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NOTE

WHY *SALINAS V. TEXAS* BLURS THE LINE BETWEEN VOLUNTARY INTERVIEWS AND CUSTODIAL INTERROGATIONS

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INTRODUCTION

Determining whether a suspect of a crime is "in custody" is a fact-specific inquiry that asks simply: Would a reasonable person feel free to leave the police?[1] The answer has implications that are now a "part of our national culture."[2] If a reasonable person would not feel free to leave, police must administer *Miranda* warnings prior to questioning the suspect; otherwise, any statements the suspect makes are inadmissible.[3] Per *Miranda*, police must inform the suspect of the right to remain silent and the right to an attorney.[4]

The custody determination is thus critically important for suspects. In analyzing situations that are ambiguously custodial, such as traffic stops, courts have traditionally looked at a variety of circumstances.[5] For instance, a situation is more likely custodial if the questioning took place in a police station as opposed to a private home,[6] if the detention was long in duration,[7] or if there were many police officers present.[8] However, none of these factors are determinative. Thus, if police asked the suspect to come to the police station and then allowed the suspect to leave, the interview was likely noncustodial, or "voluntary."[9]

In June 2013 in *Salinas v. Texas*, the Supreme Court did not explicitly change the traditional custody analysis. In *Salinas*, the Court held that a suspect's refusal to answer an officer's question during a voluntary interview could be used as evidence of guilt at trial.[10] On its

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1 *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011).

2 Dickerson v. United States, 530 U.S. 428, 443 (2000) (describing *Miranda* warnings).

3 *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966). The Supreme Court has clarified that statements obtained in violation of *Miranda* are inadmissible as part of the prosecution's case-in-chief, but they may be admissible for other purposes, such as impeachment. *See* Harris v. New York, 401 U.S. 222, 226 (1971).

4 *See Miranda*, 384 U.S. at 469. Furthermore, suspects may not actually invoke *Miranda* rights outside custodial interrogation. *See infra* note 79 and accompanying text.

5 *See infra* notes 66–68 and accompanying text.

6 *See* Beckwith v. United States, 425 U.S. 341, 349 (1976).

7 *See* Berkemer v. McCarty, 468 U.S. 420, 437 (1984).

8 *See id.* at 438.

9 *See* Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013); Oregon v. Mathiason, 429 U.S. 492, 494 (1977) (per curiam).

10 *See Salinas*, 133 S. Ct. at 2177–78. The full holding of *Salinas* is that the prosecution may, at trial, affirmatively use silence from a voluntary interview *unless* the suspect invokes

face, *Salinas* was simply a rollback of suspects' rights in voluntary interviews: police asked the suspect Genovevo Salinas an accusatory question, Salinas remained silent, and at trial the court allowed the prosecutor to comment on that silence by arguing that only a guilty person "wouldn't answer that question."[11] Straightforwardly, the *Salinas* decision took away the right to remain silent in a voluntary-interview setting.

But on a deeper level, the holding affects whether Salinas's interview was actually noncustodial. In essence, if prosecutors may use the refusal to answer questions in a voluntary interview as evidence of guilt, can suspects leave the interview once it has begun without building a case against themselves? After *Salinas*, the answer is no. A prosecutor could infer that a suspect who leaves a voluntary interview before police stop questioning has refused to answer questions and argue that the suspect is therefore guilty.[12] Tying this into the custody determination, if custody depends on whether a reasonable person would feel free to leave—and now suspects cannot leave a voluntary interview without incriminating themselves—then suspects should no longer feel reasonably free to leave. In essence, *Salinas* makes voluntary interviews function like custodial interrogations.

This Note argues that *Salinas* blurs the line between voluntary interviews and custodial interrogations. Part I summarizes *Salinas* and gives a brief legal history surrounding the right to remain silent. Part II analyzes how *Salinas* blurs the line between voluntary interviews and custodial interrogations. Part III explores the far-reaching implica-

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the right to remain silent. *Id.* at 2178. However, the Court has repeatedly said that a suspect in a voluntary interview does not actually have the right to remain silent. *See infra* note 79 and accompanying text. The Court even believes it is an open question whether the prosecution can use that attempted invocation as evidence of guilt. *See Salinas*, 133 S. Ct. at 2179. So it is entirely unclear what the Court practically meant when it said that the "petitioner was required to assert the [the right to remain silent] in order to benefit from it." *Id.* at 2178.

11 *See* Salinas v. State, 368 S.W.3d 550, 556 (Tex. Ct. App. 2011), *aff'd*, 369 S.W.3d 176 (Tex. Crim. App. 2012), *aff'd*, 133 S. Ct. 2174 (2013).

12 The decision in *Salinas* deals specifically with silence in response to a question, but the Court has repeatedly used the term "silence" more broadly. "Silence" includes not only muteness in response to a question but also a general refusal or failure to come forward with information. *See, e.g.*, Roberts v. United States, 445 U.S. 552, 554–55, 559 (1980) (describing the refusal to name coconspirators as silence); Doyle v. Ohio, 426 U.S. 610, 614–15 (1976) (describing the failure to come forward with an exculpatory story as silence); Griffin v. California, 380 U.S. 609, 615 (1965) (describing the refusal to testify at trial as silence); *see also* Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 538 (2012) ("[T]he Court uses the same phrase, 'right to remain silent,' to describe what are really two distinct sub-rights: (i) the right literally not to speak and (ii) the right to cut off police questioning."); Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 53 (2008) (describing silence as the "failure to communicate with law enforcement" (quoting the then-proposed rule)). Thus, the Court's terminology indicates that leaving an interview altogether in response to a question constitutes silence.

tions of redefining custody and demonstrates that *Salinas* will have the greatest effect on groups that are already overrepresented in our criminal justice system. Finally, Part IV asks whether silence is even probative of guilt in the first place.

I
BACKGROUND

A. The Facts of *Salinas*

Two brothers were shot and killed in Houston, Texas, on December 18, 1992.[13] Police investigated and eventually visited Genovevo Salinas, an acquaintance of the brothers, at his home.[14] After confiscating a shotgun, they asked Salinas to come back to the police station for a voluntary interview.[15] Salinas agreed and accompanied them to the station.[16] Salinas answered questions for about an hour, but when police asked him whether his shotgun "would match the shells recovered at the scene of the murder," Salinas remained silent.[17] He then resumed answering other questions.[18]

Salinas was later charged with murder.[19] At his first trial, the prosecution did not comment on Salinas's silence when police asked him about the shotgun shells.[20] The jury could not agree on a verdict, and the first trial resulted in a mistrial.[21]

However, at Salinas's second trial, the prosecution sought to introduce evidence of his refusal to answer the shotgun shell question.[22] The police officer testified specifically that instead of answering, Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[23] During his closing argument, the prosecutor then commented at length on Salinas's silence:

> The police officer testified that he wouldn't answer that question. He didn't want to answer that. Probably the first time [Salinas] realizes you can do that. What? You can compare [shotguns with shells]? You know, if you asked somebody—there is a murder in

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13 *Salinas*, 133 S. Ct. at 2178.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* (internal quotation marks omitted).

18 *Id.*

19 *Id.* at 2177.

20 *See* Salinas v. State, 369 S.W.3d 176, 177 (Tex. Crim. App. 2012), *aff'd*, 133 S. Ct. 2174 (2013).

21 Brief for Petitioner at 5, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 633595.

22 *Salinas*, 369 S.W.3d at 177.

23 *Salinas*, 133 S. Ct. at 2178 (alterations in original) (internal quotation marks omitted).

> New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.[24]

After hearing this argument, the second jury convicted Salinas of murder.[25]

The Supreme Court then granted certiorari.[26] In *Salinas v. Texas*, the Court held that the prosecution could use Salinas's silence in a response to a question during a voluntary interview as evidence of guilt at trial.[27]

B. The Right to Remain Silent

Salinas was not the first time the Supreme Court considered the prosecution's use of a person's silence as evidence of guilt. Prior decisions about the prosecution's use of silence are grounded in the Fifth Amendment, which states that no person "shall be compelled in any criminal case to be a witness against himself."[28]

1. *The Foundation:* Griffin v. California

Griffin v. California, decided in 1965, provides a foundation for the prosecution's use of silence as evidence of guilt.[29] The defendant in *Griffin* chose not to testify while on trial for murder.[30] The prosecutor commented specifically on this failure to testify, noting during closing arguments that the defendant "ha[d] not seen fit to take the stand and deny or explain" any of the allegations.[31] The Supreme Court held that by commenting on the defendant's decision not to testify, the prosecutor was asking the jury to infer guilt from the defendant's exercise of his right not to be a witness against himself.[32] In other words, the prosecutor's comment was a "penalty imposed" on the defendant for exercising his Fifth Amendment right to remain

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24 Salinas v. State, 368 S.W.3d 550, 556 (Tex. Ct. App. 2011) (third alteration in original), *aff'd*, 369 S.W.3d 176 (Tex. Crim. App. 2012), *aff'd*, 133 S. Ct. 2174 (2013).

25 *Id.* at 554.

26 *Salinas*, 133 S. Ct. at 2179.

27 *See id.* at 2177–78.

28 U.S. CONST. amend. V.

29 *See* Griffin v. California, 380 U.S. 609, 613–14 (1965).

30 *Id.* at 609–10.

31 *Id.* at 610–11 (internal quotation marks omitted).

32 *See id.*

silent.[33] Accordingly, *Griffin* prohibits prosecutors from commenting on a defendant's refusal to testify at trial.[34]

2. Miranda *and Its Progeny*

The Court analyzed the right to remain silent outside the courtroom in *Miranda v. Arizona*.[35] In a landmark ruling, the Court ruled that police must inform suspects of their right to remain silent before a custodial interrogation; otherwise, those suspects' statements are inadmissible.[36]

Doyle v. Ohio later clarified how *Miranda* affected the prosecution's use of a defendant's silence in a post-arrest setting.[37] In *Doyle*, police arrested two men on drug charges and read them their *Miranda* rights.[38] After hearing their rights, the men failed to tell police that they believed they were framed by the police informant.[39] They then testified as to their "frameup story" for the first time at trial.[40] The prosecutor attempted to impeach the defendants' credibility by noting that they had not told police the frameup story after being arrested and read their rights.[41] In other words, the prosecution argued that because the defendants had remained silent as to their story after arrest, they were likely not telling the truth at trial.[42]

The Supreme Court found the prosecution's impeachment technique a violation of due process.[43] Because the defendants were arrested and apprised of their right to remain silent per *Miranda*, the Court held that they may have just been exercising this right in not telling police their exculpatory story.[44] Thus, their silence was "insolubly ambiguous."[45] Accordingly, prosecutors may not use a defendant's silence after *Miranda* warnings for impeachment at trial.[46]

The Court again considered the use of silence as an impeachment technique in *Jenkins v. Anderson*.[47] In *Jenkins*, the defendant waited two weeks before surrendering to police for killing a man during a fight.[48] At trial, the defendant testified that he had acted in self-

33 *Id.* at 614.
34 *Id.*
35 384 U.S. 436 (1966).
36 *See id.* at 478–79. See *infra* Part II.A for a discussion of custodial interrogation.
37 *See* Doyle v. Ohio, 426 U.S. 610 (1976).
38 *See id.* at 611.
39 *See id.*
40 *Id.* at 613–14.
41 *See id.*
42 *See id.* at 614.
43 *Id.* at 619.
44 *Id.* at 617.
45 *Id.*
46 *See id.*
47 447 U.S. 231 (1980).
48 *Id.* at 232–33.

defense.[49] The prosecution attempted to impeach the defendant by inferring that he would have come forward immediately—not after two weeks—if the self-defense story were true.[50]

The Court departed from *Doyle* and allowed the prosecutor to use silence as an impeachment technique.[51] It reasoned that police in *Doyle* had given the defendants their *Miranda* warnings, thus the *Doyle* defendants were possibly heeding that warning through silence; the defendant here was not arrested and thus was not read his *Miranda* rights.[52] Thus, there was less reason to believe the *Jenkins* defendant was exercising a right and more reason to believe his silence meant that he fabricated the story.[53] Accordingly, *Jenkins* stands for the proposition that prosecutors may impeach defendants with their pre-arrest silence.[54]

The Court revisited the prosecutor's use of silence as an impeachment technique one more time in *Fletcher v. Weir*.[55] The defendant in *Fletcher* was on trial for manslaughter and again was not immediately forthcoming with his assertion of self-defense.[56] Crucially, in the Court's opinion, there was a delay between the defendant's arrest and the time when police gave him his *Miranda* warnings.[57] The defendant was silent as to self-defense during this delay.[58] The Court held that this silence was admissible for impeachment purposes, because police had not yet "induced silence" through *Miranda* warnings.[59]

3. *Summary of the Law*

Thus, to briefly summarize the cases leading up to *Salinas*, the prosecution may not comment at all on a defendant's silence in terms of a failure to testify at trial.[60] However, if the defendant testifies at trial, the prosecution may impeach the defendant with silence if that silence occurred prior to *Miranda* warnings.[61] Prosecutors may not impeach with post-*Miranda* silence, because the defendant may simply be heeding the "right to remain silent" in the *Miranda* warning.[62]

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49 *Id.* at 233.
50 *See id.* at 233–34.
51 *See id.* at 238.
52 *See id.* at 239–40.
53 *See id.* at 240.
54 *See id.*
55 455 U.S. 603 (1982) (per curiam).
56 *See id.* at 603.
57 *See id.* at 604.
58 *See id.*
59 *Id.* at 606.
60 *See* Griffin v. California, 380 U.S. 609, 613–14 (1965).
61 *See Fletcher*, 455 U.S. at 606.
62 *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976).

In sum, the Court has hinged the use of silence on *Miranda* warnings. *Salinas* is thus a predictable progression from the Supreme Court's prior decisions: *Salinas* allows the prosecution to use pre-*Miranda* silence as part of its case-in-chief, not just for impeachment.[63] Part II now explores why the Court has drawn such a bright line at *Miranda*, and it examines *Salinas*'s effect on that line.

II
Salinas Blurs the Line Between Voluntary Interviews and Custodial Interrogations

The Court's decision in *Salinas* to allow prosecutors to use silence in a pre-*Miranda*, voluntary-interview setting as evidence of guilt undoubtedly makes those interviews more dangerous for suspects. But it also fundamentally changes the nature of voluntary interviews. To examine the line between voluntary interviews and custodial interrogations in the wake of *Salinas*, it is useful to first examine custodial interrogations and then consider how *Salinas* changes voluntary interviews into custodial interrogations.

A. Custodial Interrogations

A custodial interrogation is made up of two self-evident prongs: custody and interrogation.[64] In other words, for suspects to be in a custodial interrogation—and thus to receive *Miranda* warnings—they must be both (a) in custody and (b) subject to interrogation.[65] Custody distinguishes voluntary interviews from custodial interrogations, so the custody prong deserves the most attention here.

1. *Custody*

Suspects are clearly "in custody" when police arrest them, place them in handcuffs, and escort them to the police station.[66] But custody is a term of art when the situation is ambiguous, such as a traffic stop.[67] In these situations, the relevant inquiry becomes whether a reasonable person would feel free to leave, or more specifically,

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

64 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (defining custodial interrogation); *see also* Illinois v. Perkins, 496 U.S. 292, 297 (1990) (holding that *Miranda* warnings are not required when a subject is in custody but not subject to interrogation).

65 *See Perkins*, 496 U.S. at 297.

66 *See* Berkemer v. McCarty, 468 U.S. 420, 434 (1984) ("There can be no question that respondent was 'in custody' at least as of the moment he was formally placed under arrest and instructed to get into the police car.").

67 The Supreme Court has determined that traffic stops are noncustodial. *See id.* at 439–40.

whether a reasonable person's "freedom to depart" from police was restricted "in any significant way."[68]

Custody is an objective, totality of the circumstances test.[69] So, if the questioning took place in a police station as opposed to in a private home,[70] if the questioning was long in duration,[71] or if there were many police officers present,[72] the situation was more likely custodial. Courts may also consider whether the questioning was investigatory or accusatory in nature.[73] Notably, the Supreme Court has twice found that an interview was noncustodial, or voluntary, when police asked the suspect to come to the police station and then allowed the suspect to leave once the interview was over.[74] In fact, when police have used this method of first asking suspects to come to the station and then allowing them to leave, some courts have determined that the interview was voluntary without even considering other circumstances in the custody analysis.[75]

It is worth pausing for a moment to examine this method, both because courts seem to give it such great weight in the custody analysis and because police used it on Genovevo Salinas.[76] At surface level, it is easy to see why courts give it such great weight: the custody analysis asks whether a reasonable suspect would feel free to leave, and the method involves police asking for an interview and then actually allowing the suspect to leave. But anyone who has ever been asked questions by police in any setting undoubtedly feels pressure to respond and not just walk away. Thus, the custody analysis should not simply end because the suspect has some agency in coming to and leaving the interview.

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68 Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam).

69 *See* Thompson v. Keohane, 516 U.S. 99, 110–14 (1995).

70 *See* Beckwith v. United States, 425 U.S. 341, 342 (1976); *see also Berkemer*, 468 U.S. at 437–38 (asserting that roadside questioning is less coercive than questioning at a police station).

71 *See Berkemer*, 468 U.S. at 437–38; *Beckwith*, 425 U.S. at 342.

72 *See Beckwith*, 425 U.S. at 342 (finding a detention noncustodial where only one or two police officers were present).

73 *See* Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting) (determining that suspects deserve protection when questioning "shifts from investigatory to accusatory").

74 *See* California v. Beheler, 463 U.S. 1121, 1122 (1983) (per curiam) (determining suspect who agreed to accompany police to the station and was then permitted to go home was not in custody); Oregon v. Mathiason, 429 U.S. 492, 493–94 (1977) (per curiam) (determining that suspect was not in custody when officers left note asking suspect to come to police station and then allowed him to leave).

75 *See, e.g.*, United States v. Humphrey, 34 F.3d 551, 554 (7th Cir. 1994); United States v. Brown, 7 F.3d 1155, 1164 (5th Cir. 1993); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1524 (2008) (showing that police are trained to use the method to sidestep *Miranda* warnings).

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

Rather, as the Supreme Court has consistently reaffirmed, courts should "examine *all* of the circumstances surrounding the interrogation."[77] Delving into the specifics of each case is important because the suspect has so much at stake. In a voluntary interview, police do not have to inform suspects of their *Miranda* rights.[78] Additionally, suspects may not even invoke *Miranda* rights in anticipation of custodial interrogation. In other words, if a suspect is not in custody and attempts to invoke the right to remain silent, police do not have to cease questioning.[79] In fact, the Court in *Salinas* left open the question of whether the prosecution can actually use the suspect's attempted invocation in a voluntary interview as evidence of guilt at trial.[80] Accordingly, suspects are extraordinarily vulnerable in voluntary interviews, and thus police have a strong incentive to interview all but the most imminently dangerous suspects outside of custody.[81] This is why it is so important to closely examine all of the circumstances to determine whether a reasonable suspect would feel free to leave.

2. *Interrogation*

The Court has defined interrogation as "express questioning or its functional equivalent."[82] So in voluntary interviews when police expressly question the suspect, the interview is actually an interrogation. Put differently, only the custody determination separates a custodial interrogation from a voluntary interview.

The "functional equivalent" of questioning, however, may be relevant for communications between police and the suspect *before* the voluntary interview. In *Salinas*, some communications occurred before Salinas's interview: police officers showed up at Salinas's house, took his shotgun, and requested that he come back to the station for an

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77 Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam) (emphasis added); *see also* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011) (reiterating the objective-inquiry test); Yarborough v. Alvarado, 541 U.S. 652, 661–62 (2004); Berkemer v. McCarty, 468 U.S. 420, 438–39 (1984).

78 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

79 *See* Bobby v. Dixon, 132 S. Ct. 26, 29 (2011) ("[T]his Court has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation." (internal quotation marks omitted) (quoting McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991))); *see also* Montejo v. Louisiana, 556 U.S. 778, 795 (2009) ("If the defendant is not in custody then [*Miranda* and its progeny] do not apply . . . .").

80 *See Salinas*, 133 S. Ct. at 2179 (declining to reach the question of whether the prosecution can use a suspect's invocation of *Miranda* rights in a voluntary interview in its case-in-chief).

81 *Cf.* Marc Scott Hennes, Note, *Manipulating* Miranda*:* United States v. Frazier *and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda *Silence*, 92 CORNELL L. REV. 1013, 1037 (2007) ("The current system provides an incentive for officers to postpone Mirandizing a suspect . . . .").

82 Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

interview.[83] The functional equivalent of questioning is defined as "words or actions that the police should have known were reasonably likely to elicit an incriminating response from [the suspect]."[84] This is relevant here because while the police's request for Salinas to come back to the station for an interview may not qualify as express questioning, in the wake of the *Salinas* decision it may have been reasonably likely to elicit an incriminating response. The next section, which explores custodial interrogations post-*Salinas*, posits that interrogation may have actually started with the voluntary interview request.

B. Voluntary Interviews Post-*Salinas*

Salinas blurs the line between voluntary interviews and custodial interrogations. This is because *Salinas* makes voluntary interviews much more coercive on the custody prong. Interestingly, it also makes the interview *request* more coercive on both the custody prong and the interrogation prong.

1. *Custody*

Both the prosecution and defense agreed at trial that Salinas was not in custody during his interview at the police station.[85] In other words, the parties agreed that because Salinas agreed to accompany police back to the station and then left when the interview was over,[86] his "freedom to depart" was not restricted "in any significant way."[87]

However, per the traditional custody analysis, there were certainly circumstances present that restricted Salinas's freedom to leave the interview. The interview took place at the police station as opposed to Salinas's home.[88] Police told Salinas that they were investigating a double murder and took Salinas's shotgun while at his home, so Salinas knew he was a primary suspect for the murders.[89] The interview lasted about an hour,[90] which is within the range of an average interrogation and much longer than, for instance, a traffic stop.[91]

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

84 *Innis*, 446 U.S. at 303 (determining that an officer's remark to another officer in a suspect's presence that a child might find the missing murder weapon was not reasonably likely to elicit an incriminating response).

85 *See Salinas*, 133 S. Ct. at 2180 ("[I]t is undisputed that his interview with police was voluntary.").

86 *See id.*

87 Oregon v. Mathiason, 429 U.S. 492, 494–95 (1977) (per curiam).

88 *Salinas*, 133 S. Ct. at 2178.

89 *Id.*

90 *Id.*

91 Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 534 (2009) ("The average police interrogation lasts thirty minutes to an hour . . . .").

But the *Salinas* decision adds another powerful circumstance to the traditional custody analysis. By allowing the prosecution to comment on Salinas's refusal to answer a question, the Court allows the prosecution to comment on a suspect's refusal to answer a question by walking out of the interview. In other words, if Salinas left the interview at any point, the prosecutor could say that not only did Salinas refuse to answer a question but he refused to answer a question by leaving the room altogether. The prosecutor could then make an argument similar to the one made at Salinas's trial: An innocent person would never walk out of an interview with police after two of his acquaintances were murdered the night before. More concretely, when police asked Salinas whether his shotgun "would match the shells recovered at the scene of the murder,"[92] Salinas's ability to depart was limited: it only existed so long as he accepted that his departure could be used as evidence of guilt at trial. In essence, the *Salinas* decision adds a circumstance to the custody analysis that tends to make all voluntary interviews look more custodial.

While voluntary interviews are now more custodial for all suspects, they are particularly custodial for guilty suspects. Assume for the sake of argument that Salinas actually committed the crime and then consider the critical moment when police asked Salinas whether his shotgun "would match the shells recovered at the scene of the murder."[93] Salinas's freedom of action was so limited at this moment that that there was *no way* for him to respond and not incriminate himself in some way. He had four options. First, he could have confessed to the crime, which would have been straightforwardly incriminating. Second, he could have remained silent or otherwise refused to answer, and then faced the consequence that silence is itself incriminating. Third, he could have tried to assert his Fifth Amendment right to remain silent or his right to counsel, but that assertion may also have been incriminating.[94] Fourth, he could have lied about the shotgun shells and risked an obstruction-related charge.[95] In essence, once police asked Salinas whether his shotgun shells would match, his freedom to act was very limited if he was guilty. The accusatory question effectively placed a guilty Salinas in custody.

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92 *Salinas*, 133 S. Ct. at 2178 (internal quotation marks omitted).

93 *Id.*

94 *See supra* notes 78–79 and accompanying text.

95 Lying to law enforcement officers is a crime under state law, *see e.g.*, TEX. PENAL CODE ANN. § 37.08 (West 2011), and federal law, 18 U.S.C. § 1001 (2012). These four options are a variation on Justice Arthur Goldberg's "cruel trilemma": suspects must retain the right against self-incrimination because otherwise, in response to an accusation, they must choose between "self-accusation, perjury or contempt." Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). By making silence incriminating, *Salinas* makes for an even crueler *quadrilemma*, where suspects have no option but to choose one of four ways to incriminate themselves.

Of course, *Salinas* also limits the actions of innocent suspects. As Justice Stephen Breyer pointed out in his dissent, an innocent person may still not want to answer questions as "he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances . . . ."[96] An innocent person could make a false statement to cover up those suspicious circumstances and be prosecuted for making the false statement.[97] Even more disconcertingly, speaking during a voluntary interview could produce false confessions, which have led to the convictions of an extraordinary number of individuals who have later been exonerated by DNA testing.[98] These false confessions can appear particularly trustworthy because police may inadvertently reveal details about the crime to suspects during the interview, and suspects then parrot back those details during their false confessions.[99] The point is that even innocent suspects have good reason to remain silent during a voluntary interview. The *Salinas* decision makes that silence incriminating so that even innocent people are now restricted as to how they can act in a voluntary interview. The end result is that voluntary interviews are also more custodial for innocent suspects.

Furthermore, the *Salinas* decision may actually make communications *before* the interview more custodial. Consider the moment when police entered Salinas's house and asked him to come to the station for an interview.[100] Was he actually free to refuse the interview? The decision in *Salinas* expressly allows prosecutors to comment on defendants' refusal to answer questions in a noncustodial setting,[101] and Salinas would be doing just that by declining the interview request. So he was actually not free to refuse without incriminating himself. The prosecutor could make an argument similar to the one made at Salinas's trial: An innocent person would never completely refuse to answer questions after two of his acquaintances were murdered the night

96 *See Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting); *see also* James Duane, *Don't Talk to Police*, YOUTUBE (June 21, 2008), http://www.youtube.com/watch?v=6wXkI4t7nuc (giving an example of how innocent people can incriminate themselves, at 21:30–25:00).

97 *See* Brogan v. United States, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring).

98 BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18–19 (2011) (examining 250 DNA exonerees and finding that 40 of them had falsely confessed).

99 Brandon L. Garrett, *Remaining Silent After* Salinas, 80 U. CHI. L. REV. 116, 124 (2013); *see also* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 491–92 (1998) (finding that confessions "substantially bias" triers of fact even when confession was elicited by coercive techniques and other evidence suggests that defendant is innocent).

100 *See supra* notes 15–16 and accompanying text.

101 *See Salinas*, 133 S. Ct. at 2177–78.

before.[102] In essence, the *Salinas* decision makes even an officer's *request* for an interview more custodial.

In a functional sense, the implication of *Salinas* on the custody analysis is clear: it adds another circumstance—alongside circumstances such as place of the interview, duration of the interview, and number of officers present at the interview—that tends to make all voluntary interviews with police more custodial.[103] Courts should be up front in their analyses and consider *Salinas* along with the other circumstances. The result should be that, in interviews that already have a fair number of custodial circumstances present, *Salinas* tips the scales in favor of custody. Consequently, courts should find that many more suspects who are subject to voluntary interviews, and possibly even voluntary interview requests, are actually in custody.

Before moving to the interrogation prong, there is one obvious counterargument to considering the *Salinas* decision as an additional circumstance alongside more tangible custodial circumstances like place and duration of the interview. It is that suspects may not be aware of the effects of leaving the interview; thus, they do not actually feel the coercive effects of *Salinas* as they do when the interview is long in duration or at the police station. However, this argument fails in light of the fact that the custody analysis is an objective test that asks whether a reasonable person would feel free to leave.[104] Consequently, it would be difficult for courts to find that a reasonable person would not be aware of *Salinas*, and thus *Salinas* should not factor into the custody analysis. Furthermore, the Supreme Court has reinforced the objective test by asserting that neither police officers' subjective knowledge about whether they plan on arresting a suspect,[105] nor suspects' "actual mindset[s]" about whether they are in custody, should factor into the custody analysis.[106] Accordingly, whether suspects know they can walk away without incriminating themselves also should not factor into the custody analysis.

2. *Interrogation*

The decision in *Salinas* has less of an effect on the interrogation prong of the custodial interrogation analysis. As previously stated, this

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102 To compare this with the prosecutor's actual argument at trial see *Salinas v. State*, 368 S.W.3d 550, 556 (Tex. Ct. App. 2011), *aff'd*, 369 S.W.3d 176 (Tex. Crim. App. 2012), *aff'd*, 133 S. Ct. 2174 (2013).

103 *See supra* notes 69–73 and accompanying text.

104 *See* Thompson v. Keohane, 516 U.S. 99, 113–14 (1995).

105 *See* Berkemer v. McCarty, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time . . . .").

106 *See* Yarborough v. Alvarado, 541 U.S. 652, 667 (2004).

is because an interview already consists of "express questioning," so in a legal sense, it is already an interrogation.[107]

However, the *Salinas* decision may affect the interview *request* on the interrogation prong, just as it did on the custody prong. When police officers asked Salinas to come to the station for an interview, their request was likely not "express questioning," as such questioning traditionally refers to questions directly related to the crime.[108] But words or actions can also be the "functional equivalent" of express questioning, and thus qualify as an interrogation, if they are "reasonably likely to elicit an incriminating response."[109]

The *Salinas* decision makes an interview request much more likely to elicit an incriminating response. This is because suspects can now incriminate themselves in a brand-new way, by simply refusing the interview request. Notably, refusing such a request would be wise considering the vulnerability of suspects in voluntary interviews.[110] But the problem is that when suspects refuse the request, prosecutors can now use that refusal as evidence of guilt. The result is that suspects are much more likely to incriminate themselves in response to a voluntary interview request, so such *requests* may themselves be "reasonably likely to elicit an incriminating response."[111] Interestingly, the *Salinas* decision functions to makes all police requests for voluntary interviews look more like interrogations.

C. *Salinas*'s Overall Effect on Voluntary Interviews

The overall effect of *Salinas* is that voluntary interviews, and possibly even voluntary interview requests, now look much more like custodial interrogations. As for voluntary interviews, once suspects are in the interview, their freedom to leave before police stop questioning is restricted by the fact that leaving will be incriminating. In fact, especially for guilty suspects, the freedom to act in any way when faced with an accusatory question is extraordinarily limited. Even voluntary interview *requests* are more coercive on both the custody prong and interrogation prong as a result of *Salinas*. The result is that from the moment police ask for a voluntary interview, individuals now have

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107 Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

108 *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 600 (1990) (determining that questioning a drunk driver about his "sixth birthday" constituted express questioning); *Innis*, 446 U.S. at 303 (discussing whether an officer's remark to another officer about a missing murder weapon was equivalent to express questioning, and ultimately holding that it was not); Miranda v. Arizona, 384 U.S. 436, 491–92 (1966) (finding that suspect was interrogated when officers questioned him about crime).

109 *Innis*, 446 U.S. at 301–02.

110 *See supra* notes 77–81 and accompanying text.

111 *Innis*, 446 U.S. at 301–02.

much less freedom to act. The following Part explores the implications of this result.

III
Policy Implications

Changing the nature of voluntary interviews is important primarily because of the implications it has for individuals who talk to police. It is useful to first examine these implications from a normative perspective, in terms of how *Salinas* ought to affect voluntary interviews. Then, *Salinas* must be examined from a more realistic perspective, which is rather discouraging for anyone who talks to police.

A. *Salinas*'s Implications in a Normative Sense

If courts recognize and act on the reasoning that *Salinas* makes voluntary interviews more custodial, they would necessarily provide more protection for suspects. Especially in interviews with coercive circumstances already present—like that of Salinas—courts would find that the interviews are actually custodial interrogations.[112] Thus, courts would suppress any un-*Mirandized* statements made by suspects.[113] By suppressing the statements, there would be little use for voluntary interviews, and thus many suspects would regain the protections tied to custodial interrogations. Namely, suspects would be informed of their rights to silence and an attorney and be able to exercise those rights.[114]

Police investigations would change dramatically. Gone would be the days of sidestepping *Miranda* by simply asking suspects to come to the police station, questioning them for an hour, and then allowing them to leave when questioning is over.[115] Police would have to gather information from suspects either by informing them of their *Miranda* rights up front or by making a genuine effort to remove coercive circumstances from interrogations. For instance, police could question the suspect at home and keep the questioning brief and nonaccusatory.[116] But the end result of *Salinas* would be that police would have to give *Miranda* warnings much more often to suspects they wanted to question. Police would also have to give warnings much earlier in investigations, considering that even interview requests are now more coercive.[117] In sum, if courts and police recognize that *Salinas* transforms many interviews into custodial

112 *See supra* notes 88–91 and accompanying text.
113 *See Miranda*, 384 U.S. at 469.
114 *See id.*; Bobby v. Dixon, 132 S. Ct. 26, 29 (2011); *supra* note 79.
115 *See supra* note 74 and accompanying text.
116 *See supra* notes 69–73 and accompanying text.
117 *See supra* notes 100–02 and accompanying text.

interrogations, suspects would be more protected when police wanted to talk to them.

B. *Salinas*'s Implications in a Realistic Sense

Of course, the *Salinas* decision at heart provides a brand-new way for suspects to incriminate themselves in voluntary interviews.[118] Thus, it is unlikely that the Court meant for criminal suspects to end up with more protection when they talk to police. Viewed in context, *Salinas* is actually part of a long line of cases that works to erode the workings of *Miranda* and decrease the protection of suspects in police interactions.[119] Accordingly, while courts may recognize that *Salinas* makes voluntary interviews more custodial, that does not mean courts will actually act and change the custody analysis. If they do not, voluntary interviews are now more dangerous for suspects and correspondingly more useful for the police and prosecution.

1. *If Individuals Use* Salinas *to Their Advantage*

If individuals read this Note and understand the danger of voluntary interviews in a post-*Salinas* world, they would limit all interaction with police. Even declining a request for a voluntary interview could be incriminating, so at present the best approach for individuals who see police at their front doors is to not even let them in the house. Not talking to police "under any circumstances" was of course good practice well before *Salinas*,[120] but *Salinas* reemphasizes it. When individuals are encouraged to avoid all contact with police, police will find it more difficult to conduct investigations. Thus, *Salinas* may paradoxically result in fewer prosecutions and convictions of those who commit crimes.

Of course, if individuals simply cannot avoid police, their next best option is to decline voluntary interviews. Even without considering *Salinas*, individuals are extremely vulnerable in such interviews.[121] They are not read *Miranda* rights, they cannot exercise those rights,

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118 *See* Salinas v. Texas, 133 S. Ct. 2174, 2177–78 (2013).

119 *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010) (holding that invocation of right to remain silent must be express and unambiguous); United States v. Patane, 542 U.S. 630, 644 (2004) (holding that physical evidence obtained from un-*Mirandized* statements is admissible); North Carolina v. Butler, 441 U.S. 369, 376 (1979) (determining that suspects may implicitly waive *Miranda* rights); *see also* George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092 (2003) ("*Miranda* has been a spectacular failure."); Weisselberg, *supra* note 75, at 1524 ("[L]ittle is left of *Miranda*'s vaunted safeguards . . . .").

120 *See* Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").

121 *See supra* notes 78–81 and accompanying text.

and even trying to assert them could be incriminating.[122] *Salinas* exacerbates that vulnerability by making even silence during the interview incriminating.[123] Again, when suspects decline voluntary interviews, it hinders police investigations. Accordingly, *Salinas* may actually result in fewer successful prosecutions.

2. *If Police Use* Salinas *to Their Advantage*

The foregoing assumes that individuals know about the *Salinas* decision and use it to their advantage. Considering that large parts of the population do not even understand *Miranda* rights, this is a massive assumption.[124] It is much more likely that police will understand *Salinas* and use it to their advantage, so this section deserves more attention.

Police have long made strategic use of voluntary interviews.[125] This is partly because in a "free flowing and relatively unstructured" interview, police can develop a rapport with the suspect that may bear fruit before an accusatory interrogation is even necessary.[126] It is also because suspects are less protected in voluntary interviews or, put differently, police retain much more control over voluntary interviews. This is because police do not have to worry about a suspect stopping the interview by invoking the right to silence or the right to an attorney.[127]

Post-*Salinas*, the voluntary interview is an even more powerful tool for police. The reason is that, as repeatedly stated, *Salinas* provides an additional way for police to gain incriminating evidence.[128] In fact, police are one accusatory question away from getting guilty suspects to incriminate themselves one way or another.[129] Innocent suspects are also at a far greater risk for incriminating themselves in voluntary interviews.[130]

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122 *See id.*

123 *See Salinas*, 133 S. Ct. at 2177–78.

124 Richard Rogers, *Getting it Wrong About Miranda Rights: False Beliefs, Impaired Reasoning, and Professional Neglect*, 66 AM. PSYCHOLOGIST 728, 734 (2011) ("Although streetwise and legally sophisticated offenders do exist, far more have a limited, often erroneous grasp of Miranda warnings and the underlying [c]onstitutional safeguards.").

125 A nationwide survey shows that two-thirds of police departments have trained officers in the so-called "Reid method." Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward* Miranda *and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 920 (2007). Originally devised in 1962, the Reid method advises officers to begin investigations with "free flowing" interviews as opposed to accusatory interrogations. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 7 (4th ed. 2001).

126 *See* INBAU ET AL., *supra* note 125, at 7.

127 *See* Bobby v. Dixon, 132 S. Ct. 26, 29 (2011); Miranda v. Arizona, 384 U.S. 436, 444 (1966).

128 *See Salinas*, 133 S. Ct. at 2177–78.

129 *See supra* notes 93–95 and accompanying text.

130 *See supra* notes 96–99 and accompanying text.

But furthermore, *Salinas* encourages police to use a rather insidious method of questioning during the interview: surprise the individual with accusatory questions. Abruptly asking an individual whether his shotgun shells will match those at the crime scene maximizes the chances that, at the very least, police can obtain a surprised, "transitory silence" from the individual who is shocked to realize he is actually a suspect.[131] Stated differently, police would still be wise to start the interview in an "unstructured" and "free flowing" manner.[132] But *Salinas* encourages police to then unexpectedly change gears with an accusatory question, as any hesitation by the suspect is affirmative evidence of guilt at trial.[133] Whether silence is probative of guilt at all is discussed at length in Part IV. But it is difficult to imagine how silence due to a suspect's surprise should be incriminating. Yet the decision in *Salinas* makes no distinction between surprised, "transitory" silence and extended, more permanent silence,[134] so police can maximize chances of eliciting an incriminating response by being as abrupt as possible during questioning.

Of course, even the voluntary interview *request* is now a powerful tool for police. Police can start building a case against individuals by simply asking for an interview.[135] If the individual agrees to interview, police can move forward with the investigation.[136] If the individual refuses, police have the first piece of admissible, incriminating evidence.[137]

In sum, *Salinas* discourages police from arresting suspects, reading them their *Miranda* rights, and subjecting them to custodial interrogation. Unless suspects are flight risks or dangerous to the community, there is no reason to subject them to custodial interrogation. *Salinas* then encourages police to surprise suspects with accusatory questions during the interview.

Considering that police are more likely than individuals to be informed about the implications of *Salinas*, the overall implication of *Salinas* is that police are incentivized to conduct entire investigations through voluntary interviews, and individuals are much less protected when they talk to police.

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131 Brief for Respondent at 10, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 1225769.

132 INBAU ET AL., *supra* note 125, at 7.

133 *See Salinas*, 133 S. Ct. at 2183–84.

134 *See id.*

135 *See supra* notes 100–02 and accompanying text.

136 *Id.*

137 *Id.*

3. Salinas *Will Disproportionately Impact Groups That Are Already Overrepresented in the Criminal Justice System*

By encouraging voluntary interviews, *Salinas* will reduce the protection of all individuals whom police question. But for two reasons, the decision will disproportionately impact demographics that are already overrepresented in our criminal justice system. This section uses black Americans to illustrate this implication.

The first reason why *Salinas* will disproportionately impact black Americans is simply because they are more likely to interact with police. Crime statistics paint a clear picture. In terms of arrests, about 12% of the U.S. population is black, yet black Americans make up 30% of those arrested for property crimes and 38% of those arrested for violent crimes.[138] Similarly, from 2004 to 2012 during New York City's notorious "stop and frisk" program, 52% of those stopped were black, despite making up only 23% of New York City's population.[139] Incarceration rates are even more extreme. Black men are six times more likely to be imprisoned than white men,[140] and if these trends continue, one in three black males born today can expect to go to prison in his lifetime.[141] Incarceration rates for black women are less extreme but still very disparate compared to rates for white women.[142]

These statistics make clear that black Americans are far more likely to interact with police than white Americans. Because black Americans are more likely to interact with police, they are necessarily more affected by any decrease in protection during police interactions. In other words, in the same way that more restrictive prison conditions would disproportionately affect men more than women,[143] *Salinas* disproportionately affects black Americans simply because they are more likely to be voluntarily interviewed. The troubling implica-

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138 THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 3 (2013), *available at* http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

139 Floyd v. City of New York, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013) (observing by comparison that white Americans make up 33% of the city's population yet were stopped only 10% of the time).

140 E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 25 tbl.18 (2013), *available at* http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf.

141 Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011), *available at* http://sentencingproject.org/doc/publications/prison%20journal%20-%20racial%20disparity.pdf.

142 *See id.* (finding that one out of eighteen black women can expect to go to prison as compared to one out of one-hundred eleven white women).

143 Men outnumbered women in prison by about thirteen times from 2002 to 2012. *See* E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012—ADVANCE COUNTS 2 tbl.1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/p12ac.pdf.

tion is that *Salinas* will end up exacerbating the overrepresentation of black Americans in our criminal justice system.

The second reason why *Salinas* will disproportionately impact black Americans is related to and stems from their relative distrust of police. Again, statistics support this premise. One study shows that 54% of black Americans say they have a "great deal" or "fair amount" of confidence in police to do a good job at enforcing the law as compared to 78% of white Americans.[144] Less than four in ten black Americans trust police to treat black Americans and white Americans equally.[145] More dramatically, approximately 80% of black Americans, but only approximately 25% of white Americans, consider it a "serious problem" that police "stop and question [b]lacks far more often than [w]hites."[146] In short, the majority of black Americans "remain broadly skeptical of the police in their communities."[147]

In the wake of *Salinas*, this suspicion poses a problem for black Americans if it manifests itself to police. Recall that at Genovevo Salinas's trial, the police officer who testified not only said that Salinas remained silent in response to a question, but also that he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[148] The prosecution argued that the reaction showed guilt.[149] But alternatively, Salinas's reaction could have shown a man deeply suspicious of police.

This is important because a black man may be more likely to hesitate and "tighten up" in response to a question by police not because he is guilty but because he is more likely to distrust police.[150] In short, a major problem with the *Salinas* decision is that it is virtually impossible to explain what silence coupled with signs of nervousness actually means. Yet testimony about that silence is extremely damaging and hard to rebut, largely because it is so hard to discern what it means in the first place.[151] Part IV discusses the probativeness of silence more generally, but black Americans may be especially prone to incriminate

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144 PEW RES. CTR., A YEAR AFTER OBAMA'S ELECTION: BLACKS UPBEAT ABOUT BLACK PROGRESS, PROSPECTS 43 (2010), *available at* http://pewsocialtrends.org/files/2010/10/blacks-upbeat-about-black-progress-prospects.pdf.

145 *Id.*

146 MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 43 fig.2.1 (2010).

147 PEW RES. CTR., *supra* note 144, at 43.

148 Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (alterations in original).

149 *See id.*

150 *See supra* notes 144–47 and accompanying text.

151 Recall that in Salinas's first trial, the prosecutor did not elicit testimony from the police officer about Salinas's silence, and the trial ended with a hung jury. The prosecutor's testimony about Salinas's silence comes from the second trial, where Salinas was convicted. *See* Brief for Petitioner at 5, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246), 2013 WL 633595.

themselves with this type of evidence because of their relative distrust of police.

In sum, the *Salinas* decision is likely to disproportionately impact black Americans. Black Americans interact with police more often,[152] and their comparative distrust of police may manifest itself and be construed as consciousness of guilt.[153] This reasoning also applies to other groups who are overrepresented in the criminal justice system. In particular, repeat offenders[154] and the uneducated[155] are more likely to interact with police and thus may have similar reasons to be suspicious or distrustful of them. The overall implication is that *Salinas* may exacerbate the problem of overrepresentation of certain groups in our criminal justice system.

IV
Is Silence Probative of Guilt?

The penultimate Part of this Note addresses the question at the forefront of any case about silence: Is silence probative of guilt? The Supreme Court itself has noted that "[i]n most circumstances silence is so ambiguous that it is of little probative force."[156] Accordingly, any discussion of *Salinas* would be incomplete without considering whether the assumption behind the prosecutor's argument about Salinas's silence was valid in the first place.

A. The Assumption

It is an age-old assumption that when faced with an accusation, the innocent speak while the guilty remain silent.[157] One scholar traces the idea back to Pope Boniface VIII, who decreed in the 1300s that "[h]e who is silent, agrees."[158] Jeremy Bentham also famously

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152 *See supra* notes 139–43 and accompanying text.

153 *See supra* notes 144–47 and accompanying text.

154 Pew Ctr. on the States, State of Recidivism: The Revolving Door of America's Prisons 9 (2011) (finding that 45.4% of inmates released in 1999 returned to prison within three years, and 43.3% of inmates released in 2004 returned to prison within three years).

155 *See* Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 Am. Econ. Rev. 155, 160 tbl.2, 175 tbl.10 (2004) (finding that a reduced probability of incarceration and arrest is associated with higher schooling).

156 United States v. Hale, 422 U.S. 171, 176 (1975).

157 *See* Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27, 34 (1979) (articulating a "legal presumption that all silence concurrent with accusation is prompted by a consciousness of guilt"); Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199, 220 (2001) ("The most popular understanding of silence as communication is the belief that the failure of one party to a communication to respond to another party implies assent.").

158 Gamble, *supra* note 157, at 31.

lamented that the right to silence only helps the guilty.[159] The "common sense psychology" that silence equals guilt[160] is even enshrined in the Federal Rules of Evidence. Rule 801(d)(2)(B) excludes from hearsay so-called adoptive admissions, which are out-of-court statements offered against a party-opponent that "the party manifested that it adopted or believed to be true."[161] In practice, this rule treats a party's silence in response to an out-of-court accusation just as it would a regular admission; the silent party effectively *adopts* the accusation as true.[162]

Though not stated specifically in the *Salinas* decision, Rule 801(d)(2)(B) is the reason why Salinas's silence was admitted into evidence. By failing to respond to whether his shotgun "would match the shells recovered at the scene of the murder," Salinas adopted the accusation.[163] The prosecutor then based his closing argument on the same "common sense"[164] assumption that allowed the silence into evidence in the first place: only a guilty person would remain silent in the face of an accusation.[165]

1. *Skepticism About the Assumption*

The *Salinas* decision acknowledges the potential problem with the assumption by noting briefly that "[n]ot every such possible explanation for silence is probative of guilt."[166] Yet that acknowledgement understates the problem considering that essentially no empirical basis exists for using silence as evidence of assent or guilt.[167] In fact, cracks in the conventional wisdom about silence have slowly been forming in other spheres of the criminal justice system. For example, with regard to rape, the "fresh-complaint doctrine" dates back to the thirteenth century and proceeds on the assumption that if rape victims do not immediately report the rape, it must not have occurred.[168] Yet studies have shown the assumption to be empirically false—the vast majority of rape victims neither report the rape immediately nor

159 Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 436 (2000).

160 Gamble, *supra* note 157, at 34.

161 FED. R. EVID. 801(d)(2)(B).

162 *See, e.g.*, United States v. Beckham, 968 F.2d 47, 52 (D.C. Cir. 1992).

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

164 Gamble, *supra* note 157, at 31.

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

166 *See id.* at 2176.

167 *See* Gamble, *supra* note 157, at 32 ("The presumptive basis for the [Adoptive] Admission Rule has never been scientifically tested . . . ."); Shmuel Leshem, *The Benefits of a Right to Silence for the Innocent*, 41 RAND J. ECON. 398, 408 (2010) ("[T]he empirical evidence on suspects' decisions to speak or remain silent is scarce . . . ."); Seidmann & Stein, *supra* note 159, at 435–37 (stating that it may be "altogether impossible" to empirically test whether silence indicates guilt or innocence).

168 *See* People v. Brown, 883 P.2d 949, 950 (Cal. 1994).

even report the rape at all.[169] The common assumption about why people remain silent in this context is based on simply unfounded intuition.

With regard to silence during a conversation, there are also persuasive reasons to question the intuition that silence equals guilt. Psychologists have found that, for instance, one reason people might remain silent during a conversation is to assert control over the speaker.[170] The internal dialogue of the silent party is, "As much as you may want me to respond, I'm just not going to do it!"[171] During an interrogation, suspects may remain silent in response to questions to take control over the conversation and communicate that they will not bend to the interrogator's will.[172] Along similar lines, angry people often use the "silent treatment" to communicate their disdain toward another person.[173] In an interrogation, especially one with a slew of accusatory questions, suspects may naturally respond with silence to communicate anger toward the interrogator.[174]

But perhaps there is an even more natural reason to remain silent during a voluntary interview. A salient example similar to the one at issue in *Salinas* illustrates the reason. So, for a moment, put yourself in the shoes of Genovevo Salinas and imagine the following situation:

You were at your friend's house for a party last night, and a few hours after you left the party he was stabbed to death. The very next day, you agree to interview with police at the station,[175] and they start by asking you questions about what your friend was wearing and how he was feeling the last time you saw him. You helpfully answer the questions. Then they change tone and ask unexpectedly, "Your fingerprints are going to match the ones we found on the knife, aren't they?"[176] Think about your reaction. Are you shocked that you are actually a suspect? Are you imagining the consequences of murder? Are you thinking about the effect that even being a suspect might have on your family? Did you "tighten up?"[177] Did you "shuffle[ ]

169 *See* Sherry F. Colb, *Assuming Facts Not in Evidence*, 25 RUTGERS L.J. 745, 754 (1994).

170 *See* Thompson, *supra* note 12, at 46.

171 *Id.* (internal quotation marks omitted).

172 *See id.* ("[A] suspect in custody may decide to remain silent to challenge the questioner and send her a message that she cannot force the suspect to talk.")

173 *See id.* at 47–48.

174 *See id.*

175 This was a bad move.

176 Note that this method of abruptly asking an accusatory question is allowed and actually encouraged by the *Salinas* decision. *See supra* notes 131–37 and accompanying text.

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

[your] feet?"[178] Did you "bit[e your] bottom lip?"[179] You didn't hesitate, did you? Hopefully you answered calmly and immediately, because otherwise your silence and surprised reaction will look a lot like guilt at trial.

The remainder of this Part delves further into the skepticism that silence equals guilt. It first puts forth a legal reason why we might question our intuition about the meaning of silence. It then puts forth a psychological reason, related to the sheer surprise described above, for why we might reconsider silence.

2. Miranda *and the Legal Problem with the Probativeness of Silence*

As explained in Part I, the Court hinges the use of silence on *Miranda* warnings. Prosecutors may use silence if it occurred prior to *Miranda* warnings;[180] however, they may not use post-*Miranda* silence, as the suspect may simply be heeding the warnings.[181] In other words, the meaning of post-*Miranda* silence is "insolubly ambiguous" as the suspect just learned about his right to remain silent.[182]

But the distinction between pre-*Miranda* silence and post-*Miranda* silence may progressively be fading. *Miranda* is now a "part of our national culture."[183] It is entirely reasonable to believe that individuals could heed *Miranda* warnings without first hearing them from a police officer. Indeed, research has shown that, largely due to television, most Americans can now recite some form of *Miranda* warnings starting with, "You have the right to remain silent."[184] Thus, in voluntary interviews, individuals may assume they have the right to remain silent though no police officer has explicitly informed them of this right.[185] Regardless of whether individuals are correct in this assumption, the widespread understanding of the right to remain silent today may mean that any silence toward police may simply be reliance on that right.

This reasoning is especially persuasive when considering a suspect's silence during an interview with police. Recall that the Court uses the term "silence" to mean both muteness in response to a question and, more generally, some failure to come forward with information.[186] Indeed, when the Court originally considered the

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178 *Id.*
179 *Id.*
180 *See id.* at 2177–78; Fletcher v. Weir, 455 U.S. 603, 606 (1982) (per curiam).
181 *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976).
182 *See id.*
183 Dickerson v. United States, 530 U.S. 428, 443 (2000).
184 *See* Richard Rogers et al., *"Everyone Knows Their Miranda Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 301 (2010).
185 *Id.* at 301–02.
186 *See supra* note 12.

prosecution's use of pre-*Miranda* silence at trial, the "silence" involved two defendants who did not immediately come forward with their stories of self-defense.[187] With regard to those specific defendants, it is somewhat of a stretch to believe they did not immediately come forward because they were relying on their right to remain silent. On the other hand, it is quite easy to imagine suspects believing they can rely on the right to remain silent when asked accusatory questions during an interview. Accordingly, especially in a question-and-answer setting, silence may have very little association with guilt.

3. *Psychological Bias*

Psychological bias on the part of the interviewing officer may also play a key role in both the creation and flawed perception of a suspect's silence. Bias may also affect the jury's decision-making process. This section explores how a cocktail of two well-known psychological biases, correspondence bias and confirmation bias, may help explain a suspect's transitory silence during an interview.

Correspondence bias is the tendency to attribute an individual's behavior to a disposition or personality trait rather than to the actual situation.[188] In a famous experiment that illustrated this bias, psychologists first showed college students essays that either supported or opposed Fidel Castro.[189] Then the experimenters told the students either that the writer had freely chosen which stance to take or that a teacher had instructed the writer to take a particular stance.[190] Surprisingly, even when the students knew that the writer was instructed to take a particular stance, they still believed the writer internally held that point of view.[191] This illustrates that people naturally discount the power of the situation and instead tend to attribute behavior to a person's internal disposition.[192]

Confirmation bias refers to the tendency to interpret information in a way that aligns with preexisting beliefs.[193] In an early experiment, psychologists asked participants to come up with a hypothesis based on a set of data.[194] They found that participants only tested the hy-

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187 *See* Fletcher v. Weir, 455 U.S. 603, 606 (1982); Jenkins v. Anderson, 447 U.S. 231, 233 (1980).

188 *See* Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 22, 24 (1995).

189 Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1, 4 (1967).

190 *Id.*

191 *See id.* at 7.

192 *See id.* at 23.

193 *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

194 *See id.* at 179.

pothesis by seeking out data that confirmed the hypothesis.[195] In essence, confirmation bias acts like a positive feedback loop that causes people to try to reinforce what they already believe.

In the context of an interrogation or interview, correspondence bias should first be concerning given the power of the situation.[196] The suspect is "without social support" and usually "stressed, anxious, scared, [and] confused."[197] Correspondence bias thus posits that police will interpret any signs of this stress or anxiety as dispositional rather than as a product of the situation.[198]

The problem with transitory silence is that police training materials teach police to attribute silence to a very particular disposition: untruthfulness.[199] Per the training materials, if suspects hesitate before answering questions, they may be untruthful.[200] If suspects nervously rearrange jewelry, chew their fingernails, or rub and wring their hands, they may be untruthful.[201] Indeed, at Salinas's trial, the police officer testified that he interpreted Salinas's transitory silence and "tighten[ing up]" as "signs of deception."[202] In short, because of correspondence bias, police are apt to disregard the power of the situation and attribute any transitory silence or nervousness to untruthfulness.

Research corroborates the idea that police may overestimate the significance of certain verbal and nonverbal cues. Police do not detect untruthfulness any better than chance.[203] In fact, one study even found that individuals trained to detect untruthfulness from police training materials were actually worse at detecting untruthfulness than ordinary individuals.[204] In essence, psychological studies bear out the idea that police may be reading too much into cues that they believe signal untruthfulness, like transitory silence.

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195 *See id.* This may not bode well for the psychologists cited in this Note.

196 Indeed, the *Miranda* Court believed custodial interrogations to be so powerfully coercive that if police do not administer protective warnings, statements by a suspect may not "truly be the product of his free choice." Miranda v. Arizona, 384 U.S. 436, 458 (1966).

197 Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique*, 57 CRIM. L.Q. 509, 513 (2011).

198 *See* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 505 (1999).

199 *See id.*

200 *See id.*

201 *See* INBAU ET AL., *supra* note 125, at 152–53.

202 Salinas v. State, 368 S.W.3d 550, 553 (Tex. Ct. App. 2011), *aff'd*, 369 S.W.3d 176 (Tex. Crim. App. 2012), *aff'd*, 133 S. Ct. 2174 (2013).

203 *See* Moore & Fitzsimmons, *supra* note 197, at 511–12.

204 *See* Kassin & Fong, *supra* note 198, at 511. Police are also taught to look for signs such as "rigid posture, grooming, covering the mouth while speaking, and averting gaze." *Id.*

Confirmation bias then takes over to create the real problem. Once police believe that a suspect is untruthful, confirmation bias posits that they will seek out information that confirms this untruthfulness.[205] Indeed, research shows that officers who believe a suspect is untruthful or guilty will ask more accusatory questions.[206] This increases the possibility that the suspect will hesitate and show signs of nervousness at some point during the questioning.[207] Interestingly, suspects also "behavioral[ly] confirm[ ]" the beliefs of the accusatory officer—suspects answer guilt-presumptive questions more defensively, which police read as more deceptively.[208] The result is a dangerous self-fulfilling prophecy where police believe the suspect is untruthful and continue to shape the interview so that the suspect looks even more untruthful.[209] Because of this self-fulfilling prophecy, police may actually create transitory silence from increasingly defensive suspects.

Of course, when police create transitory silence due to correspondence bias and confirmation bias, the prosecution can now use that silence as evidence of guilt.[210] To bring the psychological biases full circle, the prosecution's argument will be persuasive to the jury precisely because the jury is prone to the correspondence bias. Correspondence bias posits that the jury too will discount the power of the situation when it hears about the defendant's transitory silence. It too will fail to appreciate the coercion inherent in an interrogation or interview. Just like the police officer, the jury is biased toward thinking that the individual was silent in response to a question for an internal, dispositional reason. The end result is that silence may be initially created by police due to confirmation bias and then used as persuasive evidence of guilt due to correspondence bias.

B. Should Silence Be Inadmissible Per Evidentiary Rules?

At a certain point, judges may find that silence so lacks probative value that they should not admit it into evidence. Federal Rule of Evidence 403 provides that judges may exclude evidence if "its probative value is substantially outweighed by . . . unfair prejudice."[211] State courts have evidentiary rules that are virtually identical to Rule 403.[212]

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205 *See* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 199 (2003).

206 *See id.* ("[A] presumption of guilt triggered aggressive interrogations . . . .").

207 *See id.*

208 *See id.*

209 *See id.*

210 *See* Salinas v. Texas, 133 S. Ct. 2174, 2177–78 (2013).

211 FED. R. EVID. 403.

212 *See, e.g.*, TEX. R. EVID. 403.

As this Part has illustrated, there are serious reasons to question the probative value of silence. Thus, judges would be reasonable in finding that silence fails Rule 403's balancing test. In fact, the Supreme Court has even acknowledged that regardless of its decisions on silence, jurisdictions remain free to make their own determinations about the probativeness, prejudice, and thus the admissibility, of silence.[213]

Accordingly, a defense lawyer might try using an expert to persuade the judge that a combination of psychological biases, particularly confirmation bias, on the part of the police officer created the transitory silence in the first place. The lawyer might also argue that silence is unfairly prejudicial as the jury is prone to correspondence bias when it hears about the silence. Unfortunately, any discussion of Rule 403 is necessarily limited because it is difficult to predict how judges balance discretionary terms like "probative value" and "unfair prejudice." The terms cannot be quantified, and judges simply use their intuition to admit or exclude evidence of silence.[214]

Also, disconcertingly for defendants, the language of Rule 403 strongly favors admissibility. Relevant evidence shall not be excluded unless "its probative value is *substantially outweighed* by . . . unfair prejudice."[215] In other words, the evidence must be very significantly unfairly prejudicial, as compared to its probative value, for the judge to exclude it. The rule reflects a desire to have the jury consider as much relevant evidence as possible.

In short, while Rule 403 provides a way for courts to exclude silence and thus limit the implications of *Salinas*, its application is unpredictable. Yet judges should educate themselves about the probative value of silence and consider excluding it altogether.

CONCLUSION

On its face, *Salinas v. Texas* significantly increases the potential danger for individuals in voluntary interviews with police. Prosecutors may now use the individual's silence during a voluntary interview as evidence of guilt, so there is a brand-new way for individuals to incriminate themselves.

Yet *Salinas* has implications that go beyond a prosecutor's arguments at trial. If refusing to answer questions can be evidence of guilt,

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213 Jenkins v. Anderson, 447 U.S. 231, 240 (1980) ("Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial.").

214 *See* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FED. PRAC. & PROC. § 5214 (2012) ("Discretion is an intuitive process not susceptible to the quantification presupposed by the metaphor of the scales.").

215 FED. R. EVID. 403 (emphasis added).

individuals are much more restricted as to whether they can leave voluntary interviews. Given that the custody determination examines whether a reasonable person would feel free to leave the police, *Salinas* functionally adds a coercive circumstance to the custody analysis. All voluntary interviews now look more custodial, and the end result is that courts should find that some individuals who may not have been in custody pre-*Salinas* are now in custody post-*Salinas*.

If courts do not reconsider their custody analyses, voluntary interviews are now an even more powerful tool for police. Police already do not have to read suspects their *Miranda* rights in voluntary interviews or honor an attempted invocation of those rights. *Salinas* adds to the usefulness of voluntary interviews by increasing the chance that police gather some form of incriminating evidence during the interview. Groups that are already overrepresented in our criminal justice system are likely to be most affected by the new danger of voluntary interviews.

In light of these implications, it is worth asking whether silence is even probative of guilt in the first place. Individuals may have a variety of innocent reasons for remaining silent. They might be trying to send an angry message to the questioner. They might be relying on their personal knowledge of *Miranda* rights. They might simply be surprised. The problem is that a police officer or a jury is likely to attribute any kind of silence to the internal state of the individual.

There is a practical message in this Note. You should have a plan for when police approach and ask you to answer some questions at the station. In the wake of *Salinas v. Texas*, declining the interview is clearly prudent. Yet one might decline in such a way that minimizes the appearance of refusal. For instance, in a calm and collected tone, you might tell the police, "Although I personally want to help, my lawyer has told me never to answer questions from police. I am going to follow that advice, and I wish you the best of luck." That response may be the least incriminating way to avoid a voluntary interview functioning like a custodial interrogation.