# NOTES

## BEYOND *SALINAS V. TEXAS*: WHY AN EXPRESS INVOCATION REQUIREMENT SHOULD NOT APPLY TO POSTARREST SILENCE

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*Lower courts disagree about whether and when the Fifth Amendment permits prosecutors to raise an adverse inference of guilt from a criminal suspect's silence. In* Salinas v. Texas*, the Supreme Court introduced a new wrinkle into the constitutional analysis: Suspects must first expressly invoke their right to remain silent during police questioning in order to later claim protection for that silence at trial. Significantly, silence alone does not constitute proper invocation and instead forfeits the ability to challenge an adverse inference offered by the prosecution. This Note explores the outer limits of the express invocation requirement and focuses on its application to an area of the criminal investigation process left unaddressed by* Salinas*: the "postarrest setting," defined as the period after a suspect's arrest but before receipt of* Miranda *warnings. This Note examines the implications of requiring express invocation in the postarrest setting and identifies features that distinguish that setting from other scenarios considered by the Supreme Court in its prior invocation cases, which used law enforcement interests specific to police interrogations to justify their holdings. This Note concludes that an express invocation requirement should not apply to the postarrest setting, where this interrogation rationale is absent.*

### INTRODUCTION

Since *Miranda v. Arizona*,[1] popular culture has assured Americans that they have a right to remain silent in their dealings with police officers.[2] While the Supreme Court recognizes such a right and has confirmed that it is constitutional in nature,[3] despite "sweep[ing] more

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1. 384 U.S. 436 (1966).

2. Emily Green, "You Have the Right to Remain Silent." Or Do You?, NPR (Oct. 5, 2014, 5:05 PM), http://www.npr.org/2014/10/05/353893046/you-have-the-right-to-remain-silent-or-do-you (on file with the *Columbia Law Review*).

3. *Miranda*, 384 U.S. at 444 (requiring criminal suspect to "be warned that he has a right to remain silent" prior to any custodial interrogation); see also Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding "*Miranda* announced a constitutional rule"

broadly than the Fifth Amendment" privilege against self-incrimination,[4] there remain ongoing debates surrounding the right's precise scope and the requirements for its assertion.

For years, one issue has proven particularly divisive: whether, at trial, prosecutors may introduce evidence during their case-in-chief that a criminal suspect remained silent[5] during police questioning or custody. This evidence helps prosecutors by raising an adverse inference about a defendant's guilt; as the logic goes, no innocent person would stay silent in the face of criminal accusation.[6] However, while evidence law generally permits this move,[7] there exists a countervailing constitutional concern when police are involved: Using a defendant's silence as probative evidence of guilt may punish her for exercising her right to remain silent—an outcome directly at odds with the Fifth Amendment.

Courts have confronted this tension by considering when, if at all, Fifth Amendment protections—arising from either the Self-Incrimination Clause or the Due Process Clause—attach to a defendant's silence. In doing so, they have analyzed the constitutionality of adverse inferences of guilt from silence across three distinct phases of the arrest process: (1) silence occurring before arrest during a voluntary interview with police officers; (2) silence occurring after arrest but before receipt of *Miranda* warnings; and (3) silence occurring after both arrest and receipt of *Miranda* warnings.[8] While the Supreme Court generally prohibits

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incapable of being superseded legislatively*)*. For a more detailed account of the right to remain silent, see infra section I.B (examining right's doctrinal development).

4. Oregon v. Elstad, 470 U.S. 298, 306 (1985) (recognizing *Miranda*'s exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation").

5. Courts understand "silence" to mean more than mere muteness. Wainwright v. Greenfield, 474 U.S. 284, 295 n.13 (1986). For example, it may include a refusal or failure to come forward to police officers with information. See, e.g., Roberts v. United States, 445 U.S. 552, 554–55, 559 (1980) (describing refusal to name co-conspirators as silence); Doyle v. Ohio, 426 U.S. 610, 614–15 (1976) (describing failure to come forward with exculpatory information as silence). It also may include evidence of a party's physical demeanor. See, e.g., United States v. Rivera, 944 F.2d 1563, 1569 (11th Cir. 1991) ("[T]here is no definite outer boundary in determining what types of nonverbal conduct or demeanor, whether assertive or nonassertive, a prosecutor may permissibly comment on without running afoul of the dictates of *Miranda*."); see also Emily Rebekkah Hanks, Body Language: Should Physical Responses to Interrogation Be Admissible Under *Miranda*?, 11 Va. J. Soc. Pol'y & L. 89, 89–93 (2003) (describing trend of using suspects' physical responses, or lack thereof, as proxies for silence).

6. But see infra note 23 (noting courts and scholars are in disagreement over validity of this proposition).

7. See infra section I.A (describing how adverse inferences from silence can be admissible).

8. See infra section I.B (mapping contours of constitutional right to remain silent). This categorization aligns with two legally significant events: the arrest and the receipt of *Miranda* warnings. Courts and scholars often use the labels "prearrest," "postarrest pre-*Miranda*," and "postarrest post-*Miranda*" in describing these categories, but for the sake of clarity this Note will generally avoid those terms. Instead, this Note uses "postarrest

prosecutorial comment on the third category of silence for due process reasons,[9] the first and second categories remain open issues among lower courts and have been debated at length by scholars.[10] Given the extensive scholarly treatment, this Note refrains from adding to the wealth of literature on the underlying constitutional question.

This Note instead considers a new development that imposes an additional layer on the Fifth Amendment framework and, in doing so, may silently foreclose courts from even reaching a constitutional inquiry. In *Salinas v. Texas*, the Supreme Court announced a procedural requirement that criminal suspects first *expressly invoke* their right to remain silent in order to subsequently challenge any adverse inference at trial on Fifth Amendment grounds.[11] That is, if a suspect fails to notify officers of her reason for remaining silent at the time she does so, then a court must find that she forfeited her privilege against self-incrimination and, absent evidentiary exclusion, allow prosecutors to comment on that silence. Troublingly, this would occur regardless of whether federal or state courts previously found such comment unconstitutional.[12] The decision's implication is perplexing: In order to protect their silence, defendants first must speak up.[13]

*Salinas* was controversial and groundbreaking, but the extent of its reach remains unclear. In examining a noncustodial police interrogation—the first category above—*Salinas* justified its express

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setting" to describe the period between arrest and *Miranda* warnings (the second phase of the arrest process described above).

9. See infra notes 54–56 and accompanying text (describing prohibition of adverse inferences of guilt from silence occurring after arrest and after receipt of *Miranda* warnings).

10. See infra notes 60–63, 67–77 and accompanying text (describing absence of Supreme Court precedent and current circuit splits). For works addressing prearrest silence, see, e.g., David S. Romantz, "*You Have the Right to Remain Silent*": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt, 38 Ind. L. Rev. 1 (2005); Jane Elinor Notz, Comment, Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You, 64 U. Chi. L. Rev. 1009 (1997). For works addressing postarrest silence, see, e.g., Marc Scott Hennes, Note, Manipulating *Miranda*: *United States v. Frazier* and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda* Silence, 92 Cornell L. Rev. 1013 (2007); Jan Martin Rybnicek, Note, Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-*Miranda* Silence, 19 Geo. Mason U. C.R.L.J. 405 (2009).

11. 133 S. Ct. 2174, 2178 (2013) (plurality opinion) (explaining suspect must "expressly invoke the privilege against self-incrimination" in order to benefit from it at trial, and "does not do so by simply standing mute"). While this express invocation requirement was announced in a plurality opinion, scholars interpret that opinion to be controlling. See infra note 99 (providing analysis under Marks v. United States, 430 U.S. 188 (1977)).

12. See infra notes 160–161 and accompanying text (collecting jurisdictions prohibiting or expressing uncertainty about constitutionality of practice).

13. Orin Kerr, Do You Have a Right to Remain Silent? Thoughts on the "Sleeper" Criminal Procedure Case of the Term, *Salinas v. Texas*, Volokh Conspiracy (June 17, 2013, 8:11 PM), http://www.volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-term-salinas-v-texas [http://perma.cc/EZA6-UJQS].

invocation requirement through a pro law enforcement rationale premised on providing notice to interrogating officers.[14] While invocation may make sense in those situations, does it follow that an invocation requirement also should apply to the postarrest setting—the second category above—where the element of police questioning is removed from the equation?

This Note considers whether criminal suspects must expressly invoke their right to remain silent during or immediately after their arrest. In doing so, it examines a factual situation not considered by *Salinas*: the narrow space between arrest and the receipt of *Miranda* warnings.[15] This postarrest setting contains three distinct features that render the application of *Salinas*'s express invocation requirement problematic: the fact of arrest, the absence of *Miranda* warnings, and the absence of police questioning (or at least the type capable of yielding evidence admissible at trial).[16] The arrest itself may introduce police pressures that do not exist in a *Salinas*-style interview, thereby complicating a suspect's decision to exercise her constitutional rights. Moreover, even if a suspect has the wherewithal to exercise her rights, how or to whom should she do so? Without *Miranda* warnings or police questioning, the postarrest setting may lack identifiable cues prompting the assertion of Fifth Amendment protections.

The stakes of invocation are high. If suspects fail to unambiguously invoke their rights at the time of arrest, then trial courts are foreclosed from considering Fifth Amendment challenges to adverse inferences of guilt from silence, no matter how compelling.[17] Courts might still exclude evidence of postarrest silence as unfairly prejudicial,[18] but this evidentiary backstop is not a perfect substitute for a constitutional rule. The sizable collection of state and federal cases litigating the use of postarrest silence indicates that trial judges at least sometimes rule in favor of admissibility.[19] To the extent that an invocation requirement causes unwary or uninformed defendants to forfeit their constitutional protections, the use of postarrest silence as evidence of guilt may become more common simply by default. The rule's application to postarrest settings therefore warrants closer scrutiny.

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14. See infra section I.C (describing unique law enforcement rationale underlying invocation requirement).

15. See infra notes 124–130 and accompanying text (providing cases illustrating postarrest setting).

16. See infra section II.C (explaining how features distinguish postarrest setting from scenario in *Salinas*).

17. See infra notes 165–171 and accompanying text (offering illustration of phenomenon).

18. See infra notes 22–24 and accompanying text (noting basis for exclusion under Rule 403 of Federal Rules of Evidence).

19. See generally infra sections II.A–II.B (providing cases involving postarrest silence).

Part I of this Note provides background on the evidentiary and constitutional analyses governing the use of a defendant's silence at trial and examines *Salinas*'s recent addition of an express invocation requirement to that framework. Part II examines recent efforts by lower courts to apply *Salinas* beyond its immediate facts to the postarrest setting. It then assesses the negative implications of such an application and concludes that the unique features of the postarrest setting do not support an express invocation requirement. Part III proposes a rule treating silence at the time of arrest as the presumptive exercise of a suspect's rights and argues that such a rule would be doctrinally consistent with *Salinas*. It then explains how this rule would have minimal consequences for law enforcement officers operating in the field.

## I. THE RIGHT TO REMAIN SILENT AND THE EMERGENCE OF AN EXPRESS INVOCATION REQUIREMENT

Part I of this Note examines the practice of commenting on a defendant's silence and the role constitutional doctrine plays in shaping that practice. Section I.A describes the evidentiary rules that permit prosecutors to raise adverse inferences of guilt from silence. Section I.B considers the current contours of the constitutional right to remain silent, which may supersede these rules in prohibiting the use of silence as evidence of guilt. Section I.C considers the recent emergence of an express invocation requirement as an overlay to the exercise of this constitutional protection.

### A. *Background Evidence Law: Adverse Inferences of Guilt from Silence*

The Federal Rules of Evidence[20] generally permit prosecutors to raise adverse inferences of guilt from silence. In order to introduce any evidence in their case-in-chief, prosecutors must show that the evidence is relevant, not subject to exclusion for unfair prejudice, and not barred by the rule against hearsay. Evidence of a defendant's silence has the potential to satisfy all three criteria.

First, courts generally accept that the relevance requirement is satisfied by testimony showing that a criminal suspect stood silent in the face of police accusation, because such testimony has the tendency to make the suspect's guilt more probable.[21]

Second, testimony about a defendant's silence does not necessarily warrant exclusion for prejudice. Under Rule 403, courts may exclude

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20. While this Note references the Federal Rules of Evidence, many state legislatures have adopted evidentiary rules modeled after the federal rules.

21. See, e.g., United States v. Hale, 422 U.S. 171, 176 (1975) ("[I]n the face of accusation, . . . it is assumed . . . that the accused would be more likely than not to dispute an untrue accusation."); cf. Fed. R. Evid. 401 ("Evidence is relevant if . . . it has *any tendency* to make a fact more or less probable than it would be without the evidence . . . ." (emphasis added)).

relevant evidence "if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury."[22] Some courts and scholars favoring exclusion argue that a defendant's silence around police officers is too ambiguous and worry that, if used, jurors will give it "more weight . . . than warranted" under the circumstances.[23] However, Rule 403 does not compel such an outcome in every case and, indeed, a notable number of state and federal cases show that trial courts do in fact rule in favor of admitting such evidence.[24] Thus, silence evidence can and often does clear the Rule 403 hurdle.

Third, testimony about a defendant's silence is not necessarily barred by the rule against hearsay. Where a defendant remains silent in response to another's statement, Rule 801(d)(2)(B) permits the use of that statement if it is one that the defendant "adopted or believed to be true."[25] Silence may be sufficient to demonstrate adoption when an ordinary "person would, under the circumstances, protest the statement made in his presence, if untrue."[26] Assuming this condition is met, the failure to correct, challenge, or dispute the assertion gives rise to the inference that the criminal defendant "adopted or tacitly admitted the statement."[27] Beyond the doctrine of adoptive admissions, testimony about a defendant's silence also may avoid the rule against hearsay altogether, particularly where a witness such as a police officer provides personal observations of the defendant's physical demeanor or failure to provide exculpatory information while under official suspicion.[28]

In criminal settings, prosecutors offer evidence of a defendant's silence in order to support a similar inferential leap by jurors: The failure to deny or provide exculpatory information indicates a guilty conscience. In many instances, courts have found such inferences perfectly

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22. Fed. R. Evid. 403.

23. *Hale*, 422 U.S. at 176, 179–80 (excluding evidence of defendant's silence at time of his arrest because, while "not very probative of the defendant's credibility" as witness, it was highly prejudicial); see also Doyle v. Ohio, 426 U.S. 610, 617 (1976) (suggesting "every post-arrest silence is insolubly ambiguous"). Contrary to the belief that an innocent person will proclaim her innocence in the face of police accusation, a suspect might remain silent because she worries police officers will not believe her, wants to avoid being tricked into confessing, is angry or afraid of escalating the situation, or simply does not know what to say. Mikah K. Story Thompson, Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence, 47 U. Louisville L. Rev. 21, 38–49 (2008).

24. See generally infra sections II.A–II.B (citing cases involving postarrest silence).

25. Fed. R. Evid. 801(d)(2)(B).

26. Id. advisory committee's note. In practice, the offering party also must demonstrate that the person understood the statement. Evidence: The Objection Method 653 (Dennis D. Prater et al. eds., 4th ed. 2011).

27. Anne Bowen Poulin, Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination, 52 Geo. Wash. L. Rev. 191, 192 & n.4 (1984).

28. See supra note 5 (explaining different forms evidence of silence may take).

admissible. *United States v. Hoosier* provides a classic example.[29] A government witness testified, first, that Herman Hoosier told him of his intention to rob a bank, and second, that three weeks after a robbery occurred, Hoosier's girlfriend told the witness, in Hoosier's presence, that they had "sacks of money" in their hotel room.[30] Hoosier did not deny his girlfriend's statement at the time.[31] The prosecution offered testimony of this silence as evidence of Hoosier's guilt, and the jury convicted him at trial.[32] The Sixth Circuit affirmed the conviction, finding that "probable human behavior" would have been to promptly deny the statement if it were not true.[33]

While the *Hoosier* court found the defendant's silence not to manifest self-incrimination concerns,[34] this will not always be the case. Where silence occurs during a voluntary police interview, at the time of arrest, or during a formal in-custody interrogation, then the silence itself may be "motivated by . . . [the] realization that 'anything you say may be used against you.'"[35] This type of silence raises constitutional considerations not present in the ordinary admissibility inquiry. Section I.B examines how the Fifth Amendment can affect the admissibility analysis.

### B. *Constitutional Framework: The Development and Contours of the Right to Remain Silent*

Testimony about a criminal suspect's silence that satisfies the above evidentiary requirements may nevertheless be excluded as a constitutional matter.[36] If the silence occurs in the course of a suspect's dealings with police officers, then allowing prosecutors to raise an adverse inference of guilt from that silence may run afoul of the Fifth Amendment's right to remain silent. Importantly, while the Supreme Court recognizes such a right to exist, its precise application to the various stages of the criminal process remains unclear.[37] To better understand the effect of *Salinas*'s express invocation requirement on the Fifth

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29. 542 F.2d 687 (6th Cir. 1976).

30. Id. at 687.

31. Id. at 688.

32. Id. at 687.

33. Id. at 688.

34. The court found "little likelihood" that the silence represented fear of self-incrimination because Hoosier apparently trusted the witness enough to tell him previously about the robbery plan. Id.

35. Fed. R. Evid. 801(d)(2)(B) advisory committee's note.

36. Constitutional rules supersede federal and state rules of evidence. See Fed. R. Evid. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution . . . or other rules prescribed by the Supreme Court.").

37. Cf. Salinas v. Texas, 133 S. Ct. 2174, 2182–83 (2013) (plurality opinion) (acknowledging existence of constitutional right to remain silent, but clarifying Fifth Amendment does not provide for "unqualified" right).

Amendment's right to remain silent, it is important to first delineate the contours of the underlying framework.

1. *Modern Origins of the Fifth Amendment Right to Remain Silent.* — The modern conception of a constitutional right to remain silent first emerged in the mid-1960s by way of two Supreme Court decisions.[38] *Griffin v. California* held that, where a defendant declines to testify in a federal or state criminal proceeding, the Fifth Amendment "forbids . . . comment by the prosecution on the accused's silence."[39] The Court reasoned that any rule to the contrary imposed a "penalty" on defendants for claiming the privilege against self-incrimination,[40] which would introduce impermissibly strong pressures to forgo that privilege by testifying,[41] most likely by means of perjury.

*Miranda v. Arizona* extended Fifth Amendment protections beyond the courtroom.[42] The Court addressed a criminal suspect's constitutional rights during custodial interrogations. These settings contain inherent pressures that "compel [a suspect] to speak where he would not otherwise do so freely."[43] In order to protect one's freedom to exercise the Fifth Amendment, the Court announced its now-famous prophylactic rule requiring, inter alia, that the suspect "be warned prior to any questioning that he has the *right to remain silent*."[44] Statements obtained in the absence of these warnings are deemed presumptively coerced and

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38. See Kerr, supra note 13 (describing modern development of right to remain silent). In early American history, the Fifth Amendment appeared to cover only a very limited set of circumstances. See, e.g., Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2631, 2651–52 (1996) (arguing privilege against self-incrimination "was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions," but instead aimed to "outlaw torture and other improper methods of interrogation").

39. 380 U.S. 609, 615 (1965). While on trial for murder, the defendant did not take the stand. Id. at 609. The prosecution used this fact to raise an inference of guilt, arguing that "'in the whole world, if anybody would know [the facts related to the victim's death], this defendant would know'" but "'he has not seen fit to take the stand and deny or explain.'" Id. at 611.

40. Id. at 614.

41. Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward A Workable Test for Identifying Compelled Self-Incrimination, 93 Calif. L. Rev. 465, 493 (2005); see also Paul Cassell & Robert Litt, Debate, Will *Miranda* Survive?: *Dickerson v. United States*: The Right to Remain Silent, the Supreme Court, and Congress, 37 Am. Crim. L. Rev. 1165, 1177 (2000) ("[T]he Self-Incrimination Clause . . . deals with more than compelled testimony . . . . [A] defendant's failure to testify isn't coerced in any sense of the word that has any meaning to me. In fact, it's the essence of the voluntary choice that the Fifth Amendment protects . . . .").

42. 384 U.S. 436, 467 (1966) ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings . . . .").

43. Id. at 467.

44. Id. at 479 (emphasis added); see also Marcy Strauss, The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under *Miranda*, 17 Wm. & Mary Bill Rts. J. 773, 776–77 (2009) [hereinafter Strauss, Sounds] (describing warnings in relation to right to remain silent).

inadmissible at trial.[45] In addition to offering protections against compelled statements, in footnote 37 the Court suggested an expansion of *Griffin*'s protection against adverse inferences from silence at trial: "The prosecution may not . . . use at trial the fact that [a suspect] stood mute" during a custodial interrogation.[46]

In the aftermath of *Griffin* and *Miranda*, significant questions remained about when and how the right to remain silent might be exercised in other settings.[47] Of particular interest to this Note is the development of the concept advanced in *Miranda*'s footnote 37: that the Fifth Amendment restrains prosecutors from penalizing or undermining defendants in their efforts to assert the privilege against self-incrimination during their pretrial interactions with police officers.[48] The footnote's authority—both then and now—remains disputed: The analysis has not been replicated in subsequent Supreme Court decisions considering adverse inferences from silence,[49] although some federal circuit courts have expanded the analysis to new settings not yet addressed by the Court.[50] The Department of Justice contends that the footnote "was dicta" only,[51] and two Supreme Court Justices recently argued *Griffin*'s penalty rationale was "impossible to square" with the Fifth Amendment protection from "compelled" self-incrimination and declined to extend the doctrine any further.[52] Despite these debates, *Miranda* signaled continued legitimacy for a constitutional right to remain silent and supported its expansion beyond *Griffin*'s immediate facts. It remained for later courts to flesh this concept out more fully, which they have done in piecemeal but notably incomplete fashion.[53] The following sections explain the current contours of the right across three phases of the arrest process.

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45. See Evan H. Caminker, *Miranda* and Some Puzzles of "Prophylactic" Rules, 70 U. Cin. L. Rev. 1, 1–4 (2001) (explaining *Miranda* declared all statements derived from custodial interrogation "presumptively coerced" in absence of warnings, transforming nonviolations into "real" constitutional violations).

46. *Miranda*, 384 U.S. at 468 n.37; see also Kerr, supra note 13 (explaining footnote's doctrinal significance).

47. Strauss, Sounds, supra note 44, at 777–78 ("Despite the length of the *Miranda* decision, significant questions remained on virtually every aspect of the decision.").

48. Kerr, supra note 13.

49. For example, the Court decided *Doyle v. Ohio* and *Wainwright v. Greenfield*—both considering silence that occurred after arrest and receipt of *Miranda* warnings—on due process grounds, rather than on *Miranda*'s Fifth Amendment self-incrimination terms. See infra notes 54–56 and accompanying text (describing decisions).

50. See infra notes 67–73 and accompanying text (illustrating expansion).

51. Brief for the United States as Amicus Curiae Supporting Respondent at 13 n.1, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 1308806.

52. Salinas v. Texas, 133 S. Ct. 2174, 2184–85 (2013) (Thomas, J., concurring in the judgment).

53. See generally Marcy Strauss, Silence, 35 Loy. L.A. L. Rev. 101, 108–40 (2001) [hereinafter Strauss, Silence] (examining piecemeal development of silence cases); Hennes, supra note 10, at 1020–31 (same).

2. *Protections for Silence Occurring After Arrest and Receipt of* Miranda *Warnings.* — The Supreme Court has categorically barred prosecutors from commenting on silence occurring after both arrest and receipt of *Miranda* warnings. With respect to the impeachment use of this silence—that is, using silence to undercut a defendant's credibility when she takes the witness stand—*Doyle v. Ohio* held that, in light of *Miranda*'s "implicit" assurance that silence will carry no penalty, it was fundamentally unfair and a deprivation of due process to impeach a defendant with this silence at trial.[54] In *Doyle*, the prosecutor violated the defendant's rights by asking, on cross-examination, why the defendant never raised his innocence to police officers after being arrested and given *Miranda* warnings.[55] *Wainwright v. Greenfield* extended this due process rationale to the substantive use of silence—that is, using silence as evidence from which guilt itself could be inferred—finding it "equally unfair to breach" *Miranda*'s "implied promise" by using the defendant's silence during the prosecution's case-in-chief.[56]

3. *Protections for Silence Occurring Before Arrest.* — The Supreme Court has only partially addressed the constitutionality of prosecutorial comment on silence occurring before arrest. With respect to the impeachment use of this silence, *Jenkins v. Anderson* held that the "Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."[57] Once defendants "voluntarily [take] the witness stand in [their] own defense," all bets are off and they "cannot avoid testifying fully."[58] Unlike *Doyle*, no additional constitutional protections were required because, absent *Miranda* warnings, "no

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54. Doyle v. Ohio, 426 U.S. 610, 618–19 (1976). The *Doyle* Court decided the case under the Due Process Clause of the Fourteenth Amendment, id. at 619, but the case remains relevant to the concept of a right to remain silent.

55. Id. at 612–14. At trial, the defendant testified that he had been framed for selling narcotics. Id.

56. Wainwright v. Greenfield, 474 U.S. 284, 290–92, 295 (1986).

57. 447 U.S. 231, 238 (1980). The defendant turned himself in to the police two weeks after stabbing and killing someone. Id. at 232. At trial, he testified on his own behalf and, for the first time, affirmatively claimed self-defense. Id. at 233–34. On cross-examination, the prosecutor focused on why the defendant never raised this defense during the two-week period before his arrest. Id.

58. Id. at 235, 236 n.3. This reasoning fits with courts' general permissiveness toward impeachment evidence. "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." Id. at 239. Indeed, when the offering party seeks only to undercut the credibility of a testifying defendant on the stand, courts typically permit the use of evidence that is otherwise inadmissible to prove the substantive issue in dispute. See, e.g., Harris v. New York, 401 U.S. 222, 222–26 (1971) (allowing use of statement obtained in violation of *Miranda* to be used for impeachment because finding otherwise would provide "license to use perjury"); Walder v. United States, 347 U.S. 62, 65 (1954) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn [this] . . . to his own advantage, and provide himself with a shield against contradiction of his untruths.").

governmental action induced petitioner to remain silent before his arrest."[59]

The Supreme Court has yet to decide the constitutionality of the substantive use of this type of silence, leaving federal and state courts split on the issue.[60] In *Salinas v. Texas*, though, the Court complicated matters by introducing into the constitutional analysis a threshold invocation requirement.[61] Under this rule, during a noncustodial police interview, if a suspect fails to invoke her right to remain silent at the time she relies upon it, then it is "unnecessary" to reach the underlying constitutional issue.[62] For practical purposes, then, prearrest silence can be admissible to raise an adverse inference of guilt, at least when the suspect forgoes the assertion of her rights.[63]

4. *Protections for Silence Occurring After Arrest but Before* Miranda *Warnings*. — With respect to silence occurring after arrest but before receipt of *Miranda* warnings, constitutional doctrine is similarly incomplete. *Fletcher v. Weir* followed *Jenkins* in allowing prosecutors to impeach defendants with their postarrest silence when they "choose[] to take the stand."[64] The Court found no error in the trial court's decision to allow the prosecution to cross-examine the defendant about why he failed to raise self-defense at the time he was arrested for murder.[65] While the facts differed from *Jenkins* in that the defendant was under arrest when his silence occurred, the Court found this insufficient to change the impeachment analysis. It declined to extend *Doyle*'s due process protections and explicitly rejected the claim that "an arrest, by itself, is government action which implicitly induces a defendant to remain silent."[66]

As with silence occurring before arrest, the Supreme Court also has yet to decide the constitutionality of using postarrest silence as sub-

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

60. See Strauss, Silence, supra note 53, at 126–39 (surveying federal and state splits on admissibility of substantive use of silence occurring before arrest).

61. See infra notes 99–107 and accompanying text (describing *Salinas* holding).

62. Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (plurality opinion); see also infra section I.C (describing Supreme Court's express invocation doctrine as procedural overlay to constitutional right to remain silent).

63. Some scholars suggest that *Salinas* effectively resolved the underlying circuit split on the substantive use of silence occurring before arrest. See Kerr, supra note 13 (finding *Salinas* gave prosecutors "green light to comment on pre-arrest silence"). This effect is precisely what is at stake in postarrest settings. See infra section II.B (examining problematic implications of invocation requirement).

64. Fletcher v. Weir, 455 U.S. 603, 607 (1982).

65. Id. at 603–04. In light of general impeachment practices, this holding is not groundbreaking. See supra note 58 (describing impeachment doctrine's permissive stance toward otherwise inadmissible evidence).

66. *Fletcher*, 455 U.S. at 606 (quoting Weir v. Fletcher, 658 F.2d 1126, 1131 (6th Cir. 1981)). In the decision below, which the Supreme Court reversed, the Sixth Circuit had found an arrest to be sufficient to extend *Doyle*'s due process analysis. *Weir*, 658 F.2d at 1131.

stantive evidence of guilt. To date, six federal circuit courts have weighed in on the matter. Three circuits have found the practice to violate the Fifth Amendment.[67] *United States v. Moore* best illustrates their analyses.[68] On the basis of *Griffin* and *Miranda*'s footnote 37—rather than *Doyle*'s due process analysis—the *Moore* court found that the privilege against adverse inferences of guilt from silence "extends backward" from trial settings "at least to the time of custodial interrogation."[69] Moreover, the court thought it "evident that *custody* and not interrogation is the triggering mechanism for this right of pretrial silence."[70] A rule holding otherwise risked incentivizing police officers to create an intervening silence by delaying interrogation and, moreover, would "unduly burden" a defendant's Fifth Amendment privilege to remain silent at trial.[71] Importantly, the court found that *Fletcher*, as an impeachment case, did not control where prosecutors offered direct testimony about silence as substantive evidence of guilt.[72] Courts generally permit testifying defendants to be impeached with otherwise inadmissible evidence.[73]

Three circuits have allowed adverse inferences of guilt from silence at trial.[74] *United States v. Frazier* best illustrates this position.[75] The *Frazier* court reasoned that the Fifth Amendment is irrelevant where a citizen is under "no official compulsion to speak."[76] In light of *Fletcher*, the court found that no such compulsion exists in postarrest settings because "an arrest by itself is not governmental action that implicitly induces a defendant to remain silent."[77]

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67. See United States v. Whitehead, 200 F.3d 634, 637–40 (9th Cir. 2000) (barring use of postarrest silence as evidence of guilt); United States v. Moore, 104 F.3d 377, 384–90 (D.C. Cir. 1997) (same); United States v. Hernandez, 948 F.2d 316, 322–25 (7th Cir. 1991) (same).

68. *Moore*, 104 F.3d at 384–90.

69. Id. at 385; see also supra notes 39–53 and accompanying text (describing *Griffin* and *Miranda*).

70. *Moore*, 104 F.3d at 385 (emphasis added); see also Christopher Macchiaroli, To Speak or Not to Speak: Can Pre-*Miranda* Silence Be Used as Substantive Evidence of Guilt?, Champion, Mar. 2009, at 14 (interpreting *Moore*).

71. *Moore*, 104 F.3d at 385.

72. Id. at 387.

73. See supra note 58 (describing rationale for courts' permissive stance toward impeachment evidence).

74. See United States v. Frazier, 408 F.3d 1102, 1109–11 (8th Cir. 2005) (allowing use of postarrest silence as evidence of guilt); United States v. Rivera, 944 F.2d 1563, 1568–69 (11th Cir. 1991) (same); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (same).

75. *Frazier*, 408 F.3d at 1109–11.

76. Id. at 1110 (quoting Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). For the purposes of this analysis, silence in the face of compulsion constitutes a "statement." Id.

77. Id. at 1111 (citing Fletcher v. Weir, 455 U.S. 603, 607 (1982)); see also Frank R. Herrmann & Brownlow M. Speer, Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack, 35 Am. J. Crim. L. 1, 18–20 (2007) (examining *Frazier* analysis).

While disagreement among lower courts has been relatively long-standing, a more recent development in the Supreme Court's Fifth Amendment jurisprudence threatens to significantly alter the discourse. *Salinas*'s express invocation requirement might now allow subsequent courts to circumvent this underlying constitutional inquiry and find that a suspect forfeited any claim of protection against adverse inferences of guilt from silence.[78]

### C. *The Recent Emergence of an Express Invocation Requirement*

Since *Miranda* announced its expansive safeguards under the Fifth Amendment, the decision has been significantly undercut by subsequent rulings either qualifying its protections or carving out exceptions.[79] The express invocation requirement represents a recent iteration of this phenomenon. The *Miranda* opinion itself suggested that, at least during a custodial interrogation, suspects could exercise their right to remain silent "in *any* manner."[80] However, three cases have established a rigid clarity requirement that now restricts the way the right is exercised.

In *Davis v. United States*, the Supreme Court held that assertions of *Miranda*'s right to counsel must be "unambiguous or unequivocal" in order to impose on police officers an "obligation to stop questioning."[81] In its analysis, the Court found that the defendant's remark to police officers—"'Maybe I should talk to a lawyer'"—was too ambiguous to

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78. See supra notes 61–63 and accompanying text (explaining *Salinas*'s effect on prearrest silence); see also infra section II.B (exploring implications of extending *Salinas* to postarrest silence cases).

79. Some scholars contend *Miranda* has suffered a "death-by-a-thousand-cuts accretion of rulings." Brandon L. Garrett, Remaining Silent After *Salinas*, 80 U. Chi. L. Rev. Dialogue 116, 116–17 (2013); see also Yale Kamisar, The Rise, Decline, and Fall (?) of *Miranda*, 87 Wash. L. Rev. 965, 984 (2012) (describing "piece-by-piece 'overruling' of *Miranda*").

80. Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) (emphasis added).

81. 512 U.S. 452, 461–62 (1994). During custodial interrogations, the right to remain silent now must be invoked in the same manner in order for suspects to seek exclusion of any resultant statements. See infra notes 90–93 and accompanying text (describing expansion of *Davis* in *Berghuis v. Thompkins*). However, asserting the right to counsel affords suspects stronger protections than the right to remain silent. Compare Michigan v. Mosley, 423 U.S. 96, 104–05 (1975) (requiring police to "'scrupulously honor[]'" invocation of right to remain silent, but finding no *Miranda* violation where defendant was given fresh warnings and questioned by different officer about different crime two hours after earlier invocation), with Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (prohibiting police questioning after invocation of right to counsel until attorney made available to suspect, unless suspect himself initiates communication). In fact, Courts have even imposed the additional requirement that, even after a suspect consults counsel, no interrogation may occur without counsel present. See Minnick v. Mississippi, 498 U.S. 146, 153 (1990). In postarrest settings, though, invoking either right may have the same practical effect of protecting defendants from adverse inferences of guilt at trial. See People v. Tom, No. A124765, 2015 WL 1873218, at *5 (Cal. Ct. App. Apr. 23, 2015) (finding suspect invoked Fifth Amendment privilege "when he told the police that he would not make any statement in the absence of counsel").

trigger the right.[82] While perhaps exceedingly formalistic, the Court justified its decision using legitimate law enforcement interests. The rule avoids the premature termination of "police questioning when a suspect *might* want a lawyer," and thereby avoids hindering police efforts to investigate crimes.[83] Suspects "need not 'speak with the discrimination of an Oxford don,'" but they still must make their intentions reasonably clear to police officers.[84]

In *Berghuis v. Thompkins*,[85] the Supreme Court for the first time applied *Davis*'s clarity requirement to invocations of the right to remain silent. Van Chester Thompkins was arrested on murder charges, advised of his *Miranda* rights, and interrogated by police officers.[86] Rather than audibly and unequivocally assert his rights,[87] Thompkins remained "'[l]argely' silent" for about two hours and forty-five minutes as police tried to question him.[88] However, a detective at one point asked, "'Do you pray to God to forgive you for shooting that boy down?'" and Thompkins replied, "'Yes.'"[89] Thompkins was convicted at trial and sentenced to life without parole.

One issue on appeal was whether Thompkins's confession should have been excluded at trial on the grounds that his prolonged silence constituted an assertion of his right to remain silent and thereby required officers to cease questioning.[90] The Court found "no principled reason" to adopt different standards for asserting the right to counsel and the right to silence.[91] Like in *Davis*, the Court sought to avoid

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82. *Davis*, 512 U.S. at 462.

83. Id. at 460–62 ("Unless the suspect actually requests an attorney, questioning may continue."); see also Brian J. Foley, Policing from the Gut: Anti-Intellectualism in American Criminal Procedure, 69 Md. L. Rev. 261, 297 (2010) (describing *Davis* as "pro-police rule" that does "not require police officers to think rigorously"); Harvey Gee, In Order to Be Silent, You Must First Speak: The Supreme Court Extends *Davis*'s Clarity Requirement to the Right to Remain Silent in *Berghuis v. Thompkins*, 44 J. Marshall L. Rev. 423, 425–26 (2011) (arguing *Davis* departed from *Miranda* by no longer requiring government to "bear the entire burden" of protecting individuals' constitutional rights).

84. *Davis*, 512 U.S. at 459. Some scholars doubt whether, in the face of police authority, suspects actually speak with the unequivocal authority that *Davis* requires. See infra section II.B (describing factors undermining clear invocation).

85. 560 U.S. 370 (2010).

86. Id. at 374–75.

87. Id. at 375–76 ("At no point . . . did Thompkins say that he wanted to remain silent, that he did not want to talk to police, or that he wanted an attorney.").

88. Id. In response to continued police questioning, Thompkins occasionally answered, "Yeah," "No," or "I don't know," and he also made certain other limited statements. Id. at 375–76.

89. Id. at 376.

90. Id. at 381; see also supra note 81 and accompanying text (describing effect of invocation).

91. *Berghuis*, 560 U.S. at 381 (recognizing both rights protect privilege against self-incrimination in similar fashion "by requiring an interrogation to cease when either right is invoked").

placing a significant burden on police officers, who would be forced to guess about an accused's intent in the absence of unambiguous invocation.[92] Against common-sense intuition, proper invocation of the right to remain silent required suspects to first speak up.[93] Importantly, *Berghuis* only considered the admissibility of a confession (that is, an oral statement) obtained after continued police questioning in the face of a suspect's silence; it did not indicate whether a clarity requirement also applied to a defendant's ability to challenge prosecutorial comment on silence itself.[94]

*Salinas v. Texas* took this next step and required express invocation even to protect against adverse inferences of guilt from silence. Genovevo Salinas, under suspicion for murder, agreed to turn over his shotgun for ballistics testing and to accompany police officers to the station for an interview.[95] It was undisputed that Salinas was not under arrest and was free to leave the interview at any time.[96] Officers asked Salinas whether his gun would match shotgun shells recovered from the crime scene. Salinas, who had answered the officers' other questions, did not respond and 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.'"[97] Police later arrested Salinas for murder, and at trial

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92. Such guessing forces police officers to choose between terminating interrogations prematurely and proceeding under the risk that any confession might be excluded at trial. See id. at 381–82 (finding this choice to place "significant burden on society's interest in prosecuting criminal activity"); supra notes 83–84 and accompanying text (explaining *Davis*'s concern about terminating interrogations prematurely); see also Kit Kinports, The Supreme Court's Love–Hate Relationship with *Miranda*, 101 J. Crim. L. & Criminology 375, 409 (2011) (noting *Berghuis* "echoed *Davis*'s plea for readily administrable rules" for law enforcement); Adam Liptak, Mere Silence Doesn't Invoke *Miranda*, Justices Say, N.Y. Times (June 1, 2010), http://www.nytimes.com/2010/06/02/us/02scotus.html (on file with the *Columbia Law Review*) (suggesting *Berghuis* constituted "sensible accommodation" of "'practical realities that the police face in dealing with suspects'"). Others have disagreed with the necessity of a clarity requirement. See *Berghuis*, 560 U.S. at 410 (Sotomayor, J., dissenting) (arguing officers can avoid guessing wrong by "simply ask[ing] for clarification").

93. Adam Cohen, Has the Supreme Court Decimated *Miranda*?, Time (June 3, 2010), http://content.time.com/time/nation/article/0,8599,1993580,00.html (on file with the *Columbia Law Review*) ("We now have a right to remain silent that can be exercised only by speaking up."). This reflects a notable departure from *Miranda*, which suggested rights could be exercised "in any manner." Miranda v. Arizona, 384 U.S. 436, 473–74 (1966).

94. See, e.g., Michael A. Brodlieb, Note, Post-*Miranda* Selective Silence: A Constitutional Dilemma with an Evidentiary Answer, 79 Brook. L. Rev. 1771, 1785 (2014) ("[*Berghuis*] does not address whether that silence can be used against the defendant at trial. After all, . . . the prosecution was attempting to admit the defendant's post-Miranda *statements* not his *silence*.").

95. Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (plurality opinion).

96. Id. (plurality opinion). Salinas also "was not read *Miranda* warnings." Id. (plurality opinion).

97. Id. (plurality opinion) (alterations in original).

prosecutors "used his reaction to the . . . question . . . as evidence of his guilt."[98] He was convicted and sentenced to twenty years in prison.

The issue on appeal was whether prosecutorial comment on this silence—which occurred prior to both arrest and receipt of *Miranda* warnings—violated the defendant's Fifth Amendment rights. In a plurality decision,[99] the Court sidestepped that constitutional question and instead decided the appeal on invocation grounds. It reasoned that the right to remain silent is "not self-executing" and that in order to benefit from its protections at trial, a suspect first "'must claim it' at the time he relies on it."[100] A suspect "does not [invoke the right] by simply standing mute."[101] Accordingly, silence in the face of police questioning forfeits any Fifth Amendment protections against adverse inferences of guilt from silence,[102] regardless of whether those protections actually exist in the prearrest setting.

The Court again justified this express invocation requirement on the basis of compelling law enforcement interests. It focused in particular on the "insolubly ambiguous" nature of a suspect's silence, the underlying motive of which would not be apparent to interrogating officers:

> 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, . . . is embarrassed, or . . . is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither

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98. Id. (plurality opinion). The interview containing Salinas's silence occurred in 1993, but he absconded and was not located by police until 2007. Id. (plurality opinion).

99. Courts and scholars treat Justice Alito's plurality opinion as the controlling opinion. See Kerr, supra note 13 (explaining Justice Alito's reasoning controls under *Marks* analysis); see also Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))). Justices Thomas and Scalia, concurring in the judgment only, argued that adverse inferences from silence do not "compel" defendants to be witnesses against themselves within the meaning of the Fifth Amendment and concluded that the "penalty" rationale set forth in *Griffin v. California* was "indefensible" and should not be extended to a defendant's silence during a precustodial interview. *Salinas*, 133 S. Ct. at 2184–85 (Thomas, J., concurring in the judgment); see also supra notes 39–41 and accompanying text (explaining *Griffin* decision). While going a step further than the plurality, the concurring opinion nevertheless may be read also to accept the plurality's conclusion that nothing in the case "excused the normal requirement of invoking the Fifth Amendment . . . in order to benefit from its protection." Ronald Jay Allen et al., Comprehensive Criminal Procedure 238–39 (3d ed. Supp. 2015); see also infra notes 100–112 and accompanying text (summarizing *Salinas*).

100. *Salinas*, 133 S. Ct. at 2178–79 (plurality opinion) (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

101. Id. at 2178 (plurality opinion).

102. Id. at 2182 (plurality opinion) (finding "logic of *Berghuis* applies with equal force" to evidence of silence or confession obtained after overcoming initial silence).

> is every possible explanation protected by the Fifth Amendment.[103]

Salinas "alone knew why he did not answer the officer's question," and therefore it was "his 'burden . . . to make a timely assertion of the privilege.'"[104] Given the negative consequences of having police officers guess incorrectly,[105] express invocation "ensures that the Government is put on notice" and that officers have the opportunity to either explain that the information sought is not incriminating or cure such concerns by a "grant of immunity."[106] The Court concluded that "none of our precedents suggests that governmental officials are obliged to guess at the meaning of a witness'[s] unexplained silence."[107]

Despite this strong language, the Court also indicated that the express invocation requirement is not absolute. In two circumstances, a failure to invoke the right to remain silent will not forfeit its protections: where a defendant refuses to testify at trial,[108] or in the face of "governmental coercion."[109] Included in this second category, for example, would be a suspect subjected to the "'inherently compelling pressures' of an *unwarned* custodial interrogation,"[110] as well as other instances of "official compulsion" denying suspects "a 'free choice to admit, to deny, or to refuse to answer.'"[111] The *Salinas* Court found no such pressures to exist because at all times the interview was "voluntary" and the defendant was free to leave.[112]

After *Salinas*, the constitutional landscape of the right to remain silent takes the following shape. If a defendant remains silent following the receipt of *Miranda* warnings or during her subsequent trial, prosecutors are categorically prohibited from introducing evidence of that fact at trial, whether to impeach her testimony or raise an adverse inference of her guilt.[113] Absent *Miranda* warnings, though, if a

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103. Id. (plurality opinion).

104. Id. (plurality opinion) (quoting Garner v. United States, 424 U.S. 648, 655 (1976)).

105. See supra note 92 and accompanying text (describing legal implications of police officers guessing incorrectly regarding suspect's motive for remaining silent).

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

107. Id. at 2181 n.1 (plurality opinion).

108. Id. at 2179–80 (plurality opinion); see also Griffin v. California, 380 U.S. 609, 613–15 (1965) (finding Fifth Amendment bars comment on defendant's failure to testify); supra notes 39–41 and accompanying text (same).

109. *Salinas*, 133 S. Ct. at 2180 (plurality opinion).

110. Id. (plurality opinion) (emphasis added) (quoting Miranda v. Arizona, 384 U.S. 436, 467–68 (1966)); see also supra notes 42–46 and accompanying text (describing *Miranda* holding in context of custodial interrogation).

111. *Salinas*, 133 S. Ct. at 2180 (plurality opinion) (quoting Garner v. United States, 424 U.S. 648, 656–57 (1976)).

112. Id. (plurality opinion).

113. See supra notes 39–41, 54–56 and accompanying text (explaining *Griffin*, *Doyle*, and *Wainwright*).

defendant remains silent during a voluntary prearrest interview with police or during the space of time immediately following her arrest, prosecutors can introduce evidence of that fact for the purposes of impeaching her credibility if she testifies.[114] Lower courts disagree about whether the Constitution similarly permits the use of prearrest or postarrest silence to raise an adverse inference of guilt in the prosecution's case-in-chief.[115] In light of *Salinas*, however, one thing is clear: Trial courts cannot reach this constitutional inquiry if a defendant fails to first expressly invoke her rights at the time of her silence—at least in the prearrest context *Salinas* discussed.[116]

This Note considers one area not squarely addressed by *Salinas*: silence during the period of time between a suspect's arrest and the receipt of *Miranda* warnings. Although *Salinas* indicated that unwarned custodial interrogations—which technically fall within these parameters—would be exempt from invocation,[117] this space of time actually encompasses a variety of other factual circumstances that may entail less "coercion" than a set-piece interrogation at the police station, but that nonetheless are readily distinguishable from *Salinas*'s precustody interview.[118] Part II considers whether an express invocation requirement should apply to those settings.

## II. RECONSIDERING THE APPLICATION OF AN EXPRESS INVOCATION REQUIREMENT TO THE POSTARREST SETTING

Part II of this Note assesses the basis for applying—in cases involving silence after arrest but before the receipt of *Miranda* warnings—an express invocation requirement as a prerequisite to raising a constitutional challenge to the substantive use of silence at trial. Section II.A examines recent case law considering whether and how to apply *Salinas*'s rule to the postarrest setting. Section II.B considers the stakes of an invocation requirement and examines the ways in which its application to the postarrest setting would burden criminal suspects' constitutional rights. Section II.C examines three distinct features of the postarrest setting and concludes that these features render an express invocation requirement a poor fit for these types of cases.

### A. *Beyond* Salinas*: Requiring Express Invocation for Other Forms of Silence?*

While *Salinas* broke new ground with respect to the constitutional analysis for adverse inferences of guilt from silence, the precise reach of

114. See supra notes 57–59, 64–66 and accompanying text (explaining *Jenkins* and *Fletcher*).

115. See supra notes 60, 67–77 and accompanying text (collecting cases).

116. See supra notes 95–112 (explaining *Salinas*).

117. Supra note 110 and accompanying text.

118. See infra sections II.B–II.C (finding unique features of postarrest setting cannot support extension of rule).

its invocation requirement is not clear.[119] In particular, the Court did not fully explain how the rule might apply, if at all, beyond the case's immediate facts to a criminal suspect's silence occurring either immediately following arrest or later after receiving *Miranda* warnings.

1. *Silence After* Miranda *Warnings: Express Invocation Is Not Required.* — An express invocation requirement does not apply to adverse inferences of guilt from silence occurring after both arrest and receipt of *Miranda* warnings.[120] Admittedly, the *Salinas* plurality suggested that a failure to invoke might not be excused where a suspect has full comprehension of her *Miranda* rights.[121] However, in a footnote, the Court rendered the effect of such an omission moot by conceding that due process nevertheless prohibits prosecutors from raising adverse inferences of guilt from silence in those settings.[122] Lower courts have followed this due process reasoning in rejecting the application of *Salinas*'s invocation requirement to silence occurring after *Miranda* warnings.[123]

2. *Silence in Postarrest Settings: Lower Courts Disagree over the Rule's Application.* — A more troublesome question, though, is whether and how an express invocation requirement applies to the period of time after arrest but before *Miranda* warnings. The Supreme Court has not offered much guidance here and, in the aftermath of *Salinas*, the few jurisdictions that have had the opportunity to consider the use of postarrest silence as evidence of guilt—either directly or in dicta—have disagreed over *Salinas*'s application.

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119. See, e.g., Harvey Gee, *Salinas v. Texas*: Pre-*Miranda* Silence Can Be Used Against a Defendant, 47 Suffolk U. L. Rev. 727, 750 (2014) (arguing *Salinas* "leaves readers scratching their heads" and creates risk of "courts across the country . . . interpret[ing] *Salinas* in the way [they] deem[] fit").

120. *Berghuis* also addressed invocation in this setting, but it only examined invocation with respect to confessions taken in violation of *Miranda* and does not apply directly to cases involving adverse inferences of guilt. Supra note 94 and accompanying text.

121. *Salinas* indicated that while a failure to invoke might be excused for governmental coercion, no such coercion exists where in-custody suspects subjected to interrogation have received *Miranda* warnings. See Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (plurality opinion) ("[A] suspect in custody cannot be said to have voluntarily forgone the privilege 'unless [he] fails to claim [it] after being suitably warned.'" (quoting Minnesota v. Murphy, 465 U.S. 420, 430 (1984))); see also Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) ("'[A]s *Miranda* holds, full comprehension of the right[] to remain silent . . . [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986))).

122. See *Salinas*, 133 S. Ct. at 2182 n.3 (plurality opinion) ("Petitioner is correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings . . . ."); Wainwright v. Greenfield, 474 U.S. 284, 292–95 (1986) (prohibiting adverse inferences of guilt from defendant's silence occurring after receipt of *Miranda* warnings, because doing so breached *Miranda*'s "implied promise").

123. See State v. Galvan, 326 P.3d 1029, 1032–34 (Idaho Ct. App. 2014) (finding prosecutor's use of silence occurring after *Miranda* warnings violated due process, even though defendant could not assert Fifth Amendment protections due to lack of invocation); see also Coleman v. State, 75 A.3d 916, 924 n.5 (Md. 2013) (finding *Salinas* holding did not apply to case involving "post-arrest, post-*Miranda* silence").

Before considering the relevant case law on this topic, it is important to first identify the types of factual situations encompassed within the postarrest setting. The lone example mentioned by *Salinas* itself was silence in the face of unwarned custodial interrogation, which the Court deemed exempt from the operation of the express invocation requirement.[124] This fits with the Court's longstanding recognition of the uniquely coercive effects arising from custodial interrogations conducted without the benefit of *Miranda* warnings. Such circumstances only exist, however, where police officers subject an unwarned arrestee to "express questioning or its functional equivalent," understood to mean words or actions by officers—other than those normally attendant to arrest—that are reasonably likely to elicit an incriminating response.[125] Within the parameters of the postarrest setting, there actually exists a variety of factual circumstances not meeting this definition. These include silence upon arrest at or near an active crime scene;[126] silence while in custody during or following a Fourth Amendment search of a suspect's property or person;[127] silence while sitting in a patrol car awaiting transport to the

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124. See supra notes 108–111 and accompanying text (describing *Salinas*'s exceptions for invocation).

125. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980). Under this definition, biographical questions posed by arresting officers do not constitute an "interrogation" for constitutional purposes. See Pennsylvania v. Muniz, 496 U.S. 582, 600–02 (1990) (holding "routine booking question[s]" do not trigger *Miranda*'s protections). Similarly, remarks exchanged between arresting officers while in the suspect's presence also may not constitute an "interrogation." *Innis*, 446 U.S. at 302–03.

126. See, e.g., Rice v. Cartledge, No. 6:14-cv-3748-RMG, 2015 WL 4603282, at *13 (D.S.C. July 29, 2015) (finding postarrest silence where defendant failed to disavow knowledge of narcotics found at crime scene); Parker v. State, 124 So. 3d 1023, 1025 (Fla. Dist. Ct. App. 2013) (finding postarrest silence where defendant failed to provide information about his activities at time robbery occurred); State v. Terry, 328 P.3d 932, 936–38 (Wash. Ct. App. 2014) (finding postarrest silence where defendant did not ask why he was arrested); see also United States v. Love, 767 F.2d 1052, 1058, 1063 (4th Cir. 1985) (finding postarrest silence where defendants failed to "offer any explanation for their presence" at crime scene).

127. This type of silence is especially common in federal narcotics cases, where knowledge of contraband's existence may be a material issue at trial. See, e.g., United States v. Espinoza, 394 F. App'x 26, 29–30 (5th Cir. 2010) (finding postarrest silence where defendant "displayed no emotion" while placed under arrest after border patrol discovered narcotics in trailer); United States v. Whitehead, 200 F.3d 634, 637–40 (9th Cir. 2000) (finding postarrest silence where "'defendant didn't say a word'" during arrest at border crossing after drugs found in car); United States v. Rivera, 944 F.2d 1563, 1565–66 (11th Cir. 1991) (finding postarrest silence in defendant's "'deadpan' reaction" to discovery of cocaine while officers investigated luggage); see also United States v. Moore, 104 F.3d 377, 384–90 (D.C. Cir. 1997) (finding postarrest silence where defendant did not "'look surprised'" when illegal guns were recovered from hood of car); State v. Mainaaupo, 178 P.3d 1, 18–21 (Haw. 2008) (finding postarrest silence where defendant failed to provide identity of vehicle owner, as "'innocent person'" would, when arrested for driving stolen car).

police station;[128] silence while at the police station awaiting booking or formal interrogation;[129] and even silence in the face of statements or accusations made by third-party civilians at the scene of the crime.[130] In short, many instances of postarrest silence are not covered by the exemption for non-Mirandized custodial interrogations expressly noted in *Salinas*.

Of those lower courts starting to fill in the gaps, a handful have found that an invocation requirement does not apply to postarrest silence,[131] but the analysis in these cases lacks depth and clarity. For example, one court held that "no invocation is required post-arrest, pre-*Miranda*," but did so only on the basis of *Salinas*'s exception for unwarned custodial interrogation,[132] even though police only asked the defendant for simple biographical information—an interaction not rising to the level of interrogation.[133] Another court decided the matter on due process grounds and treated the defendant's silence as occurring after *Miranda* warnings,[134] even though that point was not certain from the facts.[135] Thus, courts rejecting *Salinas*'s application to adverse

128. See State v. Ellington, 253 P.3d 727, 733–35 (Idaho 2011) (finding postarrest silence where defendant refused to provide information to police officers while in back of police car); Hurt v. State, 34 So. 3d 1191, 1193–95 (Miss. Ct. App. 2009) (finding postarrest silence where defendant sat silently during three-hour car trip with sheriffs and failed to raise alibi defense).

129. See People v. Tom, 331 P.3d 303, 309–10 (Cal. 2014) (finding postarrest silence where defendant failed to inquire about condition of victims in alleged drunk driving collision); Angle v. State, 942 P.2d 177, 181–82 (Nev. 1997) (finding postarrest silence where defendant had time while awaiting booking at police station to explain herself but said nothing).

130. See State v. VanWinkle, 273 P.3d 1148, 1149–52 (Ariz. 2012) (finding postarrest silence where defendant "said nothing in response" to third-party statement to police that he "was the shooter"); State v. Johnson, 811 N.W.2d 136, 141, 147–48 (Minn. Ct. App. 2012) (finding postarrest silence where defendant remained silent in response to third-party questions, "'Why did you beat me? Why did you take my things?'" at time of arrest).

131. See Grant v. Ryan, No. CV-12-02606-PHX-PGR, 2014 WL 4977775, at *30–35 (D. Ariz. Sept. 30, 2014) (holding comment on defendant's silence after arrest but before *Miranda* violated constitutional rights, but finding error harmless); State v. Terry, 328 P.3d 932, 936–40 (Wash. Ct. App. 2014) (holding comment on defendant's silence after arrest violated constitutional rights and reversing conviction).

132. *Grant*, 2014 WL 4977775, at *34.

133. See id. at *31–34 ("'After I put him in handcuffs and told him he was driving a stolen car, and put him in the back of the police car, . . . I asked his name several times, he wouldn't look at me or answer my questions.'"); supra note 125 (explaining Supreme Court's recognition that routine biographical and booking questions do not qualify as "interrogation").

134. *Terry*, 328 P.3d at 936–38.

135. See id. at 936 ("'[D]id the defendant ask why he was being arrested? No. He knew. He knew that he had stolen a vehicle and he was going to get caught.'"). The arresting officer's testimony suggested that *Miranda* warnings closely followed arrest, see id. at 937–38 (noting officer "undertook to handcuff [defendant], and then read [him] his *Miranda* rights"), but whether the comment properly constituted postarrest or post-*Miranda* silence is conceptually difficult to determine.

inferences from postarrest silence have not yet articulated a clear justification for their position.

Other jurisdictions have found that invocation applies to postarrest silence.[136] *People v. Tom*, a recent decision by the California Supreme Court, best illustrates the constitutional analysis underlying this position. Richard Tom was allegedly drunk and exceeding the speed limit when he crashed his car into another vehicle, killing a passenger.[137] Tom was placed under "de facto arrest"[138] at the scene and brought to the police station for blood tests. Trial testimony showed that, despite coming in contact with many police officers while in custody, Tom never asked about the condition of the passengers in the other vehicle.[139] The prosecutor directly attributed this silence to a guilty conscience during closing arguments: Tom "'knew he had done a very, very, very bad thing, and he was scared . . . or too drunk to care.'"[140] Tom was acquitted of all alcohol-related charges, but still convicted of "vehicular manslaughter with gross negligence" and sentenced to seven years in prison.[141]

The issue on appeal was whether the prosecution violated Tom's constitutional rights by using his postarrest silence as evidence of guilt.[142] Like the Supreme Court did in *Salinas*, the California Supreme Court sidestepped this underlying constitutional issue and instead adopted the rule that, even in the narrow space between arrest and *Miranda* warnings, defendants "need[] to make a timely and unambiguous assertion of the privilege in order to benefit from it."[143] Against common-sense

136. See Torres v. State, No. 10-12-00263-CR, 2014 WL 2720800, at *3–4 (Tex. App. June 12, 2014) ("[A]ppellant did not invoke his Fifth Amendment rights when he refused to offer an explanation to police for the items found in the back seat of the vehicle."); see also United States v. Graves, 551 F. App'x 680, 684–85 (4th Cir. 2014) (noting in dicta *Salinas* "draw[s] no distinction between the invocation requirements before and after custody and *Miranda* warnings").

137. People v. Tom, 331 P.3d 303, 305–07 (Cal. 2014).

138. Custody can be an amorphous concept involving either a formal arrest or any other situation where the suspect is "otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The test for custody considers only "objective circumstances" and not "the subjective views harbored by either the interrogating officers" or the suspect. Stansbury v. California, 511 U.S. 318, 323 (1994). The California Court of Appeal determined that "the restraint on [Tom's] freedom of movement ripened into a de facto arrest . . . when police transported him and his girlfriend in a patrol vehicle to the police station for a blood test and interview." *Tom*, 331 P.3d at 315 n.4.

139. *Tom*, 331 P.3d at 309. Once in custody, Tom had limited communication with police officers and only asked about possibly refusing the blood test, using the restroom, and getting aspirin. Id. at 319. During the time in question, officers did not interrogate Tom about the accident. See id. at 311 (assuming Tom's silence occurred "in the absence of custodial interrogation").

140. Id. at 309.

141. Id. at 305–06.

142. Id. at 305.

143. Id.; see also supra notes 99–107 and accompanying text (describing *Salinas* holding).

expectations, the court ruled that "remaining silent after being placed under arrest is not enough to exercise one's right to remain silent."[144]

The decision closely followed *Salinas*'s two-part analysis. First, the court found that important law enforcement interests required invocation and justified this holding using terms identical to those provided by the Supreme Court in *Davis*, *Berghuis*, and *Salinas*.[145] Even in the postarrest setting, the court reasoned, requiring audible and unambiguous assertion of the right to remain silent would provide police officers with "clear notice" of self-incrimination concerns and minimize the risks of "'guess[ing] wrong.'"[146] Accordingly, it was Tom's "'burden . . . to make a timely assertion'" of his right to remain silent,[147] and his muteness did not suffice to preserve that privilege for trial.[148]

Second, the court considered whether the two exceptions enumerated in *Salinas* might excuse the operation of the express invocation requirement in Tom's case.[149] Neither exception applied. With respect to governmental coercion, the court recognized that, unlike *Salinas*, Tom was in custody at the time of his silence.[150] Nevertheless, the court argued on the basis of *Fletcher v. Weir*—an impeachment case[151]—that "custody alone . . . does not deny an individual 'a free choice to admit, deny, or refuse to answer.'"[152] Tom's de facto custody was

144. *Tom*, 331 P.3d at 323 (Liu, J., dissenting).

145. Compare id. at 314 (majority opinion) (finding express invocation requirement "'"provide[s] guidance to officers" on how to proceed in the face of ambiguity'" (alteration in original) (quoting Berghuis v. Thompkins, 560 U.S. 370, 381 (2010))), with supra section I.C (explaining rationale for invocation requirement in Supreme Court cases involving ongoing police questioning).

146. *Tom*, 331 P.3d at 314 (quoting Berghuis v. Thompkins, 560 U.S. 370, 382 (2010)); see also supra notes 92, 103–107 and accompanying text (identifying Supreme Court's concerns about burdening law enforcement officers).

147. *Tom*, 331 P.3d at 317 (quoting Salinas v. Texas, 133 S. Ct. 2174, 2182–83 (2013)).

148. See id. at 319–20 (describing Tom's communications with police officers while in custody and remanding for determination of whether they amounted to invocation of his right to remain silent); see also *Salinas*, 133 S. Ct. at 2178 (plurality opinion) (holding defendant "does not [invoke the privilege] by simply standing mute").

149. See supra notes 108–111 and accompanying text (finding defendants exempt from express invocation requirement if they fail to claim privilege at trial or in response to governmental coercion).

150. *Tom*, 331 P.3d at 315–16.

151. The dissent distinguished *Fletcher* as an application of the "general principle that evidence otherwise off-limits to the prosecution may be used to impeach a defendant" choosing to testify. Id. at 326 (Liu, J., dissenting); see also supra notes 58, 72–73 and accompanying text (suggesting *Fletcher*, as impeachment case, does not govern substantive use of postarrest silence).

152. *Tom*, 331 P.3d at 315 (quoting Minnesota v. Murphy, 465 U.S. 420, 429 (1984)). *Tom* also suggested that the Supreme Court already applied an invocation requirement to postarrest settings. Id. at 316. However, the case cited, *Roberts v. United States*, pertained to silence occurring *after Miranda* warnings. See 445 U.S. 552, 553–54 (1980) (considering constitutionality of comment on defendant's refusal to name co-conspirators after receiving *Miranda* warnings). Thus, *Roberts* is distinguishable from postarrest silence cases.

insufficient to except his silence from the operation of the express invocation requirement.[153] Because the lower court had not determined, as a factual matter, whether Tom unambiguously invoked his right to remain silent while in police custody, the California Supreme Court remanded the case.[154]

On remand, the intermediate court reversed the conviction, holding that Tom had, in fact, "unambiguously invoked his right to remain silent" while in police custody.[155] The record showed that, some time after his arrival to the police station, Tom spoke with his attorney by phone and clearly informed police officers that he would not make a statement in the absence of counsel.[156] This determination of adequate invocation perhaps oversimplified the temporal scope of Tom's postarrest silence: Tom's failure to inquire about the condition of the other passengers logically existed throughout his custody, including while sitting in the patrol car and while at the station prior to speaking with his lawyer. Despite expressing uncertainty about whether invocation could apply retroactively to the entire period of custody, the court nevertheless found that the prosecution's evidence was "not sufficiently focused on the period exclusively *before*" the invocation to warrant further parsing of the sequence of events.[157] It concluded that permitting prosecutorial comment on this silence violated Tom's Fifth Amendment right.[158] Although the *Tom* case ended in the defendant's favor, it still solidified an express invocation requirement for postarrest silence that future defendants lacking the timely advice of counsel might not successfully overcome.

On its face, the analysis underlying the California Supreme Court's decision appears more thorough than the analysis used by courts rejecting *Salinas*'s role in postarrest settings.[159] Given the substantial number of police encounters affected by an express invocation requirement for postarrest silence, this application warrants closer scrutiny. Sections II.B and II.C explain why *Salinas*'s rule would be a poor fit for the postarrest setting and should not be applied there.

### *B. Negative Implications of Express Invocation in the Postarrest Setting*

Why, if at all, might it be problematic to require defendants, at the time of their arrest, to expressly invoke their privilege against self-

153. *Tom*, 331 P.3d at 315–16.

154. Id. at 319 ("Whether these or other circumstances made it clear to the officers that [Tom] had invoked his privilege against self-incrimination is for the Court of Appeal to analyze . . . .").

155. People v. Tom, No. A124765, 2015 WL 1873218, at *5 (Cal. Ct. App. Apr. 23, 2015).

156. Id.

157. Id.

158. Id. at *5–8.

159. Cf. supra notes 131–135 and accompanying text (describing cases finding no invocation requirement).

incrimination if they want to avoid the use of their silence against them at trial? An invocation requirement disadvantages criminal suspects in two interrelated ways.

First, an express invocation requirement may enable prosecutors to offer evidence of a defendant's postarrest silence over an otherwise valid constitutional objection. While still a contested issue among lower courts, a number of state and federal jurisdictions have prohibited prosecutors from using a defendant's postarrest silence as substantive evidence of guilt.[160] Other jurisdictions, although declining to resolve the issue directly, have indicated uncertainty or concern about the constitutionality of the practice.[161] If an express invocation requirement applies, then in these jurisdictions a defendant's failure to audibly invoke the right to remain silent would result in the forfeiture of its protection at trial. Admittedly, in some cases, the consequences of such an omission will be relatively minimal, as the otherwise prohibited testimony about postarrest silence would amount only to harmless error due to the overwhelming evidence against the defendant.[162] However, in other

160. The Seventh, Ninth, and D.C. Circuits have found the use of a suspect's postarrest silence as evidence of guilt to violate the Fifth Amendment. See United States v. Whitehead, 200 F.3d 634, 637–40 (9th Cir. 2000) (finding prosecutorial comment on postarrest silence violated Fifth Amendment); United States v. Moore, 104 F.3d 377, 384–90 (D.C. Cir. 1997) (same); United States v. Hernandez, 948 F.2d 316, 322–25 (7th Cir. 1991) (same); see also Combs v. Coyle, 205 F.3d 269, 282–83 (6th Cir. 2000) (barring use of prearrest silence and suggesting, in dicta, privilege against self-incrimination applied to "a prearrest setting *as well as in a post-arrest setting*" (emphasis added)). Several state jurisdictions also have interpreted the Fifth Amendment to bar the practice. See, e.g., Ex parte Marek, 556 So. 2d 375, 378–82 (Ala. 1989); State v. VanWinkle, 273 P.3d 1148, 1149–52 (Ariz. 2012); *Tom*, 2015 WL 1873218, at *5; State v. Mainaaupo, 178 P.3d 1, 18–21 (Haw. 2008); State v. Moore, 965 P.2d 174, 180–81 (Idaho 1998); Green v. Commonwealth, 815 S.W.2d 398, 399–400 (Ky. 1991); Kosh v. State, 854 A.2d 1259, 1264–69 (Md. 2004); People v. McArthur, 956 N.Y.S.2d 71, 73 (N.Y. App. Div. 2012); Morris v. State, 913 P.2d 1264, 1267–68 (Nev. 1996); State v. Easter, 922 P.2d 1285, 1290–92 (Wash. 1996).

161. See United States v. Salinas, 480 F.3d 750, 758–59 (5th Cir. 2007) (recognizing circuit split over constitutionality, but declining to reach issue because defendant could not establish plain error); United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (expressing, in dicta, doubt about whether precedents permitted use of postarrest silence in government's direct case); People v. Quintana, 665 P.2d 605, 609–10 (Colo. 1983) (en banc) (noting admission of postarrest silence as substantive evidence of guilt "raises substantial constitutional questions," but excluding testimony on evidentiary grounds); Hurt v. State, 34 So. 3d 1191, 1199 (Miss. Ct. App. 2009) (finding practice to be "troubling, at the very least," but declining to reach issue due to failure to show plain error).

162. Harmless error appears in two leading cases cited in support of the proposition that the Fifth Amendment prohibits the substantive use of postarrest silence. See *Whitehead*, 200 F.3d at 637–40 (finding comment on silence impermissible but harmless because "physical evidence was virtually conclusive of guilt"); *Moore*, 104 F.3d at 384–89 (finding comment on silence impermissible but harmless error due to "overwhelming evidence").

cases, the state may have a relatively weak case against the defendant,[163] or the silence itself might play a material role in influencing a jury's assessment of a major factual issue.[164] Here, a failure to invoke is much more costly and may be the difference between conviction and acquittal.

In *United States v. Velarde-Gomez*, for example, the defendant was convicted of drug-smuggling crimes and sentenced to twenty-seven months imprisonment.[165] At trial, a law enforcement officer testified that he found illegal drugs in the defendant's vehicle, "informed" the defendant of his discovery, and then took the defendant into custody.[166] Rather than deny any awareness of the drugs, the defendant remained silent and "'didn't look surprised or upset.'"[167] During closing arguments, the prosecutor used this silence to raise an inference of guilt: "'[W]as he shocked? Was he surprised? Was he enraged? No. He showed no emotion at all . . . . He was the perfect guy to bring drugs across the border.'"[168] The Ninth Circuit, sitting en banc, found that this use of postarrest silence violated the defendant's Fifth Amendment right and reversed his conviction because the error was not harmless.[169] The court reasoned that the government "relied *entirely* upon circumstantial evidence" and,

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163. See, e.g., Parker v. State, 124 So. 3d 1023, 1026 (Fla. Dist. Ct. App. 2013) (reversing robbery conviction because, in absence of impermissible inference, prosecution's case was "far from conclusive"); *Mainaaupo*, 178 P.3d at 18–22 (finding inference of guilt from postarrest silence impermissible and reversing conviction because "evidence in this case is not so overwhelming"); Commonwealth v. Johnson, No. 13-P-220, 2014 WL 223016, at *2 (Mass. App. Ct. Jan. 22, 2014) (finding "particularly troubl[ing]" prosecutor's use of postarrest silence as evidence of guilt and holding aggregated errors deprived defendant of "fair trial"); State v. Pinson, 333 P.3d 528, 531–33 (Wash. Ct. App. 2014) (reversing assault conviction because, in absence of impermissible inference, "State's case was not particularly strong").

164. See, e.g., United States v. Williams, 38 F. App'x 442, 443 (9th Cir. 2002) (reversing drug conviction because postarrest silence was probative of defendant's knowledge, which was "the *only* element of the offense that was at issue" (emphasis added)); *Tom*, 2015 WL 1873218 at *6–8 (reversing manslaughter conviction because, in absence of physical evidence conclusively showing defendant's speed, jury's assessment of his conduct in aftermath of car accident "was very likely [a] . . . determinative factor in its verdict" that he drove with gross negligence); Hall v. Commonwealth, 862 S.W.2d 321, 323–24 (Ky. 1993) (finding comment on postarrest silence to be reversible error in sexual abuse case because evidence against defendant was "no better than weak" and verdict depended on jury's comparative assessment of complainant's and defendant's credibility).

165. 269 F.3d 1023, 1025–28 (9th Cir. 2001) (en banc).

166. Id. at 1026–28. Informing suspects of the reason for their arrest would not fit the definition of unwarned "custodial interrogation" or provide a basis for excusing a failure to invoke under current Supreme Court precedent. See supra notes 124–125 and accompanying text (defining interrogation).

167. *Velarde-Gomez*, 269 F.3d at 1027. After this initial silence, officers read the defendant *Miranda* rights, which the defendant waived by speaking with officers. Id. At no point during the subsequent conversation did the defendant confess to knowledge of the drugs. Id. at 1027–28.

168. Id. at 1028.

169. Id. at 1028–33, 1034–36.

while "not necessarily compelling," the defense's theory was nevertheless "equally plausible."[170]

*Velarde-Gomez* illustrates the high stakes of express invocation: If such a requirement applied, then the relief granted by the Ninth Circuit would not have been possible. Since the defendant failed to audibly assert his right to remain silent, he would have been barred from raising a constitutional challenge to the prosecution's use of his postarrest silence—a costly result considering that the adverse inference from this silence appeared to drown out his defense at trial.[171] In this way, an invocation requirement circumvents the underlying constitutionality of adverse inferences of guilt from postarrest silence—at least insofar as suspects fail to invoke their rights.

Second, compliance with an invocation requirement is no simple matter. Scholars challenge the rule's unstated premise—that suspects actually invoke their rights when concerned about self-incrimination—as unrealistic and not borne out in practice.[172] Some suspects may lack the "moxie" to assert their constitutional rights "in the face of police authority."[173] Others may be especially reluctant to make such an assertion for reasons owing to their race,[174] age,[175] or gender.[176] A large number might simply not know about the existence of such a requirement

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170. Id. at 1035–36 (emphasis added) (describing defense's theory, under which prostitute and others may have taken advantage of defendant's return trip to California and hidden drugs in car without knowledge).

171. Cf. United States v. Hale, 422 U.S. 171, 180 (1975) ("[T]he jury is likely to assign much more weight to the defendant's previous silence than is warranted.").

172. See Garrett, supra note 79, at 123–24 (finding "not remotely realistic" *Salinas*'s assurance that invocation is simple matter); Neal Davis & Dick DeGuerin, Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of *Salinas v. Texas*, Champion, Jan.–Feb. 2014, at 16, 18 (arguing *Salinas* encourages police to take advantage of fact that suspects "rarely assert the [Fifth Amendment] privilege").

173. Tracey Maclin, The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 75 Cornell L. Rev. 1258, 1306 (1990); see also David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 556–57 (1997) (arguing, in Fourth Amendment context, "mere appearance of authority" may cause most people to comply with officers' requests).

174. Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 1013 (2002) ("[P]eople of color are less likely than whites to assert their constitutional rights."); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 262 (1991) ("The realities of the street, however, make challenging an officer's authority out of the question for a black man."); Know Your Rights!, Cmtys. United for Police Reform, http://changethenypd.org/resources/know-your-rights-help-end-discriminatory-abusive-illegal-policing (on file with the *Columbia Law Review*) (last visited Oct. 27, 2015) (noting "risk that asserting . . . rights during a police encounter may escalate the situation").

175. See Saul M. Kassin, Inside Interrogation: Why Innocent People Confess, 32 Am. J. Trial Advoc. 525, 533 (2009) (arguing "most" juveniles are "more compliant and suggestible" than adults and waive right to remain silent during custodial interrogation).

to begin with.[177] Moreover, even if suspects decide to speak up, certain demographics may "invoke their rights by using speech patterns that the law currently refuses to recognize."[178]

These arguments about the negative implications of an express invocation requirement admittedly conflict with the broader rationale that the Supreme Court adopted in *Salinas*. The Court recognizes that pro law enforcement considerations generally favor express invocation, although it also has not applied these considerations canonically to all cases.[179] Accordingly, while critics of express invocation cannot reject outright its application to the postarrest setting, one still would expect to find at least some similar pro law enforcement justification for imposing such a requirement. As section II.C explains, though, the arguments offered in support of an express invocation requirement in *Salinas* appear absent in the postarrest setting.

### C. *Inadequate Justification for an Express Invocation Requirement in the Postarrest Setting*

Although *Salinas* found an invocation requirement justifiable in the context of voluntary police interviews, this finding does not necessarily translate to the postarrest setting. There is good reason to believe that the postarrest setting is qualitatively different from other phases of the arrest process due to its three distinctive features: the fact of arrest, the

176. See Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 Yale L.J. 259, 261 (1993) (suggesting "women and ethnic minorities" are "far more likely" not to assert rights).

177. See Green, supra note 2 (noting invocation requirement may create "trap for the unwary"); Hugh B. Kaplan, Evidence of Pre-*Miranda*, Pre-Arrest Silence Is Admissible to Prove Guilt, Prosecutors Say, Stanford Law Sch. (Apr. 24, 2013), https://law.stanford.edu/press/evidence-of-pre-miranda-pre-arrest-silence-is-admissible-to-prove-guilt-prosecutors-say/ [http://perma.cc/Q99J-J3SY] (describing one scholar's concern that invocation requirement is "formalism of the absolute worst kind" and creates "trap for the unwary"). But see Dickerson v. United States, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) ("The Constitution is not . . . offended by a criminal's . . . fortunate fit of stupidity.").

178. Ainsworth, supra note 176, at 261; see also Samira Sadeghi, Comment, Hung Up on Semantics: A Critique of *Davis v. United States*, 23 Hastings Const. L.Q. 313, 330–31 (1995) (explaining cultural differences may cause certain groups' speech patterns to favor equivocal language, which is not direct enough to invoke protection after *Davis*). Although *Salinas* did not indicate what types of statements would be adequate to claim the right to remain silent, *Davis* suggests that courts may require a very high bar. See Davis v. United States, 512 U.S. 452, 462 (1994) (finding "'[m]aybe I should talk to a lawyer'" inadequate to invoke right to counsel).

179. Pro law enforcement justifications support an express invocation requirement during a voluntary police interview before arrest and during a Mirandized custodial interrogation. See supra notes 90–94, 99–107 and accompanying text (summarizing Court's justifications for invocation requirement in those settings). *Salinas*, however, also recognized that these rationales do not justify such a requirement in the uniquely coercive circumstances of unwarned custodial interrogations. See supra notes 109–111 (explaining inclusion of unwarned interrogations under government coercion exception for invocation).

absence of *Miranda* warnings, and, most importantly, the lack of lawful police questioning. Taken together, these features suggest that invocation may be less likely in the postarrest setting and, moreover, not supported by the pro law enforcement rationale underlying the rule's adoption elsewhere.

1. *The Fact of Arrest in Postarrest Silence Cases.* — First, the arrest itself introduces at least some pressures into a suspect's decisionmaking process that do not exist in other types of police–suspect interactions.[180] To understand the relevance of this point, consider the varying degrees of state pressure existing across the pretrial investigative process.[181] On the one hand, during interviews before arrest, suspects are "'free to leave' at any time" and no governmental pressures prevent them from voluntarily invoking their rights or walking away.[182] On the other hand, during a custodial interrogation after both arrest and receipt of *Miranda* warnings, the Court has also found no such pressures to exist, but for a significantly different reason. Constitutional law is acutely concerned that in-custody suspects questioned without advisement of their rights "might be unable to make a free and informed choice to remain silent."[183] Once suspects receive *Miranda* warnings, though, the inherently coercive nature of custodial interrogation dissipates and they cannot be said to have failed to invoke their rights involuntarily.[184]

The postarrest setting finds itself trapped between these extremes. An arrest alone is not as coercive as prolonged in-custody questioning inside a police interrogation room,[185] where police officers are trained to

180. Cf. Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (plurality opinion) (noting "some form of official compulsion" could "deprive[] [a suspect] of the ability to voluntarily invoke the Fifth Amendment").

181. See supra section I.B (separating pretrial process into before arrest, after arrest but before *Miranda* warnings, and after both arrest and *Miranda* warnings).

182. See *Salinas*, 133 S. Ct. at 2180 (plurality opinion) (quoting Brief for Petitioner at 3, *Salinas*, 133 S. Ct. 2174 (No. 12-246), 2013 WL 633595) (finding "voluntary" nature of interview brought case "outside the scope of *Miranda* and other cases in which . . . various forms of governmental coercion prevented defendants from voluntarily invoking" their rights). But see Brian Donovan, Note, Why *Salinas v. Texas* Blurs the Line Between Voluntary Interviews and Custodial Interrogations, 100 Cornell L. Rev. 213, 215 (2014) (arguing *Salinas* makes "voluntary interviews function like custodial interrogations" because suspects may no longer feel free to leave if inference of guilt can result from early termination).

183. Roberts v. United States, 445 U.S. 552, 560–61 (1980) (citing Miranda v. Arizona, 384 U.S. 436, 475–76 (1966)).

184. *Salinas*, 133 S. Ct. at 2180 (plurality opinion); see also Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) ("'[F]ull comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.'" (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986))); Minnesota v. Murphy, 465 U.S. 420, 429–34 (1984) ("[T]he *Miranda* Court required the exclusion of incriminating statements obtained during custodial interrogation *unless* the suspect fails to claim the Fifth Amendment privilege *after being suitably warned* . . . ." (emphasis added)).

185. Cf. *Murphy*, 465 U.S. at 430 (finding "extraordinary safeguard[s]" for custodial interrogations do not apply outside of their "inherently coercive" context).

find ways of getting suspects to incriminate themselves.[186] Still, it must be recognized that there are *at least some* official state forces at work at the time of arrest. Suspects are not free to leave and face restraints on their freedom pending police officers' next move—whether booking, questioning, or some other act attendant to custody.[187] While not explicit in its silence jurisprudence, the Supreme Court clearly attaches special significance to the initiation of custody for Fifth Amendment purposes,[188] as evidenced by the differing treatment of questioning in-custody versus out-of-custody suspects.[189] This is not to say that as an empirical matter, an arrest itself causes a suspect to remain silent. Indeed, a person under arrest may deny charges or even become hostile toward officers and refuse to cooperate.[190] Nevertheless, the arrest itself constitutes a salient instance of police authority that may intimidate some into not invoking their rights for fear of escalating the situation[191] or create "fairly chaotic" circumstances complicating the invocation decision.[192]

2. *The Absence of* Miranda *Warnings in Postarrest Silence Cases.* — A second feature of the postarrest setting—the absence of *Miranda* warnings—reinforces this point. When criminal suspects receive *Miranda* warnings in advance of custodial interrogation, invocation of the right to silence or the right to counsel must be audible and unambiguous in order for the defendant to challenge any resultant confession on self-incrimination grounds.[193] In *Berghuis*, the Supreme Court reasoned that while allowing mere silence to sufficiently exercise constitutional rights

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186. See Charles D. Weisselberg, Mourning *Miranda*, 96 Calif. L. Rev. 1519, 1562 (2008) (examining police training manuals and explaining how officers still find ways to compel suspects to make confessions).

187. See supra note 125 and accompanying text (providing examples of permissible interactions occurring around time of arrest).

188. See United States v. Hale, 422 U.S. 171, 177 (1977) ("At the time of arrest . . . , innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute."); cf. *Salinas*, 133 S. Ct. at 2180 (plurality opinion) (finding no pressures because suspect was not in custody).

189. Compare supra note 182 and accompanying text (describing treatment of out-of-custody questioning), with supra notes 183–184 and accompanying text (describing treatment of in-custody questioning).

190. See, e.g., Grant v. Ryan, No. CV-12-02606-PHX-PGR, 2014 WL 4977775, at *31 (D. Ariz. Sept. 30, 2014) ("'[Defendant] became very belligerent and yelling. And I asked his name several times, he wouldn't look at me or answer my questions.'"). A refusal to provide information nevertheless qualifies under the broader conceptualization of silence. See supra note 5 (defining silence).

191. See supra notes 172–178 and accompanying text (identifying reasons why suspects might fail to assert Fifth Amendment protections in face of police authority).

192. See People v. Tom, 331 P.3d 303, 332 (Cal. 2014) (Liu, J., dissenting) (doubting suspects will have "awareness and presence of mind" to invoke their rights "immediately after being arrested").

193. In cases involving adverse inferences from post-*Miranda* silence, as opposed to oral confessions, the Due Process Clause bars reference to that silence regardless of whether the defendant invoked the right to remain silent. See supra section II.A.1 (making this argument).

"'might add marginally to *Miranda*'s goal of dispelling . . . compulsion,'" such a rule was unnecessary where the suspect already had been advised of those rights.[194] In the absence of warnings, though, the Court will not fault a suspect for failing to invoke her rights during a custodial interrogation that produces a confession.[195]

How might this principle apply to adverse inferences from postarrest silence itself, which occurs when the suspect is in custody but has not yet been given warnings or interrogated? The Supreme Court has not answered, but there is good reason to believe that requiring invocation here would be similarly problematic. At the time of arrest, when surrounded by police officers, a suspect faces some pressures to remain silent—due either to intimidation or the simple fact that the suspect has actually committed the charged offense. The effect of these pressures is compounded, though, by the fact that the suspect has not yet even been advised of her rights or implicitly told that, if she intends to invoke them, now is the time to do so. While empirical studies indicate that criminal suspects, in large numbers, fail to invoke their rights even after receiving *Miranda* warnings,[196] the data also suggest that invocation (if it occurs) is more likely *immediately* after receiving *Miranda* warnings,[197] when police implicitly invite invocation as they attempt to secure a waiver of the suspect's rights. It is unrealistic to expect suspects to claim their rights when they have not yet been reminded of them. In this way, an invocation requirement at the time of arrest risks creating a trap for the unwary and the uninformed.

3. *The Absence of Police Questioning in Postarrest Silence Cases.* — The third—and most important—feature that serves to distinguish the postarrest setting is the absence of police questioning. Unlike those features described above, which may speak more to the unlikelihood of successful invocation, this feature illustrates that express invocation—premised on a unique law enforcement rationale of assisting police

194. Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (quoting Moran v. Burbine, 475 U.S. 412, 425 (1986)).

195. See supra notes 124–125, 184 and accompanying text (explaining exception to invocation rule during unwarned custodial interrogations).

196. Recent empirical studies of custodial interrogations indicate that a large majority of suspects fail to claim their rights after being warned. One study surveyed 631 police investigators around the nation, who estimated that approximately 81% of suspects they interrogated waived their rights. Saul M. Kassin et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 Law & Hum. Behav. 381, 394 (2007).

197. In one study, of the 21% of criminal suspects invoking their *Miranda* rights, only 1% did so after the police began their interrogation. Richard A. Leo, The Impact of *Miranda* Revisited, 86 J. Crim. L. & Criminology 621, 653 tbl.1 (1996) (noting 38 of 182 suspects invoked their *Miranda* rights, but only two did so after initial waiver). The other 20% "invoke[d] right away, when the warnings [were] first given." Allen et al., supra note 99, at 828 (3d ed. 2011). At least for custodial interrogations, then, the warnings themselves rather than coercive questioning are more likely to prompt a suspect's invocation. Id. In the postarrest setting, these warnings are absent.

officers with conducting interrogations—is a poor fit for the postarrest setting.

The main problem with applying an invocation requirement to the postarrest setting is that, in doing so, courts mistakenly conflate two important but distinct "sub-rights" under the right to remain silent: "the right literally not to speak" and "the right to cut off police questioning."[198] Although closely related, these sub-rights are exercised in two crucially different ways.[199] The differences between them, once understood, show that an express invocation requirement at the time of arrest lacks sound justification.

The Supreme Court has never explicitly distinguished between these two concepts, but different sub-rights must exist. According to Professor Laurent Sacharoff, the right to remain silent contains an "inherent contradiction": If a suspect *invokes* the privilege, then any statement subsequently obtained by police questioning must be excluded at trial; yet statements produced for trial are admissible only if police officers first obtained a voluntary *waiver*.[200] Therein lies the contradiction: "[A] suspect either already enjoys the right and it is hers to waive, or the right has not yet been triggered and she must assert it; *but it cannot be both*."[201] Professor Sacharoff resolves this tension by breaking the "right to remain silent" into its Hohfeldian parts.[202] The right to not speak constitutes a core "liberty" protected by the "claim" against police to not be questioned.[203] The right to cut off questioning ensures that continued police questioning does not undermine or compel the waiver of a suspect's right to not speak.[204] A crucial distinction underlies the operation of

198. See Laurent Sacharoff, *Miranda*'s Hidden Right, 63 Ala. L. Rev. 535, 538 (2012) (distinguishing two sub-rights contained in Supreme Court's often-used phrase "right to remain silent"); see also The Supreme Court, 2009 Term: Leading Cases: Fifth Amendment—Invocation of the Right to Cut Off Questioning, 124 Harv. L. Rev. 189, 189 (2010) (noting "right to cut off questioning" actually constitutes "distinct right [from the right to remain silent] created by the decision in *Miranda*," even though courts consistently treat it as "derivative" of the latter).

199. See infra notes 200–205 and accompanying text (describing operational distinction whereby suspects waive right to not speak but must invoke right to cut off questioning).

200. Sacharoff, supra note 198, at 537–38. Professor Sacharoff's article focuses on custodial interrogations and their resultant confessions, but its arguments have a more general application to prosecutorial comment on silence itself.

201. Id. at 538 (emphasis added).

202. See generally Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 28–30 (1913) (arguing courts use legal term "right" so broadly as to obscure important differences in how rights actually function in practice, and proposing new terminology to describe operation of constitutional rights).

203. See Sacharoff, supra note 198, at 542–49 (breaking right to remain silent into functional sub-rights).

204. Id. at 540.

these two sub-rights: "[A] suspect can *waive* the right not to speak but must *invoke* the right to cut off questioning . . . ."[205]

Fifth Amendment cases implicitly but imperfectly recognize the distinct operation of these sub-rights, often considering them together in jumbled fashion.[206] On the one hand, courts use the concept of waiver to determine whether an incriminating statement—obtained by police after *Miranda* warnings—was knowingly and voluntarily made in spite of a suspect's right to not speak with police officers.[207] In this way, waivers use ex post analysis to determine whether a statement made after a suspect broke her silence resulted from compelled self-incrimination.[208] On the other hand, courts use the concept of invocation to determine whether to exclude an incriminating statement from trial on the basis that the suspect actually invoked her right to cut off questioning but police continued with the interrogation anyway.[209] Invocation provides an alternative means for determining whether a suspect's statement was improperly obtained and thus provides an added layer of protection—albeit one that must be affirmatively claimed—for the right to not speak.

Although *Salinas*—by blending these two sub-rights together—represents a partial rejection of Professor Sacharoff's functional conceptualization of the right to remain silent, the idea may nevertheless still inform the application of the express invocation requirement. *Salinas* held, in effect, that criminal suspects must invoke the right to not speak, even though they already possess such a right and could only forfeit it

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205. Id. at 538 (emphasis added). Professor Sacharoff argues that the term waiver obscures the operation of the right to not speak: A suspect can never waive that liberty, but "rather, he simply does not exercise" it by choosing to speak with police officers. Id. at 578 (emphasis omitted).

206. See, e.g., United States v. Plugh, 648 F.3d 118, 127 (2d Cir. 2011) (finding both that "Plugh did not unambiguously invoke his right to remain silent" *and* "Plugh knowingly and voluntarily waived his rights to remain silent"); Simpson v. Jackson, 615 F.3d 421, 430 (6th Cir. 2010) (finding both that defendant did "not clearly invoke his right to remain silent" *and* suspect consented "to waive his *Miranda* rights").

207. A statement obtained during custodial interrogation is inadmissible unless the government establishes that the accused "knowingly and voluntarily waived [*Miranda*] rights." North Carolina v. Butler, 441 U.S. 369, 373 (1979). A valid waiver exists where, first, it was "voluntary" and the product of "a free and deliberate choice rather than intimidation, coercion, or deception," and second, it was made with "full awareness" of the consequences of its abandonment. Moran v. Burbine, 475 U.S. 412, 421 (1986).

208. See Berghuis v. Thompkins, 560 U.S. 370, 375–76 (2010) (analyzing constitutionality of confession on basis of whether defendant voluntarily waived right to remain silent, despite sitting silently in interrogation room for nearly three hours); see also Salinas v. Texas, 133 S. Ct. 2174, 2189 (2013) (Breyer, J., dissenting) (noting *Berghuis* found defendant "waived his Fifth Amendment rights in respect to his *later speech*").

209. See *Berghuis*, 560 U.S. at 380–82 (analyzing constitutional admissibility of confession on basis of whether defendant's prolonged silence was sufficient to invoke rights and force questioning to "'cease[]' before he made his inculpatory statements" (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966))).

through a voluntary waiver (i.e., deciding to speak).[210] Despite creating doctrinal uncertainty with respect to how the right to not speak functions, the Court's articulated justification for its holding suggests the decision may not be so far-reaching. Cases developing the modern invocation requirement, including *Salinas*, each pertain to a suspect's silence *in the face of police questioning*.[211] In those settings, the rule makes good sense because suspects subjected to police questioning are arguably better positioned to bear the burden of placing police officers on notice that they want that questioning to end.[212]

This justification, however, does not apply to the postarrest setting because, in the space between arrest and *Miranda* warnings, police questioning cannot actually occur—at least if it is to produce evidence admissible for trial. From the moment suspects enter police custody, they receive protection from unwarned custodial interrogation in two ways. First, they are excused from having to invoke their Fifth Amendment right to remain silent if questioning occurs.[213] Second, any statements obtained through such questioning are deemed presumptively coerced and inadmissible at trial.[214] To be sure, the postarrest setting features other types of interactions between police officers and in-custody suspects.[215] However, these interactions do not contain the element of investigatory police questioning about which the Supreme Court expressed concern in its prior invocation cases.[216] The postarrest setting

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210. Compare supra notes 99–107 and accompanying text (explaining *Salinas*), with supra notes 200–209 and accompanying text (describing functional differences between sub-rights of right to remain silent). This is precisely what was so groundbreaking and controversial about *Salinas*.

211. See *Salinas*, 133 S. Ct. at 2178, 2183 (plurality opinion) (finding defendant "did not expressly invoke the privilege against self-incrimination *in response to the officer's question*" and holding "constitutional right *to refuse to answer questions* depends on [informing officers of] reasons for doing so" (emphasis added)); *Berghuis*, 560 U.S. at 382 (finding defendant failed to make unambiguous statements "invok[ing] his 'right to cut off *questioning*'" (emphasis added) (quoting Michigan v. Mosley, 423 U.S. 96, 103 (1975))); Davis v. United States, 512 U.S. 452, 462 (1994) (holding "*questioning* may continue" in absence of unambiguous request for counsel (emphasis added)); see also People v. Tom, 331 P.3d 303, 328 (Cal. 2014) (Liu, J., dissenting) (noting rule "derive[s] from case law addressing what a suspect must do . . . *in the face of questioning by law enforcement*").

212. See supra section I.C (describing law enforcement rationale).

213. See *Salinas*, 133 S. Ct. at 2180 (plurality opinion) ("[A] suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege." (quoting Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966))); see also supra notes 109–111 and accompanying text (identifying exceptions to *Salinas*'s invocation rule).

214. See supra notes 3–4, 43–45 and accompanying text (explaining *Miranda*'s prophylactic rule).

215. See supra notes 126–130 and accompanying text (describing types of interactions between police officers and in-custody suspects).

216. Factually, the cases establishing the law enforcement rationale for invocation involved questions posed by police officers that directly confronted the issue of the

therefore solely implicates the right to not speak because there is no police questioning to cut off. Even if the *Salinas* logic marks a partial rebuke of Professor Sacharoff's theory, the justification underlying this doctrinal shift does not apply to postarrest cases. Absent police questioning, the rule serves no purpose because invoking the right to officers lacking an information-seeking motive is not "materially different from simply remaining silent."[217]

It should be noted that, in practice, there might actually exist police interrogations in the narrow space between arrest and *Miranda* warnings. *Miranda* announced "a rule of admissibility only" that "addresse[d] courts, not police"; if officers "are willing to suffer the exclusionary consequences, they can disregard the *Miranda* rules without violating the Constitution."[218] However, these practical realities cannot justify an express invocation requirement in postarrest settings. *Salinas* explicitly declined to fault suspects for failing to invoke their rights during unwarned custodial interrogations.[219] To the extent that a suspect's silence occurs while officers are attempting to circumvent *Miranda*, it would seem irreconcilable for courts to adopt a pro law enforcement invocation procedure that facilitates this tactic while still maintaining fidelity to the *Miranda* framework.

Ultimately, there exists a number of reasons why an express invocation requirement lacks sound justification in the time after arrest but before *Miranda* warnings. Part III argues, on these grounds, that an invocation requirement should not apply to postarrest cases and that current rules barring the use of silence as evidence of guilt should be allowed to operate unimpeded.

## III. PROTECTING SILENCE BETWEEN ARREST AND *MIRANDA* WARNINGS

Part III of this Note proposes a solution to the problematic implications of express invocation in the postarrest setting. Section III.A proposes to dispense with the requirement at the time of arrest, while

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suspect's guilt. See supra section I.C (providing facts of invocation cases and accompanying rationales).

217. People v. Tom, 331 P.3d 303, 324 (Cal. 2014) (Liu, J., dissenting) ("Was [Tom] required to approach an officer on his own initiative and blurt out, 'I don't want to talk'? . . . What purpose would that have served, since no police officer was trying to question him?"); see also Herrmann & Speer, supra note 77, at 11, 20–21 (distinguishing "pure silence" at time of arrest from adoptive admission of accusatory statement, on ground that "'adoptive admissions' require[] there to be something to adopt").

218. Steven D. Clymer, Are Police Free to Disregard *Miranda*?, 112 Yale L.J. 447, 450 & n.9 (2002). One common police practice is to postpone *Miranda* warnings at the outset of an interrogation and "wait until . . . the suspect is willing to make a statement." Id. at 522. This technique reduces the risk of invocation and might also preserve prosecutors' ability to impeach with silence at trial. Id.; see also Weisselberg, supra note 186, at 1562 (describing ways police may circumvent *Miranda* warnings).

219. See also supra notes 110–111, 213 and accompanying text (identifying exception to *Salinas*'s invocation rule for unwarned custodial interrogations).

section III.B explains that this solution imposes few additional burdens on law enforcement officers in the field—an issue of particular importance to the Supreme Court in its prior invocation cases.[220]

### A. *Dispensing with an Express Invocation Requirement Between Arrest and* Miranda *Warnings*

An express invocation requirement should not apply to the narrow space of time between arrest and the receipt of *Miranda* warnings.[221] Instead, this Note argues that a suspect's postarrest silence should be treated as the presumptive "exercise"[222] of the right to not speak and therefore should not result in the forfeiture of that right at trial.[223] While this rule does not address directly the underlying constitutionality of adverse inferences of guilt from silence—which scholars and courts already have debated at length[224]—it nevertheless carries real implications for many criminal defendants. Indeed, for state and federal jurisdictions that categorically prohibit prosecutors from using postarrest silence to raise an adverse inference of guilt in their case-in-chief,[225] dispensing with invocation preserves the integrity of these exclusions and prevents prosecutors from easily circumventing their protections on the basis of an unrealistic procedural requirement.[226]

In particular, this Note argues that, in the postarrest setting, the theoretical distinction between invocation and waiver should be preserved.[227] In advancing this argument, this Note builds upon Professor Sacharoff's conceptualization of the right to remain silent. Where a criminal suspect has simply remained silent in the face of arrest and has not been subjected to investigatory questioning, she should have no additional obligation to invoke her rights in order to avoid forfeiting

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220. See supra section I.C (explaining law enforcement rationale in cases developing invocation requirement).

221. This Note therefore disagrees with the conclusion reached by the California Supreme Court. See *Tom*, 331 P.3d at 305 (holding defendants "need[] to make a timely and unambiguous assertion of the privilege in order to benefit from it," even in the space between arrest and *Miranda* warnings).

222. Misuse of the terms "invocation" and "waiver" contributes significantly to the confusion in this area of the law. Supra section II.C.3. Fifth Amendment cases would benefit from greater differentiation between these concepts and the *Miranda* sub-rights to which they correlate. This Note proposes treating silence at the time of arrest as an *exercise* of the right to not speak, which can be waived but need not be invoked.

223. See supra section I.C (describing operation of express invocation requirement).

224. See supra note 10 (providing examples of scholarship addressing underlying constitutionality of using suspect's postarrest silence as substantive evidence of guilt); supra notes 67–77 and accompanying text (explaining court splits).

225. See supra notes 160–161 and accompanying text (collecting cases).

226. See supra sections II.B–II.C (examining problematic application of invocation to postarrest setting).

227. See supra section II.C.3 (explaining mechanics of right to not speak and right to cut off questioning).

them at trial. On these facts, *only* the right to not speak has been implicated. While the precise moment at which the panoply of *Miranda*'s pretrial protections attach has not been explicitly identified,[228] some courts find that "custody and not interrogation is the triggering mechanism."[229] Thus, at the time of arrest, a suspect may exercise the right to not speak simply by remaining silent or may waive it in offering inculpatory statements;[230] but in either case, the suspect already possesses the right and need not audibly invoke it.

How can this understanding be doctrinally squared with *Salinas* and other invocation cases? While *Salinas* partially rejected Professor Sacharoff's thesis,[231] its reasons for doing so allow for the continued legitimacy of an invocation–waiver distinction at the time of arrest. The Supreme Court's invocation cases, by involving police interrogations, *simultaneously* implicated the right to not speak and the right to cut off questioning. Where *Miranda*'s two sub-rights are intertwined like this, *Salinas* requires suspects to invoke their rights and notify police officers of their intent to rely on the Fifth Amendment.[232] Thus, in interrogation settings, *Salinas* can be read as treating a failure to invoke the right to cut off questioning as a *de facto waiver* of the right to not speak. Two specific law enforcement interests underlie this doctrinal mixing. First, it ensures that interrogating officers understand why criminal suspects are silent and allows them an opportunity to cure self-incrimination concerns without undue delay to the investigation.[233] Second, it incentivizes suspects to make public their motives for "refus[ing] to answer questions," which "courts need to know . . . to evaluate the merits of a

228. See Kerr, supra note 13 (noting right to remain silent has "always been a bit of a puzzle" as to what exactly "that right means or when it is triggered"). Police officers' obligation to advise suspects of their *Miranda* rights arises only in instances of custodial interrogation. See Allen et al., supra note 99, at 794–811 (3d ed. 2011) (explaining prerequisites of "custody" and "interrogation" for warning obligation). However, the doctrine does not clearly identify when the Fifth Amendment permits a suspect to preemptively assert those rights in the absence of *Miranda* warnings.

229. United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997). But see United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991) (recognizing prosecution may comment on defendant's silence if it occurred before *Miranda* warnings). In *Salinas*, the Supreme Court did nothing to dispel this idea. In fact, the decision may be read to support the idea that once a suspect is in custody and is no longer "free to leave," the suspect might fall under *Miranda*'s purview and receive the benefit of its protections. Cf. Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (plurality opinion) (noting absence of custody "place[d] petitioner's situation outside the scope of *Miranda*").

230. See Sacharoff, supra note 198, at 560 (finding situation where suspect remains silent and neither audibly waives nor invokes her rights "presents no trouble with respect to the liberty not to speak" because simply remaining silent "exercises that very liberty").

231. See supra notes 210–212 and accompanying text (explaining how *Salinas* partially rejected Professor Sacharoff's conceptualization of *Miranda*'s two sub-rights).

232. See supra notes 99–107 and accompanying text (explaining *Salinas*'s holding and rationale).

233. See supra notes 103–107 and accompanying text (explaining specific law enforcement concerns).

Fifth Amendment claim."[234] Either reason, though, assumes that suspects actually have had a realistic opportunity to assert their rights. That is, where suspects could have claimed their right to cut off police questioning but failed to do so, it makes sense for courts to assume no self-incrimination concerns actually existed during their interrogation.[235]

The crux of this Note's argument is that no logically equivalent opportunity exists during the period of time after arrest but before *Miranda* warnings. As shown in section II.C, the postarrest setting contains three features distinguishing it from other segments of the pretrial investigation process: the arrest itself, which imposes some pressures on suspects to remain silent;[236] the absence of *Miranda* warnings, which otherwise remind suspects they have rights to invoke;[237] and the lack of police questioning, at least of the type capable of producing evidence for trial.[238] Without any questioning to cut off in the first place, *Salinas*'s de facto waiver rationale lacks sound justification. At least one jurisdiction already has hinted that the absence of questioning might be sufficient grounds for distinguishing *Salinas* in the postarrest setting.[239] Suspects should not be faulted for failing to invoke their right to not speak when police have not prompted such an assertion or when the factual circumstances do not place notice to police officers at issue.[240]

This Note's proposed rule, in effect, defers the decisionmaking process of in-custody suspects until after they have received *Miranda* warnings, at which point constitutional law assumes "'full comprehension

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234. *Salinas*, 133 S. Ct. at 2183 (plurality opinion).

235. See id. (plurality opinion) ("In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing." (citing Minnesota v. Murphy, 465 U.S. 420, 427–28 (1984))).

236. See supra notes 185–192 and accompanying text (explaining how fact of arrest potentially makes audible invocation of suspects' protections less likely).

237. See supra notes 194–197 and accompanying text (examining effect of *Miranda* warnings on invocation calculus). In practice, law enforcement officers may be wary about advising suspects of their *Miranda* rights precisely because receipt of the warnings can result in the invocation of those rights and thereby foreclose anticipated information-gathering interrogations. See Clymer, supra note 218, at 516 (noting risk to law enforcement that suspects receiving warnings will claim protections).

238. See supra notes 213–217 and accompanying text (explaining constitutional prohibition on unwarned custodial interrogations, which can occur but cannot be used against suspect at trial).

239. See State v. Krancki, 851 N.W.2d 824, 830 (Wis. Ct. App. 2014) ("In contrast to *Salinas,* Krancki was *never asked* whether he was or was not the driver, and therefore, Krancki had *no opportunity* to affirmatively assert his Fifth Amendment right to remain silent in response to that question." (emphasis added)); see also People v. Tom, 331 P.3d 303, 330 (Cal. 2014) (Liu, J., dissenting) ("Tom's silence about the crash victims did not occur in response to police questioning. The dispute does not involve an effort by the government to obtain incriminating information . . . . [T]he state can hardly suggest it had 'no substantial reason to believe' Tom remained silent for fear of self-incrimination.").

240. See *Tom*, 331 P.3d at 330 (Liu, J., dissenting) (finding invocation unnecessary in postarrest settings because "no similar problem of notice" exists).

of the rights to remain silent and request an attorney.'"[241] Here, suspects in theory are better positioned to decide whether to exercise their rights and, in fact, the warnings essentially prompt them to do so.[242] The warnings' familiar refrain—"that anything said can and will be used against the individual in court"[243]—reminds criminal suspects that they are under a police microscope and brings to the fore any self-incrimination concerns they may have. Moreover, waiver forms used by law enforcement agencies typically require suspects to certify both their understanding of their rights and their desire to speak with officers.[244] If there is any logical time for suspects to anticipatorily invoke their right to cut off police questioning—for example, by saying they do not want to talk to officers or by requesting the presence of counsel[245]—it is at the moment they are reminded of that right's existence.[246] This is not to say that police officers should be required to immediately provide *Miranda* upon arrest. Practical realities frustrate such a rule, and police officers may have compelling reasons for delaying warnings.[247] But until warnings are received, the burden should not lie with suspects to affirmatively claim their right not to speak in order to avoid having their silence used against them at trial.

In jurisdictions already affording constitutional protection against the substantive use of postarrest silence at trial, this Note's proposed rule bars the use of certain evidence that might otherwise be available to prosecutors under a more robust *Salinas* doctrine. These exclusionary consequences, while perhaps rare, are not unprecedented. Indeed, courts on several occasions have provided for the categorical exclusion of perfectly relevant evidence when it runs up against important constitutional considerations.[248] The rule advanced here protects one such

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241. Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

242. Cf. Meghan Morris, The Decision Zone: The New Stage of Interrogation Created by *Berghuis v. Thompkins*, 39 Am. J. Crim. L. 271, 271 (2012) (identifying "decision zone," defined as "period, however brief or prolonged, after officers have read a suspect his rights but before the suspect has decided whether to waive or to invoke those rights").

243. Miranda v. Arizona, 384 U.S. 436, 469 (1966).

244. See Wayne R. LaFave et al., Criminal Procedure § 6.8(c), at 392 (5th ed. 2009) (suggesting best practice includes providing suspect with written copy of *Miranda* warnings and explaining "it must be shown that the defendant could and did read the warnings and that he acknowledged an understanding of them").

245. See supra note 81 (explaining effect of invoking right to silence versus right to counsel).

246. But see Richard Rogers et al., An Analysis of *Miranda* Warnings and Waivers: Comprehension and Coverage, 31 Law & Hum. Behav. 177, 181, 186 (2007) (describing results of study in which, of 560 jurisdictions, 98.2% provide no express warning to suspects indicating they may cut off interrogation by request).

247. See supra note 218 and accompanying text (describing practice of questioning outside of *Miranda*).

248. See generally Bruton v. United States, 391 U.S. 123 (1968) (excluding nontestifying codefendant's confession implicating defendant as violation of Sixth

instance. Although silence at the time of arrest may be relevant to and probative of a defendant's guilt,[249] allowing prosecutors to use this silence would penalize a defendant for asserting her Fifth Amendment protections. To be sure, there are many reasons one might decide not to speak with police officers, but at the time of arrest there is a much greater likelihood that this silence implicates the Fifth Amendment.[250] *Salinas* admittedly rejected this sort of speculation about a suspect's motive, but it did so on the basis of overriding law enforcement interests. As this Note has shown, no equivalent interests apply in the postarrest setting. Given the risk that juries are "likely to assign much more weight to [a] defendant's . . . silence than is warranted,"[251] any resultant exclusion of postarrest silence rests on solid foundation. Dispensing with an invocation requirement preserves the integrity of this categorical exclusion.

### B. *An Assessment of the Implications for Law Enforcement*

As a final matter, how would this Note's proposed rule—dispensing with an express invocation requirement for the right to not speak between arrest and *Miranda* warnings—affect law enforcement officers working in the field? One of the concerns "clearly animating" the Supreme Court's invocation cases is the "desire not to hamper law enforcement by foreclosing a valuable opportunity to question the suspect."[252] To be sure, treating postarrest silence as the presumptive exercise of the right to not speak might significantly affect prosecutors in jurisdictions holding that the Fifth Amendment, when claimed, bars the use of such silence at trial. But would this rule significantly alter police practices or place officers at a disadvantage?

Allowing suspects, at the time of arrest, to exercise their rights through silence alone would not significantly affect police investigative efforts. In some cases, invocation can serve an important role in minimizing potentially serious burdens on police officers that seek

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Amendment's Confrontation Clause); Miranda v. Arizona, 384 U.S. 436 (1966) (excluding defendant's incriminating statements obtained by police during incommunicado custodial interrogations in violation of Fifth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (excluding physical evidence obtained by police through search and seizure in violation of Fourth Amendment).

249. The probative value of a suspect's silence remains a matter of some dispute. See supra notes 22–24 and accompanying text (noting longstanding belief that silence in face of accusation indicates guilt, but citing cases and scholars arguing suspects may have other reasons for remaining silent).

250. See People v. Tom, 331 P.3d 303, 331 (Cal. 2014) (Liu, J., dissenting) ("[A] suspect's silence after being arrested gives rise to a much stronger inference of reliance on the Fifth Amendment privilege than a witness's noncustodial silence . . . .").

251. United States v. Hale, 422 U.S. 171, 180 (1975).

252. Strauss, Sounds, supra note 44, at 809–14; see also supra notes 103–107 and accompanying text (describing law enforcement rationale for express invocation requirement).

information from criminal suspects. For example, if ambiguous silence sufficed to exercise the Fifth Amendment, then police officers would be forced to end questioning anytime they think a suspect *might* have self-incrimination concerns,[253] even if in reality she actually did not.[254] But consider again the type of silence occurring in the postarrest setting, where no police questioning capable of producing admissible evidence occurs. In these cases, a suspect's silence may entail the failure to "look surprised"[255] or to challenge the reasons for arrest.[256] Such cases do not involve silence in response to police officers' targeted questions seeking crucial information about a suspect's guilt or innocence[257]—that is, the important investigative moments that could warrant clarification of a suspect's motives before presuming assertion of the Fifth Amendment.[258] In this way, postarrest silence does not appear to burden arresting officers in any discernible way.[259] It might confirm police suspicions and allow officers to focus on a single suspect, but these suspicions would

253. See, e.g., Davis v. United States, 512 U.S. 452, 462 (1994) ("[W]e are unwilling . . . to prevent police questioning when the suspect *might* want a lawyer."). Some courts have also expressed concern about allowing suspects to selectively answer only some questions and have their silence protected in response to others. See, e.g., United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002) (holding once suspect waives *Miranda* rights by participating in interrogation with police, *entire* conversation is admissible and prosecutors may note any refusal to answer questions); see also Stephen Rushin, Comment, Rethinking *Miranda*: The Post-Arrest Right to Silence, 99 Calif. L. Rev. 151, 163–69 (2011) (describing selective invocation and collecting cases). Courts might circumvent the problem and still permit the use of such evidence at trial by interpreting a suspect's selective silence as seeking to change the subject with police officers, rather than as exercising the Fifth Amendment privilege. See Strauss, Sounds, supra note 44, at 796–99 (providing interpretations of selective silence).

254. See Salinas v. Texas, 133 S. Ct. 2174, 2182 (2013) (plurality opinion) (finding suspect might be silent "because he is trying to think of a good lie, . . . embarrassed, or . . . protecting someone else"); see also supra notes 22–24, 249 (describing ambiguous nature of silence and other reasons why suspect might remain silent in response to police questioning).

255. United States v. Moore, 104 F.3d 377, 384 (D.C. Cir. 1997).

256. See State v. Terry, 328 P.3d 932, 936–38 (Wash. Ct. App. 2014) (finding postarrest silence when defendant did not ask why he was arrested).

257. See, e.g., *Salinas*, 133 S. Ct. at 2178 (plurality opinion) (describing silence in response to police officer's question about whether gun would match casings found at crime scene); Berghuis v. Thompkins, 560 U.S. 370, 374–76 (2010) (describing silence in response to questions about involvement in homicide). In those cases, the suspects' silence was unclear but also pertinent to the police officers' investigations.

258. Notice of the suspect's motives prevents officers from having to decipher the silence itself or weigh the exclusionary consequences of guessing incorrectly about the existence of self-incrimination concerns. See supra notes 103–107 and accompanying text (describing law enforcement rationale for express invocation requirement).

259. In the postarrest setting, there is no comparable risk of proceeding without clarification because any evidence obtained before *Miranda* warnings would already be inadmissible. See supra notes 42–46, 218–219 and accompanying text (explaining *Miranda*'s exclusionary rule for statements obtained during unwarned custodial interrogations).

exist with or without audible invocation of the right to not speak. There also is no risk of prematurely terminating an interrogation because none is ongoing.[260] Thus, the decision to either stay mute or audibly invoke the right to not speak at the time of arrest provides officers with the same information without the associated cost to the defendant at trial.

Moreover, while this Note's proposed rule might incentivize police officers to provide *Miranda* warnings sooner in order to "start the clock" for obtaining evidence admissible at trial, this would neither bind nor burden law enforcement. Like *Miranda* itself, a limit on the use of silence as evidence of guilt "addresses courts, not police."[261] Assuming that the ability of prosecutors to comment on postarrest silence does not factor significantly into police decisions about when to provide *Miranda* warnings,[262] officers remain free to engage in police tactics that the Supreme Court has so far allowed.[263] Even if police officers feel some pressure to provide warnings sooner, this does not necessarily pose any additional burden. Indeed, empirical studies show that even after receiving warnings, most criminal suspects do in fact waive their rights and agree to interrogation.[264] Police practices would likely continue unimpeded in the absence of invocation, thereby undermining a major justification for requiring invocation offered by the Supreme Court in *Salinas* and other cases.

This Note's proposed rule may incentivize certain police practices that are harmful toward criminal suspects, but these concerns are likely unfounded. Many scholars have noted the growing trend of police officers circumventing *Miranda*'s protections by using noncustodial interrogations—where criminal suspects are without many of their constitutional protections and, per *Salinas*, where silence in the absence of invocation may be used as evidence of guilt—in lieu of custodial interrogations.[265] To the extent this Note's proposed rule deprives

260. See supra notes 124–125, 213–219 and accompanying text (describing limits to police questioning in postarrest setting).

261. See Clymer, supra note 218, at 495 (interpreting *Miranda*'s protections as binding on courts only).

262. But see United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) (arguing rule allowing prosecutorial comment on postarrest silence "would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant").

263. See, e.g., Clymer, supra note 218, at 522 (examining costs and benefits for police officers subjecting suspects to unwarned custodial interrogations); Weisselberg, supra note 186, at 1547–63 (explaining how police officers may blur "administration of *Miranda* warnings" and "use of interrogation tactics" in ways that fail to minimize "compelling pressures" as *Miranda* Court envisioned).

264. See Clymer, supra note 218, at 515–16 ("[T]here is agreement that most suspects do waive their rights and make statements . . . after receiving *Miranda* warnings."); supra note 196 (citing studies showing approximately 81% of criminal suspects waive their rights even after receiving *Miranda*).

265. Police officers frequently replicate the compelling pressures of custodial interrogation in settings where the suspect is technically free to leave. For example,

prosecutors of silence-based evidence, police officers might see greater advantages in delaying custody altogether. However, it seems unlikely that dispensing with invocation at the postarrest stage would actually accelerate this ongoing trend; indeed, recent studies of police training manuals indicate that "officers are now consistently trained" to engage in noncustodial questioning where possible.[266]

Dispensing with invocation at the time of arrest not only imposes minimal effects on police officers in the field, but it also promises to benefit defendants in the courtroom. In many jurisdictions,[267] this Note's proposed rule would have the practical effect of preventing prosecutors from drawing adverse inferences of guilt from postarrest silence. However, between arrest and *Miranda*, there are a number of reasons—ranging from the innocent to the guilty—why a defendant may be silent. Some of the evidence lost might actually be inconclusive of guilt and therefore would have risked extreme prejudice if placed in front of a jury.[268] Other evidence might bear directly on the issue of guilt, but in doing so it risks implicating the Fifth Amendment and penalizing suspects for exercising their right to remain silent. While courts remain split on how to resolve the use of this evidence as a constitutional matter,[269] in either case, the use of postarrest silence as evidence of guilt may not be a practice worth continuing. This Note's proposed rule ensures that an ill-suited procedural requirement does not indirectly foreclose state and federal jurisdictions already reaching that conclusion.

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officers may bring suspects to the police station for interrogation, "intending to place suspects under formal arrest later and knowing that the suspects *actually believe* they are in custody," but still use "*Beheler* admonishments" to assure them that they are free to leave at any time. Weisselberg, supra note 186, at 1542–47. This practice permits police to question suspects without providing *Miranda* warnings. Some scholars argue that *Beheler* admonishments do not actually make interrogations "less coercive." E.g., id. at 1547. Other scholars note additional dangers arising from non-custodial interrogations. See Garrett, supra note 79, at 118 (arguing *Salinas* "encourages police to question suspects in informal settings" that "lack clear rules" and "are not documented and therefore prone to the dangers of confession contamination").

266. Weisselberg, supra note 186, at 1547.

267. See supra notes 160–161 and accompanying text (listing jurisdictions' positions on constitutionality of adverse inferences from postarrest silence).

268. The Supreme Court has noted the danger that a "jury is likely to assign much more weight to [a] defendant's previous silence than is warranted[,] and permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference" resulting from that silence. United States v. Hale, 422 U.S. 171, 180 (1975); see also Meaghan Elizabeth Ryan, Note, Do You Have the Right to Remain Silent?: The Substantive Use of Pre-*Miranda* Silence, 58 Ala. L. Rev. 903, 916–18 (2007) (examining probative value of silence). When intimidation, rather than fear of self-incrimination, underlies a suspect's decision to not speak at the time of her arrest, then the use of this evidence can have grave consequences for her defense.

269. See supra notes 67–77 and accompanying text (explaining division among courts).

## CONCLUSION

The Supreme Court's express invocation requirement should not be extended into the postarrest setting. This Note does not dispute the wisdom of applying such a requirement to voluntary interviews and custodial interrogations. In those instances, the Supreme Court has identified a clear law enforcement justification that outweighs the merits of unburdened access to the privilege against self-incrimination.

This Note does, however, challenge the expansion of the requirement beyond its original terms. The space of time between arrest and *Miranda* warnings contains certain features that raise serious doubts about whether suspects actually will invoke their privilege against self-incrimination, even when they in fact rely on it. The Supreme Court has not yet decided whether the Fifth Amendment is violated by the practice of using a criminal suspect's postarrest silence to raise an adverse inference of guilt. The *Salinas* decision suggests, though, that if the current Court has the opportunity to hear a case on the matter, the justices will be divided. In the interim, defendants across the nation should be allowed to rely on their jurisdictions' own constitutional determinations of the issue. Defendants' protections should not be forfeited by an ill-suited procedural requirement that sets an unrealistically high bar at the time of arrest.