
***Salinas v. Texas*: Pre-Miranda Silence Can Be Used Against a Defendant**

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*“It’s a little scary to me that an unanswered question is evidence of guilt.”*¹

I. INTRODUCTION

For decades, the Supreme Court has expressly declined to address whether the Fifth Amendment right against self-incrimination prohibits the State from using evidence of a non-testifying defendant’s pre-arrest silence in its case-in-chief. But it did so last term in *Salinas v. Texas*,² a ruling that significantly affected the rights of Americans set forth in *Miranda v. Arizona*.³ In *Salinas*, the Court considered whether the Fifth Amendment’s protection against self-incrimination bars the admission of evidence about a defendant’s pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. However, the Court did not ultimately address this broad issue. Instead, a three-justice plurality only narrowly held that because *Salinas* did not expressly invoke his Fifth Amendment privilege in his pre-arrest, pre-*Miranda* police interview, his silence was admissible at his trial.⁴

Despite its importance, *Salinas* received little media coverage relative to other, more closely watched cases regarding California’s ban on same-sex marriage,⁵ the federal Defense of Marriage Act,⁶ the University of Texas’s affirmative action program,⁷ and voting rights.⁸ However, this “sleeping decision” did not escape the attention of legal scholars. Awaiting the release of the Court’s opinion, Professor David Harris remarked:

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1. Transcript of Oral Argument at 30, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246).
2. 133 S. Ct. 2174 (2013).
3. 384 U.S. 436 (1966).
4. See *Salinas*, 133 S. Ct. at 2176.
5. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
6. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).
7. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).
8. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

Instead of having a protected right to silence, the suspect is forced to decide between three terrible choices: give a statement and implicate himself; lie, and be charged with perjury; or refuse to talk—as the Constitution says he can!—but have that silence used against him to prove his guilt. That’s wrong, and the Supreme Court should not allow it.⁹

After the *Salinas* opinion was announced, constitutional scholar Erwin Chemerinsky cautioned:

The case is troubling because it is so divorced from reality There is a profound irony to the plurality’s approach: exercising the right to remain silent by being silent is not sufficient to invoke that right. A defendant must speak in order to claim that right and likely must do so with exactly the type of “ritualistic formula” that the Court has previously rejected.¹⁰

Salinas came as no surprise to Court observers who recognize that the Court, with occasional exceptions, is continually conservative in the area of criminal procedure.¹¹ This conservatism is especially evident in its recent *Miranda* rulings.¹²

This Essay will discuss *Salinas* as part of a prolonged drama affording law enforcement license to conduct overarching investigations. The first act, *Davis v. United States*,¹³ allowed a suspect to be continually questioned unless the suspect unambiguously requests an attorney.¹⁴ The second act, *Berghuis v. Thompkins*,¹⁵ required an invocation of the right to silence to be made unambiguously before the police are required to end the interrogation.¹⁶ In the third act, *Salinas* allowed the pre-custodial silence of the defendant to be used

9. David Harris Available to Comment on *Salinas v. Texas Case Challenging the Fifth Amendment’s Self-Incrimination Clause, to be Argued April 17 Before the U.S. Supreme Court*, PITT LAW (Apr. 16, 2013), <http://law.pitt.edu/news/0413/david-harris-available-to-comment-on-salinas-v-texas-case-challenging-the-fifth-amendment->.

10. Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2d 361, 368 (2013).

11. Compare *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), and *Crawford v. Washington*, 541 U.S. 36 (2004), with *Maryland v. Shatzer*, 559 U.S. 98 (2010), and *Florida v. Powell*, 559 U.S. 50 (2010).

12. See Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 21, 27 (2010) (discussing conservatism of Roberts Court); see also JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 17 (2012) (asserting “Roberts towers above his colleagues, conservative and liberal alike, in savvy, intelligence, and understanding of the place of the Supreme Court in American life The conservative ascendancy at the Court owes much to Republican victories in presidential elections and to well-funded sponsors but also to the power of ideas”); MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* xii-xiii (2013) (stating “the Roberts Court’s decisions correspond to the main constitutional positions associated with the Republican Party of the early twenty-first century”).

13. 512 U.S. 452 (1994).

14. See *id.* at 461.

15. 560 U.S. 370 (2010).

16. See *id.* at 371.

as evidence of guilt in the prosecutor's case-in-chief. However, a close analysis shows this line of jurisprudence is based on a faulty foundation. *Davis* was wrongly decided because it was not faithful to *Miranda*, and *Berghuis* erroneously relied on the analysis in *Davis*. These cases, which weakened an already emaciated *Miranda*, wrongly served as legal precedent for *Salinas*.

II. PROVIDING CONTEXT: *MIRANDA V. ARIZONA*

In 1966, *Miranda* became the Warren Court's most sweeping criminal procedure case, ensuring that an individual is accorded a meaningful Fifth Amendment privilege that can be enforced against overzealous police practices in an interrogation room.¹⁷ As many Americans have gleaned from watching television crime dramas like "Law & Order" and its spin-off series, *Miranda* requires: a person be warned that any statement he makes may be used against him; a person has a right to the presence of an attorney; and if the defendant waives these rights, he must do so voluntarily, knowingly, and intelligently.¹⁸ But these same television viewers may not understand how or when to invoke these same rights in practice.

The importance of *Miranda* rights cannot be emphasized enough. Professors Stephen Saltzburg and Daniel Capra have summarized the purposes of *Miranda* as: (1) "creat[ing] a prophylactic rule to aide in judicial review" so a court can determine whether a confession is tainted by the absence of warnings, or is more likely to be voluntary because the warnings were provided; and (2) creating confidence that a voluntary confession is intelligently made by a person who is aware of the right to remain silent, and knows that any statements made can be used against him.¹⁹ Regrettably, the Supreme Court's post-*Miranda* decisions, specifically *Davis*, *Berghuis*, and *Salinas*, have impaired *Miranda*'s original clarity, making it difficult for the police and lower courts to determine the circumstances under which confessions may be obtained.²⁰ This has resulted in confusion and the tacit encouragement of

17. See *Miranda v. Arizona*, 384 U.S. 436, 439-44 (1966) (expressing Court's commitment to preserving individual's Fifth Amendment right).

18. See *id.* at 444-45 (laying out procedural safeguards).

19. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 541 (5th ed. 1996) (analyzing *Miranda* as having two distinct aspects). Interestingly, some scholars advocate for a modification of the *Miranda* rights. For example, Professor Mark Godsey has proposed that the current instruction be "buttressed by a new 'right to silence' warning that provides something to the effect of: 'If you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.'" Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783-84 (2006). He argues *Miranda* warnings should be expanded to include a warning regarding the right to silence, a right to re-invoke silence, and a more detailed explanation of the right to counsel. See *id.*

20. See Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 142, 144-45 (Richard A. Leo & George C. Thomas III eds., 1998).

police overreaching.²¹ Today, the original *Miranda* protections are almost gone. After a suspect has been Mirandized, the suspect must unambiguously request counsel and expressly invoke his or her right to silence. Prosecutors can use a defendant's pre-*Miranda* silence, including non-verbal gestures like demeanor and conduct, against him or her.²²

III. *DAVIS V. UNITED STATES*: AFTER BEING MIRANDIZED, A SUSPECT MUST UNAMBIGUOUSLY REQUEST COUNSEL

Under *Davis*, any post-waiver remark made by a suspect that would have previously been regarded as an invocation, may be ignored.²³ In *Davis*, a sailor in the United States Navy was beaten to death with a pool cue on October 2, 1988.²⁴ His body was discovered on the morning of October 3, 1988, on a loading dock behind the Charleston Naval Base commissary.²⁵ The investigation gradually began to focus on another sailor, Operations Specialist Seaman Apprentice Robert Davis.²⁶ Investigators established there was a dispute between Davis and the victim over the results of a pool game played the night before.²⁷ Through a series of screening interviews, the Naval Investigative Service (NIS) discovered Davis had told others he was involved in the killing and shared intimate details concerning the beating.²⁸

Once taken into custody, Davis cooperated during the thirty-minute interview. Prior to the interrogation, he was advised of his right to speak with an attorney and to have an attorney present during questioning, as is required by both *Miranda* and Article 31 of the Uniform Code of Military Justice.²⁹ Davis subsequently gave an oral and written waiver of these rights.³⁰ Approximately an hour and a half into the interrogation, Davis stated, “[m]aybe

21. *See id.*

22. *See id.*

23. *See Davis v. United States*, 512 U.S. 452, 462 (1994) (allowing continued questioning in absence of unambiguous request for counsel).

24. *See id.* at 454.

25. *See id.*

26. *See id.*

27. *See Davis*, 512 U.S. at 454.

28. *See id.*

29. *See Davis v. United States*, 512 U.S. 452, 454-55 (1994) (describing suspect's legal rights). Article 31(b) of the Uniform Code of Military Justice states:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

10 U.S.C. § 831(b) (2012).

30. *See Davis*, 512 U.S. at 455.

I should talk to a lawyer.”³¹ An NIS agent continued discussions with Davis in an attempt to clarify whether he was asserting his right to counsel.³² The agent asked Davis if he was asking for a lawyer or just making a comment about a lawyer.³³ According to the agent, Davis stated, “[n]o, I’m not asking for a lawyer” and “[n]o, I don’t want a lawyer.”³⁴ After a short break, the NIS agents briefly reminded Davis of his rights under *Miranda* and Article 31, and subsequently continued the interrogation.³⁵ An hour later, Davis exclaimed, “I think I want a lawyer before I say anything else.”³⁶ The NIS agents then terminated the interrogation.³⁷

Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, wrote the majority opinion.³⁸ This opinion addressed two issues: whether an ambiguous request for counsel is enough to invoke a suspect’s right to counsel under *Miranda*, and whether police officers must confine themselves to clarifying questions after an ambiguous request for counsel has been made. The majority decisively addressed these issues by stating that after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney, and that such questioning is not limited, by any means, to clarifying questions.³⁹

In two lengthy passages, the Court discussed the *Miranda* statements as setting up a suspect’s right to counsel. In the first section, the Court noted *Miranda*’s right to counsel is sufficiently important to criminal suspects in that it “requir[es] the special protection of the knowing and intelligent waiver standard.”⁴⁰ The Court reiterated that “[i]f the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him.”⁴¹ Further, “if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.”⁴²

In the second section, the *Davis* Court continued with its emphatic dicta regarding the application of the *Miranda* doctrine as it had evolved from *Edwards v. Arizona*⁴³ to *Davis*. In doing so, Justice O’Connor utilized a bipolar

31. *Id.*

32. *See id.*

33. *See id.*

34. *Davis*, 512 U.S. at 455.

35. *See Davis v. United States*, 512 U.S. 452, 455 (1994).

36. *Id.*

37. *See id.* at 455.

38. *Id.* at 453.

39. *See Davis*, 512 U.S. at 461-62.

40. *See id.* at 458 (quoting *Edwards v. Arizona*, 451 U.S. 477, 483 (1981)).

41. *Davis v. United States*, 512 U.S. 452, 458 (1994).

42. *Id.*

43. 451 U.S. 477 (1981).

“yes/but” paradigm in explaining the majority’s infirm reasoning leading up to its holding. She began by making four independent and definitive assertions that are consistent with *Miranda*’s intent and reasoning, but then concluded with four contradictory ends, thus completely undermining those assertions.

First, Justice O’Connor stated:

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.⁴⁴

Second, Justice O’Connor wrote:

[W]e must consider the other side of the *Miranda* equation: the need for effective law enforcement The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so⁴⁵

Third, Justice O’Connor reasoned:

[W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.⁴⁶

Fourth, Justice O’Connor boldly stated:

We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel

44. *Davis*, 512 U.S. at 460 (describing protections of *Miranda*).

45. *Id.* at 461.

46. *Id.* at 461-62.

at any time, the police must immediately cease questioning him until an attorney is present.⁴⁷

The Court's conclusion sets forth comprehensive and compelling arguments that effectively state Supreme Court precedent does not require clarifying questions or the cessation of an interrogation unless the suspect articulates a clear desire to have counsel present. Oddly, the *Davis* Court used language from *Edwards* that supports the *Miranda* rationale and holding, only in order to limit that same holding. The *Davis* Court short shifted *Edwards* because of its concern that requiring the cessation of questioning immediately upon an ambiguous or equivocal reference to counsel would unjustifiably extend *Edwards*. Justice O'Connor declared that the Court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue."⁴⁸ In coming to her narrowly-focused conclusion, Justice O'Connor rationalized the mere act of informing suspects of their *Miranda* rights will be sufficient to overcome deficiencies and protect against the coerced relinquishment of the right against self-incrimination. According to Justice O'Connor, the two more lenient approaches taken by other jurisdictions were unnecessarily burdensome on law enforcement.⁴⁹ In adopting a more rigid rule, she reasoned police officers should not have to shoulder the burden of guessing whether a suspect was invoking the right to counsel or not.⁵⁰

As a result, years later, juvenile defendants are particularly vulnerable under *Davis*. The California Supreme Court addressed the issue of a juvenile's ambiguous request for counsel in *People v. Nelson*.⁵¹ In *Nelson*, law enforcement officers questioned a fifteen-year-old about a murder after he voluntarily waived both his right to remain silent and his right to counsel.⁵² The court concluded Nelson's request to speak to his mother three and a half hours into the session, along with his decision not to take a polygraph test until

47. *Davis v. United States*, 512 U.S. 452, 462 (1994).

48. *Id.*

49. *See id.* *See generally* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) (expounding on hard trade offs of *Miranda* decision); Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996) (weighing benefits and costs of *Miranda*'s creation of national standard for police interrogation); Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999) (exploring history and effects of 1968 federal statute disregarding warnings); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (defending analysis and argument of original article); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (suggesting fall in crime clearance rates following *Miranda* attributable partly to restrictions on police interrogations).

50. *See Davis*, 512 U.S. at 461 (preferring clarity and ease of application).

51. 266 P.3d 1008 (Cal. 2012).

52. *See id.* at 1011 (describing background of case).

his mother or lawyer arrived, was not a clear invocation of his *Miranda* rights.⁵³ The court then relied on the *Davis* and *Berghuis* standards to reject Nelson's claim that his statement to the police to leave him alone was not a *Miranda* invocation.⁵⁴ In its analysis, the court interpreted *J.D.B. v. North Carolina*,⁵⁵ which addressed custody determinations for purposes of imposing *Miranda* warnings, and held a child's age and maturity informed the *Miranda* custody analyses. The court declared, "[a]lthough the Supreme Court has not spoken on the matter, there appears no persuasive basis for exempting juveniles from *Davis*'s reasonable-officer standard. The interest in protecting lawful investigative activity is equally weighty in the adult and juvenile contexts."⁵⁶

IV. *BERGHUIS V. THOMPKINS*: AFTER BEING MIRANDIZED, A SUSPECT MUST SPEAK UP TO INVOKE RIGHT TO SILENCE

Sixteen years after *Davis*, the issue before the Court in *Berghuis* was whether the law enforcement officer violated Thompkin's privilege against self-incrimination.⁵⁷ Van Chester Thompkins, Jr. was charged with first-degree murder, assault with intent to commit murder, and several firearms-related charges stemming from a shooting in Michigan.⁵⁸ The detective read the *Miranda* rules to Thompkins in an eight-by-ten-foot room, including the fifth warning: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."⁵⁹ Thompkins declined to sign the *Miranda* form.⁶⁰ Thompkins also never said he wanted to remain silent, talk with police, or obtain an attorney.⁶¹ About two hours and forty-five minutes into the interrogation, the detective asked Thompkins, "Do you believe in God?"⁶²

53. See *id.* at 1019-20 (noting Nelson's actions not invoking *Miranda* rights). Sometimes, juveniles are ultimately successful in persuading courts to issue a suppression ruling. The Texas Supreme Court held a juvenile who told a magistrate that he wanted his mother in order to get an attorney invoked his right to counsel before police interrogated him about a murder. See *In re H.V.*, 252 S.W.3d 319, 326-27 (Tex. 2008) (holding H.V. invoked right to counsel). The majority opinion referred to *Davis* and provided examples of what constituted a valid request for counsel. See *id.* at 325-26. The court recognized that, "[t]here appear to be no cases answering whether a juvenile's age is among the 'variety of other reasons' courts cannot consider when deciding whether an accused has requested counsel." *Id.* at 326 (quoting *Davis*). The court later determined that, "[t]his is not a case in which H.V. simply wanted to see his mother; the only reason he said he wanted her was for the purpose of getting him an attorney." *Id.* at 327.

54. See *Nelson*, 266 P.3d at 1020 (applying *Davis* and *Berghuis*).

55. 131 S. Ct. 2394 (2011).

56. *Nelson*, 266 P.3d at 1016 (positing juveniles not exempt from reasonable-officer standard).

57. See *Berghuis v. Thompkins*, 560 U.S. 370, 374 (2010).

58. See *id.* at 376.

59. *Id.* at 375.

60. See *id.*

61. See *Berghuis*, 560 U.S. at 375.

62. *Id.* at 376.

Thompkins made eye contact with the detective and replied “yes” as he began to get teary eyed.⁶³ The detective asked Thompkins if he prayed to God, and Thompkins answered “yes.”⁶⁴ Thompkins also answered “yes,” and looked away, when the detective asked if he prayed to God to forgive him “for shooting that boy down.”⁶⁵ Thompkins refused to make a written confession, and the interrogation ended about fifteen minutes later.⁶⁶ At trial, the jury found Thompkins guilty of first-degree murder and assault.⁶⁷

Justice Kennedy wrote for the Court, and was joined by Chief Justice Roberts and Justices Alito, Thomas, and Scalia.⁶⁸ The Court was not persuaded by Thompkins’s argument that he invoked his right to silence by not saying anything for a sufficient period of time (two hours and forty-five minutes), and that the interrogation should have ceased before he made his inculpatory statements.⁶⁹ Neither was the Court swayed by Thompkins’s argument that even if his three “yes” responses were not tantamount to any waiver of his right to silence under *Miranda*, the police should have obtained an express waiver prior to any questioning.⁷⁰

Justice Kennedy began his analysis by citing to *Davis* and boldly stating a request for counsel must be made unambiguously before the police are required to end the interrogation.⁷¹ Justice Kennedy acknowledged that while the Court had yet to determine whether an invocation of the right to remain silent can be ambiguous or equivocal, there was no reason to treat these two rights differently; he wrote, “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*.”⁷² Leaning on *Davis* for analytical support, Justice Kennedy discussed what he deemed to be good reasons to require an accused to invoke the right to remain silent unambiguously.⁷³ Even though he never explicitly mentions *Edwards* in his opinion, Justice Kennedy completely relied upon *Davis* and its interpretation of *Edwards*.⁷⁴ In the process, Justice Kennedy suggested that if officers are forced to make a difficult judgment call and guess wrong about the intent of an ambiguous statement, they risk suppression of an otherwise voluntary

63. *Berghuis v. Thompkins*, 560 U.S. 370, 376 (2010).

64. *Id.*

65. *Id.*

66. *See id.*

67. *See Berghuis*, 560 U.S. at 378.

68. *See id.* at 373.

69. *See Berghuis v. Thompkins*, 560 U.S. 370, 388-89 (2010).

70. *See id.* at 389.

71. *See id.* at 381 (citing proposition from *Davis*).

72. *See id.*

73. *See Berghuis*, 560 U.S. at 381-82.

74. *See id.* (citing to *Davis* to support requirement of unambiguous invocation of *Miranda* rights); *Davis v. United States*, 512 U.S. 452, 458 (1994) (analyzing *Edwards* case).

confession, which “would place a significant burden on society’s interest in prosecuting criminal activity.”⁷⁵

Moving to the issue of waiver in *Berghuis*, Justice Kennedy unequivocally held there was sufficient evidence that Thompkins’s response to the detective’s questions about whether he prayed to God for forgiveness was a “course of conduct indicating waiver.”⁷⁶ In the view of the majority, “he could have said nothing in response to [the detective’s] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation,” but instead Thompkins gave sporadic answers to these questions.⁷⁷ Accordingly, the majority determined Thompkins waived his right to remain silent by making an uncoerced statement to the police.⁷⁸

However, I would argue the Supreme Court wrongly decided *Berghuis* because it circumvented *Miranda*’s intent. In *Miranda*, the Court stated: “Once warnings have been given, the subsequent procedure is clear. If the individual *indicates in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”⁷⁹ In spite of this, the *Berghuis* Court almost blindly applied the reasoning and holding from *Davis* to the facts in *Berghuis* without any attempt to distinguish these two factually and legally distinct cases. To begin, *Davis* is not a right to silence case, which is reflected in the opinion. The case only mentions the right to remain silent twice: “[p]etitioner waived his rights to remain silent and to counsel, both orally and in writing” and “[a]fter a short break, the agents reminded petitioner of his rights to remain silent and to counsel.”⁸⁰ There is no further analysis of the right to remain silent. One commentator remarked: “[N]either the language nor logic of the *Davis* opinion suggests the appropriateness of applying its holding in the right-to-silence context.”⁸¹

Had the Supreme Court in *Berghuis* more closely compared the facts before it with the facts of *Davis*, it would have realized the major differences between these cases. *Davis* waived his right to remain silent and to counsel, both orally and in writing, ninety minutes after his rights were read to him.⁸² In contrast, Thompkins immediately declined to sign the *Miranda* forms after the rules were read aloud to him.⁸³ Later on, Thompkins refused to make a written

75. See *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (explaining rationale for requirement of unambiguous invocation of right to remain silent).

76. See *id.* at 385-86 (stating Thompkins waived right to remain silent).

77. See *id.* at 386.

78. See *id.* at 387.

79. *Miranda v. Arizona*, 384 U.S. 472, 473-74 (1966) (emphasis added).

80. See *Davis v. United States*, 512 U.S. 452, 455 (1994).

81. Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558, 574 (1998) (noting problem of applying *Davis* in right-to-silence context).

82. See *Davis*, 512 U.S. at 455.

83. See *Berghuis v. Thompkins*, 560 U.S. 370, 375 (2010).

confession.⁸⁴ Silence is arguably more definitive and certain than the statement in *Davis*: “I think I want a lawyer before I say anything else.”⁸⁵ With this in mind, the detective should have reasonably concluded Berghuis did not wish to speak.

Despite the stark contrasts between *Davis* and *Berghuis*, Justice Kennedy forced the application of the right to counsel to the right to silence. Conflating the two, he failed to explain why making a judgment about whether a suspect has made an unambiguous request to remain silent is any less difficult than making a judgment about whether the suspect has made an ambiguous request to speak with an attorney. As a practical matter, it may be easier to ascertain whether a defendant wanted to remain silent than it would be to determine whether a suspect has made a clear, unambiguous request for counsel. Accordingly, the Court should have, but did not, treat Thompkins’s conduct as the exercise of his right to remain silent by essentially not saying anything. Because silence may be more easily implied, it should be held to a lower threshold than the right to counsel. The “clear statement” rule from *Davis* should not have been applied in *Berghuis* based solely on the premise that both cases are fundamentally about the invocation of the same right to cut off questioning.

The infirmities of the majority opinion did not escape the attention of Justice Sotomayor, who was critical of the majority’s decision not to exercise judicial restraint. She believed the Court could have rendered a decision based strictly on Thompkins’s request for habeas relief alone, without creating new constitutional law.⁸⁶ It is evident the Court recognized as much when it remarked, “[t]he Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal.”⁸⁷ Justice Sotomayor proceeded to criticize the Court’s leap forward in its belief that there is no reason not to treat the right to counsel and the right to remain silent the same for *Miranda* purposes. Justice Sotomayor accused the majority of discarding judicial restraint, explaining: “Today’s decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak [S]uspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so.”⁸⁸

Justice Sotomayor analyzed the facts of the case and determined: Thompkins never expressly waived his right to remain silent, which was supported by his refusal to sign the *Miranda* acknowledgment; and

84. *See id.* at 376.

85. *See Davis*, 512 U.S. at 455.

86. *See Berghuis*, 560 U.S. at 411-12 (Sotomayor, J., dissenting) (noting majority holding inconsistent with *Miranda*).

87. *See id.* at 381 (majority opinion).

88. *Id.* at 412 (Sotomayor, J., dissenting).

Thompkins's "actions and words" before he made inculpatory statements did not constitute a "course of conduct indicating waiver."⁸⁹ She believed the prosecution did not carry its heavy burden in establishing Thompkins either expressly or implicitly waived his right to remain silent.⁹⁰ As such, she argued the Court's conclusion that Thompkins waived his right to silence, and that invocation of the right to remain silent had to be a clear statement, was counterintuitive.⁹¹ Accordingly, Justice Sotomayor forcefully disagreed with the Court's application of *Davis*, a case involving a right to counsel, not the right to silence, holding that police may continue questioning a suspect until he unambiguously invokes his right to remain silent.⁹² Justice Sotomayor argued *Davis* said nothing about the right to silence and noted *Miranda* itself distinguished the right to counsel from the right to silence. She argued *Davis*'s clear-statement rule is a poor fit for the right to silence, and further, the Court's concern that police will face "difficult decisions about an accused's unclear intent and suffer the consequences of 'guess[ing] wrong' is misplaced."⁹³ Instead, she asserted: "[T]oday's novel clear-statement rule for invocation invites police to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights."⁹⁴

Further, Justice Sotomayor made an astute observation of the pre/post-waiver distinction in *Davis* that the majority ignored.⁹⁵ In particular, Justice Sotomayor considered the split among federal and state courts in their interpretation of *Davis*'s applicability in pre/post-waiver situations:

[T]he suspect's equivocal reference to a lawyer in *Davis* occurred only *after* he had given express oral and written waivers of his rights The Court ignores this aspect of *Davis*, as well as the decisions of numerous federal and state courts declining to apply a clear-statement rule when a suspect has not previously given an express waiver of rights.⁹⁶

Justice Sotomayor's argument that *Berghuis*, like *Davis*, only applies in post-waiver invocations should be given deeper consideration. Accordingly, when there is no waiver, there is no need to clearly assert the right to silence. After *Davis*, lower courts adhered to the Court's clarity requirement for

89. See *Berghuis v. Thompkins*, 560 U.S. 370, 399 (2010) (Sotomayor, J., dissenting).

90. See *id.* at 402.

91. See *id.* at 412.

92. See *id.* at 407.

93. See *Berghuis*, 560 U.S. at 410 (Sotomayor, J., dissenting) (citing *Davis v. United States*, 512 U.S. 452, 461 (1994)).

94. *Id.* at 404.

95. See *Berghuis v. Thompkins*, 560 U.S. 370, 407-08 (2010) (Sotomayor, J., dissenting).

96. *Id.*

requests of counsel. The only manner in which the courts differed was in the determination of whether or not the rule applied in pre-waiver situations.⁹⁷ After *Berghuis*, it may have been a reasonable prediction that courts will do the same with regard to the right to silence. However, *Salinas* has foreclosed that possibility.

V. *SALINAS V. TEXAS*: A SUSPECT'S PRE-ARREST SILENCE CAN BE USED AS EVIDENCE OF GUILT

Before *Salinas*, the Court's reservation on the issue of admissibility of pre-arrest silence led to a longstanding and unsettled split among the circuit courts regarding whether the prosecution may use pre-arrest silence as substantive evidence of a defendant's guilt.⁹⁸ In fact, the circuit courts of appeal are divided on whether pre-arrest silence is admissible as substantive evidence of a defendant's guilt. The Eleventh, Ninth, and Fifth Circuits have ruled pre-arrest

97. Some lower courts have reasoned that *Davis* is applicable even when a suspect makes an ambiguous request for counsel before waiving *Miranda* rights. See e.g., *Abela v. Martin*, 380 F.3d 915, 925-26 (6th Cir. 2004); *In re Christopher K.*, 841 N.E.2d 945, 964-65 (Ill. 2005); *In re H.V.*, 252 S.W.3d 319, 325-26 (Tex. 2008). But most courts have determined that *Davis* is not applicable because a clear request is necessary only after waiving *Miranda* rights. See e.g., *United States v. Rodriguez*, 518 F.3d 1072, 1078 (9th Cir. 2008); *State v. Collins*, 937 So. 2d 86, 92-93 (Ala. Crim. App. 2005); *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006); *Alvarez v. State*, 15 So. 3d 738, 744 (Fla. Dist. Ct. App. 2009); *State v. Holloway*, 760 A.2d 223, 228 (Me. 2000); *Freeman v. State*, 857 A.2d 557, 573 (Md. Ct. Spec. App. 2004); *State v. Blackburn*, 766 N.W.2d 177, 182-83 (S.D. 2009); *State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002); *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997).

98. In the interim, scholars expressed divergent opinions on this issue. See e.g., Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 933 (2012) ("[A]dmitting pre-Miranda silence would create the very evil out of which the right was born: cruel choices."); Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant's Pre-arrest Silence*, 63 BROOK L. REV. 897, 931 (1997) ("Silence . . . like a nod or head shake, clearly meets the threshold [sic] requirement that the act be testimonial in character. If found to be elicited through compulsion, the silence is privileged under the Fifth Amendment."); 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, 224 (1997) ("Allowing a prosecutor to comment on a defendant's silence in its case-in-chief violates the Fifth Amendment privilege against self-incrimination [T]he use of silence to imply guilt is a violation of the defendant's Fifth Amendment rights, even if the silence occurred before arrest."); Meaghan Elizabeth Ryan, Commentary, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903, 918 (2007) ("[T]he use of silence as substantive evidence of guilt adds virtually nothing to the truth-seeking function of a criminal trial, it has the enormous potential to detract from that function."); Christopher Macchiaroli, *To Speak or Not to Speak: Can Pre-Miranda Silence Be Used As Substantive Evidence of Guilt?*, CHAMPION, Mar. 2009, at 14, 20 ("Permitting the government to comment on post-arrest, pre-Miranda silence does nothing more than to invite law enforcement officers to delay the issuance of *Miranda* warnings in order to gain a perceived strategic advantage at trial."). But see 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, 3 (2005) ("[N]either *Miranda* nor the Constitution bar the use of a defendant's pre-arrest or pre-Miranda silence in the government's case-in-chief."); Jan Martin Rybnick, *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, 407-08 (2009) (arguing neither Self-Incrimination Clause nor Court's expansion of it in *Miranda* applies to pre-arrest silence).

silence is admissible in the prosecution's case-in-chief.⁹⁹ The Eleventh and Fifth Circuits have ruled that comment during trial on pre-arrest silence is constitutional.¹⁰⁰ However, the Tenth, Seventh, Sixth, and First Circuits have held the use of a non-testifying defendant's pre-arrest silence violates the Fifth Amendment right against self-incrimination.¹⁰¹

After the Court granted certiorari in *Salinas*, divergent positions held by amici emerged. The National Association of Criminal Defense Lawyers and the Texas Criminal Defense Lawyers Association argued the government's use of a suspect's pre-arrest silence as evidence of his guilt undermines Fifth Amendment protections. These groups argued that a real dilemma exists, because when a defendant answers a question, he may incriminate himself, but if he remains silent, that silence will be used as evidence of his guilt.¹⁰² The American Civil Liberties Union argued withholding protection of pre-arrest, pre-*Miranda* silence would compromise the truth-seeking function of criminal proceedings and compel defendants to testify at trial about the reasons for such silence.¹⁰³

The facts of *Salinas* are straightforward. Police were investigating the murder of two brothers at their home.¹⁰⁴ There were no witnesses to the murder, but a neighbor heard the sound of gunshots and saw a man run out of the house to a dark-colored car that sped away.¹⁰⁵ Six shotgun shell casings

99. See e.g., *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (allowing post-arrest silence for impeachment and substantive evidence of guilt); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998), *overruled by* *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (announcing use of silence as substantive evidence of guilt does not violate Constitution); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (allowing use of pre-arrest silence when defendant not under compulsion); *United States v. Tenorio*, 69 F.3d 1103, 1107 (11th Cir. 1995) (holding use of pre-arrest silence proper for showing guilt); *United States v. Calise*, 996 F.2d 1019, 1022 (9th Cir. 1993) (ruling prosecutor's comment regarding silence harmless error); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (allowing prosecution's comment on defendant's demeanor during initial questioning to show guilt).

100. See *Zanabria*, 74 F.3d at 593; *Rivera*, 944 F.2d at 1568. The Eleventh Circuit relied on *Jenkins v. Anderson*, where the Court held that prosecutors may use a testifying defendant's pre-arrest silence to impeach. 447 U.S. 231, 240 (1980); see *Rivera*, 944 F.2d at 1568. Likewise, the Fifth Circuit held the Fifth Amendment is not applicable where the defendant's silence is "neither induced by nor a response to any action by a government agent." *Zanabria*, 74 F.3d at 593.

101. See e.g., *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001) (ruling use of silence improper under Fifth Amendment but harmless error); *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000) (holding use of silence impairs policies underlying self-incrimination privilege); *United States v. Davenport*, 929 F.2d 1169, 1174-75 (7th Cir. 1991) (determining privilege does not protect selective invocation in pre-arrest context); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (limiting use of pre-arrest silence to impeachment); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (extending rationale of *Griffin* to pre-arrest context).

102. See Brief for Nat'l Ass'n of Criminal Def. Lawyers and Tex. Criminal Def. Lawyers Ass'n as Amicus Curiae Supporting Petitioner at 8-10, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 860456.

103. See Brief for Am. Civil Liberties Union as Amicus Curiae Supporting Petitioner at 11-13, *Salinas*, 133 S. Ct. 2147 (No. 12-246), 2013 WL 768644.

104. See *Salinas*, 133 S. Ct. at 2178.

105. See *id.*

were recovered at the scene.¹⁰⁶ The defendant, Genovevo Salinas, had been at the home the night before the killing.¹⁰⁷ Salinas was called down to the police station to hand over his shotgun for ballistics testing and to answer questions in connection with the investigation.¹⁰⁸ A police officer interviewed Salinas for about an hour without reading him his *Miranda* warnings.¹⁰⁹ When the officer asked Salinas if his shotgun would match the shells found at the murder scene, he declined to answer.¹¹⁰ Instead, Salinas looked down at the floor, shuffling his feet and biting his lip.¹¹¹ After some brief silence, the officer asked additional questions, which Salinas answered.¹¹² The prosecutor used Salinas's reaction to the officer's questioning as evidence of his guilt.¹¹³

During oral argument on appeal, Jeffrey Fisher of the Stanford Law Supreme Court Clinic argued on behalf of Mr. Salinas that "[t]he Fifth Amendment prohibits using a person's silence during a noncustodial police interview against him at trial," and if that rule was not applied, the burden of proof would be unjustly shifted to Salinas.¹¹⁴ Justice Ginsburg, in response, asked whether the *Berghuis* rule applied and if Salinas's silence could be commented upon because he did not invoke his right to silence.¹¹⁵ Fisher explained *Berghuis* was not applicable because the Court did not hold silence preceding a defendant's statements could be used against a defendant.¹¹⁶ In making this argument, Fisher conceded to Justice Ginsburg's assertion that the demeanor of the suspect, if communicative, can be commented upon.¹¹⁷

Fisher then proceeded to distinguish between *Berghuis* and *Salinas* by explaining that Salinas had the right to cut off questioning, whereas the defendant in *Berghuis* did not.¹¹⁸ He strenuously argued the *Miranda* Court determined the right to remain silent need not be expressly invoked.¹¹⁹ Based on that premise, Fisher argued about the fundamental unfairness of enforcing this rule against a suspect who likely would not know about the "magic words" necessary to invoke the right.¹²⁰

The state's arguments focused on the meaning of Salina's silence. When Justice Scalia asked Alan Curry, the Texas Assistant District Attorney, whether

106. *See id.*

107. *See id.*

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

109. *See id.*

110. *See id.*

111. *See id.*

112. *See Salinas*, 133 S. Ct. at 2178.

113. *See id.* at 2184.

114. Transcript of Oral Argument at 3, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246).

115. *See id.* at 4-5.

116. *See id.*

117. *See id.* at 8.

118. *See* Transcript of Oral Argument, *supra* note 114, at 11.

119. *See id.* at 12.

120. *See* Transcript of Oral Argument at 19, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246).

Salinas could have been invoking his Fifth Amendment right by not talking anymore, he responded that this outcome was merely a possibility:

It might, but it also might suggest that he's having difficulty coming up with an exculpatory response. It might suggest that he can't think of a good answer. It might suggest that he is worried about the question and he is thinking more about how worried he is about the question than how he wants to respond to it.¹²¹

Curry attempted to distinguish *Berghuis* and *Salinas* by explaining that the facts in *Salinas* show that Salinas selectively answered some questions and avoided answering others, and it was therefore necessary for him to affirmatively invoke his right. On this point, Justice Kagan professed to Curry that *Berghuis* was not the proper precedent for him to use, and asked:

The question is: What is it insufficient for? In *Berghuis*, it was insufficient for the purpose of cutting off police questions That's not the case here. The question here is whether it's sufficient or insufficient for the purpose of allowing his—his silence to be used against him at trial."¹²²

Justice Kagan followed up by noting that:

Berghuis is different for a different reason. *Berghuis* is different because the question in *Berghuis* is what do you have to do to make the police go away. Here, the police were not going away That's why *Berghuis* is irrelevant here because *Berghuis* said at a certain point—you know, you need to invoke in order to stop questioning. But—but that's not what's at issue here.¹²³

Later, Ginger Anders, Assistant to the Solicitor General, argued, that “the Fifth Amendment privilege is not self-executing and that a suspect must invoke it in order to claim its protection to a noncustodial interview.”¹²⁴ Justice Sotomayor then responded:

That is such a radical position, that silence is an admission of guilt. That's really what the argument is. I certainly understand that speaking can implicate you, and, if you choose to speak, clearly, whatever you say can be used against you, unless you're in custody and unless you've invoked the right before. But

121. *Id.* at 35.

122. *See id.* at 26.

123. *Id.* at 41 (quoting Justice Kagan's distinction from *Berghuis*).

124. *See* Transcript of Oral Argument, *supra* note 114, at 48.

this is radically different. We are—we are—you're trying to say acts of commission and omission are the same, but statements are different than silence because, then, you're making the person who is asking this question your—your admission. You are saying you're adopting their statement as true.¹²⁵

Not swayed by the comments made by Mr. Fisher or his fellow justices, Justice Alito, writing for the three-justice plurality, held Salinas was required to invoke his privilege against self-incrimination, but failed to do so.¹²⁶ At the outset, he rejected Salinas's argument that the Fifth Amendment's Self-Incrimination Clause forbids the prosecution from using a person's refusal to answer pre-arrest police questioning against him at trial on the grounds that invocation does "not apply where a witness is silent in the face of official suspicions."¹²⁷ Justice Alito emphatically distinguished this case from *Griffin v. California*,¹²⁸ stating Salinas's Fifth Amendment rights were not violated because Salinas was not testifying on the witness stand at trial.¹²⁹ In *Griffin*, the Court held the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."¹³⁰ In drawing this contrast, Justice Alito pointed to the fact that Salinas was not on the witness stand, and therefore, in his view, there was no government coercion.¹³¹ Similar to Justice O'Connor in *Davis*, and Justice Kennedy in *Berghuis*, Justice Alito was concerned that holding otherwise would create additional burdens on law enforcement officers and hinder their efforts in seeking criminal justice.¹³² For Justice Alito, the need to find a criminal defendant guilty outweighed any possibility that a defendant might be invoking his or her right not to speak.¹³³

Here, Justice Alito erroneously interpreted *Griffin*. In *Griffin*, the Court only prohibited comment on the accused's silence during trial—not before arrest.¹³⁴

125. *Id.* at 49 (noting Justice Sotomayor's response).

126. *See Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013) (holding Salinas did not invoke privilege). The majority opinion was written by Justice Alito, and joined by Chief Justice Roberts and Justice Kennedy. *See id.* at 2176.

127. *See id.* at 2181-82.

128. 380 U.S. 609 (1965).

129. *See Salinas*, 133 S. Ct. at 2179.

130. *Griffin*, 380 U.S. at 615.

131. *See Salinas*, 133 S. Ct. at 2180.

132. *See Salinas v. Texas*, 133 S. Ct. 2174, 2180, 2183 (2013). *But see* Stephen Schulhofer, *Miranda v. Arizona: A Modest But Important Legacy*, in *CRIMINAL PROCEDURE STORIES*, 155, 177 (Carol S. Steiker, ed., 2006) ("Miranda's impact on conviction rates is negligible and that it does not present serious problems for law enforcement.").

133. *See Salinas*, 133 S. Ct. at 2182.

134. *See Griffin v. California*, 380 U.S. 609 (1965) (prohibiting use of defendant's silence at trial to be used as evidence of guilt); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent (1996)*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 153, 164 (Richard A.

Likewise, he wrongly relied on *Berghuis* despite its factual and legal distinction with *Salinas*. As Justice Kagan astutely observed, *Salinas* involved the admission of silence itself, whereas *Berghuis* involved the admissibility of statements after silence.¹³⁵ Nevertheless, Justice Alito assumed the analysis in *Berghuis* was sound, and on this basis, he asserted: “If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.”¹³⁶ Unfortunately, Justice Alito committed the same error as Justice Kennedy committed in *Berghuis*—forcing the application of the right to counsel as outlined in *Davis* to the right to silence. Similarly, Justice Alito’s findings mirrored Justice Kennedy’s determinations in *Berghuis*, stating: “So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation. Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it.”¹³⁷

Consequently, Justice Alito’s conclusion minimized *Salinas*’s argument at oral argument that “it would be unfair to require a suspect unschooled in the particulars of legal doctrine to do anything more than remain silent in order to invoke his ‘right to remain silent.’”¹³⁸ Justice Alito’s ruling does not give defendants like *Salinas* the benefit of the doubt; instead, it concludes that in non-custodial interviews, suspects who remain silent are not invoking their Fifth Amendment rights. Rather, these suspects may be acting based on deception, embarrassment, or the protection of someone else.¹³⁹ To the contrary, Justice Alito argued, “[s]tatements against interest are regularly admitted into evidence at criminal trials, and there is no good reason to approach a defendant’s silence any differently.”¹⁴⁰ His own rhetoric rivaled Justice O’Connor’s reasoning in *Davis*:

Notably, petitioner’s approach would produce its own line-drawing problems, as this case vividly illustrates. When the interviewing officer asked petitioner

Leo & George C. Thomas III, eds., 1998) (examining *Griffin* and observing that “[b]ecause an unsworn statement made in response to police interrogation would be used against a suspect at trial, it was the ‘functional equivalent’ of testimony. The distinction between sworn and unsworn statements, central to the Framers’ understanding of what it meant to be compelled to testify, had disappeared”); Stephen J. Schulhofer, *Reconsidering Miranda (1987)*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 106, 108 (Richard A. Leo & George C. Thomas III, eds., 1998) (noting “what mattered in *Griffin* were the real-world consequences of the prosecutorial behavior, not whether the state had brought to bear any formal process or official sanction”).

135. See Transcript of Oral Argument, *supra* note 114, at 36-37.

136. *Salinas*, 133 S. Ct. at 2182.

137. *Id.* at 2184.

138. *Salinas v. Texas*, 133 S. Ct. 2174, 2177 (2013).

139. See *id.* at 2182.

140. *Id.* at 2183 (citation omitted).

if his shotgun would match the shell casings found at the crime scene, petitioner did not merely remain silent; he made movements that suggested surprise and anxiety. At precisely what point such reactions transform “silence” into expressive conduct would be a difficult and recurring question that our decision allows us to avoid.¹⁴¹

Justice Alito’s reliance on *Berghuis* and *Davis* is most prominent in his contention that the Court’s ruling will not be difficult to apply in practice.¹⁴² In doing so, he unmistakably dismisses the concern that the Court’s ruling will result in persistent litigation of close cases involving suspects who are required to assert their constitutional privilege to benefit from it. But Justice Alito’s remark contrasts with the stark reality of the continued litigation in the lower courts. As I have written elsewhere, a survey of the case law illustrates the great ambiguity caused by *Davis* and *Berghuis*.¹⁴³

Not surprisingly, Justice Thomas, joined by Justice Scalia, wrote a brief concurring opinion agreeing with Justice Alito’s conclusion, but disagreeing with the rationale of the plurality opinion.¹⁴⁴ Having his druthers, Justice Thomas would have gone further by overruling *Griffin* in its entirety because the Fifth Amendment’s protection against compelled self-incrimination bars the admission of evidence about a defendant’s pre-arrest, pre-*Miranda* silence as substantive evidence of guilt.¹⁴⁵ Justice Thomas perceives *Griffin* as wrongly decided because it is not supported by the text, history, or logic of the Fifth Amendment.¹⁴⁶

Justice Breyer authored a lengthy and pointed dissent, joined by Justices Ginsburg, Sotomayor, and Kagan, explaining that he would have held Salinas did not need to expressly invoke his right to silence and the Fifth Amendment barred the prosecution from introducing the evidence of silence as substantive evidence of guilt.¹⁴⁷ Justice Breyer stressed that the Fifth Amendment prohibits the prosecution from commenting on Salinas’s silence during police questioning, and insisted that the Court’s conclusion is inconsistent with existing Supreme Court jurisprudence.¹⁴⁸ As a rejoinder to Justice Alito’s measured deference to “society’s interest in the admission of evidence that is probative of a criminal defendant’s guilt,” Justice Breyer characterizes Salinas’s situation during the interview as one which placed him in a quandary:

141. *Id.* at 2183.

142. *See Salinas*, 133 S. Ct. at 2183.

143. *See generally* Harvey Gee, *An Ambiguous Request for Counsel Before, and Not After a Miranda Waiver*: *United States v. Rodriguez*, *United States v. Fry* and *State v. Blackburn*, 5 CRIM. L. BRIEF 51 (2009).

144. *See Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring).

145. *See id.*

146. *See id.*

147. *See id.* at 2189 (Breyer, J., dissenting).

148. *See Salinas*, 133 S. Ct. at 2186-89 (Breyer, J., dissenting).

To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent. If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt.¹⁴⁹

The thrust of his dissent is based on Justice Breyer's critique of the cases relied upon by the plurality insisting a defendant must expressly invoke the Fifth Amendment.¹⁵⁰ Justice Breyer asserted these cases could be distinguished on the grounds that the facts involved circumstances that did not give rise to an inference that the defendant intended to exercise his Fifth Amendment rights through silence.¹⁵¹ Justice Breyer makes two distinct and important points. First, he believed the plurality erroneously relied on *Jenkins v. Anderson*,¹⁵² a case that is factually distinct from *Salinas*.¹⁵³ In *Jenkins*, the defendant, who was indicted for murder, claimed he acted in self-defense.¹⁵⁴ At trial, the prosecution cross-examined Jenkins about his failure to explain his version of events to the police for at least two weeks, and also referred to the defendant's pre-*Miranda* silence in his closing argument.¹⁵⁵ Although the Court held the Fifth Amendment was not violated by the prosecutor's use of the defendant's pre-arrest silence to impact his credibility, in dicta, the Court noted it did "not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment."¹⁵⁶ As such, it was dubious for Justice Alito to rely on *Jenkins* because that case did not rely on the use of silence as substantive evidence.

Second, Justice Breyer faulted the plurality for anchoring much of its analytic framework on *Berghuis*, urging that "[t]he Court said nothing at all about a prosecutor's right to comment on his preceding silence and no prosecutor sought to do so."¹⁵⁷ Justice Breyer stressed the factual differences between *Berghuis* and *Salinas*, and pointed out that *Berghuis* never discussed whether a prosecutor had a right to comment about preceding silence, and as such any analogy could not be drawn.¹⁵⁸ He argued a waiver of right could be

149. *Id.* at 2182 (citation omitted) (plurality opinion); *see also id.* at 2186 (Breyer, J., dissenting).

150. *See Salinas v. Texas*, 133 S. Ct. 2174, 2186-89 (2013) (Breyer, J., dissenting).

151. *See id.* at 2188.

152. 447 U.S. 231 (1980).

153. *See Salinas*, 133 S. Ct. at 2187-88 (Breyer, J., dissenting) (describing *Jenkins* as "most illustrative" of distinctions).

154. *See Jenkins*, 447 U.S. at 232-33.

155. *See id.* at 233-34.

156. *See id.* at 236 n.2.

157. *See Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Breyer, J., dissenting).

158. *See id.* at 2189.

inferred from the circumstances in *Berghuis*, however the same cannot be said about Salinas which did not involve an out of custody situation, and he was not expressly provided with any rights with which to waive.¹⁵⁹

VI. AFTER *SALINAS V. TEXAS*: INTERPRETING AND APPLYING THE RULING

As a result of the divergent approaches of the plurality and concurring opinion, it can be argued there was no majority opinion in *Salinas*, because there was no common ground that garnered the necessary support. An argument can be made that Justice Thomas's concurring opinion is not likely the holding of *Salinas* based on *Marks v. United States*,¹⁶⁰ because there was no single rationale that garnered the support of a majority in *Salinas*.¹⁶¹ A court that adopted this reasoning could hold that the *Salinas* plurality and concurring opinions did not share enough common reasoning, such that Justice Thomas's concurrence might be regarded as a logical subset of the plurality opinion, and therefore, controlling under *Marks*. The plurality opinion anchored its analysis in the idea that Salinas should have invoked the right to silence if he wanted to exercise his constitutional right. By contrast, Justice Thomas's narrow concurrence devoted three of its four paragraphs to criticizing *Griffin*. Absent a controlling opinion, the decision can be read only for its persuasive force.¹⁶² As such, a court could just as well conclude the four-justice dissent written by Justice Breyer, and joined by Justices Ginsburg, Sotomayor, and Kagan, provides a significantly more persuasive rationale because it most clearly and loudly echoes *Miranda*'s original intent.

If a court chooses to apply the *Marks* rule, it will rely on *Salinas*, which, like *Davis* and *Berghuis*, departs from *Miranda*. *Salinas* forgets *Miranda*'s insistence that, prior to any questioning, the arrestee must be warned of his right to remain silent.¹⁶³ In deciding *Miranda*, the Warren Court was aware interrogators are encouraged to induce confessions through deception and by utilizing intimidating environments designed to "subjugate the individual to the will of his examiner."¹⁶⁴ It acknowledged the prejudicial effect a defendant's admission of silence can have if presented to a jury, and professed, "[o]ur aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."¹⁶⁵ More to the point,

159. *See id.*

160. 430 U.S. 188 (1977).

161. *See id.* at 193 (explaining how holding determined in "fragmented" decisions). The Court in *Marks* suggested that when "no single rationale" garners a majority, the holding is the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* (citation omitted).

162. *See United States v. Epps*, 707 F.3d 337, 349 (D.C. Cir. 2013).

163. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding warning of rights must precede questioning).

164. *See id.* at 457.

165. *See id.* at 469.

the Court reasoned: “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.”¹⁶⁶ Thus, it is unfair and arbitrary for a prosecutor to use noncustodial silence against the defendant at trial, but not custodial silence obtained during a post-*Miranda* interrogation.¹⁶⁷

Some legal scholars share similar views about the constitutionality of using pre-arrest silence. Professor Stephen Saltzburg suggests impeachment by pre-arrest silence impermissibly burdens the right to remain silent and the right to testify.¹⁶⁸ Further, Professor Marcy Strauss argues against the admissibility of pretrial silence because it violates due process given its inherent ambiguity, and the right against self-incrimination applies when a person is forced to provide incriminating evidence against the suspect who decides to remain silent prior to arrest.¹⁶⁹ Professor Orin Kerr suggests that the *Salinas* ruling will have a significant impact because “it is relatively easy for the government to claim that a suspect’s reaction to an incriminating question suggests guilt—and very hard for a defendant to challenge that characterization.”¹⁷⁰ He further opines it is unlikely a person questioned by law enforcement outside of custody will invoke their *Miranda* rights, and questions how a person can clearly identify their Fifth Amendment rights if they have not been informed they have these rights.¹⁷¹

Emphasizing the ruling’s far-reaching impact, and transcending socioeconomic lines, corporate law white-collar defense practice groups filed an amicus brief expressing their concerns in *Salinas*, which did not occur in *Davis* or *Berghuis*. This is not surprising given the increase in prosecutions of insider-trading cases. Nonetheless, this is a reminder that *Miranda* issues are

166. See *id.* at 468 n.37. A few years after *Miranda*, the Court declared the Fifth Amendment privilege should be given a broad interpretation in all proceedings where answers might incriminate an individual in future criminal proceedings. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

167. See *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013).

168. See Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 203-05 (1980).

169. See Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 141, 154 (2001). But see Rybnicek, *supra* note 98, at 440 ([N]either the Self-Incrimination Clause nor the Court’s expansion of it in *Miranda* applies to . . . post-arrest, pre-*Miranda* silence.”).

170. 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/>.

171. See *id.* Though Kerr does not mention it, there is also a possibility that cultural and sociolinguistic differences affect how a person hears discourse. See Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 345, 369 (2012) (discussing impact of sociolinguistics on civil discourse); Samira Sadeghi, Comment, *Hung Up on Semantics: A Critique of Davis v. United States*, 23 HASTINGS CONST. L.Q. 313, 330-31 (1995) (explaining how cultural differences may affect certain group’s speech patterns).

not relegated to the stereotypical street hoodlum, but rather, everyone is affected. *Salinas* has an especially heightened effect in white-collar crime matters because criminal investigations in the corporate world are conducted largely through pre-arrest investigations. The American Board of Criminal Lawyers made this same argument in their amicus brief, and further contended the admissibility of pre-*Miranda* silence places high risk on white collar defendants—who are typically not experienced with the criminal-justice system—who may be intimidated to speak.¹⁷² The Board cautioned that “silence as evidence of guilt increases the likelihood of prosecution and conviction” of white collar defendants, and “[t]he length and breadth of white-collar investigations increases the likelihood of abuse of guilt-by-silence evidence, and investigators can further extract assistance based on multiple threats to use an individual’s silence against him.”¹⁷³

There are other issues not addressed by the parties or amici. For instance, what about the ethical and professional issues affecting defense lawyers who are advising clients about cooperating with law enforcement? This is a potential quandary. If a defense attorney instructs his client to fully cooperate with law enforcement, is he acting as an extension of the state and enabling the prosecution to build a more effective case against his client? But if the attorney advises the client to say and do nothing, the silence and non-verbal conduct could be admitted against the client under *Salinas*.¹⁷⁴

172. See Brief for Am. Board of Criminal Lawyers as Amicus Curiae Supporting Petitioner at 8-10, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 785629.

173. *Id.* at 2-3.

174. Relatedly, it becomes even trickier for defense counsel in federal criminal cases to advise their clients regarding grand jury testimony after the government has provided them assurances of immunity. There is great risk under existing case law that the client will be found in civil contempt if he invokes the Fifth Amendment and refuses to testify, even after being given immunity. For example, a grand jury witness has been found in civil contempt after refusing to testify under the Fifth Amendment, even though he was given use of immunity beforehand. See e.g., *In re Grand Jury Proceedings*, 943 F.2d 132, 136 (1st Cir. 1991); *In re Grand Jury Proceedings*, 872 F.2d 5, 11 (1st Cir. 1989); *In re Grand Jury Proceedings*, 819 F.2d 981, 983 (11th Cir. 1987); *In re Grand Jury Proceedings*, 757 F.2d 1580, 1583 (5th Cir. 1985); *In re Grand Jury Investigation John Doe*, 542 F. Supp. 2d 467, 469 (E.D. Va. 2008). A witness was found in civil contempt when he invoked the Fifth Amendment and refused to testify before a grand jury concerning a violation of the Federal Communications Act; and even after he had been granted immunity, he was ordered to imprisonment for the term of grand jury or until he answered the questions. See *In re Lazarus*, 276 F. Supp. 434, 447-48 (C.D. Cal. 1967). Similarly, a grand jury witness, who had been held in civil contempt for refusing to testify about criminal activity of other persons under a grant of immunity, could be held in criminal contempt for refusing to give voice exemplars. See *In re Special September, 1972 Grand Jury*, No. 71 GJ 4509, 500 F.2d 1283, 1284-85 (7th Cir. 1974). There are fewer cases where the court held that there was no contempt. See *United States v. Wilson*, 421 U.S. 309, 325-26 (1975); *United States v. D’Apice*, 664 F.2d 75, 78 (5th Cir. 1981). For instance, in one case an individual who invoked Fifth Amendment protections after he was given use of immunity by the court and prosecution was not found in criminal contempt of court. See *D’Apice*, 664 F.2d at 78. The Supreme Court also held that witnesses who, after being granted immunity, continued to refuse to testify on Fifth Amendment grounds were subject under federal rules to summary punishment for contempt, because their refusals to answer, although not delivered disrespectfully, were intentional obstructions of court proceedings that disrupted the progress of the trial and the orderly administration of justice. See *Wilson*, 421 U.S. at 314-15.

The opinion in *Salinas* leaves readers scratching their heads. While the Court dodged the broader question presented in *Salinas*, it created additional questions. Can a prosecutor bypass an individual's reliance upon the right against self-incrimination when that person has not been arrested? What precisely must a suspect say to invoke his Fifth Amendment privilege? The Second Circuit in *United States v. Okatan*¹⁷⁵ addressed this first question when it held the prosecution may not use a defendant's pre-arrest invocation of the right against self-incrimination as substantive evidence by the prosecution.¹⁷⁶ In *Okatan*, a border patrol agent pulled over Okatan after an odd U-turn.¹⁷⁷ After being asked about whether he was a U.S. citizen, Okatan presented his passport.¹⁷⁸ When asked why he made a U-turn, Okatan said he needed to use the restroom.¹⁷⁹ The unconvinced patrolman then warned Okatan that lying to a federal officer is a criminal act and asked whether he was there to pick someone up.¹⁸⁰ At that moment, Okatan requested a lawyer.¹⁸¹ The Second Circuit reasoned Okatan should not have been placed in a catch-22 of either responding to the police interrogation, violating federal law, or having his attempt to invoke his rights used against him.¹⁸² Perhaps the Second Circuit's decision is the first of many by courts across the country that will interpret *Salinas* in the way it deems fit.

In *People v. Tom*,¹⁸³ the California Supreme Court held the defendant was required to clearly invoke his Fifth Amendment right against self-incrimination in order to rely on that privilege to preclude evidence of post-arrest, pre-*Miranda* silence, in the absence of custodial interrogation, from being admitted at trial.¹⁸⁴ On a fateful evening in 2007, Richard Tom, apparently legally drunk and exceeding the speed limit, drove his Mercedes, without braking, into a vehicle carrying a mother and her two young daughters. One daughter was

175. 728 F.3d 111 (2d Cir. 2013).

176. *See id.* at 120.

177. *See id.* at 114.

178. *See id.*

179. *See Okatan*, 783 F.3d at 114.

180. *See id.*

181. *See United States v. Okatan*, 728 F.3d 111, 114 (2d Cir. 2013).

182. *See id.* at 116.

183. No. S202107, 2014 WL 3953471 (Cal. Aug. 14, 2014).

184. *See id.* at *17. The majority discussed *Davis* and *Berghuis*, and ultimately relied on *Salinas* for the following propositions: the prosecution can use a defendant's pre-arrest silence in response to questioning as substantive evidence of guilt if the defendant did not expressly invoke the privilege; the objective invocation requirement ensures that the government is placed on notice when a witness intends to rely on the privilege so that either party may argue that the testimony sought could not be self-incriminating, or cure any potential self-incrimination through a grant of immunity; a criminal defendant does not need to take the stand and assert the privilege at his own trial; a witness's failure to invoke the privilege is excused when government coercion makes the forfeiture of the privilege involuntary; *Salinas* refused to adopt a "third exception" to the general rule that a witness must assert the privilege; "the protections of the privilege hinge on whether the defendant clearly invoked the privilege"; and the objective invocation rule applies when prosecutors seek to use silence or a confession. *See id.* at *8-14.

killed and the other was seriously injured.¹⁸⁵ After the accident, Tom did not inquire about the physical condition of the driver or passengers.¹⁸⁶

In its case-in-chief, the prosecution relied on Tom's failure to inquire about the occupants of the other vehicle as evidence that he was driving without regard for their safety.¹⁸⁷

Tom extends *Salinas*, allowing prosecutors to use a suspect's silence against them even after they have been placed under arrest, when the defendant has not yet been Mirandized. *Tom* could have profound implications for criminal defendants because it significantly curtails the right of a criminal defendant to remain silent while in police custody. *Tom* requires many arrestees to explicitly invoke their right to remain silent in order to benefit from that right. The only way to safely remain silent is to speak first.

In his dissent, Justice Goodwin Liu asserted the majority decision conflicts with Ninth Circuit precedent, and points out some of the potential problems raised by the holding. He explains why the majority misconstrued *Salinas*, and suggested that defendants in a similar situation would choose to remain silent in reliance on his or her rights under the Fifth Amendment.¹⁸⁸ According to Liu: "The court today holds, against commonsense expectations, that remaining silence after being placed under arrest is not enough to exercise one's right to remain silent."¹⁸⁹

Further, Liu referred to *Griffin* and warned: "Penalizing silence . . . pressur[es] the suspect to speak and potentially incriminate or perjure himself . . ."¹⁹⁰

Concern from the federal courts has continued, and is already showing its effect. In *Sessoms v. Runnels*,¹⁹¹ with a sharply divided six-to-five en banc panel, the Ninth Circuit Court of Appeals reversed the district court's denial of a prisoner's petition for writ of habeas corpus.¹⁹² Nineteen-year-old Tio Sessoms was suspected of involvement in a burglary and murder, and turned himself into the local police.¹⁹³ His father had previously advised him that he should ask for a lawyer before he talked to the police.¹⁹⁴ When two officers arrived to interrogate Sessoms, they first read him his *Miranda* rights.¹⁹⁵ Sessoms then said: "There wouldn't be any possible way that I could have

185. *See id.* at *1.

186. *See id.* at *1.

187. *See Tom*, 2014 WL 3953471, at *1.

188. *See id.* at *21 (Liu, J., dissenting).

189. *People v. Tom*, No. S202107, 2014 WL 3953471, at *21 (Cal. Aug. 14, 2014) (Liu, J., dissenting).

190. *Id.* at *27.

191. 691 F.3d 1054 (9th Cir. 2012), *vacated by* *Grounds v. Sessoms*, 133 S. Ct. 2886 (2013).

192. *See id.* at 1064.

193. *See id.* at 1056.

194. *See id.*

195. *See Sessoms*, 691 F.3d at 1056.

a—a lawyer present while we do this?”¹⁹⁶ The detective responded: “Well, uh, what I’ll do is, um—.”¹⁹⁷ Sessoms then explained: “Yeah, that’s what my dad asked me to ask you guys . . . uh, give me a lawyer.”¹⁹⁸ However, the officers did not end the interrogation, but instead convinced Sessoms to talk with them, and ultimately, make incriminating statements.¹⁹⁹

Writing for the majority, Judge Fletcher explained the clear-invocation rule of *Davis* did not apply in determining whether a suspect invokes his right to counsel during interrogation when the suspect requests an attorney before receiving a clear and complete statement of his *Miranda* rights.²⁰⁰ Judge Fletcher reasoned that *Davis* clearly limited its holding to statements made after a suspect has waived his *Miranda* rights.²⁰¹ She was not swayed by the state’s argument that *Davis* applies to all requests for counsel, regardless of whether it is pre-or-post-waiver.²⁰² In response, Judge Fletcher distinguished *Sessoms* from *Davis* and *Berghuis*: Sessoms made his statement before he was informed of his rights under *Miranda*.²⁰³ Further, “it is clear that *Berghuis* does not alter *Davis*’s requirement that an unambiguous invocation can apply only after a suspect has been informed of his *Miranda* rights.”²⁰⁴

In 2013, the Supreme Court vacated the *Sessoms* decision and remanded the case back to the Ninth Circuit for further consideration in light of *Salinas*.²⁰⁵ The Court did so even though Sessoms did not make any incriminating statements until after having been advised of his *Miranda* rights and waiving them.²⁰⁶ On remand, the en banc panel, again sharply divided six-to-five, reversed the district court, and granted Sessoms’ habeas petition and ordered a new trial.²⁰⁷ The panel held that the clear-invocation requirement of *Davis* applied to Sessoms, and he had unequivocally claimed the privilege twice before he was given his *Miranda* warnings; therefore, further questioning should have ceased.²⁰⁸ If the robust litigation and varying judicial interpretations of *Davis* is any indication, courts will continue to grapple with when to apply *Salinas*, and may unevenly use it as precedent.

Alternatively, there is reasonable likelihood that a lower court will look

196. *Id.*

197. *Sessoms v. Runnels*, 691 F.3d 1054, 1056 (9th Cir. 2012), *vacated by* *Grounds v. Sessoms*, 133 S. Ct. 2886 (2013).

198. *Id.*

199. *See id.* at 1057.

200. *See id.* at 1062.

201. *See Sessoms*, 691 F.3d at 1061.

202. *See id.* at 1061-62.

203. *See Sessoms v. Runnels*, 691 F.3d 1054, 1062 (9th Cir. 2012), *vacated by* *Grounds v. Sessoms*, 133 S. Ct. 2886 (2013).

204. *Id.*

205. *See generally* *Grounds*, 133 S. Ct. 2886.

206. *See Sessoms*, 691 F.3d at 1056-57.

207. *Sessoms v. Grounds*, No. 08-17790, 2014 WL 4668005, at *12 (9th Cir. Sept. 22, 2014).

208. *See id.*

beyond *Salinas* and rely on prior Supreme Court cases addressing the Fifth Amendment. For example, while the dissent in *Salinas* cited to *Pennsylvania v. Muniz*,²⁰⁹ I would suggest that it deserves more attention and weight than it was given. More specifically, the dissent cited to *Muniz* to support the proposition that “where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as ‘a witness against himself’—very much what the Fifth Amendment forbids.”²¹⁰ In *Muniz*, the Court held part of a field sobriety test administered by police compelled testimonial communication because the response elicited expressed “consciousness of the facts and the operations of his mind in expressing it.”²¹¹ I believe that *Muniz*, along with *Schmerber v. California*,²¹² could serve as the basis for an alternative analytical framework in assessing the admissibility of pre-arrest silence and distinguishing between testimonial and non-testimonial evidence.²¹³ Such a framework would guard against efforts by the prosecutor to bypass an individual’s reliance upon the right against self-incrimination when a person is not under arrest.

In *Schmerber*, the Court held testimonial evidence is inadmissible at trial when it is obtained during custodial interrogation and not preceded by *Miranda* warnings.²¹⁴ The Court addressed when a police officer may order blood drawn on an allegedly intoxicated driver without a warrant or the driver’s consent, and reasoned evidence of the driver’s blood taken over his objection after arrest was not inadmissible because it violated the Fifth Amendment privilege against self-incrimination.²¹⁵ In the Court’s view, the driver’s testimonial capacities were not implicated, “[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis.”²¹⁶ As applied in the context of a situation like *Salinas*, a court would ferret out the facts to determine whether a defendant was compelled by police to provide testimonial evidence during questioning.

Ultimately, as a practical matter, the general application of *Davis* and *Berghuis*, and now *Salinas*, without definite guidelines, could potentially lead to more aggressive police interrogation tactics. Police can conduct stealth “interrogations” under the auspices of “investigation.” Neal Davis and Dick DeGuerin, co-counsel for *Salinas*, expressed, after *Salinas*, the police are now encouraged to “question first, arrest later” and conduct noncustodial

209. 496 U.S. 582 (1990).

210. *Salinas v. Texas*, 133 S. Ct. 2174, 2186 (2013).

211. *See Muniz*, 496 U.S. at 594.

212. 384 U.S. 757 (1966).

213. *See id.* at 759 (holding part of field sobriety test implicated Fifth Amendment).

214. *See id.* at 762-63 (holding testimonial evidence admissible only if it follows *Miranda* warning).

215. *See id.* at 765.

216. *See Schmerber*, 384 U.S. at 765.

questioning of a suspect knowing that he will rarely assert the privilege.²¹⁷ As I have learned through my work as a public defender, law enforcement officers possess great advantages in getting incriminating statements and confessions during interrogations. Anyone who believes otherwise has never been interrogated by the police. Professor Brandon Garrett warns that *Salinas* “encourages police to blur the line between a custodial and noncustodial interrogation,” and to question suspect in informal settings that can cause false confessions and wrongful convictions.²¹⁸

In an essay on police interrogation and the privilege against self-incrimination published a year before *Miranda*, Professor Yale Kamisar asserted that “[p]olice interrogators may now hurl ‘jolting questions’ where once they swung telephone books, may now ‘play on the emotions’ where once they resorted to physical violence.”²¹⁹ Professor Kamisar’s comment is just as apt today as it was in 1965, and there is ample research supporting it. For instance, Professor Richard Leo, a leading interrogation expert, asserts that “[m]odern methods of psychological interrogation have been designed to persuade suspects that—contrary to all appearances, logic, and common sense—it is actually in their self-interest to confess.”²²⁰ Detectives often employ a ruse and call suspects to “voluntarily” come into the police station for questioning.²²¹ Investigators will not let on they believe the suspect committed a crime or their intent to interrogate him.²²² As Professor Leo explains the procedure:

Detectives intentionally ask the suspect to come to the police station so that they can isolate the suspect from any familiar environments, friends, family, or any other source of social support that might psychologically empower the suspect to resist the interrogation process. Detectives also wish to get the suspect on police territory, in an interrogation room, in order to exercise control over the timing, pace, and strategy of interrogation. By isolating the suspect, stripping him of any social support, and questioning him on police turf, investigators believe that they maximize the suspect’s vulnerability to police pressure. Their goal is to create the structural and psychological conditions

217. See 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, available at <http://www.nacdl.org/Champion.aspx?id=32158>.

218. Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. CHI. L. REV. DIALOGUE 116, 118 (2013), available at <http://lawreview.uchicago.edu/page/remaining-silent-after-salinas>.

219. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . . (1965)*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 25, 29 (Richard A. Leo & George C. Thomas III eds., 1998).

220. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 121 (2008).

221. See *id.*

222. See *id.*

most conducive to compliance and confession.²²³

From that point forward, detectives apply targeted psychological techniques designed to create a rapport.²²⁴ Professor Leo describes common tactics employed by detectives, including avoiding *Miranda* by redefining the circumstances of questioning so that the suspect technically is not in custody through means of “telling the suspect that he is not under arrest and is free to leave.”²²⁵ Detectives may also avoid asking the suspect for an explicit waiver of his rights, and move directly into the interrogation.²²⁶ Further, they can also minimize the importance of *Miranda* warnings and persuade the suspect to waive *Miranda* and consent to interrogation.²²⁷ Similarly, interrogators can portray themselves as friends, as opposed to adversaries.²²⁸ Finally, harsher techniques materialize in flat out accusations, attacking denial, and utilizing ploys to entice a suspect into believing that the police possess criminalizing evidence against him.²²⁹ Professor Christopher Slobogin voices similar concerns, relaying that U.S. interrogation manuals advocate minimization (lulling suspects into a false sense of security and offering sympathy) and maximization (exaggerating seriousness of offense and bluffing about incriminating evidence) techniques when a suspect does not initially confess to the crime.²³⁰

Theoretically, the Court should be aware of such practices because it recently explored the realities of coercive interrogations in *Missouri v. Seibert*.²³¹ In *Seibert*, the Court held that police interrogators could not exploit the mere form of the *Miranda* warnings while intentionally depriving these warnings of their meaningful substance.²³² There, the Missouri police officers were instructed to intentionally avoid reading suspects their *Miranda* warnings

223. *Id.* at 122.

224. *See* LEO, *supra* note 220, at 122.

225. *Id.* at 124-25.

226. *See id.* at 125.

227. *See id.* at 126.

228. *See* LEO, *supra* note 220, at 128.

229. *See id.* at 134-139.

230. *See* Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT'L L. & COM. REG. 321, 338-39 (2011). Noticeably, there is a dearth of scholarship regarding the influence of racial stereotyping and profiling in the police interrogation process. It would be useful to have empirical and psychological studies about the efficacy of *Miranda* rights given to racial minorities and immigrants whose primary language is not English. Michael O'Neil has done some valuable research in this area. *See* Michael O'Neil, *The Unjust Application of Miranda: Berghuis v. Thompkins and Its Inequitable Effects on Minority Populations*, 31 B.C. THIRD WORLD L.J. 85, 100-101 (2011) (“*Berghuis* will negatively impact all criminal suspects, but its dual holdings will have more damaging effects on the poor and minority populations who have been relatively powerless throughout U.S. history.”) O'Neil proceeded to examine the effects of the decision on marginalized, indigent, and uneducated populations.

231. 542 U.S. 600 (2004).

232. *See id.* at 617.

prior to interrogation.²³³ Instead, the officers were instructed to inform suspects of their constitutional rights under *Miranda* only after the suspect had already made an incriminating statement.²³⁴ While the pre-*Miranda* statements would be inadmissible in court, police and prosecutor would use the subsequent, post-*Miranda* statement against the defendant.²³⁵ The Court held that *Miranda* warnings given mid-interrogation after the defendant gave an unwarned confession were ineffective, and suppression of the defendant's self-incriminatory statements was necessary.²³⁶ The Court highlighted the realities of police employing trickery and deception when it discussed the myriad ways police strategies served to undermine *Miranda* warnings:

The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid These circumstances must be seen as challenging the comprehensibility and efficiency of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.²³⁷

Incredibly, these same concerns about coercive interrogations seemingly escaped the attention of the *Salinas* plurality.

Upon reflection, while the prosecutor in *Salinas* professed to the jury that an innocent person would have answered the accusation with a statement, as opposed to not answering, this is not necessarily true.²³⁸ An innocent individual in that situation could have also remained silent or refused to answer on the basis that they may simply choose not to do so. Also, an innocent person may be at a loss for words due to the shock of being accused of a crime. Another person could feel insulted, and not want to dignify the question with a response, while another individual could have been too emotionally upset to speak. An individual could be introverted, and may use different ways to digest complex information, and could be used to listening before speaking.²³⁹ What if the suspect comes from a different cultural background than the interrogator?²⁴⁰ The possibilities are virtually endless.

233. *See id.* at 604.

234. *See id.* at 605.

235. *See Seibert*, 542 U.S. at 606.

236. *See id.* at 616-17.

237. *Missouri v. Seibert*, 542 U.S. 600, 616-17 (2004).

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

239. *See Heidi K. Brown, The "Silent But Gifted" Law Student: Transforming Anxious Public Speakers into Well-Rounded Advocates*, 18 J. LEGAL WRITING INST. 291, 297-299 (2012).

240. *Salinas* will also affect undiagnosed mentally retarded suspects. In such cases, the police, defense counsel, prosecutor, and the court may often overlook this fact given the lack of resources available to probe and investigate the issue. One can compare this with capital litigation where better-funded federal defender

VII. CONCLUSION

Individually and collectively, *Davis*, *Berghuis*, and *Salinas* defy the realities of police interrogations, and create opportunities for gross police overreaching in non-custodial interviews and custodial interrogations. *Miranda* was supposed to address problems associated with coercive psychological tactics applied against a suspect during custodial interrogations, but unfortunately, that goal is now threatened by case law that misreads *Miranda* and allows the rights of the accused under the Fifth Amendment to be compromised.²⁴¹ In 1956, Justice Douglas remarked: “The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well.”²⁴² Unfortunately, as this Article has illustrated, *Davis*, *Berghuis*, and *Salinas* have undermined Justice Douglas’s sentiments.

The future of *Miranda* looks bleak. Things will likely get worse if the Court upholds the legality of the Justice Department’s policy of allowing the interrogation of terrorist suspects without *Miranda* warnings on matters unrelated to an imminent threat if they believe the suspect may provide valuable intelligence under the “public safety” exception carved out by the Court in *New York v. Quarles*.²⁴³ The Justice Department’s policy was most recently exercised in the investigation of Paul Anthony Ciancia following the shooting rampage at the Los Angeles International Airport in November of

offices have the resources to conduct investigation of a client’s life, family, medical history, and academic records, and are better able to access and collect documentation. See e.g., John H. Blume, et al., *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 943, 952 (2012) (“Comprehension studies consistently find that individuals with mental retardation have significant difficulty in understanding *Miranda* rights and therefore may lack the competency to waive their *Miranda* rights.”); Morgan Cloud, et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 531-72 (2002) (providing empirical study demonstrating differences between understanding of *Miranda* warnings between disabled and non-disabled individuals); Solomon M. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudential Therapy Perspective*, 28 LAW & PSYCHOL. REV. 53, 53 (2004) (“Persons with mental retardation who become suspects in criminal cases must deal with issues of competence to waive their right to remain silent upon police questioning, as well as the admissibility of any confession that is made as a result of that questioning.”).

241. See SALTZBURG, *supra* note 19, at 544.

Miranda does not put an end to confessions without counsel, or to stationhouse interrogation. *Miranda* does impose a warning requirement . . . [and] provides a right to counsel, but the decision whether to invoke these rights (and conversely whether to waive them) is made by the suspect in the same coercive atmosphere that the Court was so concerned about.

Id.

242. *Ullmann v. United States*, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting).

243. 467 U.S. 649, 655-56 (1984) (permitting waiverless confession by suspect leading police officer to loaded gun in crowded supermarket). The Court limited the application of the exclusionary rule by creating a “public safety” exception to *Miranda*’s warning requirement. See *id.*

2013.²⁴⁴ It was also used when the Federal Bureau of Investigation apprehended Dzhokhar Tsarnaev, the only surviving suspect in the April 15, 2012, Boston Marathon Bombing.²⁴⁵ Such a broad interpretation of the public safety exception could be used as justification for questioning suspects in non-emergency situations to circumvent *Miranda*. With this in mind, I ask—what is left of *Miranda*?

244. See Joe Palazzolo & Tammy Audi, 'Public Safety' Exception to Miranda Warnings Arises in LAX-Shooting Case, WALL ST. J. L. BLOG, Nov. 7, 2013, <http://blogs.wsj.com/law/2013/11/07/public-safety-exception-to-miranda-warnings-arises-in-lax-shooting-case/>.

245. See Joanna Wright, *Applying Miranda's Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions*, 113 COLUM. L. REV. SIDEBAR 136, 136-37, 139 (2013) ("When Tsarnaev regained consciousness, the FBI interrogated him for sixteen hours over the course of two days without Mirandizing him . . . Tsarnaev, for all practical purposes, was deprived of all *Miranda* rights and their constitutional safeguards during his interrogation, yet the statements may still be admitted as evidence against him based on the PSE [public safety exception]."); see also H. Joshua Rivera, Note, *At Least Give Them Miranda: An Exception to Prompt Presentment as an Alternative to Denying Fundamental Fifth Amendment Rights in Domestic Terrorism Cases*, 49 AM. CRIM. L. REV. 337, 339-40 (2012) (analyzing Justice Department's memorandum and its potential impact on *Miranda*).