>197</sup> See Holland, *supra* note 83 (discussing that the Texas Court found that pre-arrest silence was not protected under the Constitution). The dissent in *Salinas* found that *Salinas* must either answer questions or remain silent, but if he answered, he could have incriminated himself or revealed "prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent." *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting). "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." *Id.*

<sup>198</sup> *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting). The following discusses the significance of allowing comments on silence:

If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt. And if the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say for impeachment purposes, a prior conviction that



undue burden for a defendant, one in which he must attempt to overcome pre-arrest statements or possible incriminating silences and actions at trial.<sup>199</sup> This is a direct infringement of the Fifth Amendment.<sup>200</sup> The protection provided for is the right against self-incrimination, and when the Court allows silence to be used as incrimination, that protection is stripped from the person.<sup>201</sup>

The plurality's reasoning behind *Salinas* indicated Salinas had no right to remain silent because he did not expressly invoke the privilege.<sup>202</sup> Therefore, he would have needed to explicitly state his intent to rely on the Fifth Amendment, which he failed to do when he remained silent.<sup>203</sup> The Court has held that the prosecution may not comment on a suspect's silence after the *Miranda* warning is given in a custodial interrogation,

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the law would otherwise make inadmissible. Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as "a witness against himself" – very much what the Fifth Amendment forbids.

*Id.*

<sup>199</sup> See Murphy, *supra* note 13, at 185 (detailing the implications pre-arrest statements have and the mountains defendants must climb to right the wrongs they committed during those statements). This burden is what Genovevo Salinas had to overcome at his trial. *Salinas*, 133 S. Ct. at 2180. The Court explained that it would have been simple for him to just tell the officers that he was not answering the questions because of his Fifth Amendment rights. *Id.* at 2191. However, since he did not, the use of his silence at trial did not violate his constitutional right. *Id.* at 2180.

<sup>200</sup> See *supra* Part II.A (explaining the language of the Fifth Amendment and its protections).

<sup>201</sup> See U.S. CONST. amend. V (elaborating on the right not to be "compelled in any criminal case to be a witness against himself"); Green, *supra* note 107, at 406–07 (explaining the justification of Justice Breyer). Justice Breyer argued further that Salinas was "punished both by his silence and his spoken words." Green, *supra* note 107, at 406–07. When the Court allows the prosecution to comment on silence, either directly or indirectly, it is compelling the suspect to act as a witness against himself, which is precisely what the Fifth Amendment is protecting. *Id.* at 407. Breyer also noted that precedent held "no ritualistic formula [was] necessary in order to invoke the privilege . . ." *Id.* The dissent formed a test that asked if: "one [can] fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege? If the answer to this question is 'yes,' then 'the Fifth Amendment prohibits the Prosecutor from commenting on [defendant's] silence.'" *Salinas*, 133 S. Ct. at 2191. See Totten, *supra* note 152, at 1510 n.45 (explaining that the dissent found the circumstances were such that Salinas was told he was a suspect, the interrogation happened at the police station, and he did not have an attorney; "those factors give rise to a reasonable inference"). See also Green, *supra* note 107, at 407 (providing that analysis of the Fifth Amendment takes into account for the fact that the Court has consistently held no special words or formula is required to invoke privilege).

<sup>202</sup> See *Salinas*, 133 S. Ct. at 2178–79, 2184 (providing the reasoning for which the Court held that Salinas' argument failed).

<sup>203</sup> See Ollivierre, *supra* note 100, at 580 (providing a suspect's right to remain silent is available only if he is in a custodial interrogation, which Salinas was not).

even to impeach him.<sup>204</sup> Salinas' situation differs from the normal standards of *Miranda* because the *Miranda* factors were not met; he was neither given the *Miranda* warning, nor was he in a custodial interrogation.<sup>205</sup> Since the Court failed to explain what happens if a defendant, like Salinas, remains silent prior to being given the *Miranda* warning, his silence actually could be used against him as evidence of his guilt.<sup>206</sup>

The problem with not knowing to expressly invoke the privilege is that a prosecutor can point out the defendant's silence at trial.<sup>207</sup> This, in turn, will give an unjust advantage to the prosecution, eliminating the need for it to prove all the elements of its case.<sup>208</sup> The defendant would effectively be forced to prove his innocence rather than the prosecution proving all the issues.<sup>209</sup> The most offensive infringement of the Fifth

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<sup>204</sup> See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (stating that it would be unfair to use silence). Justice Powell delivered the opinion, expressing that:

[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 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.

*Id.* See Donovan, *supra* note 96, at 219 (giving a brief synopsis of the law on *Miranda* warnings). The prosecution is not allowed to comment in any way during the trial if the defendant fails to testify. *Id.* The prosecution may use the silence to impeach the defendant, if he does take the stand, so long as the silence occurred before the *Miranda* warning. *Id.* The prosecution may not use post-*Miranda* silence, even to impeach. *Id.* See *Salinas*, 133 S. Ct. at 2182 (using the holding in *Berghuis* to determine that if a two hour and forty-five minute silence in that case were not enough to invoke the privilege, Salinas' momentary silence surely was not enough either).

<sup>205</sup> See *Salinas*, 133 S. Ct. at 2177 (providing that Salinas was neither placed in custody, nor was he given *Miranda* warnings).

<sup>206</sup> See Ryan, *supra* note 22, at 903 (analyzing pre-*Miranda* silence in 2007, before the *Salinas* case).

<sup>207</sup> See Stephen E. Smith, *Defendant Silence and Rhetorical Stasis*, 46 CONN. L. REV. ONLINE 19, 21 (2013) (explaining how the advantage a defendant has, by not having to prove his innocence, is jeopardized through the use of silence in eliminating the need for the government to prove all the elements of his case).

<sup>208</sup> See *id.* at 25 (explaining that jurors were allowed to infer that silence indicated an affirmative response). In a criminal trial, the person charged with the crime is not required to prove he did not commit the crime. See Wilson, *supra* note 169, at 731–32 (discussing the burden of proof and when it shifts to the defendant in a criminal case). “The accused stands innocent until he is proven guilty.” *Id.* at 732. The prosecution must meet an onerous burden, proving guilt beyond a reasonable doubt. *Id.* If the prosecution proves all of the elements of the crime, then the burden shifts to the defendant to raise a doubt of one element of the crime. *Id.* at 774.

<sup>209</sup> *Id.* at 774–75. See Transcript of Oral Argument at 3, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246) (providing the dialogue between Jeffrey Fisher, Stanford Law Supreme Court Clinic, and the Court on behalf of Mr. Salinas). Jeffrey Fisher argued for Mr. Salinas

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Amendment happens when the burden shifts to the defendant.<sup>210</sup> A criminal defendant remains protected under the Fifth Amendment from being forced to take the stand at a criminal trial and from being compelled to be a witness against himself.<sup>211</sup> However, after the burden has shifted, as a result of *Salinas*, he must now defend himself, and rather than the state having the burden to prove its case, the defendant must disprove it.<sup>212</sup>

### C. Mistrust

In high crime areas, there is already a lack of cooperation between citizens and the police due to the lack of trust.<sup>213</sup> The use of silence as evidence further creates a divide between the two sides.<sup>214</sup> Members of the community will be more fearful of cooperating with the police if “an uncomfortable look or gesture or silence [may] be interpreted as a guilty

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during the appeal. *Id.* Mr. Fisher advocated that “[t]he Fifth Amendment prohibits using a person’s silence during a non[-]custodial police interview against him at trial . . . .” *Id.* Mr. Fisher indicated that if that were not the case, the “burden of proof would be unjustly shifted to [Mr.] Salinas.” *Id.* Justice Ginsburg asked in reply if *Berghuis* would apply because Mr. Salinas did not invoke his right to silence. *Id.* at 4. Mr. Fisher accepted that if Mr. Salinas’ conduct was communicative, then it could be commented upon. *Id.* at 8–9. *See also* Gee, *supra* note 115, at 741 (explaining the argument on behalf of Mr. Salinas, as well as the questions posed by the Court).

<sup>210</sup> *See* Wilson, *supra* note 169, at 774 (illustrating that when the prosecution meets its burden, the burden of proof shifts to the defendant to defend himself). In a criminal defense case, the defendant should never be coerced into testifying. *See id.* at 745–46 (indicating that there would be an abuse against self-incrimination).

<sup>211</sup> *See* U.S. CONST. amend. V (stating that no person should be compelled to testify against himself in a criminal trial).

<sup>212</sup> *See* Wilson, *supra* note 169, at 774–75 (providing the procedural explanation of burden shifting).

<sup>213</sup> *See* Ollivierre, *supra* note 100, at 596 (explaining that cooperation with police officers is already unlikely in high-crime neighborhoods because many of the residents feel that the police cannot be trusted); Hutchins, *supra* note 123, at 884 (describing that *Terry* stops are so pervasive that people believe the police are allowed to stop anyone for any reason). Officers have been trained to be suspicious, more than an average American. *See* Hutchins, *supra* note 123, at 901 (indicating that officers are trained specially to be suspicious). An officer might see the activity of an African American youth as more suspicious than the same activity performed by a white youth. *Id.* at 902. *See also* Harris, *supra* note 136, at 659–660 (explaining the minority’s view of police following episodes of unwarranted stop and frisk, including instances of police brutality).

<sup>214</sup> *See* Ollivierre, *supra* note 100, at 596 (indicating that because of the use of silence as an indicator of guilt is granted by the Court, “witnesses to crime and suspects like Salinas may hesitate to cooperate with the police for fear of being deceived by them”).

gesture or an incriminating silence.”<sup>215</sup> That fear will further impede the government from gaining testimony.<sup>216</sup>

Typically a stop and frisk means that the officer may ask the suspect questions to obtain identity and dispel the officer’s suspicions, but the suspect is not obligated to respond.<sup>217</sup> However, the *Salinas*, along with the *Hiibel* holding now change that obligation.<sup>218</sup> Unfortunately, African Americans have a fear of responding to the police during *Terry* stops.<sup>219</sup> Despite their legitimate fear that responding to the police will lead to mistreatment, the opinion of many non-minority Americans is that the only reason to avoid the police is out of guilt.<sup>220</sup> *Salinas* supports this idea by assuming that suspects remain silent to provide time to think of a good lie, rather than just out of sheer mistrust.<sup>221</sup> The residents in those high crime neighborhoods are most in need of police protection and are now fearful of the police.<sup>222</sup>

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<sup>215</sup> See Garrett, *supra* note 74, at 124 (explaining a growing mistrust of law enforcement). See also Susskind, *supra* note 12, at 332 (discussing reasonable suspicion and race). The totality of the circumstances is what is used to determine reasonableness in a *Terry* stop. *Id.* However, the “indeterminate nature of the standard” makes it very easy for a police officer to justify the reasons for the stop, when it was actually for no reason at all. *Id.* Courts are also deferential towards the law enforcement, thereby allowing officers to use race as a factor without actually saying so. *Id.*

<sup>216</sup> See Harris, *supra* note 136, at 679 (stating that people have other reasons to fear the police besides guilt). African Americans are frequent targets of abuse by police. *Id.* at 679–80. Therefore, they are more likely to avoid interactions with the police. *Id.* They want to “avoid harassment, baseless stops and frisks, and even more extreme actions, such as beatings, at the hands of police.” *Id.* at 680. As such, one would think they would remain silent out of fear. See *id.* (explaining how minority suspects want to avoid ill treatment).

<sup>217</sup> See Shapiro, *supra* note 20, at 4 (explaining that the officer is able to ask the suspect questions to determine identity or information to clear the officer’s suspicions of the suspect).

<sup>218</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (holding that in a non-custodial context, a suspect must expressly invoke his right to remain silent).

<sup>219</sup> See Harris, *supra* note 136, at 680 (elaborating on how many African Americans do not even know why they are being stopped or know others who have had the same happen). “African Americans, as more frequent targets of undesirable treatment by police than whites, are naturally more likely to want to avoid contact with the police.” *Id.*

<sup>220</sup> See *id.* at 679 (explaining that the dissection of cases is a misrepresentation of all cases, and there are many reasons people run from the police). “Opinions in post-*Terry* cases that include avoidance of the police create a distorted picture. These cases convey the impression that only one reason exists to avoid police: escaping apprehension for a crime.” *Id.*

<sup>221</sup> *Salinas*, 133 S. Ct. at 2182. “To be sure, someone might decline to answer a police officer’s question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie . . . .” *Id.* See George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 958 (1985) (“[S]uch silence should be inadmissible to prove guilt under *Griffin* and *Doyle*; despite the absence of warnings, it is highly likely that the citizen intended the silence as an exercise of the right to decline to answer.”).

<sup>222</sup> See Harris, *supra* note 136, at 681 (contributing that the location plus evasion stop and frisks treat all-black neighborhoods as if they were enemy territory to the police). “Those

D. *The Miranda Warning*

The Law & Order fans who have the *Miranda* warning memorized – from watching Lennie Briscoe every Tuesday night for years – would be shocked to learn that there is no standard *Miranda* warning.<sup>223</sup> Due to the rising popularity of television shows depicting criminal law, the Fifth Amendment is one of the most recognized constitutional rights.<sup>224</sup> Therefore Americans would never think that remaining silent could be proof of their guilt.<sup>225</sup> There are simply too many versions of *Miranda* warnings.<sup>226</sup> Some are easy to understand, while others still are more complicated and difficult for the average defendant to understand.<sup>227</sup> The inconsistencies between jurisdictions prevent uniformity in the reading of the warning.<sup>228</sup> Without a clear and concise standard reading, the understanding of the right becomes blurred.<sup>229</sup>

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communities most in need of police protection may come to regard the police as a racist, occupying force." *Id.*

<sup>223</sup> See WRIGHTSMAN & PITMAN, *supra* note 22, at 3 (explaining how recognizable the Fifth Amendment right is to Americans because of mass media). "Even [the] casual viewers of television recognize the term 'Miranda Rights' and the most inveterate watchers of crime shows can readily repeat [the lines]." *Id.* "To the devoted Lenny Briscoe fan ('Law & Order' character portrayed by the late Jerry Orbach), this may come as a bit of a surprise." *Id.* at 86. There is no standard *Miranda* warning. *Id.* A fifty state survey yielded 886 different written *Miranda* warnings among 945 federal, state, and county jurisdictions. *Id.* Law & Order was a syndicated police procedural and legal drama in which Lennie Briscoe was a police detective for more than twenty years. *Jerry Orbach Biography*, A&E TELEVISION NETWORK, <http://www.biography.com/people/jerry-orbach-9542264> [<http://perma.cc/6DU4-B6QJ>].

<sup>224</sup> See Ryan, *supra* note 22, at 903 (asserting that Americans know that they have a right to remain silent). Chief Justice Rehnquist wrote in *Dickerson v. United States* that "*Miranda* has become embedded in routine police practice to the point where the warnings have become a part of our national culture." WRIGHTSMAN & PITMAN, *supra* note 22, at 3. See also Leo, *supra* note 61, at 651 (explaining that this knowledge is attributed to mass media introducing the *Miranda* warning in television programming). It is also doubtful that suspects have not ever heard the *Miranda* warning before being arrested. *Id.*

<sup>225</sup> See Ryan, *supra* note 22, at 903 (contending that because the Fifth Amendment is the most widely known of the Bill of Rights, Americans would never even think that the use of their silence could be used against them to prove their guilt).

<sup>226</sup> See WRIGHTSMAN & PITMAN, *supra* note 22, at 85-90 (finding that there are too many *Miranda* warnings to obtain a full and accurate count).

<sup>227</sup> See *id.* at 87 (providing information from resources that found *Miranda* warnings that ranged from elementary level understanding through post-college).

<sup>228</sup> See *supra* Part II.B.1 (explaining how each jurisdiction can have its own *Miranda* warning and that they range in difficulty to understand).

<sup>229</sup> See WRIGHTSMAN & PITMAN, *supra* note 22, at 88 (finding that understanding the warning requires more than just recognition of the words). The suspect "must be able to integrate the whole message and apply its meaning to their own case." *Id.*

Problems begin when police officers interrogate a suspect without first providing him with his *Miranda* rights.<sup>230</sup> Police are now encouraged to question suspects outside of the stationhouse.<sup>231</sup> The new standard operating procedure for police officers will be to question the suspects first, outside of custody, and arrest afterward.<sup>232</sup> Officers will be able to interview or interrogate in a non-custodial context, and if the suspect does not know to expressly invoke his right to remain silent, the prosecution will be able to comment on that silence.<sup>233</sup> In this scenario, the arrestee has more rights than the person not in custody.<sup>234</sup> So, if there is nothing to stop officers from conducting entire investigations without an arrest, they will be able to use all of a defendant's actions, conduct, silence, and testimony during the pre-arrest interrogations.<sup>235</sup>

The *Salinas* decision draws a line in the protection of suspects based on custody.<sup>236</sup> The custodial suspect has a better understanding of his Fifth Amendment rights because the officer reads him the *Miranda* warning, and for those suspects the Court holds a higher standard for waiving privilege.<sup>237</sup> For example, the suspect in a non-custodial

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<sup>230</sup> See Garrett, *supra* note 74, at 116 (stating that the Fifth Amendment protections “eroded” with the *Salinas* holding by allowing “informal, undocumented questioning”).

<sup>231</sup> See *id.* at 128 (elaborating on how officers are taking advantage of the lack of protection to suspects not in custody). The following discusses police questioning suspects:

As a result of the Supreme Court's tolerance of a questions-first, rights-later approach, police have more incentives to informally question suspects with an eye to a confession. The result encourages police to question suspects without the protections that more and more departments have adopted precisely to prevent false and contaminated confessions.

*Id.* See also Davis, *supra* note 103, at 16 (explaining that as a result of *Salinas*, the police will be able to interrogate before arresting a suspect and use his silence against him at trial).

<sup>232</sup> See Davis, *supra* note 103, at 16 (describing the effects of the stripping of protections without *Miranda* for pre-arrest suspects).

<sup>233</sup> See Weisselberg, *supra* note 167, at 182 (discussing how without express invocation, officers can comment on the silence during its case-in-chief).

<sup>234</sup> See Murphy, *supra* note 13, at 185 (explaining that the rights of the custodial suspects are afforded greater protections, which infringes upon the rights of the suspect that is not charged with a crime).

<sup>235</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (allowing the prosecution to comment on *Salinas*'s silence during interrogation during the trial).

<sup>236</sup> See Totten, *supra* note 152, at 1502 (discussing the distinction put in custody in *Salinas*). “[T]he *Salinas* judgment also arbitrarily and unjustifiably creates a distinction between custodial (i.e., *Mirandized*) and non-custodial suspects who remain silent in response to police questioning—the former being much more protected under the Fifth Amendment privilege with respect to their silence than the latter.” *Id.* at 1523.

<sup>237</sup> See GOLDSTEIN, *supra* note 39, at 21 (illustrating that a suspect taken into custody must be warned before questioning that “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he can’t afford an attorney one will be appointed for him prior to any questioning

interview is not guaranteed his privilege unless he expressly invokes it, but the Court has held that a custodial suspect can only waive his privilege knowingly.<sup>238</sup> This infringement on a person's constitutional right is biased toward the non-custodial suspect, who is not afforded a pre-arrest warning of his rights.<sup>239</sup>

#### E. Terry Stops and Miranda Warnings

The Court in *Terry* held that *Miranda* warnings are not necessary when a person is detained and questioned in a stop and frisk.<sup>240</sup> When *Miranda* was decided in 1966, coercive police behavior that is considered reasonable in a *Terry* stop today, would have almost definitely required a *Miranda* warning.<sup>241</sup> Today there is a circuit split whether the *Miranda* warning is required for a *Terry* stop based on reasonableness of the stop.<sup>242</sup> This split is the reason why *Terry* stops are used as the example for the non-custodial police interrogation in this Note.<sup>243</sup> The pre-arrest statement that is necessary for the states to adopt will be applied to *Terry* stops, in which the suspect is not in custody, nor read his *Miranda* warning.<sup>244</sup>

The *Salinas* Court relied on the holding of *Berghuis* that “[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privileges.”<sup>245</sup> Since a *Terry* stop, just as a non-custodial interrogation, does not require the reading of the *Miranda*

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if he so desires”). See also Totten, *supra* note 152, at 1523 (explaining that the custodial suspects are more protected under the Fifth Amendment privilege with respect to their silence than non-custodial).

<sup>238</sup> See GOLDSTEIN, *supra* note 39, at 21 (describing that the Court has made it “clear that the Constitutional guarantees to silence and counsel in custodial interrogation can only be waived knowingly, intelligently, and voluntarily”).

<sup>239</sup> See *infra* Part IV (indicating that a pre-arrest statement could alleviate this bias and provide uniformity to all suspects in interrogations).

<sup>240</sup> See Dinger, *supra* note 125, at 1469–70 (explaining that *Miranda* warnings are not necessary to participate in investigative detentions and not be in violation of the Fourth Amendment, regardless of the detention's coercive nature).

<sup>241</sup> See Swift, *supra* note 124, at 1075 (discussing that coercive behavior by the police that is considered reasonable in this day, would definitely not have been reasonable at the time *Miranda* was decided).

<sup>242</sup> See *supra* Part II.C.1 (providing the background to the circuit split and the reasoning the courts hold for finding either custody or non-custody in a *Terry* stop).

<sup>243</sup> See *supra* Part II.C.1 (explaining the reasonableness standard applied to determine custody in four circuits).

<sup>244</sup> See *infra* Part IV (providing the suggestion for a pre-arrest statement that officers would carry on a card, similar to the *Miranda* warning, and read to suspects in a non-custodial interrogation).

<sup>245</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2182 (2013) (finding that “the logic of *Berghuis* applies with equal force”).

warnings, suspects will not know to expressly invoke their Fifth Amendment privilege.<sup>246</sup> The Court in *Salinas* listened to the petitioner argue that “it would be unfair to require a suspect unschooled in the particulars of legal doctrine to . . . invoke his ‘right to remain silent.’”<sup>247</sup> The end result was that if the privilege is not invoked, the suspect’s silence may be used against him at a later date for a conviction.<sup>248</sup>

#### IV. CONTRIBUTION

A pre-arrest model code should be adopted in every state to address the problem created by the decision in *Salinas*, in which the non-custodial suspects are not afforded a warning of their rights. The purpose of the pre-arrest model code is to protect the people who are unaware of their rights, especially when they are being interrogated or stopped by police during any non-custodial stop, such as a *Terry* stop. The pre-arrest model code will give officers clear language to inform suspects of their rights. The language should be presented to all persons in a non-custodial, pre-arrest context before a *Miranda* warning would normally be necessary. The code should include language about the use of silence alone not being enough to properly invoke the Fifth Amendment privilege. First, Part IV.A proposes a pre-arrest model code to protect suspects’ rights during police interrogation, including *Terry* stops.<sup>249</sup> Second, Part IV.B addresses the advantages of a pre-arrest model code as a solution to the problem and Part IV.D provides counterarguments to the proposed pre-arrest model code.<sup>250</sup>

##### A. *The Proposed Language of the Model Code*

A model code that is adaptable by all states, in a clear language understood by all citizens, is the best remedy to ensure a suspect is aware

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<sup>246</sup> See *id.* at 2179–80 (holding that the Court did not suggest what threshold a suspect must cross to meet invocation of the Fifth Amendment in the eyes of the Court).

<sup>247</sup> *Id.* at 2177. In responding to the petitioner’s argument, the court found that the Fifth Amendment guarantees that no one may be compelled in any criminal case to be a witness against himself; it does not establish an unqualified “right to remain silent.” A witness’ 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.

*Id.* at 2182–83. (internal citations omitted).

<sup>248</sup> See *id.* at 2178 (holding that the use of silence was not a violation of *Salinas*’ constitutional rights).

<sup>249</sup> See *infra* Part IV.A (stating the text of the proposed model code to be used during interrogations of suspects).

<sup>250</sup> See *infra* Part IV.B (explaining why a model code is better than other solutions).



of what they must do to protect his rights. All States should adopt the pre-arrest model code, provided below:

*During this interrogation, you have the right to leave. You are not under arrest. You do not have to answer my questions, but you must state that you are choosing to invoke your Fifth Amendment right. If you remain silent, without stating your intent to use your constitutional privilege, your silence may be used against you during a trial.*<sup>251</sup>

Officers would need to read this during a non-custodial interrogation, for example a *Terry* stop. This would be printed on a card that officers would carry, perhaps even on the back of the *Miranda* warning they already carry.<sup>252</sup> The pre-arrest card will be effective for maintaining uniform language. The police officer will have no problem, when called in court, recalling what he read to a suspect because he will have the card.

#### B. Commentary

This model code is proposed, as a warning similar to *Miranda*, to help protect the non-custodial suspects who are unaware how to invoke their privilege. This warning will inform suspects of their rights as non-custodial suspects during questioning, how to invoke the privilege, and how their chosen silence can be used against them. This proposed warning eliminates the confusion regarding the rights of the suspects. This language also indicates exactly what will happen if they do not state the Fifth Amendment right to remain silent.

An interrogation is meant to be any questioning done by police officers when the suspect is not in custody. The warning will let the suspect know that he has a right to leave the police station or walk away from the situation and is not being detained for an arrest. He will be afforded his Fifth Amendment right to remain silent, as the Constitution

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<sup>251</sup> The proposed section is the contribution of the author. The right to remain silent portion of the text is pulled from the *Miranda* warning because it is imperative that the code be similar to the language provided by the Court. See *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (finding that from the outset the person subjected to interrogation shall be informed in "clear and unequivocal terms" that he has the right to remain silent). Those terms must also include "that anything said can and will be used against the individual in court." *Id.* at 469. The warning must also let the suspect know that they have the right to counsel. *Id.* at 471-72. The suspect must also be informed that the court can appoint counsel if he cannot afford one. *Id.* at 472. The portion of the code that states your silence may be used against you during a trial is an interpretation of how *Salinas* would be applied to his trial. See *Salinas*, 133 S. Ct. at 2179 (claiming that because *Salinas* did not assert his Fifth Amendment right, they did not have to address the issue of silence used during his trial).

<sup>252</sup> See Schultz, *supra* note 25, at 165 (explaining that officers carry *Miranda* cards).

outlines, but will be told that to invoke that right, the suspect must expressly say that he chooses to use it. The model code also warns the suspect of the consequences if he remains silent without an express invocation of the Fifth Amendment privilege. Finally, there are only fifty-nine words in the model code, so that it is easily understood.

Possible criticisms to this proposed model code include the procedural requirements and effectiveness of the model code. The disincentives may be an issue for police during an investigation. This code could potentially halt a suspect or witness from giving information he might have given had he not realized his rights, therefore closing the door to vital investigative information. However, the preservation of citizens' rights justifies the code. The code would also better serve to protect those individuals who cannot afford an attorney. This is because a public defender is generally assigned after the initial appearance. If a suspect cannot afford an attorney, he would have to go through the entire arrest process before he would have counsel to guide him in his decision-making process.

Another challenge to this model code is that some may feel this code will allow criminals to be set free. This will not be the case because the prosecution should have substantial evidence to meet its burden, as in *Salinas* where the prosecution had matching ballistics to his gun from the casings at the murder scene. The liberty of a defendant should not be stripped away because of anxious behavior at the stationhouse.

This proposal is the best way to get the states to adopt a uniform warning without having to rewrite *Miranda* or propose a constitutional amendment. Creating an amendment would require two-thirds of the legislatures of all the states to ratify.<sup>253</sup> Legislatures on the state level are in the best position to adopt this code because state legislatures should want to protect their citizens, and states can more easily adopt this code into their state legislation.

## V. CONCLUSION

It is a misnomer to say that, “[y]ou have the right to remain silent.” In reality, “[y]ou have the right to expressly invoke the right to remain silent.”<sup>254</sup> Returning to the hypothetical introduced earlier where Genovevo Salinas voluntarily went to the police station to answer questions about his gun that he turned over to the police, the situation

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<sup>253</sup> See U.S. CONST. art. V (stating that two thirds of both Houses of Congress must propose amendments to the Constitution).

<sup>254</sup> See *Salinas*, 133 S. Ct. at 2179 (finding that a suspect must expressly invoke the right to remain silent).

would be significantly different applying the model code.<sup>255</sup> If the officer read the pre-arrest statement to Salinas before leaving his house, answering any questions at the station, or remaining silent to the ballistics question, he would have known his options. He would have known that he had the right not to answer the question, but he also would have known to expressly invoke his right. Instead of having that silence mentioned during a court case against him, Salinas would have been able to tell the officer his intentions to remain silent were in an effort to preserve his Fifth Amendment right. Perhaps, Salinas would not be in jail if the provision was used.<sup>256</sup>

The same can be said for Gerry, the man who chose to remain silent during the *Terry* stop. If Gerry had been read this model code, he would have known his rights. He would have been able to make a better educated decision about whether he was accomplishing what he thought he was accomplishing by remaining silent without specifically invoking his Fifth Amendment privilege. The man would have known that remaining mute was not sufficient to invoke the privilege. He would have been able to tell the officer that he was remaining silent. That would have been all that was needed. The Court acknowledges there are no magic words, just that the person provide to officers a reasonable expression of intent that he is invoking the right to remain silent.

The proposed pre-arrest model code provides a warning for all pre-arrest suspects. Simply remaining silent is not the correct way to protect the right to remain silent. The Court has been clear that to protect the right, it must be expressly invoked. Unfortunately, even the *Miranda* warning is not read to suspects until they are in police custody. The citizens who are not in custody are not afforded the same precautions to protect their rights. There is no warning for citizens in non-custodial interrogations, only custodial interrogations. The proposed model code will provide a precaution to citizens. It will warn them at the same time it is educating them how to ensure they are protecting themselves from incriminating statements or actions.

Without the adoption of the model code, the government will continue to narrow the Fifth Amendment privilege. The model code is an effective tool that is efficient for states to incorporate through adoption, and can be applied uniformly in all the states. Absent such a code, citizens' rights will continue to be infringed upon because there is not a

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<sup>255</sup> See *supra* Part I (introducing the hypothetical similar in fact pattern to the *Salinas* case).

<sup>256</sup> See generally *Salinas*, 133 S. Ct. at 2184 (permitting the prosecutor to use Salinas' reactions during questioning as evidence of his guilt). The ballistics to his gun matched, so most likely he would still be in jail, but his silence would not have been able to be used against him. *Salinas v. Texas*, 369 S.W.3d 176, 177 (Tex. Crim. App. 2012).

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pre-arrest warning explaining what their rights are and how to protect them. The model code limits the infringement of rights and uniformly applies *Salinas*.

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