

PROBING INTO SALINAS’S SILENCE: BACK TO THE “ACCUSED SPEAKS” MODEL?

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INTRODUCTION

In the recent case of *Salinas v. Texas*, the United States Supreme Court was presented, for the first time, with the question of whether the Fifth Amendment’s Self-Incrimination Clause allows the prosecution to admit a non-testifying defendant’s silence during pre-arrest, pre-*Miranda* police questioning as substantive evidence of guilt at trial.¹ There has been a division of authority over this question among the United States courts of appeals for a long period,² and the time was ripe for a definite ruling on the matter by the Court.

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¹ *Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013).

² *Compare, e.g.*, *United States v. Rivera*, 944 F. 2d 1563, 1568 (11th Cir. 1991) (allowing the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt), *with* *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (holding that the use of a defendant’s pre-arrest

However, the 5-4 plurality decision, authored by Justice Alito, avoided ruling on this question and instead decided the case on a technicality. The Court held that the government was allowed to introduce petitioner's silence in its case-in-chief because he had not explicitly invoked his rights under the Fifth Amendment. Thus, the question of whether the prosecutor and the judge may refer to a non-testifying defendant's silence during a non-custodial police interview as substantive evidence of guilt when the suspect does "plead the Fifth" remains unresolved. By so holding, not only did the Court refrain from resolving the broader constitutional question and the split among the lower courts, but it also significantly undermined the Fifth Amendment's protection against self-incrimination. This holding weakened the amendment's protection by, *inter alia*, failing to draw a distinction between witnesses, who are obliged to answer, and accused persons, who may refuse to respond and may challenge the prosecution's case by silence. The Court's narrow interpretation of the privilege also has significant implications for the conduct of investigations. It might lead to pre-arrest questioning becoming the norm and incentivize the manipulative delaying of *Miranda* warnings and custody until after the interrogation, thus largely obviating Fifth Amendment protections.

The analysis of the Court's decision and its implications raises two distinct questions. The first is whether the Fifth Amendment protects the right to silence of an accused person who is not under arrest and who has not yet been read his *Miranda* rights, and if so, whether he may enjoy the right without its explicit invocation. The second question is whether admissibility of pre-arrest silence as evidence of guilt against a non-testifying defendant violates the privilege against compelled self-incrimination. This article argues that the answer to both questions should be in the affirmative.

Permitting adverse inferences from silence carries a clear and unambiguous message of guilt. Leonard Levy, in his seminal book on the origins of the Fifth Amendment, notes that throughout seventeenth-century common law, "[t]here was not yet any recognition of the fact that refusal to answer an incriminating question did not imply guilt."³ Without recognition of the conceptual development that the criminal justice system has gone through since that period—from the notion that the accused must speak, to the notion that the prosecution must meet its burden of proof in order to obtain convictions—it is difficult to sustain the privilege against self-incrimination.

In view of this conceptual development, this article argues that pre-arrest, pre-*Miranda* silence should not be used as evidence of guilt, notwithstanding

silence as substantive evidence of guilt violates the Fifth Amendment's privilege against Self Incrimination). For a detailed overview of the conflicting decisions of the federal courts, see Christopher Macchiaroli, *To Speak Or Not to Speak: Can Pre-Miranda Silence Be Used as Substantive Evidence of Guilt?*, CHAMPION, Mar. 2009, at 14, 16–19.

³ LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 283 (1968).

the explicit invocation of the privilege or the lack thereof. This argument is built on two pillars, each of which is sufficient to sustain this conclusion. The first pillar refers to the status of a person as a suspect. Leveling accusations by law enforcement authorities against a person, even if she is not warned and is not held in custody, creates a situation of conflict. Accordingly, the state cannot resort to its adversary for assistance. In the face of accusations, a person may legitimately cut off any contact with his accusers. He should not be compelled to explain his decision and should have no duty to expressly invoke the privilege against self-incrimination. Rather, the privilege should be implied from the very status of being an accused. The second pillar refers to the burden of proof imposed upon the state. The state—through its law enforcement agencies—bears the burden of proof throughout the criminal process, and it should take into account that the accused person may elect silence as a defense strategy. Choosing to remain silent either during police questioning or during the trial constitutes a statement that the emphasis should be placed on the prosecution's evidence rather than on the defendant's version. Such a statement is consistent with the above-mentioned historical development of the right to silence.

Part I of this article presents a brief overview of the relevant areas of the Supreme Court's silence jurisprudence and the rules regarding adverse trial inferences drawn from pre-arrest, pre-*Miranda* silence. Part I also examines the facts of *Salinas v. Texas* and the Court's holding there. Part II discusses the invocation requirement, arguing that the Court's proposed justifications for requiring explicit invocation of the privilege are inapplicable to the factual situation presented in *Salinas*. This part also argues that in the face of accusations, when there is a conflict between the state and the individual, the privilege should be self-executing. Part III of the article focuses on the probative value of pretrial silence. It argues that silence does not indicate guilt and that allowing adverse inferences does not promote the truth-seeking purpose of the trial as their use is highly prejudicial. It further argues that considering silence as part of the prosecution's evidence is inconsistent with the presumption of innocence. Part IV discusses the applicability of the Fifth Amendment to pre-arrest, pre-*Miranda* silence and the implications of refusal to speak in the face of accusations. It argues that in light of the ambiguity of silence, and given that non-custodial police questioning is not necessarily less coercive than custodial interrogations, drawing adverse inferences from silence when a person is confronted with police questioning as a suspect is unconstitutional. Part V of the article discusses the historical shift from the "accused speaks" approach to the theory of "testing the prosecution," and it analyzes the significance of the burden of proof in light of the complexity of choosing silence at the pretrial stage. It also considers the rationales for distinguishing between the use of silence for impeachment purposes and its use in the prosecution's case-in-chief, arguing that the latter is prohibited as the prosecution must meet the burden of proof by its own independent labors. Finally, the article concludes that drawing adverse inferences from a suspect's pre-arrest, pre-*Miranda* silence against non-testifying

defendants violates the Fifth and the Fourteenth Amendments, whether the suspect affirmatively asserted the privilege or not.

I. THE SUPREME COURT'S SILENCE JURISPRUDENCE:
FROM *MIRANDA* TO *SALINAS*

A. *Pre-Salinas Holdings Regarding the Use of Pretrial Silence*

The plurality's holding in *Salinas* avoided the question of whether pre-arrest, pre-*Miranda* silence is admissible evidence in the prosecution's case-in-chief against a non-testifying defendant who asserted his privilege during a police interview. Until *Salinas*, the Court admitted a defendant's pre-*Miranda* silence only for impeachment purposes. There has been a split of authority between the lower courts regarding the question of whether adverse inferences from pre-*Miranda* silence can be drawn against non-testifying defendants as substantive proof of guilt.⁴

As far as silence at trial is concerned, the prohibition on adverse inferences is clear. In *Griffin v. California*, the Court held that prosecutorial or judicial comment on the defendant's failure to testify at trial as tending to prove guilt is prohibited since it violates the Self-Incrimination Clause of the Fifth Amendment.⁵ The Court later held, in *Carter v. Kentucky*, that a defendant, upon request, has a right to a judge's instruction to the jury not to draw any adverse inferences from his silence at trial.⁶ In *Griffin*, the Court did not specify the nature of the coercion embodied in directing the jury's attention to the defendant's silence, but rather held that a comment on silence "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."⁷ The holding in *Griffin* does not seem to be based on a concern for coercion to speak, but rather on the worry that a defendant would be obliged to provide the prosecution incriminating evidence if he exercises the right not to testify.⁸

The Court in *Miranda* held, albeit in dicta, that an accused person's constitutional right to remain silent implies that no weight would be attributed to her silence in evaluating the incriminating evidence brought against her.⁹ In *Doyle*

⁴ See *supra* note 2.

⁵ *Griffin v. California*, 380 U.S. 609, 615 (1965).

⁶ *Carter v. Kentucky*, 450 U.S. 288, 303–05 (1981).

⁷ *Griffin*, 380 U.S. at 614.

⁸ See Lisa Louise Savadjian, Student Scholarship, *Silence Should Not Speak Louder than Words: The Use of Pre-Arrest, Pre-Miranda Silence as Substantive Evidence of Guilt*, SETON HALL LAW EREPOSITORY (May 1, 2013), http://erepository.law.shu.edu/student_scholarship/299.

⁹ *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966) ("In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.").

v. *Ohio*, the Court explicitly held that commenting on a defendant's pretrial silence after she has been taken into custody and warned pursuant to *Miranda* for impeachment purposes is constitutionally forbidden.¹⁰ The Court explained this holding based on the Fourteenth Amendment's Due Process Clause:

Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.¹¹

The Court recognized one understandable exception: evidence of post-*Miranda* silence is allowed to impeach the defendant's testimony that contradicts the very fact of silence.¹² In *Wainwright v. Greenfield*, the Court reiterated the unfairness embodied in taking post-*Miranda* silence into account and barred the substantive use of post-warning custodial silence to prove guilt.¹³ *Wainwright*, *Miranda*, and *Doyle* are applicable only to the use at trial of an accused's silence following a Mirandized custodial interrogation. The courts were thus left to determine whether adverse inferences could be drawn from a defendant's silence arising in two other pretrial scenarios: first, before custody and *Miranda* warnings; and second, after custody but before *Miranda* warnings.¹⁴ However, the Court has addressed each of these scenarios only with regard to the use of silence for impeachment purposes against testifying defendants.

In *Jenkins v. Anderson*, the defendant turned himself in two weeks after committing a murder; only at trial did the defendant claim that he acted in self-defense after being attacked.¹⁵ In closing argument, the prosecutor argued that the defendant's failure to report the alleged attack cast doubt on his claim to have acted in self-defense. The Court held that the use of this unusual form of pre-arrest, pre-*Miranda* silence to impeach the defendant's credibility did not violate either the Fifth or the Fourteenth Amendments to the Constitution.¹⁶

¹⁰ *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

¹¹ *Id.* at 617–18 (footnote and citations omitted).

¹² *Id.* at 619 n.11.

¹³ *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (disallowing the use of post-*Miranda* silence to rebut defendant's claim of insanity).

¹⁴ See Jan Martin Rybnicek, *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, 407 (2009).

¹⁵ *Jenkins v. Anderson*, 447 U.S. 231, 233 (1980).

¹⁶ *Id.* at 238–39. While the majority emphasized the Due Process Clause, the concurrence of Justice Stevens rejected defendant's claim on Fifth Amendment grounds. *Id.* at 241 (Stevens, J., concurring).

The fact that Jenkins had not come forward to the police with his self-defense story was admitted in order to impeach his trial testimony.¹⁷ The Court emphasized that “the Constitution does not forbid ‘every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights,’ ”¹⁸ and that impeachment through pre-arrest silence “may enhance the reliability of the criminal process.”¹⁹ In the absence of *Miranda* warnings, there is no breach of promise that silence will not be used against the defendant, and thus no unfairness exists.²⁰

In *Fletcher v. Weir*, the Court continued this line of reasoning. Applying *Jenkins v. Anderson* to silence following an arrest, it held that impeaching defendants by their pretrial silence is constitutionally permissible if no *Miranda* warnings had been given.²¹ As in *Jenkins*, the defendant in *Fletcher* faced murder charges for which he later provided an exculpatory account at trial. According to *Fletcher*, silence of a custodial suspect whose questioning had not yet begun may be used to undermine the credibility of his testimony at trial. In both *Jenkins* and *Fletcher*, the Court did not rule on the question of whether, or under what circumstances, pre-*Miranda* silence may be used as substantive evidence of guilt against a non-testifying defendant.²² As the Court made clear, both of these cases presented significantly different circumstances from *Doyle*, because *Doyle*'s holding was mainly based “on the unfairness of explicitly representing to a suspect that he has the right to silence and then penalizing the suspect for exercising that right.”²³ *Miranda* warnings, regarded as embodying an implicit promise not to use a defendant's silence against him, are therefore the watershed for the prosecution's ability to impeach a testifying defendant's credibility by his pretrial silence. It is far from clear, however, whether it follows that the Fifth Amendment's right to remain silent should be triggered by *Miranda* warnings insofar as the use of a defendant's pre-arrest silence as evidence of guilt is concerned. Rather, it seems that a clear distinction should be drawn between these two doctrinal categories—the use of silence for the impeachment of a testifying defendant and the substantive use of silence against a

¹⁷ *Id.* at 233–34 (majority opinion).

¹⁸ *Id.* at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)).

¹⁹ *Id.* at 238.

²⁰ *Id.* at 239–40.

²¹ *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam).

²² *Jenkins*, 447 U.S. at 236 n.2.

²³ MCCORMICK ON EVIDENCE 266 (Kenneth S. Broun ed., 6th ed. 2006); see *Fletcher*, 455 U.S. at 605–07; *Jenkins*, 447 U.S. at 240.

non-testifying defendant²⁴—the latter situation requiring far greater protection than the former.²⁵

B. Salinas v. Texas: Facts and Opinion

Prior to *Salinas*, the Court had not been faced with the question of whether pre-*Miranda* silence can be admitted as substantive evidence of guilt against a non-testifying defendant. The case of *Salinas* arose out of the December 1992 homicide of two brothers at their home in Houston, Texas. An officer who arrived at the scene located shotgun shell casings around the doorway of the brothers' apartment.²⁶ The police were informed that Genovevo Salinas had attended a party at the apartment the night before the shooting.²⁷ Consequently, police officers interviewed Salinas and his father at their residence.²⁸ The officers told them that the interview was made in connection with a murder investigation.²⁹ Salinas and his father voluntarily answered the investigators' questions and consented to a search of their residence.³⁰ Salinas's father also handed over his shotgun to the officers upon their request.³¹ Subsequently, Salinas voluntarily agreed to accompany the police officers to the stationhouse for an interview.³² At the police station, during a noncustodial interview of nearly an hour, Salinas admitted that he knew the victims and that he had visited their residence several times, yet denied any disagreement with them.³³ He answered all the questions and remained silent only at one point, when asked if the shotgun shells found at the scene would match the shells of his father's shotgun.³⁴ After a few moments of silence, the police changed the subject and asked other questions that Salinas did answer. Following the interview, the interrogating officer arrested Salinas "on some outstanding traffic warrants."³⁵ However, the officer provided the following explanation at trial: "I had the opinion that he was being deceptive and lying to me and I wanted to hold on to him."³⁶ The

²⁴ See Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 922 (2012); see also *United States v. Moore*, 104 F.3d 377, 385–86 (D.C. Cir. 1997).

²⁵ See *infra* Part V; see also Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 35 (2008).

²⁶ *Salinas v. Texas*, 368 S.W.3d 550, 552 (Tex. App. 2011).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013).

³³ *Salinas*, 368 S.W.3d at 552.

³⁴ *Id.* at 552–53.

³⁵ *Id.* at 554.

³⁶ *Id.*

following day, a ballistics analysis identified a match between the casings from the murder scene and the shotgun owned by Salinas's father.³⁷ Salinas was charged only later, when a witness came forward and reported that Salinas had confessed to the murders.³⁸ Salinas did not testify at trial, and the prosecutor referred to his silence during police questioning only in passing. The trial resulted in a hung jury.³⁹ On retrial, Salinas refrained once again from testifying and the prosecutors, despite the defense's objection, were permitted to rely on his pre-arrest, pre-*Miranda* selective silence at closing arguments as evidence of his guilt, stating as follows:

The police officer testified that [Salinas] wouldn't answer that question. He didn't want to answer that. . . . You know, if you asked somebody—there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.⁴⁰

The jury found Salinas guilty of murder and sentenced him to twenty years in prison and a \$5,000 fine.⁴¹ Salinas appealed the decision, and the Texas courts of appeal affirmed the judgment, holding that the Fifth Amendment permitted the use of a non-testifying defendant's pre-arrest, pre-*Miranda* silence not only for impeachment purposes, but also as substantive evidence of guilt, stating that, "[a]bsent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of pre-arrest, pre-*Miranda* silence in the State's case-in-chief."⁴²

On discretionary review, the Texas Court of Criminal Appeals affirmed the conviction.⁴³ The Court of Criminal Appeals noted that different courts had reached conflicting decisions, and that "[n]early all of the courts that have addressed this issue have noted the conspicuous split and the lack of guidance from the Supreme Court."⁴⁴ The United States Supreme Court granted certiora-

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sidney Rosdeitcher & Katriana Roh, *Supreme Court Preview: The Right to Remain Silent*, BRENNAN CTR. FOR JUSTICE (Apr. 15, 2013), <http://www.brennancenter.org/analysis/supreme-court-preview-right-remain-silent>.

⁴⁰ *Salinas*, 368 S.W.3d at 556.

⁴¹ *Id.* at 554.

⁴² *Id.* at 558.

⁴³ *Salinas v. Texas*, 369 S.W.3d 176, 177 (Tex. Crim. App. 2012).

⁴⁴ *Id.* at 178–79. On this split, see also 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, 28–47 (2005).

ri to resolve the split of authority over the admissibility of pre-arrest, pre-*Miranda* silence against non-testifying defendants.⁴⁵

The plurality opinion written by Justice Alito, and joined by Chief Justice Roberts and Justice Kennedy, held that standing mute is not equivalent to asserting the privilege and that “a witness who desires its protection must claim it.”⁴⁶ Accordingly, since Salinas had not expressly invoked the privilege against self-incrimination when declining to respond during his police interview, he could not rely on the privilege to avoid inferences of guilt from his silence.⁴⁷ The Court distinguished the case before it from its prior rulings in *Griffin*⁴⁸ and *Miranda*,⁴⁹ in each of which it held that the privilege against self-incrimination forbids the prosecution from using a defendant’s silence during trial or custodial questioning as substantive evidence of guilt. The Court in *Salinas* held that *Griffin* and *Miranda* were the exceptions to the general rule that a person must expressly assert the privilege as a necessary condition for enjoying it, that he should provide a reason for refusing to answer, and that he must be clear that his answer might lead to self-incrimination. Justice Thomas, faithful to his aspiration to overrule the *Griffin* holding in the appropriate case,⁵⁰ issued a concurrence joined by Justice Scalia, opining that since the holding in *Griffin* was erroneous, there was no reason to extend its reach to other situations.⁵¹ Justice Breyer filed a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.

Absent a common ground for the decision, its value as a binding precedent is limited.⁵² However, as will be discussed below, the decision does affect the privilege against self-incrimination. Accordingly, this article now turns to the concerns created by the Court’s narrow interpretation of the right to silence and considers the implications of the invocation requirement on the question of whether pre-arrest, pre-*Miranda* silence should be admitted as substantive evidence of guilt.

II. THE INVOCATION REQUIREMENT: REMAINING SILENT BY SPEAKING

The plurality opinion of Justice Alito held that Salinas should have explicitly invoked the privilege in order to enjoy it,⁵³ but the decision lacked a clear

⁴⁵ *Salinas v. Texas*, 133 S. Ct. 928 (2013).

⁴⁶ *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (internal quotation marks omitted) (citing *Minnesota v. Murphy*, 465 U.S. 420, 425, 427 (1984)).

⁴⁷ *Id.* at 2178.

⁴⁸ *Griffin v. California*, 380 U.S. 609 (1965).

⁴⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁰ *Mitchell v. United States*, 526 U.S. 314, 343 (1999) (Thomas, J., dissenting).

⁵¹ *Salinas*, 133 S. Ct. at 2184.

⁵² *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000); *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁵³ *Salinas*, 133 S. Ct. at 2178.

ruling regarding the exact language that a suspect must use in order to invoke his Fifth Amendment rights during non-custodial police questioning.⁵⁴ Moreover, in rejecting the argument that “the invocation requirement does not apply where a witness is silent in the face of official suspicions,”⁵⁵ the Court failed to distinguish between a mere witness and a suspect facing accusations. Undoubtedly, “a witness does not [invoke the privilege] by simply standing mute.”⁵⁶ Whereas a mere witness has a duty to assist law enforcement agencies in seeking the truth by providing information,⁵⁷ a suspect bears no such obligation.

The Court’s distinction between pre-arrest and post-arrest silence—as far as the conditions for enjoying the privilege are concerned—is equally unpersuasive. The Court construed prior case law as establishing only two exceptions to the express invocation requirement. First, a criminal defendant need not take the stand and assert the privilege at his own trial. Second, a witness’s failure to invoke the privilege against self-incrimination must be excused where governmental coercion makes his forfeiture of the privilege involuntary.⁵⁸ The Court held that since Salinas’s interview with police was voluntary—as opposed to the interrogation of a custodial suspect—he could not benefit from the latter exception. However, as explained below, pre-arrest questioning may be as coercive as post-arrest interrogation. Therefore, the proposition that a suspect should not be required to explicitly invoke the privilege due to the coercive nature of the interrogation holds true to every conflict between the state and the individual in which the state levels criminal accusations towards the individual, whether pre- or post-custody.⁵⁹

Furthermore, the precedents that the plurality relied upon do not seem to substantiate its conclusion that non-custodial suspects must explicitly invoke the Fifth Amendment in order to enjoy it. The plurality’s ruling in this matter stands in contrast to the Court’s prior holding that “no ritualistic formula is necessary in order to invoke the privilege.”⁶⁰ As the dissent asserted, “[c]ircumstances, not a defendant’s statement, tie the defendant’s silence to the right.”⁶¹ Whenever a reasonable person may infer that a suspect intended, by his silence, to exercise the privilege, there should be no need to require explicit

⁵⁴ *Id.* at 2183; see also Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. CHI. L. REV. DIALOGUE 116, 121 (2013).

⁵⁵ *Salinas*, 133 S. Ct. at 2181–82.

⁵⁶ *Id.* at 2178.

⁵⁷ See Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 702–03 (1969); see also *United States v. Dionisio*, 410 U.S. 1, 9 (1973) (“It is clear that a subpoena to appear before a grand jury is not a “seizure” in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome”).

⁵⁸ *Salinas*, 133 S. Ct. at 2180.

⁵⁹ For a detailed discussion of the coercive nature of pre-custody questioning, see *infra* Part IV.

⁶⁰ See *Quinn v. United States*, 349 U.S. 155, 164 (1955).

⁶¹ *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting).

reference to the Fifth Amendment. The plurality relied heavily on *Roberts v. United States*,⁶² *Jenkins v. Anderson*,⁶³ and *United States ex rel. Vajtauer v. Commissioner of Immigration*,⁶⁴ interpreting these cases as requiring the application of the explicit invocation prerequisite to all instances of pre-arrest silence. However, the aforementioned cases presented unique circumstances in which the defendants' intentions were unclear, as none of the circumstances suggested reliance on the privilege, and in which it was particularly important for the state to know whether the defendants sought to rely on the Fifth Amendment.⁶⁵ These precedents are therefore far removed from the facts of *Salinas*. As the dissenting Justices aptly concluded:

Salinas need not have expressly invoked the Fifth Amendment. The context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station. Salinas was not represented by counsel. The relevant question—about whether the shotgun from Salinas' home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder.⁶⁶

The plurality, however, emphasized that “[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.”⁶⁷ The Court reasoned that the requirement of expressly invoking the privilege “ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating . . . or cure any potential self-incrimination through grant of immunity.”⁶⁸ However, this rationale applies only at the trial stage, as it is aimed at allowing the judge to make the necessary inquiries in order to determine whether reliance on the privilege was appropriate to the facts.⁶⁹ As the Court itself stated, “A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.”⁷⁰ The Court's proposed rationale for requiring explicit invocation of the privilege is therefore inapplicable to the interrogation stage.

What, then, might be the rationale for requiring explicit invocation of the right to silence at the pretrial stage? In order to answer this question, one should explore the origins of the invocation requirement. The explicit invocation rule had originally been crafted solely for the purpose of the right to coun-

⁶² *Roberts v. United States*, 445 U.S. 552, 559 (1980).

⁶³ *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

⁶⁴ *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927).

⁶⁵ See *Salinas*, 133 S. Ct. at 2188 (Breyer, J., dissenting).

⁶⁶ *Id.* at 2189.

⁶⁷ *Id.* at 2182 (plurality opinion).

⁶⁸ *Id.* at 2179.

⁶⁹ See MCCORMICK ON EVIDENCE, *supra* note 23.

⁷⁰ *Salinas*, 133 S. Ct. at 2183.

sel rather than the right to remain silent.⁷¹ In *Davis v. United States*, the Supreme Court held that a suspect's *Miranda* right to counsel must be invoked "unambiguously."⁷² If the accused refrains from invoking the right to counsel or if his statement is equivocal, the police are not required to cease the interrogation and may continue questioning him.⁷³ In *Berghuis v. Thompkins*, the Court extended the explicit invocation requirement to the right to remain silent, holding that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."⁷⁴ The Court in *Berghuis* reasoned that both rights "protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked."⁷⁵ In *Berghuis*, the defendant was in custody after being informed of his *Miranda* rights, and he was subsequently silent in the face of two hours and forty-five minutes of questioning before he made his inculpatory statements.⁷⁶ Defendant did not tell the police that he wished to remain silent. The Court held that the defendant's silence did not constitute invocation of the privilege and thus did not trigger his right to cut off the questioning. Accordingly, the Court concluded that the defendant's subsequent statements were admissible.

Although *Berghuis* had nothing to do with a prosecutor's right to comment on a defendant's silence, the *Salinas* plurality held that "the logic of *Berghuis* applies with equal force"⁷⁷ to the case at hand, thereby disregarding the rationale of the *Berghuis* rule as well as the context in which it was crafted. As the Court's holdings in both *Davis v. United States* and *Berghuis v. Thompkins* indicate, the explicit invocation requirement was designed to provide police with clear guidance as to whether or not they should cease the interrogation. Otherwise, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong.⁷⁸

In light of the rule that police must cease further interrogation whenever the right to counsel or the right to remain silent is invoked,⁷⁹ the unambiguous

⁷¹ See George M. Dery III, *Do You Believe in Miranda? The Supreme Court Reveals Its Doubts in Berghuis v. Thompkins by Paradoxically Ruling That Suspects Can Only Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. C.R. L.J. 407, 418 (2011).

⁷² *Davis v. United States*, 512 U.S. 452, 459 (1994).

⁷³ *Id.* at 462.

⁷⁴ *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (citing *Solem v. Stumes*, 465 U.S. 638, 648 (1984)).

⁷⁵ *Id.* (citations omitted).

⁷⁶ *Id.* at 376.

⁷⁷ *Salinas v. Texas*, 133 S. Ct. 2174, 2182 (2013).

⁷⁸ *Berghuis*, 560 U.S. at 382 (citing *Davis*, 512 U.S. at 461).

⁷⁹ See *Michigan v. Mosley*, 423 U.S. 96, 104–07 (1975) (holding that police may resume questioning after a suspect invoked his right to silence only if they scrupulously honored this

invocation requirement is understandable. However, there seems to be no compelling reason to extend the requirement to the circumstances of *Salinas*, where a suspect remains silent in the face of accusations during police questioning and refrains from making an incriminating statement. The unambiguous invocation rule—as far as the right to silence is concerned—should be applicable only when the admissibility of an accused's statement (preceded by silence) during police questioning is at issue at trial, not the admissibility of his silence. *Salinas* did not argue, and had no reason to argue, that police should have ceased the interrogation once he remained silent; nor did he argue that his statements were inadmissible. The policemen's knowledge of *Salinas*'s reasons for remaining silent is simply irrelevant to the question of whether adverse inferences could be drawn against him at trial. As will be discussed below, one of the main reasons for prohibiting the use of silence in the face of police questioning as evidence of guilt is its ambiguity.⁸⁰ Silence is no less ambiguous when the accused explicitly asserts the privilege against self-incrimination.

If the *Salinas* plurality was of the view that even explicit invocation of the privilege is not a shield against the use of pre-arrest silence as evidence of guilt, it could have avoided the lengthy discussion of the invocation requirement and could have simply held instead that the Fifth Amendment does not apply to pre-arrest questioning. The Court's detailed analysis of the invocation requirement and its significance suggests that had *Salinas* explicitly invoked his rights, the use of his silence as substantive evidence of guilt would have been prohibited. However, the Court's logic and reasoning are far from clear as to why *Salinas*'s silence would not have been incriminating had he explicitly invoked his rights and why the applicability of the Fifth Amendment in such circumstances should be conditioned upon the manner of its invocation. It seems that the Court's requirement of explicit invocation can only be explained by its wish to restrict and undermine the applicability of the privilege, based on the notion that silence is indicative of guilt, a notion which is implicit in the plurality's holding.

III. SILENCE IS NOT INDICATIVE OF GUILT

Numerous scholars hold the view that silence in the face of accusations implies guilt because it indicates that the accused person has no explanation that is compatible with innocence.⁸¹ A reasonable innocent person would take the opportunity to exculpate herself.⁸² An accused's silence in the face of accu-

invocation by cutting off questioning, waited a reasonable amount of time, and informed the suspect of his or her *Miranda* rights once again).

⁸⁰ See *infra* Part III.

⁸¹ Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1049–50 (1989).

⁸² *Id.* at 1029.

sations is therefore relevant evidence for the establishment of her guilt or innocence.⁸³ It is just a matter of common sense.⁸⁴

Silence clearly passes the test of relevancy; the probability that silence indicates guilt is higher than the probability that it indicates innocence.⁸⁵ This is because the guilty suspect has an additional reason to remain silent: his inability to provide a true story that would exculpate him and his willingness to conceal the truth.⁸⁶ Bentham's remarks on this matter have become canonic: "If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security?"⁸⁷ Innocence heightens our expectations of getting a response. The innocent person has motives to speak that the guilty lacks—his indignation at being falsely accused, and his willingness to reveal the truth.⁸⁸

Some argue that silence is not different from other aspects of conduct, such as fleeing from the crime scene, that are routinely considered as evidence of guilt.⁸⁹ Therefore, the possibility to draw inferences from the conduct of failure to speak should not be regarded as a compulsion or penalty.⁹⁰ At any rate, since the test for the admission of evidence is relevance rather than conclusiveness, the fact that silence does not inexorably lead to the conclusion of guilt and might be consistent with innocence does not render silence irrelevant.⁹¹

Various scholars assume that silence in the face of substantial incriminating evidence is especially suspicious.⁹² Moreover, in cases of selective silence, or the refusal to answer only particular questions, as in *Salinas*, drawing adverse inferences from silence is prima facie consistent with common sense.

It may be claimed that, from a normative point of view, silence should be discouraged. The criminal justice system has no interest to spur accused persons to remain silent. The opposite is true. Cooperation is the behavior that should be encouraged. Testimony promotes the search for truth,⁹³ whereas silence does not. Thus, the Supreme Court has recognized that confessions during interrogations are "essential to society's compelling interest in finding,

⁸³ LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 152 (2006); Office of Legal Policy, *supra* note 81, at 1007.

⁸⁴ Office of Legal Policy, *supra* note 81, at 1011.

⁸⁵ *Id.* at 1074.

⁸⁶ *Id.* at 1074, 1101.

⁸⁷ JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., 1825).

⁸⁸ Office of Legal Policy, *supra* note 81, at 1101.

⁸⁹ *Id.* at 1061–62 (relating to silence at trial or before trial); Stefanie Petrucci, Comment, *The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in Its Case-in-Chief*, 33 U.C. DAVIS L. REV. 449, 483–84 (2000) (regarding pre-arrest silence).

⁹⁰ Office of Legal Policy, *supra* note 81, at 1078.

⁹¹ *Id.* at 1073.

⁹² *Id.* at 1074.

⁹³ Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1330–34 (2009).

convicting, and punishing those who violate the law.”⁹⁴ Likewise, some scholars opine that “[i]t is difficult to perceive any legitimate criminal justice or societal interest that is served when a defendant declines to testify at trial.”⁹⁵

In opposition to this view, in *United States v. Hale* the Supreme Court viewed pre-arrest silence as having no significant probative value and as prejudicial evidence.⁹⁶ The Court held that “[i]n most circumstances silence is so ambiguous that it is of little probative force.”⁹⁷ Its prejudicial effect is so significant that it is unlikely to be expelled by the defendant’s explanations as to the reasons for not telling his story to police officers.⁹⁸ Pretrial silence should be excluded as evidence because its prejudicial effect to the defendant outweighs its probative value.

According to this perception, silence is simply indicative of nothing: “Mere silence . . . does not necessarily make it more probable than not that the defendant is attempting to hide something, or is guilty.”⁹⁹ The exercise of the privilege against self-incrimination is not probative of guilt.¹⁰⁰ The concept that silence indicates guilt may simply mislead. When Goneril and Regan testify to their enormous love for their father, King Lear, they simply lie. When Cordelia declares that she can say nothing about her love for her father, it does not mean that she does not truly love him.¹⁰¹

In light of silence’s insoluble ambiguity, “allowing in pretrial silence does not promote truth seeking, it promotes confusion and misjudgment.”¹⁰² Additionally, there are normative considerations militating against the admission of silence. Thus, as the Court stated in *Lefkowitz v. Cunningham*, “[w]e have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need.”¹⁰³

Some scholars argue that “[t]he difference between a prohibited punishment and a permitted negative consequence is often very slight.”¹⁰⁴ Thus, allowing adverse inferences from silence exerts pressure on suspects to waive

⁹⁴ *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

⁹⁵ Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 854 (2008).

⁹⁶ *United States v. Hale*, 422 U.S. 171, 180 (1975).

⁹⁷ *Id.* at 176.

⁹⁸ *Id.* at 176–77.

⁹⁹ Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on a Defendant’s Pre-Arrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 219 (1997).

¹⁰⁰ *Garrity v. New Jersey*, 385 U.S. 493, 499–500 (1967).

¹⁰¹ WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR* act 1, sc. 1.

¹⁰² Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 160 (2001).

¹⁰³ *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977).

¹⁰⁴ Craig Peyton Gaumer & Charles L. Nail, Jr., *Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings*, 76 NEB. L. REV. 497, 545 (1997).

their privilege.¹⁰⁵ This pressure is greater during the pretrial stage because the jury has no way of learning about the defendant's pre-arrest silence without prosecutorial comment.¹⁰⁶ The possibility of considering silence as part of the prosecution's evidence is also inconsistent with the presumption of innocence.¹⁰⁷ Allowing incriminating conclusions based on silence is unwarranted as it is reminiscent of the perception of silence as an admission of guilt.¹⁰⁸ It is unfair to grant the right to silence and in tandem assume that anyone who exercises this right is guilty of a crime.¹⁰⁹ The unfairness increases because "[t]he innocent are just as likely as the guilty to remain silent pretrial, yet the evidence damns all with a broad stroke."¹¹⁰

Innocent persons may remain silent for various reasons that have nothing to do with a desire to conceal guilt.¹¹¹ Thus, silence may emanate from the will to preserve one's privacy, to evade embarrassment, to protect one's security, or to cover up for another person, and from mistrust of the police and a fear that the police will turn an exculpatory story into a sword against the suspect.¹¹² Silence may emanate from feelings of helplessness, confusion, tension, shock,

¹⁰⁵ Deborah Stavile Bartel, *Drawing Negative Inferences Upon a Claim of Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1410 (1995) (regarding attorney-client privilege); Strauss, *supra* note 102, at 155–56.

¹⁰⁶ Strauss, *supra* note 102, at 156.

¹⁰⁷ ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY* 112–13 (1994).

¹⁰⁸ Danny Ciracò, *Reverse Engineering*, 11 WINDSOR REV. LEGAL & SOC. ISSUES 41, 59 (2001).

¹⁰⁹ *Id.*

¹¹⁰ Strauss, *supra* note 102, at 156–57.

¹¹¹ Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 399 (2006); Pettit, *supra* note 99.

¹¹² *United States v. Hale*, 422 U.S. 171, 177 (1975); Skrapka, *supra* note 111, at 359; *see also* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55–56 (1964) (listing the policies and values protected by the right to silence). The Court explained that:

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. (citations omitted) (quoting 8 WIGMORE ON EVIDENCE 317 (McNaughton rev., 1961); *United States v. Grunewald*, 233 F.2d 556, 581–582 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957); *Quinn v. United States*, 349 U.S. 155, 162 (1955))(internal quotation marks omitted).

anger, insult, or misunderstanding.¹¹³ The Supreme Court has indeed recognized that innocent persons may incriminate themselves through speaking, stating that “truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker’s own mouth.”¹¹⁴ The right to silence “serves as a protection to the innocent as well as to the guilty.”¹¹⁵ An innocent person may incriminate himself, especially under circumstances of tension, due to contradictions that stem from memory weakness, confusion, excitement, and lack of concentration.¹¹⁶ Many times, persons may tend to describe events inaccurately. Since an innocent person questioned by the police is often close to the incident under interrogation, her defense argument may be used to her detriment and bring about self-incrimination. As Justices Marshall and Brennan opined:

[I]n order for petitioner to offer his explanation of self-defense, he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide. It is hard to imagine a purer case of self-incrimination.¹¹⁷

The right to silence may thus contribute to the defense of an innocent person. Even an innocent person may utilize silence to escape conviction.

Silence should be regarded as consistent with innocence, notwithstanding the time of its occurrence, whether pre- or post-delivery of *Miranda* warnings: “[W]e cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights”¹¹⁸ Since accused persons in both stages are equally exercising their constitutional rights, pre-arrest silence is no more indicative of guilt than post-arrest silence. In fact, the Court’s aforementioned rationales for viewing post-arrest silence as consistent with innocence are equally applicable to silence during pre-arrest, pre-*Miranda* interrogations. Chief Justice Burger’s observation in *Hale* is equally applicable to both stages: “It is no more accurate than to say, for example, that the innocent rather than the guilty, are the first to protest their innocence. There is simply no basis for declaring a generalized probability one way or the other.”¹¹⁹ The Court resolved *Hale* on evidentiary, non-constitutional grounds, exercising its

¹¹³ Strauss, *supra* note 102, at 102; Maria Noelle Berger, Note, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence Be Admissible as Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015, 1039; Skrapka, *supra* note 111, at 362–63, 388.

¹¹⁴ *Ohio v. Reiner*, 532 U.S. 17, 21 (2001).

¹¹⁵ *Ullman v. United States*, 350 U.S. 422, 427 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

¹¹⁶ Rinat Kitai-Sangero, *Respecting the Privilege Against Self-Incrimination: A Call for Providing Miranda Warnings in Non-Custodial Interrogations*, 42 N.M. L. REV. 203, 231–32 (2012).

¹¹⁷ *Jenkins v. Anderson*, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *United States v. Hale*, 422 U.S. 171, 181 (1975) (Burger, J., concurring).

supervisory powers over the federal courts.¹²⁰ However, in the face of accusations, treating silence as an indication of guilt implicates constitutional law. The drawing of negative inferences from silence when disparity of power exists and when the stronger party levels accusations towards the weaker party violates the privilege against self-incrimination guaranteed by the Fifth Amendment and the fairness guarantee of the Fourteenth Amendment.

IV. REFUSAL TO SPEAK IN THE FACE OF ACCUSATIONS

The privilege against self-incrimination does not prohibit compelled testimony. Thus, witnesses are commanded by law to give testimony in court.¹²¹ The privilege against self-incrimination prohibits only compelled incriminating testimony. More accurately, given the court's authority to compel a witness to incriminate himself under the shield of "use immunity," the privilege only bars the use of incriminating evidence at trial under certain circumstances.¹²²

In *Miranda*, the Court held explicitly that the privilege was applicable to out-of-court custodial interrogations by law enforcement officers. In *Jenkins*, the Court declined to decide "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."¹²³ However, Justice Stevens, who concurred with the judgment, made clear that "[t]he fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police."¹²⁴ Accordingly, the Fifth Amendment applies whenever a suspect faces police questioning, even before being arrested or Mirandized. Similarly, the *Miranda* Court did not limit the application of the privilege to custodial interrogations, holding that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."¹²⁵

Additional Supreme Court rulings also indicate that the privilege against self-incrimination applies to pre-arrest, pre-*Miranda* silence. The Court made clear that every risk of a criminal conviction triggers the Fifth Amendment. In so holding, the Court stated:

¹²⁰ *Jenkins*, 447 U.S. at 239 n.5. See, however, the dissenting opinion of Justices Marshall and Brennan, according to which, "the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment." *Id.* at 246 (Marshall, J., dissenting).

¹²¹ See *supra* note 57 and accompanying text.

¹²² Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 YALE L.J. 447, 450 (2002).

¹²³ *Jenkins*, 447 U.S. at 236 n.2.

¹²⁴ *Id.* at 243.

¹²⁵ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.¹²⁶

A person who is not placed under arrest or read his *Miranda* rights is allowed to refuse to answer official questions that might incriminate him in future criminal proceedings under the protection of the self-incrimination privilege.¹²⁷ The privilege thus applies in out-of-court situations, whether the person is in custody or not.¹²⁸ As Justice Kennedy opined in *Chavez v. Martinez*,

[T]he Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts. The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. . . . The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future.¹²⁹

A suspect’s silence cannot be subjected to criminal punishment. The danger of self-incrimination is inherent in the very status of a person as an adversary. The “cruel trilemma” rationale also applies in such circumstances.¹³⁰ In civil proceedings, in administrative hearings, and in many criminal proceedings as well, a person is not under arrest. This fact alone does not lead to the loss of protection under the Fifth Amendment.

The possibility of drawing adverse inferences from silence is a separate issue from the existence or non-existence of a duty to provide information during police questioning or trial. Regarding trial, taking the stand might obviously heighten the probability of a defendant’s innocence in the eyes of the trier of fact, and no court may effectively forbid it.¹³¹ Furthermore, if the defendant leaves the prosecution’s case uncontested, he takes the risk that the trier of fact will accept the prosecution’s explanation at face value.¹³² But the Court in *Griffin* held that “[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused

¹²⁶ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

¹²⁷ Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 337 (1988); Pettit, *supra* note 99, at 213.

¹²⁸ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1984).

¹²⁹ *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Kennedy, J., concurring in part).

¹³⁰ Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115, 1137 (2008); Bentz, *supra* note 24, at 910; Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant’s Prearrest Silence*, 63 BROOK. L. REV. 897, 933 (1997); Pettit, *supra* note 99, at 218–19.

¹³¹ Stein, *supra* note 130, at 1123, 1228.

¹³² See Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants’ Trial Silence*, 71 OHIO ST. L.J. 229, 261 (2010).

into evidence against him is quite another.”¹³³ *Griffin* notwithstanding, there is a disagreement among scholars as to the question of whether the defendant should be protected by right from judicial or prosecutorial comment on his silence, as held in *Griffin*, and whether such comment constitutes a compulsion within the meaning of the Fifth Amendment and an indirect penalty for the exercise of one’s Fifth Amendment rights.¹³⁴ Some argue that drawing adverse inferences from silence does not constitute compulsion under the Fifth Amendment.¹³⁵ Rendering the option to remain silent less attractive does not amount to compulsion.¹³⁶ As Judge Friendly put it: “It requires a rather active imagination to analogize the judge’s refusal to comment, either way, on the accused’s failure to testify, to subjection to the thumbscrew or the rack.”¹³⁷

In *Baxter v. Palmigiano*, the Supreme Court held in a six-to-two majority that “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”¹³⁸ The Court noted that drawing adverse inferences from silence in such a situation should not be regarded as a penalty on the exercise of the privilege.¹³⁹ In the civil context, then, although the court may not compel self-incriminating testimony, it may draw adverse inferences from a party’s silence. Permission to invoke the privilege to refuse to respond does not necessarily imply that no adverse inferences from this refusal may be drawn. The Court in *Baxter* stressed the fact that “[t]he State has not, contrary to *Griffin*, sought to make evidentiary use of his silence at the disciplinary hearing in any criminal proceeding.”¹⁴⁰

As opposed to civil proceedings, the use of a criminal defendant’s silence at trial as evidence of guilt is prohibited.¹⁴¹ Drawing adverse inferences from pretrial, post-*Miranda* silence is also prohibited.¹⁴² Clearly, the rationale for the differentiation between civil and criminal proceedings cannot rest solely on the promise implicit in the warnings. If that were the reason for prohibiting adverse

¹³³ *Griffin v. California*, 380 U.S. 609, 614 (1965).

¹³⁴ For the distinction between direct and indirect penalty in the context of the Fifth Amendment, see Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1592–93 (1986).

¹³⁵ Office of Legal Policy, *supra* note 81, at 1078–79; Adam M. Stewart, *The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda*, 37 Suffolk U. L. Rev. 189, 204 (2004).

¹³⁶ Office of Legal Policy, *supra* note 81, at 1095.

¹³⁷ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 933 (1965).

¹³⁸ *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

¹³⁹ *Id.* at 316–20.

¹⁴⁰ *Id.* at 317.

¹⁴¹ *Griffin v. California*, 380 U.S. 609, 615 (1965); see also *supra* text accompanying notes 5–8.

¹⁴² *Wainwright v. Greenfield*, 474 U.S. 284, 292, 295 (1986); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); see also *supra* text accompanying notes 9–14.

inferences from post-*Miranda* silence, then the language of the warnings could simply be modified so that the suspect would also be informed of the possible negative consequences of his silence. Modifying the warnings accordingly would arguably enable the prosecution to use a defendant's silence during custodial interrogation as evidence of guilt.¹⁴³ No issue of honoring a promise would be raised in such a scenario. Thus, for example, in England the suspect is put on notice that he has a right to remain silent but that exercising this right might strengthen the evidence against him.¹⁴⁴ Drawing a distinction between the use of pre- and post-*Miranda* silence as evidence of guilt based on the language of the warnings is therefore illogical and unjustifiable.¹⁴⁵ Moreover, any reasonable person is already aware of his right to remain silent during a confrontation with the police, especially when under arrest, even before the official receipt of *Miranda* warnings. Thus, the bright-line test of pre- and post-*Miranda* warnings in terms of the assurance embedded in the warnings is to a large extent artificial and may cause injustice to the accused person.¹⁴⁶

Since the criminal justice system effectively conveys to people that one has the right to remain silent in dealing with law enforcement agencies, the use at trial of pre-warning silence as evidence of guilt is just as unfair as the use of post-warning silence.¹⁴⁷ Given widespread knowledge of *Miranda*, silence may reflect "a decision to invoke what even an innocent suspect believes to be an available and useful right of silence that may reduce the risk of wrongful prosecution or conviction."¹⁴⁸ Additionally, the police may eschew *Miranda* by simply delaying the arrest or the delivering of the warnings in the hope of ob-

¹⁴³ Office of Legal Policy, *supra* note 81, at 1014 (claiming, for support of the abolition of the right, that "[t]he most promising approach would be to argue that the restriction of *Doyle v. Ohio* does not apply if the defendant had been put on notice that his failure to talk could be used against him"); *see also id.* at 1106; Strauss, *supra* note 102, at 141–44 (supporting the exclusion of pre-arrest silence for impeachment purposes).

¹⁴⁴ In England, the suspect is told: "You do not have to say anything. But it may harm your defense if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence." Kuk Cho, *Reconstruction of the English Criminal Justice System and its Reinvented Exclusionary Rules*, 21 LOY. L.A. INT'L & COMP. L.J. 259, 285 (1999).

¹⁴⁵ Strauss, *supra* note 102, at 141–44.

¹⁴⁶ Bentz, *supra* note 24, at 932; 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, 1036–37 (2007); David E. Melson, Comment, *Fourteenth Amendment—Criminal Procedure: The Impeachment Use of Post-Arrest Silence Which Precedes the Receipt of Miranda Warnings*, 73 J. CRIM. L. & CRIMINOLOGY 1572, 1586–87 (1982); Pettit, *supra* note 99, at 217; Skrapka, *supra* note 111, at 358–59, 392; *see also* Salinas v. Texas, 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting).

¹⁴⁷ MCCORMICK ON EVIDENCE, *supra* note 23.

¹⁴⁸ *Id.*

taining incriminating statements or using the silence against the suspects later at trial.¹⁴⁹ For police officers, it is a win-win situation.

The rationales for not regarding a suspect's silence during police questioning as evidence of guilt are considerable and material, not technical. In *Salinas*, the Court should have recognized, as did some of the circuit courts, that while *Miranda* warnings provide additional protection to defendants, the constitutional right to remain silent as well as the rule against adverse inferences should not be dependent upon their delivery or the lack thereof.¹⁵⁰ It is therefore not a mere matter of breaching a promise. Rather, it touches on the very status of a person as a suspect in the commission of a criminal offense.

Some scholars claim that a person who is not under arrest is not subject to official compulsion to speak and therefore should not be entitled to any protection against compulsion.¹⁵¹ However, even non-custodial police interrogations may be coercive. Moreover, the compulsion to speak seems to be even more powerful during pre-custody questioning, as the suspect may still hope to secure release if he can convince the officer of his innocence.¹⁵² Contrary to an arrest interrogation scenario, a suspect in a pre-arrest interview has the added threat of being arrested if he does not provide an exculpatory account.¹⁵³ From a normative perspective, non-custodial suspects should also receive warnings of their rights to remain silent and to have the assistance of counsel.¹⁵⁴ During police interrogation, law enforcement agencies may exercise pressure on suspects even if they are not held in custody. True, the suspect's freedom of movement is not restricted. The suspect is, at least de jure, free to end the interrogation and walk away. However, when a person is suspected of committing a crime and becomes the subject of an interrogation, law enforcement agencies make efforts to secure his or her confession.¹⁵⁵ Every interrogation of a suspect aimed at securing a confession is a threatening situation that contains inherently compelling pressures that might lead to self-incrimination.¹⁵⁶ Thus, notifying a suspect

¹⁴⁹ Berger, *supra* note 113, at 1043; Hennes, *supra* note 146, at 1015; Skrapka, *supra* note 111, at 392; Vanessa Willis, Comment, *The Government's Use of Pre-Miranda Silence in Its Case-in-Chief: An Alternative Approach Under Schmerber v. California*, 77 U. CIN. L. REV. 741, 756–57 (2008).

¹⁵⁰ See, e.g., United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987) (holding that a prosecutor's use of a defendant's pre-arrest, pre-*Miranda* silence as evidence of guilt violates the Fifth Amendment); see also Savadjian, *supra* note 8, at 3–4.

¹⁵¹ See, e.g., Romantz, *supra* note 44, at 51.

¹⁵² Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320 (2012).

¹⁵³ *Id.* at 1321.

¹⁵⁴ Kitai-Sangero, *supra* note 116, at 218.

¹⁵⁵ Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2815 (2007).

¹⁵⁶ Kitai-Sangero, *supra* note 116, at 210.

that she is not under arrest and is free to end the interrogation whenever she wishes is not enough to protect her from being compelled to speak.¹⁵⁷

Police officers employ various tactics during interrogation in order to secure a suspect's confession. Most of these techniques may also be employed in non-custodial settings.¹⁵⁸ Some interrogative tactics were "created for no purpose other than to subjugate the individual to the will of his examiner."¹⁵⁹ In a police-dominated atmosphere, such pressures may undermine the suspect's free will.¹⁶⁰ The non-custodial interrogation process, which obviously carries the threat of arrest and prosecution, "can be just as frightening and intimidating as a custodial interrogation."¹⁶¹ Given the interrogation atmosphere, an innocent suspect may believe that the chances of avoiding a wrongful conviction would increase if he remains silent.¹⁶² During pressured non-custodial interrogations, innocent suspects may deem their protestations of innocence futile.¹⁶³ Moreover, creating the false impression of overwhelming incriminating evidence may cause innocent persons to falsely confess guilt.¹⁶⁴

The mere threat of being arrested is highly intimidating and might paralyze the accused person. It is certainly not a situation that naturally calls for speaking out.¹⁶⁵ On the contrary, a person may believe that since he committed no crime, no explanation is needed, and his innocence would simply be revealed.¹⁶⁶ This proposition may be true even within personal relationships. Thus, suppose a person is accused by his friend of stealing his wallet. He might look at the friend angrily. Suppose the friend proceeds to say, "Yes, you did it. I have a lot of evidence against you." Knowing for sure that he has not taken the wallet, the accused person might think to himself, "He is crazy; he is not worth my answer."¹⁶⁷

Similarly, when a police officer asks an innocent person "if the ballistics from his shotgun were going to match the shotgun shells found at the apartment," that person might remain silent out of anger and surprise. Such a person

¹⁵⁷ *Id.* at 206.

¹⁵⁸ Kitai-Sangero, *supra* note 116, at 218; Pettit, *supra* note 99, at 216.

¹⁵⁹ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (regarding custodial interrogation environment).

¹⁶⁰ Kitai-Sangero, *supra* note 116; *see also* Pettit, *supra* note 99, at 216.

¹⁶¹ Pettit, *supra* note 99, at 219.

¹⁶² Kitai-Sangero, *supra* note 116, at 232; Pettit, *supra* note 99, at 220.

¹⁶³ Strauss, *supra* note 102, at 145–46.

¹⁶⁴ Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 128 (1997).

¹⁶⁵ Strauss, *supra* note 102, at 145.

¹⁶⁶ *Id.* at 146.

¹⁶⁷ This is contrary to Professor Greenawalt's account. Greenawalt discusses a natural response in the face of a friend's accusations, which are based on strong evidence of wrongdoing. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 20–26 (1981).

is not a civil adversary. Any reasonable person would understand that he is a suspect and that he is therefore in jeopardy of being detained, charged, and convicted. Even without employing coercive tactics of interrogation, the very risk that is inherent in police questioning creates an atmosphere of compulsion.¹⁶⁸

Notwithstanding the compulsion inherent in police questioning, the Department of Justice opined that the reasons for protecting silence at trial (despite the defendant's right not to testify) are more compelling than the justifications for protecting silence at the pretrial stage because, unlike testimony at trial, giving a statement in the pretrial stage does not lead to negative consequences such as a disclosure of criminal records or exposure to aggressive cross-examination.¹⁶⁹ It seems, however, that the opposite is true. Some of the rationales that justify silence during interrogation lose their validity at the trial stage. Testimony in the courtroom is less vulnerable to misuse than testimony at the police station.¹⁷⁰ Defendants at trial are not incommunicado. The trial is conducted publicly and is controlled by a judge. The judge does not interrogate the defendant. She does not impose undue pressure on him to confess.¹⁷¹ The defendant is normally represented by counsel throughout the trial. The defendant is much better prepared for answering questions during cross-examination than for answering questions during police interrogation. He is, fully or partially, aware of the incriminating evidence against him, and is thus also aware that the prosecution is not attempting a fishing expedition. There are substantial quantitative and qualitative differences between the degrees of coercion at each of the stages.¹⁷² If silence at trial is protected from comments on failure to testify, then there is no reason not to extend the same protection to silence during police interrogation. The conclusion that pre-arrest, pre-*Miranda* silence should not be used as evidence of guilt may also be established on the implications of placing the burden of proof upon the state, implications to which this article now turns.

V. BEARING THE BURDEN OF PROOF: THE ACCUSED PERSON'S RIGHT TO DEFY ACCUSATIONS BY SILENCE

The state bears the burden of establishing the defendant's guilt in order to secure a conviction.¹⁷³ Actually, "[n]o principle in Anglo-American criminal law is more vaunted than the so-called 'presumption of innocence': the doctrine

¹⁶⁸ See Bentz, *supra* note 24, at 928.

¹⁶⁹ Office of Legal Policy, *supra* note 81, at 1012.

¹⁷⁰ HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 231 (1996); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 637-38.

¹⁷¹ Levinson, *supra* note 170.

¹⁷² Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 380 (1998).

¹⁷³ *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

that the prosecution must both *produce* evidence of guilt and *persuade* the fact-finder 'beyond a reasonable doubt.'"¹⁷⁴ This heavy burden of proof has sound justifications.¹⁷⁵

In the early modern period, the common law trial employed the model of the "accused speaks." This model was aimed at securing the defendant's confession, and did not allow the defendant's representation by counsel.¹⁷⁶ The "accused speaks" approach was also prevalent in America during the first century of settlement.¹⁷⁷ The trial was transformed to the model of "testing the prosecution" during the end of the eighteenth century and the nineteenth century.¹⁷⁸ Subsequently, the privilege against self-incrimination became a powerful tool for the defense counsel as part of the reordered modern criminal trial.¹⁷⁹ As Langbein explains, "[o]nly when the modern 'testing the prosecution' theory of the criminal trial displaced the older 'accused speaks' theory did the criminal defendant acquire an effective right to decline to speak to the charges against him."¹⁸⁰ The right to be represented by counsel brought about the breakdown of the "accused speaks" model.¹⁸¹ The establishment of the beyond-a-reasonable-doubt standard of proof "encouraged defense counsel to silence the defendant and hence to insist that the prosecution case be built from other proofs."¹⁸² Under modern proceedings, then, the emphasis is placed on the strength of the prosecution's case rather than on the reasonability of the accused's response.¹⁸³ The accused does not need to prove her innocence, and has no obligation to provide information regarding the offense attributed to her either to the police or to the court.

Indeed, the state must bear the burden of proof based on its own efforts and should obtain evidence independently of the accused person's testimony.¹⁸⁴ The *Miranda* Court held that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."¹⁸⁵ The defendant is under no ob-

¹⁷⁴ Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 133–34 (2005).

¹⁷⁵ See generally Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163 (2003).

¹⁷⁶ Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1092 (1994).

¹⁷⁷ *Id.* at 1091–92.

¹⁷⁸ John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1066.

¹⁸¹ *Id.* at 1069.

¹⁸² *Id.* at 1070.

¹⁸³ Kitai-Sangero, *supra* note 116, at 225.

¹⁸⁴ Strauss, *supra* note 102, at 158.

¹⁸⁵ *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

ligation to assist the prosecution in proving its case, and may remain passive during all stages of the criminal process. “But, if prosecutors can use silence in the face of accusatory questions as a sign of guilt, then the burden shifts to the suspect in making the government’s case and impairs the privilege.”¹⁸⁶

In criminal proceedings, the state accuses the individual of breaching the social compact.¹⁸⁷ In such proceedings, the state creates a situation of conflict with the accused person. Accordingly, the accused person has a right to act as an adversary. Therefore, the state must fight its own battle, and it cannot force its adversary to cooperate in the same way that it cannot force a combatant of war to salute its flag.¹⁸⁸ Acting as an adversary may be expressed in cutting off any contact with police officers who represent the state. The privilege should therefore be self-executing through silence.¹⁸⁹ By silence the accused person declares that she views the state as an adversary.

The same applies to the trial stage. In *Jenkins v. Anderson*, the Court emphasized that Jenkins “voluntarily took the witness stand in his own defense,”¹⁹⁰ and that “impeachment follows the defendant’s own decision to cast aside his cloak of silence.”¹⁹¹ Although the distinction between using silence for impeachment purposes and using silence in the prosecution’s case-in-chief encourages defendants not to testify in their defense, it can be justified. When the defendant decides to testify on his own behalf, it is legitimate to examine his credibility by, *inter alia*, questioning his decision to raise his current version for the first time.¹⁹² Accordingly, impeachment evidence “advances the truth-finding function of the criminal trial.”¹⁹³ Additionally, defendants who testify waive their privilege against self-incrimination regarding the offenses attributed to them.¹⁹⁴ Thus, for example, the Supreme Court has clarified that a defendant who testifies may be asked on cross-examination about prior silence in his first trial in order to impeach his credibility.¹⁹⁵ But when the defendant does not take the stand in his own defense he conveys the following message: “I want the prosecution to prove its case completely detached from me. I do not offer my credibility. I simply claim that the prosecution does not have sufficient evi-

¹⁸⁶ Savadjian, *supra* note 8, at 42.

¹⁸⁷ Kitai-Sangero, *supra* note 116, at 225.

¹⁸⁸ Michael S. Green, *The Privilege’s Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 706–07 (1999).

¹⁸⁹ See Strauss, *supra* note 102, at 139 (citing *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995)).

¹⁹⁰ *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980).

¹⁹¹ *Id.* at 238.

¹⁹² See Strauss, *supra* note 102, at 120.

¹⁹³ *Jenkins*, 447 U.S. at 238.

¹⁹⁴ Strauss, *supra* note 102, at 120. Strauss thinks, however, that this waiver should exclude pretrial Fifth Amendment rights because in the case of silence there is no contradiction of testimony. *Id.* at 159.

¹⁹⁵ *Raffel v. United States*, 271 U.S. 494, 497 (1926).

dence to obtain a conviction.” “Through silence, the accused person challenges the prosecution: ‘So prove your case, if you have any.’”¹⁹⁶ Refusal to speak, then, is communicative.¹⁹⁷ Using what a person did not say turns him into a communicative device to unwillingly supply evidence against himself.¹⁹⁸ It is reminiscent of the “accused speaks” model rather than “testing the prosecution” model which replaced it.

The defendant is entitled to plan her defense strategy not by positively introducing her own version, but rather by pointing to the weaknesses and flaws in the prosecution’s case. Defendants have a right to remain silent in the hope that the prosecution will fail to meet the burden of proof that is required for conviction.¹⁹⁹ The prosecution’s knowledge that it cannot necessarily rely on the defense’s weaknesses and flaws also incentivizes it to establish its case on compelling evidence.

The Latin maxim “*nemo tenetur prodere seipsum*” (no man is bound to accuse himself), which was recognized by *ius commune* in the sixteenth century,²⁰⁰ had carried only limited implications in light of its exceptions: it was excluded “where there was public knowledge that a crime had been committed, where the public had an interest in punishing the crime, and where there were legitimate indicia that the defendant being questioned had committed it.”²⁰¹ Despite its broad exceptions, it had a value: “the rule *nemo tenetur prodere seipsum* still applied in the absence of public notoriety indicating that an accused had committed a crime, and it still applied to prohibit judicial fishing expeditions to search out defendants’ private faults.”²⁰² The rule recognized the accused person’s right against being made the object of a charge in the absence of substantial indications of guilt.

Salinas would have been protected from the duty to speak even under the narrow protection of the *ius commune*. The police officer who asked the match question did not present to Salinas even prima facie evidence regarding his guilt. This is usually the case in criminal interrogations: the interrogators do not systematically reveal the incriminating evidence they possess against the suspect and do not allow him the opportunity to coherently refute the evidence against him.²⁰³ Moreover, when a suspect is not under arrest, no probable cause

¹⁹⁶ Kitai-Sangero, *supra* note 116, at 224.

¹⁹⁷ Bentz, *supra* note 24, at 931; Willis, *supra* note 149, at 753–54.

¹⁹⁸ R. v. Noble, [1997] 1 S.C.R. 874, 920 (Can.).

¹⁹⁹ Andrew Palmer, *Silence in Court—The Evidential Significance of an Accused Person’s Failure to Testify*, 18 U.N.S.W. L.J. 130, 133 (1995) (Austl.).

²⁰⁰ R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 967 (1990).

²⁰¹ *Id.* at 983.

²⁰² *Id.* at 984.

²⁰³ Kitai-Sangero, *supra* note 116, at 231.

is required, and there is therefore less reason to require her to answer police questions.²⁰⁴

Additionally, there is a close connection between the pretrial and the criminal trial stages.²⁰⁵ Thus, colonial criminal procedure had put an emphasis on the pretrial stage, “and it was in pretrial proceedings that the full weight of the criminal process was enlisted behind the attempt to induce self-incrimination.”²⁰⁶ The conduct of the investigation may dictate the result of the trial. As Langbein notes, “[t]hen as now, pretrial dominated trial.”²⁰⁷ Compelling a person to speak during the investigation stage may render his silence at trial superfluous as a shield against the charges. Similarly, if adverse inferences may be drawn against the defendant from his pretrial silence then he would have to testify at trial and explain his pretrial silence in order to expel the conclusion of guilt. Allowing the use of pre-arrest silence as evidence of guilt “would favor the state in its competition against the individual. If a defendant knows that her prearrest silence may be used against her at trial, she is more likely to speak with the police earlier.”²⁰⁸ Substantive use of pre-arrest silence therefore places substantial pressure upon the defendant to waive his privilege against self-incrimination in order to explain his silence either during police questioning or at trial.²⁰⁹ Creating incentives to speak conveys a message regarding the desirability of speaking. This message has no room under the “testing the prosecution” model, which ought to place the emphasis upon the prosecution’s obligation to come forward with evidence sufficient for a conviction, and not upon the accused person, who may defend himself by silence.

CONCLUSION

Levy emphasizes that the right against self-incrimination is “a right to refuse to answer, not a right to be immune from questioning or exposure to incrimination.”²¹⁰ Internalization of this insight should lead to the conclusion that the right to silence during police questioning is self-executing, and that its exercise should draw no adverse inferences.

²⁰⁴ Bentz, *supra* note 24, at 915.

²⁰⁵ Langbein, *supra* note 178, at 1059.

²⁰⁶ Moglen, *supra* note 176, at 1094–95.

²⁰⁷ Langbein, *supra* note 178, at 1061.

²⁰⁸ 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, 1020 (1997).

²⁰⁹ Thompson, *supra* note 25.

²¹⁰ Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821, 822 (1997); *see also* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (the right to remain silent is contained in the Fifth Amendment). For a different opinion, *see* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2667–68 (1996) (arguing that the privilege against self-incrimination is solely a safeguard against coercive interrogation and does not imply the right to remain silent).

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PROBING INTO SALINAS'S SILENCE

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Using pretrial silence against non-testifying defendants as substantial proof of guilt violates the Fifth Amendment. The status of a person as a criminal suspect grants her the right to silence. No person should be forced to supply law enforcement authorities with proof of his guilt in the face of accusations.

Moreover, given the various reasons and justifications for remaining silent, standing mute in the face of accusations does not indicate guilt. Levy concludes:

[T]he right became neither a privilege of the guilty nor a protection of the innocent. It became merely one of the ways of fairly determining guilt or innocence, like trial by jury itself Forcing self-incrimination was thought not only to brutalize the system of criminal justice but to produce weak and untrustworthy evidence.²¹¹

The understanding that silence is not inimical to the search for truth is a far cry from Bentham's view. This evidentiary insight becomes a constitutional insight when a person becomes a suspect of committing a crime.

No one can envision what his reaction would be in the face of accusations. False accusations may spark unexpected reactions. It is very difficult to gauge whether response or silence on the part of the accused person should be expected. Every person, whether innocent or guilty, wishes to avoid self-destruction. A desire to avoid prosecution and conviction is common to both the guilty and the innocent. The innocent, too, may be led toward silence by the instinct of self-preservation. The primary goal of the Fifth Amendment should be the protection of the innocent rather than providing shelter to the guilty.

In a situation of conflict between the state and the individual that involves accusations leveled against the individual, the state bears the burden of proof, and it should carry it without any assistance on the part of the accused. Refraining from taking the witness stand at trial or refusing to answer a police officer's questions implies a statement that the state should shoulder the burden of proof by relying solely on the prosecution's case. Choosing silence emphasizes the accused person's will to put the emphasis on the prosecution's duty to gather its own evidence. Silence is a means of defense, not of proof. Silence is not a piece of evidence. It should be a shield against a conviction, and not a sword used by the state against the individual.

We conclude with an optimistic note, which sees the glass half full. Since the Court in *Salinas* held that non-custodial suspects are required to explicitly invoke the privilege, there is reason to hope that, at least in cases of such invocations, adverse inferences against non-testifying defendants would not be allowed. Such a rule would make clear that no one could be required to be his or her own accuser in a situation of conflict with the state, at least in cases where the accused person explicitly asserts this rivalry. Notwithstanding, this rivalry is discernible from the very accusations leveled by the state against the accused person.

²¹¹ Levy, *supra* note 3, at 332.