NONCUSTODIAL SELECTIVE SILENCE: EXISTING BASES FOR NEWFOUND PROTECTION

Chase Cunningham[*]

I. INTRODUCTION

Much like speaking the word "silence" out loud, raising the privilege against self-incrimination is paradoxical.[1] Courts must ensure that asserting the privilege is not made costly—otherwise, invocation of the Self-Incrimination Clause might undermine its purpose.[2]

When it functions, this privilege reinforces the presumption of innocence and precludes improper inferences from a defendant's silence.[3] It is clear that the privilege automatically applies during trial.[4] But the same is not always true for those who remain silent outside the courtroom.[5] Even less clear is whether an individual who remains only *partially* silent is protected from negative inferences based upon his refusal to speak.[6]

This Note argues that selective invocation of the Self-Incrimination Clause while speaking freely with law enforcement in a noncustodial setting is constitutionally protected and may not be disclosed at trial.[7] This position

---

[*] J.D. Candidate, May 2018, Louis D. Brandeis School of Law, University of Louisville; B.A., Journalism & Mass Communication, May 2015, Samford University.

[1] *See* Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (one must "unambiguously" speak up and invoke the right to remain silent).

[2] *See, e.g.*, Griffin v. California, 380 U.S. 609, 614 (1965).

[3] U.S. CONST. amend. V; Lefkowitz v. Cunningham, 431 U.S. 801, 810 (1977) (Stevens, J., dissenting) ("[T]he privilege against compulsory self-incrimination . . . is an expression of our conviction that the defendant in a criminal case must be presumed innocent, and that the State has the burden of proving guilt without resorting to an inquisition of the accused."); *see also* Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 708, 727 (2016).

[4] *See infra* notes 20–24 and accompanying text.

[5] *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2181–82 (2013) (plurality opinion).

[6] *See* Hurd v. Terhune, 619 F.3d 1080, 1088–89 (9th Cir. 2010). *But see* McBride v. Houtzdale, 687 F.3d 92, 104–05 (3d Cir. 2012).

[7] By this Note's definition, an instance of "selective silence" is a non-response to a particular question during an otherwise admissible conversation between the subject and the government. *See* Stephen Rushin, Comment, *Rethinking* Miranda*: The Post-Arrest Right to Silence*, 99 CALIF. L. REV. 151, 163 (2011) (judicial definitions of "selective invocation"); *see also* Ian C. Kerr, Note, *Beyond* Salinas v. Texas*: Why an Express Invocation Requirement Should Not Apply to Postarrest Silence*, 116 COLUM. L. REV. 489, 490 n.5 (2016) (judicial conceptions of "silence").

reflects the majority stance on the custodial setting's parallel issue.[8] It is also supported by broader principles of Fifth Amendment jurisprudence.[9]

Section II will explore the history of protections against self-incrimination and inferences of guilt from silence. It will begin with early cases which addressed testimony in the courtroom, and it will conclude with the more contentious issues of selective silence in the custodial and noncustodial settings. Section III will analyze this broad backdrop of criminal jurisprudence and evaluate its implications for narrow issues. It will ultimately explain that existing law and important policies mandate the protection of selective silence. Finally, Section IV will propose a three-prong rule which protects noncustodial selective silence.

II. HISTORY

The Self-Incrimination Clause is liberally construed. Its protections evolve with society to ensure their effectiveness. This is illustrated by the Supreme Court's willing application of Fifth Amendment precedents to broader factual contexts than their own. At the heart of these judicial applications lies a uniform policy: the assertion of the privilege against self-incrimination cannot be made costly.

Today, the Self-Incrimination Clause automatically protects individuals both in the courtroom and in custodial interrogations, at least to some extent. Most authorities agree that a detained individual may waive his protections selectively. There are no automatic protections during noncustodial interviews.

A. Protections Against Self-Incrimination at Trials and Hearings

The Clause's protections apply full-force at the trial stage, even if a defendant takes no steps to invoke them. *Hoffman v. United States*[10] was the Supreme Court's first explanation of a valid privilege against self-incrimination claim.[11] At a grand jury hearing, the prosecutor asked the petitioner about both himself and an associate who did not appear.[12] In

---

[8] *See, e.g.*, *Hurd*, 619 F.3d at 1088–89; United States v. Jumper, 497 F.3d 699, 704 (7th Cir. 2007).

[9] *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (unambiguous invocation requirement); Hoffman v. United States, 341 U.S. 479, 485–86 (1951) ("liberal construction"); *see also* Minnesota v. Murphy, 465 U.S. 420, 427 (1984); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[10] 341 U.S. 479 (1951).

[11] Larissa L. Ollivierre, Case Note, *Suspects Beware: Silence in Response to Police Questioning Could Prove as Fatal as a Confession*, 65 MERCER L. REV. 579, 582 (2014).

[12] *Hoffman*, 341 U.S. at 481, 487.

response to several of these questions, Hoffman only repeated, "I refuse to answer," on the basis that answers might have incriminated him.[13] He was held in contempt for his refusal.[14] The appellate court found that the relationship between any possible admissions and the pertinent criminal statutes was too attenuated to manifest "real danger in answering."[15]

The Supreme Court disagreed.[16] It held that the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure."[17] The Court found that the Clause protected admissions "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," so long as "the witness has reasonable cause to apprehend danger from a direct answer."[18]

Four years later, the Court reiterated *Hoffman*'s liberal construction of the Fifth Amendment and stated that invocation "does not require any special combination of words."[19]

Some implications of a subject's silence in the courtroom may be so inherently obvious that they cannot be removed from the jury's purview. But in *Griffin v. California*,[20] the Court rebuked amplification of such inferences by the court or prosecution. It held that neither may comment on a defendant's decision not to testify or suggest that it is indicia of guilt.[21]

> [C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. . . . What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[22]

Under *Griffin*, defendants need not take the stand solely to invoke the Fifth Amendment. They therefore have "an absolute right not to testify" at

---

[13] *Id.* at 481–82.

[14] *Id.* at 482.

[15] *Id.* at 484.

[16] *Id.* at 487–88, 490 ("The court should have considered . . . that truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity.").

[17] *Id.* at 485–86.

[18] *Id.* at 486.

[19] Quinn v. United States, 349 U.S. 155, 162 (1955).

[20] 380 U.S. 609 (1965).

[21] *Id.* at 615.

[22] *Id.* at 614 (internal citation omitted).

trial.[23] More importantly, *Griffin* was the first case in which the Court found automatic application of the privilege against self-incrimination.

As the Court has broadened its application of the Self-Incrimination Clause, it has likewise expanded the applicability of these three cases. Their interpretations of the Clause now apply outside the courthouse and to other stages of the criminal process.[24]

B. Protections Against Self-Incrimination in Custodial Interrogations

The Court's earliest protections of custodial confessions were simply evidentiary rulings. Later, the Due Process Clause gave constitutional durability to these protections. Today, the Self-Incrimination Clause provides bright-line requirements for law enforcement and interrogation subjects.

1. Voluntariness, Coercion, and the "Third Degree"

The young Supreme Court was more concerned with officer misconduct and aggressive "third degree" interrogation tactics than with suspects' privileges against self-incrimination.[25] Its earliest opinions determined a custodial confession's validity by its voluntariness.[26] This rule was meant to ensure that only trustworthy evidence was admitted at trial. Therefore, these opinions were almost entirely based upon English rules of evidence.[27]

But in *Brown v. Mississippi*,[28] the Court took a sharp departure from common law precedent. It used the Due Process Clause to exclude the confessions of three defendants who had been savagely beaten by officers.[29] It held that the state action was inconsistent with "the fundamental principles of liberty and justice" and therefore was "a clear denial of due process."[30]

By using the Due Process Clause, the Court gave constitutional durability to a common law doctrine and rendered it impervious to legislative interference.[31] However, subsequent cases under this due process–

---

[23] Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (quoting Turner v. United States, 396 U.S. 398, 433 (1970) (Black, J., dissenting)).

[24] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 461, 461 n.30, 464 (1966).

[25] Gerardo Schiano, Note, *"You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 182 (2012).

[26] *See, e.g.*, Hopt v. Utah, 110 U.S. 574, 585 (1884).

[27] *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 959 (1966).

[28] 297 U.S. 278 (1936).

[29] *Id.* at 281–82.

[30] *Id.* at 286.

[31] Schiano, *supra* note 25, at 181.

voluntariness test were still more concerned with officer conduct than the privilege against self-incrimination.[32]

Brown was not the Court's first application of the Constitution to a confession. Earlier, in *Bram v. United States*,[33] the Court applied the Fifth Amendment to a confession for the first time.[34] It is possible that the *Bram* Court did not even intend to create a new legal doctrine by connecting the privilege against self-incrimination to the common law rules of evidence.[35] But intentions notwithstanding, *Bram* set the stage for expanding protections against self-incrimination "from the courtroom to investigative confessions."[36]

The Court melded these two constitutional holdings together when it incorporated the Self-Incrimination Clause to the states.[37] The *Brown* Court had expressly differentiated "[c]ompulsion by torture to extort a confession" and the privilege against self-incrimination,[38] but by 1964, that distinction had been abandoned.[39] The resulting rule, supported by both constitutional clauses, was another step forward in "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."[40]

For thirty years, the due process–voluntariness test guided the Court's confession jurisprudence. Practically, it deterred the brutal police conduct that it was designed to prevent.[41] But legally, it was "a 'subtle mixture of factual and legal elements' that 'virtually invited' judges to 'give weight to their subjective preferences.'"[42] By 1966, the Court was ready to replace this

---

[32] *Id.* at 182.

[33] 168 U.S. 532 (1897).

[34] *Id.* at 542 ("[W]hether a confession is incompetent because not voluntary . . . is controlled by that portion of the fifth amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'").

[35] *See Developments in the Law—Confessions*, *supra* note 27, at 960 (discussing apparent mistakes in *Bram*'s legal analysis); *see also* Miranda v. Arizona, 384 U.S. 436, 527–28 (1966) (White, J., dissenting) (noting that the *Bram* view had "been questioned" and had "scant support in either the English or American authorities").

[36] Griffin, *supra* note 3, at 723. Though the Court did not acknowledge *Bram*'s use of the Self-Incrimination Clause in *Brown*, it did cite *Bram* with approval in another evaluation of a custodial confession. *See* Ziang Sung Wan v. United States, 266 U.S. 1, 14–15 (1924).

[37] *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[38] *Brown*, 297 U.S. at 285.

[39] *Malloy*, 378 U.S. at 6–7.

[40] *Id.* at 7.

[41] Spano v. New York, 360 U.S. 315, 321 (1959) ("The facts of no case recently in this Court have quite approached the brutal beatings in *Brown v. Mississippi* . . . .").

[42] Griffin, *supra* note 3, at 709 n.65 (quoting Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–70 (1981)).

cumbersome case-by-case due process analysis with a bright-line rule rooted in the Self-Incrimination Clause.[43]

2. *Miranda v. Arizona*

Miranda v. Arizona[44] was a compilation of four different cases. In each case, "the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world."[45] Chief Justice Warren, writing for the majority, revisited the issues raised in *Escobedo v. Illinois*,[46] a case which primarily dealt with the Sixth Amendment right to counsel and its application to custodial interrogation.[47]

In order to "insure that what was proclaimed in the Constitution had not become but a 'form of words,'" the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[48] Those "procedural safeguards" are the now-famous *Miranda* warnings:

> Prior to any questioning, the person must be warned [1] that he has a right to remain silent, [2] that any statement he does make may be used as evidence against him, and [3] that he has a right to the presence of an attorney, [4] either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[49]

---

[43] *See id.* at 709–10.

[44] 384 U.S. 436 (1966).

[45] *Id.* at 445.

[46] 378 U.S. 478 (1964).

[47] *Miranda*, 384 U.S. at 440–42. Though *Escobedo* was reaffirmed in *Miranda*, it has since fallen out of favor. *See* John Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886, 888 (1981).

[48] *Miranda*, 384 U.S. at 444.

[49] *Id.* at 444–45. It would seem possible-in-fact for a suspect who has not been mirandized to nonetheless make a voluntary confession—at least in circumstances void of coercive conduct by investigators. But *Miranda*'s bright-line rule is clear: if a suspect is not mirandized, his statements will

The Court used various lines of authority, all related to interrogations, to support its conclusion that the privilege applies during custodial interrogations.[50] It then injected the Self-Incrimination Clause with analyses and holdings from other areas of law, including the right-to-counsel doctrine[51] and the *McNabb–Mallory* doctrine.[52] The result was a bright-line requirement for law enforcement to inform detainees of their rights, though officers still had considerable leeway in how they administered the warnings.[53] Furthermore, a subject's invocation of the right to remain silent can fade; law enforcement may reinitiate interrogation at a later time, so long as its behavior is not coercive.[54]

The *Miranda* Court insisted that its holding was "not an innovation in our jurisprudence," but "an application of principles long recognized and applied in other settings."[55] And since the decision, despite many hurdles and adaptations, the Court has continually defended *Miranda* as a sound, workable protection of individual rights.[56]

The *Miranda* warnings are "a prophylactic means of safeguarding Fifth Amendment rights."[57] To serve that interest, the case gave the Self-Incrimination Clause automatic effect outside the courtroom.[58] But custodial interrogation triggers only *warnings*, not the Clause's substantive protections.[59] When in custody, a subject still must speak up and "unambiguously" invoke the right to remain silent.[60]

---

not be presentable at trial. *See id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

[50] *See id.* at 461 (quoting Bram v. United States, 168 U.S. 532, 542 (1897)); *id.* at 462 (quoting Ziang Sung Wan v. United States, 266 U.S. 1, 14–15 (1924)); *id.* at 461 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

[51] *Id.* at 464–66 (discussing *Escobedo*, 378 U.S. 478); *id.* at 471–72 (discussing Carnley v. Cochran, 369 U.S. 506, 513 (1962)).

[52] *Id.* at 463 (discussing FED. R. CRIM. PROC. 5(a), McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957)).

[53] Florida v. Powell, 559 U.S. 50, 60 (2010).

[54] Michigan v. Mosley, 423 U.S. 96, 104 (1975).

[55] *Miranda*, 384 U.S. at 442.

[56] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443–44 (2000).

[57] Doyle v. Ohio, 426 U.S. 610, 617 (1976).

[58] *See* Mathis v. United States, 391 U.S. 1, 4–5 (1968) (*Miranda*'s protections automatically activate when an individual is already imprisoned, even if for a different offense); Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (under *Miranda*, "interrogation" means "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response").

[59] In this respect, *Miranda* stands in stark contrast to *Griffin*, its trial-context counterpart.

[60] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

For example, Thompkins, a known suspect, was found and arrested about one year after a shooting.[61] He was mirandized and interrogated.[62] He remained mostly silent, until an officer struck a nerve almost three hours into the interrogation.[63] When asked whether he prayed to God for forgiveness "for shooting that boy down," Thompkins answered "yes," then looked away.[64] He was later convicted on all related counts.[65] The Court rejected Thompkins' argument that his lengthy silence constituted an invocation of the privilege against self-incrimination.[66] Had he made a "simple, unambiguous statement" expressing his desire to remain silent or to not speak with the police, "he would have invoked his 'right to cut off questioning.'"[67]

Though *Miranda* originally put a "heavy burden" on the government to show that a defendant "knowingly and intelligently" waived his rights to silence and counsel, subsequent cases like *Thompkins* have "retreated" from this strong burden and permitted the implication of waiver "from all the circumstances," including "the words and actions of the person interrogated."[68] Therefore, "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."[69]

More complications arise when a defendant who was detained and mirandized chooses to testify at trial and face cross-examination.[70] This can lead to the unwitting subversion of his constitutional protections.[71] Post-mirandization silence is certainly protected, but post-waiver statements may be subject to impeachment.

In *Doyle v. Ohio*,[72] the defendants were arrested and charged with selling marijuana to an informant.[73] Both claimed at their separate trials that the

---

[61] *Id.* at 374.

[62] *Id.* at 374–75.

[63] *Id.* at 375–76.

[64] *Id.* at 376.

[65] *Id.* at 378.

[66] *Id.* at 381 (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

[67] *Id.* at 382 (citing Michigan v. Mosley, 423 U.S. 96, 103 (1975)).

[68] *Id.* at 383–84, 387; *see also* Connecticut v. Barrett, 479 U.S. 523, 529–30 (1987) (construing a subject's oral conversation as a waiver of rights, despite his apparent misunderstanding that his statements would be unusable without written consent).

[69] *Thompkins*, 560 U.S. at 388–89.

[70] Stefanie Petrucci, Comment, *The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in Its Case-in-Chief*, 33 U.C. DAVIS L. REV. 449, 459 (2000).

[71] *See* Raffel v. United States, 271 U.S. 494, 499 (1926) ("The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do.").

[72] 426 U.S. 610 (1976).

[73] *Id.* at 611.

informant had framed them.[74] On cross-examination, the prosecution impeached them by pointing out that the defendants had not offered their "frameup story" after their arrests.[75] Both defendants were convicted.[76]

The Supreme Court found that it was "fundamentally unfair and a deprivation of due process" to use their post-arrest silence for impeachment purposes.[77] "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[78] "Miranda warnings contain no explicit assurance that silence will not carry a penalty,"[79] but the *Doyle* decision "deviates from traditional practice in order to give meaning to a defendant's Miranda rights."[80]

Doyle does not, however, prevent a prosecutor from impeaching inconsistent prior statements. In *Anderson v. Charles*,[81] the respondent was arrested while driving a stolen car and charged with murdering the vehicle's owner.[82] During interrogation, Charles stated that he had stolen the car about two miles away from a bus station.[83] But at trial, he claimed that he had taken the car from the parking lot of a tire store adjacent to the bus station.[84] The prosecutor exposed this inconsistency on cross-examination, and the jury convicted Charles.[85] The Supreme Court concluded that *Doyle* did not control on these facts.[86] "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements," because "[s]uch questioning makes no unfair use of silence."[87]

Under *Miranda* and its progeny, when in custody, silence is the safest option. It precludes both cross-examination about silence, which would

---

[74] *Id.* at 612–13.

[75] *Id.* at 613.

[76] *Id.* at 611.

[77] *Id.* at 618.

[78] *Id.* at 617.

[79] Stephen Rushin, Comment, *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 CAL. L. REV. 151, 158 (2011) (discussing *Doyle*).

[80] Grieco v. Hall, 641 F.2d 1029, 1034 (1st Cir. 1981).

[81] 447 U.S. 404 (1980) (per curiam).

[82] *Id.* at 404.

[83] *Id.* at 405.

[84] *Id.* at 405–06.

[85] *Id.* at 406.

[86] *Id.* at 409.

[87] *Id.* at 408. For more on the relationship between *Doyle* and *Charles*, see John W. Auchincloss II, Note, *Protecting* Doyle *Rights after* Anderson v. Charles: *The Problem of Partial Silence*, 69 VA. L. REV. 155, 164–76 (1983).

violate *Doyle*, and impeachment of post-waiver statements, which would be possible under *Charles*.

C. Selective Silence and Selective Invocation in Custodial Interrogations

Miranda and the Self-Incrimination Clause certainly allow a subject in custody to end interrogation or prevent it in the first place. But whether a detainee may carve out and protect non-answers to specific portions of ongoing questioning is a much more contentious issue.

The Supreme Court's custodial interrogation cases have generated a rough circuit split over selective silence at the custodial stage.[88] Selective silence—or answers to some questions and non-answers to others—occupies a gray space between literal silence (protected by *Doyle*) and substantive response (vulnerable under *Charles*). The Eighth and Third Circuits have not yet protected custodial selective silence. The Fourth, First, Seventh and Ninth Circuits have done so.

1. The Eighth Circuit

The Eighth Circuit has "avoided addressing the constitutional issue by focusing on the mechanics of invoking the right to silence."[89] In *United States v. Burns*,[90] during post-arrest questioning, the defendant signed a written waiver of his *Miranda* rights. The waiver explained that he could "stop talking at any time."[91] He responded to some questions, but when faced with one in particular, he "just looked" at the agents questioning him.[92] The district court allowed testimony about this exchange, and Burns was convicted.[93] On appeal, the Eight Circuit held that "the refusal . . . constitute[d] part of an otherwise admissible conversation between the police and the accused."'[94]

---

[88] At least eight federal circuit courts have considered the issue. In addition to the cases discussed *infra*, compare United States v. Pando Franco, 503 F.3d 389, 397 (5th Cir. 2007), with United States v. Soliz, 129 F.3d 499, 504 (9th Cir. 1997) (overruled in part on other grounds).

[89] Michael A. Brodlieb, Note, *Post-Miranda Selective Silence: A Constitutional Dilemma with an Evidentiary Answer*, 79 BROOKLYN L. REV. 1771, 1777 (2014).

[90] 276 F.3d 439 (8th Cir. 2002).

[91] *Id.* at 441.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 442 (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)). *Harris* involved a defendant's termination of conversation after voluntary waiver of his *Miranda* rights—not true selective silence. *See Harris*, 956 F.2d at 181. For a similar case, see also *infra* notes 108–15 and accompanying text (discussing *United States v. Ghiz*, 491 F.2d 599 (4th Cir. 1974)).

Two factors curtail *Burns*' persuasiveness.[95] First, when faced with the contentious question, Burns simply remained silent; he made no attempt to expressly reinvoke his Fifth Amendment protections. Circuits which have protected selective silence have done so by identifying sufficient reinvocation.[96] It is possible that the Eighth Circuit would do so as well in an appropriate case. Second, the court might have given little attention to this issue—it found that any existing error was harmless anyway.[97]

2. The Third Circuit

The Third Circuit has declined to protect selective silence as well. In *McBride v. Houtzdale*,[98] a neighbor noticed the defendant and his landlord removing a bloody mattress from his apartment.[99] Years later, upon DNA evidence, McBride was arrested and charged with criminal homicide for his wife's death.[100] The trial judge allowed an agent to read his notes from a custodial interview in which McBride refused to answer some questions.[101] And on cross-examination, the district attorney revealed that McBride had not answered every question during a different custodial interview.[102] Defense counsel did not object to the references to McBride's silence, and McBride was convicted.[103]

The Third Circuit reviewed solely to determine whether the defense counsel's failure to object was constitutionally ineffective assistance.[104] The court considered both sides of the circuit split and ultimately concluded that federal law did not clearly prevent the use of a defendant's selective silence against him.[105]

McBride is weakened by its context as a habeas case and its application of the corresponding statute's high standard. Nonetheless, it is one of the

---

[95] *But see* Evelyn A. French, Note, *When Silence Ought to be Golden: Why the Supreme Court Should Uphold the Selective Silence Doctrine in the Wake of* Salinas v. Texas, 48 GA. L. REV. 623, 640–41 (2014) (calling *Burns* "likely the strongest rejection of the selective silence doctrine by any of the circuit courts").

[96] *See, e.g.*, Hurd v. Terhune, 619 F.3d 1080, 1089 (9th Cir. 2010).

[97] *Burns*, 276 F.3d at 442. As in *Moore*, the court took no issue with the prosecution's use of the testimony to impeach the reliability of the defendant's testimony. *Id.*

[98] 687 F.3d 92 (3d Cir. 2012).

[99] *Id.* at 94.

[100] *Id.*

[101] *Id.* at 95.

[102] *Id.* at 96.

[103] *Id.*

[104] *Id.* at 99–100.

[105] *Id.* at 104–05.

most recent and comprehensive analyses of the selective silence circuit split.[106]

3. The Fourth Circuit

Most protections of selective silence are rooted in *Doyle* and due process.[107] *United States v. Ghiz*,[108] however, predates *Doyle*. In *Ghiz*, the defendant expressed during a custodial interview that he did not want to answer questions about the vehicle at issue; the interview ended there.[109] The FBI agent who interviewed Ghiz disclosed these details in his trial testimony.[110] Ghiz was then convicted of transporting a stolen vehicle across state lines.[111]

The Fourth Circuit held in a very short opinion that "if, in declining to answer certain questions, a criminal accused invokes his fifth amendment privilege or in any other manner indicates he is relying on his understanding of the Miranda warning, evidence of his silence or of his refusal to answer specific questions is inadmissible."[112]

Though Ghiz actually cut off questioning after waiving his *Miranda* rights, later opinions have recognized *Ghiz* as a protection of selective silence.[113] Interestingly, *Ghiz* was based in part on a true selective silence case in which the admission of an agent's testimony was upheld.[114] But in that case, the testimony was admitted not as indicia of guilt, but to challenge the *reliability* of the information offered—essentially, for impeachment purposes.[115]

4. The First Circuit

More recent opinions that have protected selective silence, or at least explained what conduct would have protected selective silence, have

---

[106] *See id.* at 105 n.13 (an in-depth analysis of *Thompkins*, also a habeas case).

[107] *See* French, *supra* note 95, at 635 ("The Court in Doyle provided the necessary language that laid the foundation for the selective silence doctrine."). A circuit court reversing for failure to protect a defendant's selective silence might identify a "*Doyle* error." *See, e.g.*, Hurd v. Terhune, 619 F.3d 1080, 1085 (9th Cir. 2010) (discussed *infra*).

[108] 491 F.2d 599 (4th Cir. 1974).

[109] *Id.* at 600.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See, e.g.*, United States v. Williams, 665 F.2d 107, 109 (6th Cir. 1981).

[114] *See* United States v. Moore, 484 F.2d 1284, 1285–86 (4th Cir. 1973), *cited in Ghiz*, 491 F.2d at 600.

[115] *See Moore*, 484 F.2d at 1286.

typically relied on *Doyle*'s appeal to fundamental fairness and protection of post-mirandization silence.

In *Grieco v. Hall*,[116] the petitioner testified at trial and offered an exculpatory story.[117] During cross-examination, the prosecutor pointed out that Grieco had failed to offer his story earlier.[118] He was convicted, and he sought habeas review.[119]

The First Circuit distinguished Grieco, who had spoken to law enforcement after his arrest, from the *Doyle* defendants, who had remained silent.[120] "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements."[121] The court stated that "Miranda protections apply equally to refusals to answer specific questions,"[122] but this statement was merely dicta, as *Charles* controlled under the present facts.[123] "When a defendant elects to make post-arrest statements and later contradicts them, the prosecutor may challenge him with those statements and with the fact that he withheld his alibi from them."[124]

Grieco divided selective silence cases into two categories: *Doyle* cases and *Charles* cases. For a defendant to enjoy constitutional protection of his selective silence, he must not contradict prior statements if he testifies at trial. The court did not consider Grieco's post-arrest silence to be selective silence as defined by this Note. Instead, it became an *omission* which crippled the credibility of his trial testimony. It was the impeachment doctrine, not an outright refusal to protect selective silence, that led the First Circuit to affirm Grieco's conviction. In fact, the First Circuit expressly recognized protections for selective silence when an individual asserts his rights.[125]

---

[116] 641 F.2d 1029 (1st Cir. 1981).

[117] *Id.* at 1031.

[118] *Id.* at 1032.

[119] *Id.* at 1030.

[120] *Id.* at 1032–33.

[121] *Id.* at 1034 (quoting Anderson v. Charles, 447 U.S. 404, 408 (1980)).

[122] *Id.* (citing United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974)).

[123] *Id.* at 1036.

[124] *Id.* at 1035 (internal quotations omitted); *see also* United States v. May, 52 F.3d 885, 890 (10th Cir. 1995) ("Because the prosecutor's comments were designed to call attention to prior inconsistent statements, such comments do not constitute a violation of [the defendant's] due process rights under *Doyle*."). *But see* United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993) ("[W]hen a defendant answers some questions and refuses to answer others, or in other words is "partially silent," this partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*."). It seems that only the Tenth Circuit has differentiated between prior omissions and inconsistencies vulnerable to impeachment.

[125] *Grieco*, 641 F.2d at 1034 ("Miranda protections apply equally to refusals to answer specific questions.").

5. The Seventh Circuit

In *United States v. Jumper*,[126] during a videotaped custodial interrogation, Jumper indicated three times that he did not want to answer particular questions.[127] His motion to exclude the corresponding portions of video was denied,[128] and he was convicted.[129]

The Seventh Circuit found error.[130] Because Jumper had not testified at trial, he had not used the privilege against self-incrimination "to attempt to gain an advantage in the criminal process."[131] The error was permitting the evidence "not . . . for impeachment purposes, but rather, as part of the Government's case-in-chief."[132]

Jumper did not give defendants who have waived their *Miranda* warnings an unfettered right to conceal their ensuing selective silence. "[I]n order for a defendant to have a right to remain silent as to a specific or selective question (and the corresponding right that the prosecution will not comment on this silence), the defendant must indicate in some manner that he is invoking that right."[133] Since Jumper reinvoked his right to remain silent "by using the very words provided to him" in his *Miranda* warnings, his selective silence should have been protected.[134]

6. The Ninth Circuit

True silence after a waiver of *Miranda* rights cannot convey reinvocation because it is indistinguishable from mere "uncomfortable pauses" in conversation.[135] In *United States v. Lorenzo*,[136] an agent testified at trial that the defendant had made no response to a particular question during a custodial interview.[137] It is "clear" in the Ninth Circuit "that a suspect may, if he chooses, selectively waive his Fifth Amendment rights by indicating

---

[126] 497 F.3d 699 (7th Cir. 2007).

[127] *Id.* at 702.

[128] *Id.* at 703.

[129] *Id.* at 701.

[130] *Id.* at 706.

[131] *Id.* at 705 (quoting United States v. Davenport, 929 F.2d 1169, 1174 (7th Cir. 1991)).

[132] *Id.*

[133] *Id.* Though no "talismanic phrases" are necessary to reinvoke the Fifth Amendment, "silence itself may not be enough." *Id.* at 705–06.

[134] *Id.* at 706. However, because the trial court's error was harmless, Jumper's conviction was affirmed. *Id.* at 708.

[135] United States v. Ford, 563 F.2d 1366, 1367 (9th Cir. 1977).

[136] 570 F.2d 294 (9th Cir. 1978).

[137] *Id.* at 296.

that he will respond to some questions, but not to others."[138] But ironically, by simply remaining silent, Lorenzo failed to reinvoke his previously-waived right to silence.[139]

The *Lorenzo* court reached its holding without determining what would constitute legitimate reinvocation,[140] but the Ninth Circuit revisited that issue in *Hurd v. Terhune*.[141] The *Hurd* opinion is a valuable in-depth discussion of the selective silence doctrine and may presently be the best judicial exploration of valid reinvocation.[142]

Police found Hurd at his home and next to his wife, who had been shot and killed in what Hurd described as a firearm inspection accident.[143] They took him into custody and delivered his *Miranda* warnings, which he waived.[144] Detectives then asked Hurd to submit to a polygraph exam, which he refused.[145] They repeatedly asked Hurd to reenact the incident, which he likewise refused to do.[146] At trial, the prosecutor relied heavily on Hurd's refusal to reenact the event as affirmative evidence of guilt in his opening statement, case-in-chief, and closing argument.[147]

Hurd sought habeas relief for his conviction due to, among other things, the disclosure at trial of his refusal to reenact the incident.[148] The Ninth Circuit considered *Miranda*, *Doyle*, *Charles*, *Thompkins*, and *Mosley* in turn.[149] It ultimately concluded that "the right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial."[150] The court found that "Hurd

---

[138] *Id.* at 297–98 (citing Egger v. United States, 509 F.2d 745, 747 (9th Cir. 1975)). *Egger* involved selective waiver in a noncustodial setting. *See infra* notes 182–87 and accompanying text.

[139] *Id.* at 298. *Compare* United States v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) ("There is nothing in the record to indicate that Pino's momentary silence was intended to be a reinvocation of his rights."), *with* United States v. Garcia-Cruz, 978 F.2d 537, 542 (9th Cir. 1992) ("The statement reasonably could be construed as a selective revocation of Cruz's prior waiver of the right to remain silent.").

[140] *Lorenzo*, 570 F.2d at 298 n.1.

[141] 619 F.3d 1080 (9th Cir. 2010).

[142] French, *supra* note 95, at 643.

[143] *Hurd*, 619 F.3d at 1083.

[144] *Id.*

[145] *Id.* at 1083–84.

[146] *Id.* at 1084.

[147] *Id.*

[148] *Id.* at 1085.

[149] *Id.* at 1085–88.

[150] *Id.* at 1087. *But see* Schiano, *supra* note 25, at 189–90 (arguing that the *Hurd* court "misapplied the rules set out by the Supreme Court and its subsequent cases concerning the right to remain silent"). Other courts have taken the same position as the Ninth Circuit. *See, e.g.*, United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995) ("Thus a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his

unambiguously invoked his right to silence when the officers requested that he reenact the shooting. . . . In fact, it is difficult to imagine how much more clearly a layperson . . . could have expressed his desire to remain silent."[151] In short, Hurd successfully carved out *Doyle* protections for his selective silence.[152]

The *Hurd* court used *Thompkins*' "unambiguous" invocation requirement as the litmus test for selective reinvocation of the Self-Incrimination Clause.[153] It found that an "explanatory refusal" is sufficient.[154] Perhaps most importantly, it held that reinvocation need not expressly mention the Fifth Amendment or Self-Incrimination Clause to be sufficiently clear.[155]

It seems that no circuit has protected pure selective silence, meaning literal silence when faced with specific questions, in the custodial setting. However, as demonstrated by the above cases, most circuits have protected the silence of subjects who overtly reinvoked their constitutional protections.

D. Protections Against Self-Incrimination in Noncustodial Settings

There is "no doubt" after *Miranda* that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[156] But beyond trials and custodial interrogations, the privilege is not self-activating.

In *Oregon v. Mathiason*,[157] an officer asked the respondent to meet him at the state patrol office just two blocks from his apartment to "discuss something."[158] Mathiason agreed; upon arrival, he was told that he was not under arrest, then put behind a closed door and across a desk from the officer.[159] The officer expressed his suspicion that Mathiason had been involved in a burglary, and he falsely told Mathiason that his fingerprints were found at the scene.[160] Less than five minutes after his arrival, Mathiason

---

silence against him.").

[151] *Hurd*, 619 F.3d at 1088–89 (second omission in original, internal quotations omitted).

[152] *Id.* at 1089.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[157] 429 U.S. 492 (1977) (per curiam).

[158] *Id.* at 493.

[159] *Id.*

[160] *Id.*

confessed to taking the property.[161] The officer then mirandized him and took a taped confession, which was "critical" to his conviction at a bench trial.[162] The Supreme Court of Oregon reversed his conviction and held that *Miranda*'s warnings requirement applied to the pre-arrest interrogation because it "took place in a 'coercive environment.'" The state petitioned for certiorari.[163]

In a heated per curiam opinion, the Supreme Court rejected the Oregon Supreme Court's conclusion that a "coercive environment" existed without any "formal arrest or restraint on freedom of movement."[164] It reiterated that *Miranda*'s concern for coercive environments and accompanying warnings requirement were strictly limited to environments "where there has been such a restriction on a person's freedom as to render him 'in custody.'"[165]

Mathiason does not mean that the privilege against self-incrimination has no noncustodial application at all. But if someone in such a setting "desires the protection of the privilege, he must claim it."[166] Subjects of noncustodial interviews must know and assert their own rights.

Salinas v. Texas[167] is the Supreme Court case nearest to this Note's thesis. In December of 1992, two brothers were shot and killed.[168] Police came to suspect Salinas, who agreed to turn over his shotgun and attend an interview at the station.[169] The resulting one-hour interview was noncustodial, and Salinas was not mirandized.[170] He answered most questions, but when asked whether his shotgun "would match the shells recovered at the scene of the murder," he merely "[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."[171] The officers moved on, and Salinas answered their additional questions.[172] At trial, his silence was presented as evidence of guilt, and he was convicted.[173]

---

[161] *Id.*

[162] *Id.* at 492–94.

[163] *Id.* at 492–93.

[164] *Id.* at 495.

[165] *Id.* Justices Marshall and Stevens dissented, expressing concerns over the majority's rigid and formalistic curtailment of *Miranda*. *Id.* at 496 (Marshall, J., dissenting); *id.* at 500 (Stevens, J., dissenting). Nonetheless, *Mathiason* has endured. *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420, 430 (1984); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam).

[166] *Murphy*, 465 U.S. at 427 (quoting United States v. Monia, 317 U.S. 424, 427 (1943)).

[167] 133 S. Ct. 2174 (2013) (plurality opinion).

[168] *Id.* at 2178.

[169] *Id.*

[170] *Id.*

[171] *Id.* (substitutions in original).

[172] *Id.*

[173] *Id.*

Salinas' literal silence was fatal to his case. Justice Alito, writing for the plurality, concluded that "it would have been a simple matter" for Salinas to invoke the privilege during his voluntary interview; he was never "deprived of the ability" to do so.[174] Salinas had not been mirandized or otherwise informed of his constitutional rights, but "forfeiture of the privilege against self-incrimination need not be knowing."[175]

Salinas conceded that neither literal silence nor official suspicions can trigger automatic protection of non-responses, but he asked the Court to fashion a new exception for when both factors are present. His request was denied.[176] Justice Alito even used *Doyle*'s characterization of silence as "insolubly ambiguous"—an advantage for those questioned in the custodial setting—to render Salinas' noncustodial silence detrimental.[177] Lastly, Justice Alito insisted that the overt assertion requirement in noncustodial circumstances had "not proved difficult to apply" as Salinas argued.[178] The conviction was affirmed.[179]

Ultimately, *Salinas* simply reiterated what *Murphy* stated after *Mathiason*: the privilege against self-incrimination is never self-executing in the noncustodial setting.[180] The case displays many current Justices' conflicting views of the Self-Incrimination Clause and the authorities that are relevant to this Note.

Because Salinas had not invoked the Fifth Amendment, the Court did not reach the issue which had prompted it to take the case: "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief."[181] The derivative problem of *selective* invocation likewise went unresolved.

---

[174] *Id.* at 2180.

[175] *Id.* at 2183 (citing Minnesota v. Murphy, 465 U.S. 420, 427–28 (1984)).

[176] *Id.* at 2181–82 (citing Berghuis v. Thompkins, 560 U.S. 370 (2010)).

[177] *Id.* at 2182 (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976)).

[178] *Id.* at 2183.

[179] *Id.* at 2184.

[180] *See id.* at 2178 (Alito, J., writing for the plurality) (citing *Murphy*, 465 U.S. at 425, 427).

[181] *Id.* at 2179. Justice Thomas answered yes, but based on his own prior contention that "*Griffin*'s no-adverse-inference rule to a defendant's silence during a precustodial interview" is bad law. *Id.* at 2184 (Thomas, J., concurring in the judgment) (citing Mitchell v. United States, 526 U.S. 314, 341 (1999) (Thomas, J., dissenting)). Justice Alito, meanwhile, cited *Griffin* with approval. *See id.* at 2179–80 (plurality opinion). Justice Breyer framed the issue in a subtly yet significantly different way: "Can one fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege?" *Id.* at 2191 (Breyer, J., dissenting). Breyer agreed with Salinas that the plurality's approach was far less workable than its bright-line nature would suggest. *Id.* at 2190. With a narrower view of *Thompkins*, but broader views of *Miranda* and *Quinn*, Breyer concluded that the answer to his question was "clearly" yes. *Id.* at 2188–91.

E. Selective Silence and Selective Invocation in Noncustodial Interviews

No federal circuit court of appeals has expressly addressed noncustodial selective silence since *Salinas*. The earlier circuit cases which addressed the problem were not cited in the *Salinas* opinions, but they are still insightful analyses of the issue. Only the Ninth Circuit has expressly protected noncustodial selective silence.

1. The Ninth Circuit

In *Egger v. United States*,[182] the appellant, who was an attorney, "reserved the right to answer selectively" during an interview with two FBI agents.[183] He answered "no comment" to several questions, as one of the agents explained at trial.[184] He was convicted of receiving and possessing stolen money, as well as conspiring to do so.[185] The Ninth Circuit determined that any error was harmless.[186] Though the *Egger* opinion did not clearly state whether any constitutional error occurred, the Ninth Circuit has since explained that Egger's selective invocation of the Fifth Amendment was valid.[187]

2. The Tenth Circuit

Egger was decided in 1975, before *Mathiason*. Cases decided after *Mathiason* put much heavier burdens on selectively silent defendants. Three circuits since 1977 have decided in some fashion to not protect noncustodial selective silence.

In *United States v. Harrold*,[188] the Tenth Circuit took no issue with the disclosure of Harrold's pre-mirandization silence because his "refusal to respond to certain . . . questions was not based on a *Miranda* warning or any other government action."[189]

---

[182] 509 F.2d 745 (9th Cir. 1975).

[183] *Id.* at 747.

[184] *Id.*

[185] *Id.* at 746.

[186] *Id.* at 747.

[187] *See* United States v. Lorenzo, 570 F.2d 294, 297–98, 298 n.1 (9th Cir. 1978) ("Selective exercise of the right to remain silent was accomplished in Egger . . . by the suspect's initial, express declaration that such was his intent.").

[188] 796 F.2d 1275 (10th Cir. 1986).

[189] *Id.* at 1279.

3. The Seventh Circuit

In *United States v. Davenport*,[190] the married co-defendants were convicted for attempting to avoid currency transaction reports by making several fractional deposits of a suspicious lump of cash.[191] They complained about the admission of some noncustodial statements and non-statements, including the wife's refusal to name her father-in-law, whose inheritance they claimed to be depositing.[192] The court held that "once [the defendants] started down this path of self-exculpation, any statement they made—including 'I won't tell you'—was fair game."[193] Though neither defendant took the stand, the court likened their noncustodial scenario to that of a witness facing cross-examination at trial, who after making an incriminating statement cannot invoke the Self-Incrimination Clause.[194]

Judge Posner, writing for the court, facetiously denied Mrs. Davenport "a privilege to weave a tapestry of evasions."[195] But he also weakened the court's findings somewhat by adding that any error, if one had indeed occurred, "was harmless beyond a reasonable doubt."[196]

4. The Fourth Circuit

In *United States v. Quinn*,[197] during a noncustodial interview, Quinn "declined to answer certain questions concerning his interests in outside businesses."[198] He and a co-defendant sought to set aside their bribery convictions because, among other reasons, the district court had allowed testimony about Quinn's refusal to answer certain questions.[199] The Fourth Circuit held that *Doyle* and the Due Process Clause could not protect Quinn because the agent's concessions before the interview "merely informed him that he could . . . stop the interview at any time" and were not "assurances to Quinn that his selective silence would not be used against him."[200]

In sum, whether any constitutional protections exist for selective reinvocation of the Self-Incrimination Clause in the noncustodial setting

---

[190] 929 F.2d 1169 (7th Cir. 1991).
[191] *Id.* at 1171.
[192] *Id.* at 1173.
[193] *Id.* at 1174 (discussing the facts in light of the Self-Incrimination Clause).
[194] *Id.*
[195] *Id.* at 1175 (discussing the same facts, but in light of *Doyle* and the Due Process Clause).
[196] *See id.*
[197] 359 F.3d 666 (4th Cir. 2004).
[198] *Id.* at 678.
[199] *Id.* at 672.
[200] *Id.* at 678.

remains unresolved by the Supreme Court and largely unaddressed by the circuit courts. The circuit opinions that do not protect it are dubious authority in light of *Salinas*'s strong suggestion that express invocation is protected. The following sections explain how the courts should approach future instances of this issue.

III. ANALYSIS

Noncustodial selective silence is defendable under existing law. *Salinas* invites its protection, and cases from the custodial context illustrate the value of selective silence. Furthermore, the defense of selective silence serves important public policies, including investigative efficiency and individual autonomy.

A. Noncustodial Invocation After Salinas

At the outset, the preliminary question from *Salinas* must be answered: may the prosecution "use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief"?[201] The answer is almost certainly no. If invocation of the privilege against self-incrimination would offer no more protection than Salinas' silence, there would have been no reason for the Court's lengthy discussion of it.[202]

Noncustodial use of the Self-Incrimination Clause was a topic of scholarly discussion before *Salinas* was decided.[203] And in its short life, *Salinas* has received abundant criticism for both its legal holding[204] and its factual interpretation.[205] But the Court's apparent requirement of express

---

[201] *See* Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (plurality opinion).

[202] *See* Rinat Kitai-Sangero & Yuval Merin, *Probing into Salinas's Silence: Back to the "Accused Speaks" Model?*, 15 NEV. L.J. 77, 89 (2014) ("The Court's detailed analysis of the invocation requirement and its significance suggests that had Salinas explicitly invoked his rights, the use of his silence as substantive evidence of guilt would have been prohibited.").

[203] *Compare* Petrucci, *supra* note 70, at 488–89 (confirmed by *Salinas*), *with* Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. CHI. L. REV. 1009, 1035–36 (1997) (refuted by *Salinas*).

[204] *See, e.g.*, Neal Davis & Dick DeGuerin, *Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of* Salinas v. Texas, 38 CHAMPION 16, 16 (2014) ("Welcome to the Roberts Court and the shrinking Bill of Rights."); Karen M. Brindisi, Comment, *Pre-Arrest Silence and Self-Incrimination Rights: Why States Should Adopt an Implied Invocation Standard Under Their State Constitutions in the Wake of* Salinas v. Texas, 84 MISS. L.J. 431, 434–35 (2015); Kerr, *supra* note 7, at 532 (concluding that, in the narrow window of time between arrest and mirandization, express invocation should not be necessary).

[205] *See* Griffin, *supra* note 3, at 731 ("[T]he prosecutor in *Salinas* was simply incorrect that any

invocation is not fatal for noncustodial silence. As most commenters agree, express invocation satisfies *Salinas* and protects an individual from disclosure at trial of his noncustodial silence.[206]

So, what language constitutes sufficient invocation?[207] There is no reason to think that the Supreme Court has not already answered this question. Historically, the Court has willingly applied self-incrimination precedents to broader factual contexts than their own.[208] For example, to address a noncustodial issue, all three *Salinas* opinions cited custodial-stage and trial-stage Fifth Amendment cases.[209]

Accordingly, it seems appropriate to give *Thompkins*, *Quinn*, and *Hoffman* controlling weight here: under *Salinas*, noncustodial invocation must be "unambiguous," but also need not be rigidly formalistic, or even mention the Fifth Amendment by name.[210]

The Second Circuit has already used *Salinas* to protect noncustodial invocation. In *United States v. Okatan*,[211] the appellant told an officer while talking at a highway rest stop that he wanted a lawyer.[212] The officer disclosed this information in his trial testimony.[213] The court formulated *Salinas* as two sequential questions: "first, whether the defendant's silence constituted an 'assertion of the privilege against self-incrimination,' and second, if so, 'whether the prosecution may use [that assertion] . . . as part of its case in chief.'"[214] It concluded that allowing the jury to infer guilt from Okatan's overt assertion had been a mistake.[215]

---

innocent person questioned about the shotgun casings would have responded, 'What are you talking about? I didn't do that. I wasn't there.'"); Kitai-Sangero, *supra* note 202, at 89–94 (asserting that *Salinas* is implicitly based on the misplaced notion that silence is indicative of guilt).

[206] Peg Green, *Pre-Arrest, Pre-Miranda Silence: Questions Left Unanswered by* Salinas v. Texas, 7 PHOENIX L. REV. 395, 410 (2013) ("[A] fair reading of history and prior case law would lead one to believe that using a person's invocation of his constitutional right against him as evidence of guilt violates the Fifth Amendment.").

[207] *See* Salinas v. Texas, 133 S. Ct. 2174, 2190 (2013) (Breyer, J., dissenting); Brendan Villanueva-Le, Comment, *When Silence Requires Speech: Reviving the Right to Remain Silent in the Wake of* Salinas v. Texas, 16 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 835, 838 (2014); *see generally* Ollivierre, *supra* note 11.

[208] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 461, 463–64 (1966).

[209] *See Salinas*, 133 S. Ct. at 2178–80 (plurality opinion); *id.* at 2184 (Thomas, J., concurring); *id.* at 2185–86 (Breyer, J., dissenting).

[210] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Quinn v. United States, 394 U.S. 155, 162 (1955); Hoffman v. United States, 341 U.S. 479, 485–86 (1951); *see also* Minnesota v. Murphy, 465 U.S. 420, 427 (1984); *Miranda*, 384 U.S. at 444–45.

[211] 728 F.3d 111 (2d Cir. 2013).

[212] *Id.* at 114.

[213] *Id.* at 115.

[214] *Id.* at 118 (quoting *Salinas*, 133 S. Ct. at 2179 (plurality opinion) (substitution in original)).

[215] *Id.* at 119 (quoting Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989)).

B. Looking to the Custodial Selective Silence Cases

The *Okatan* court protected noncustodial silence generally, but not *selective* silence specifically. The custodial selective silence circuit split provides a template for the noncustodial setting's parallel issue.

Decisions on custodial selective silence may not be binding in the noncustodial context.[216] However, some circuits have obscured, ignored, or rejected the distinction between custodial and noncustodial selective silence.[217] Accordingly, authorities which protect custodial selective invocation are highly persuasive to this Note's analysis.

Most cases and commentaries endorse some degree of protection for custodial selective silence.[218] The strongest supports for this position come from *Miranda* and *Doyle*.[219] In fact, *Miranda* may even protect selective silence by its own express language.[220] Furthermore, the *Miranda–Doyle* due process analysis is not the only method by which circuits have protected custodial selective silence; *Ghiz*, which is widely cited as one of the circuit courts' first selective silence cases, was decided before *Doyle*.[221]

A two-step analysis fits most circuits' approaches to custodial selective silence. The first question is whether the defendant, who waived his *Miranda* rights but refused to answer certain questions, testified at trial. If he did, his prior statements are subject to impeachment—and partial silence may be construed as an inconsistency.[222] If he did not, a second question must be asked: whether the defendant sufficiently reinvoked protection for his non-

---

[216] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[217] *See* United States v. Jumper, 497 F.3d 699, 705 n.3 (7th Cir. 2007) ("In *Bonner*, the court hinted that the custodial/noncustodial distinction might be of no import."); United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993). *But see Jumper*, 497 F.3d at 704–05 (distinguishing the present custodial case from an earlier noncustodial case).

[218] *See, e.g.*, Hurd v. Terhune, 619 F.3d 1080, 1088–89 (9th Cir. 2010); *Jumper*, 497 F.3d at 706; *see also* Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U.L. REV. 905, 961 (2016) (proposing a concessions system, via legislation instead of judicial decision, to support various policy interests); Brodlieb, *supra* note 89, at 1771–72 (recommending evidentiary rather than constitutional protections for selective silence).

[219] *See Hurd*, 619 F.3d at 1085–86.

[220] Miranda v. Arizona, 384 U.S. 436, 445 (1966) ("The mere fact that [a suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries.").

[221] *See* United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974).

[222] Anderson v. Charles, 447 U.S. 404, 408 (1980); *e.g.*, Grieco v. Hall, 641 F.2d 1029, 1034 (1st Cir. 1981); *see also* Raffel v. United States, 271 U.S. 494, 499 (1926) ("The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do.").

answers. If he did, the silence is protected.[223] If he did not, it is vulnerable to disclosure.[224]

C. Practical Innovation

Selective silence is an expedient alternative to repetitive terminations and resumptions of interrogation. The same goals can be accomplished by the latter means, but far less efficiently.

Anyone who desires the Fifth Amendment's protections can invoke them.[225] Once someone has invoked the right to remain silent, his decision must be "scrupulously honored" before law enforcement reinitiates interrogation.[226] Alternatively, the individual himself may reinitiate contact with law enforcement.[227]

One can imagine a scenario where an individual's refusal to answer certain questions, coupled with law enforcement's refusal to abandon those questions, leaves the parties' conversation in a convoluted cycle of termination and reinitiation. Each time the officer revisits a particular question, the individual temporarily terminates the conversation in an attempt to move on.

Respecting an individual's desire to remain selectively silent takes far less time than it does to "scrupulously honor" his decision to terminate interrogation. It also encourages clear communication between the parties, who are then able to explore both the risks associated with answering and the possibility of immunity.[228]

In these ways, selective silence actually aids the truth-seeking process. It allows a witness who will not risk total exposure to still offer the information which he is comfortable disclosing.[229]

---

[223] Doyle v. Ohio, 426 U.S. 610, 618 (1976); *e.g.*, *Hurd*, 619 F.3d at 1089 ("[I]t is enough if the suspect says that he wants to remain silent or that he does not want to answer that question.").

[224] Berghuis v. Thompkins, 560 U.S. 370, 382 (2010); *e.g.*, United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002).

[225] Minnesota v. Murphy, 465 U.S. 420, 427 (1984).

[226] *Cf.* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (discussing only the custodial setting).

[227] Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

[228] *See* Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951) and Kastigar v. United States, 406 U.S. 441, 448 (1972)). An immunity offering neutralizes the subject's risk of self-incrimination and entitles the government to that subject's testimony. Ullmann v. United States, 350 U.S. 422, 431 (1956) ("[I]f the criminality has already been taken away, the Amendment ceases to apply."). Such an offering must be proportional to, but not necessarily broader than, a particular scenario's risk of incrimination. *Kastigar*, 406 U.S. at 453.

[229] *Contra* United States v. Bonner, 302 F.3d 776, 784 (7th Cir. 2002) ("[I]t would not serve the criminal justice system to allow defendants to use the Fifth Amendment both as a shield and as a sword, answering questions selectively and preventing the prosecution from mentioning such selectiveness at

D. The Unreliability of Silence

The use of a noncustodial subject's selective silence against him forces substance out of silence. It eliminates his ability to contribute only substantive blankness or emptiness—in other words, to contribute nothing at all. Salinas' best attempt at true silence became damning evidence.[230] He was effectively forced "to choose between incrimination through speech and incrimination through silence."[231]

It is entirely ordinary for any individual, whether innocent or guilty, to exhibit silence, hesitation, or at least nervousness when confronted by the police.[232] Law enforcement can "create and then misattribute" evidence from these signals, even unintentionally.[233] "[S]ilence rarely succeeds in separating defendants' own thoughts and plans from investigators' intentions," and it "is often taken as incriminating speech."[234] Selective invocation of the Self-Incrimination Clause allows a subject to displace the amorphous dangers of silence with concrete protection, and inform law enforcement of his particular concerns while doing so.

To voluntarily speak with law enforcement is the subject's choice. Selective silence serves the investigative process well when a subject would choose without it to make no disclosures at all. It allows law enforcement to access information which it could not if the subject remained totally silent, and it allows the subject to confidently protect sensitive information.

Noncustodial selective silence is defendable under existing law and serves important policies. But because this Fifth Amendment issue is so rare, no circuit has had recent occasion to build a framework that addresses it. The following section will formulate a precise rule for application to future cases.

IV. RESOLUTION

If someone "desires the protection of the privilege," he must claim it.[235] In the noncustodial context, an interview subject should make a conditional

---

trial.").

[230] *Salinas*, 133 S. Ct. at 2183 ("[P]etitioner 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.").

[231] *Id.* at 2190 (Breyer, J., dissenting).

[232] *Cf.* United States v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992).

[233] Griffin, *supra* note 3, at 727.

[234] *Id.* at 708 (recognizing *Salinas* as an example of law enforcement creating substantive evidence by submitting an accusation and then reporting the subject's silent response).

[235] Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (quoting United States v. Monia, 317 U.S. 424, 427 (1943) (footnote omitted)).

invocation of the Self-Incrimination Clause. He should then indicate in some manner that he is relying on that privilege when he declines to answer a question. These requirements give the individual the responsibility to protect himself. And crucially, they do not improperly expand *Miranda*'s automatic protections into the noncustodial setting.[236]

A. The Conditional Invocation Requirement

As demonstrated by *Salinas*, ambiguity in the noncustodial setting will not be construed in a subject's favor.[237] Therefore, a noncustodial interviewee cannot simply invoke the Self-Incrimination Clause and "pierce" it with selective answers; a response would eradicate the invocation. Law enforcement would reasonably perceive that the subject had waived his prior invocation by giving an answer.[238]

Instead, a subject of a noncustodial interview should make a preliminary invocation of the Self-Incrimination Clause and also explain that he intends to assert his privilege selectively. This requirement is both efficient and overt. It demands express, though not formalistic, acknowledgement of the Self-Incrimination Clause.[239]

Additionally, because a conditional invocation is clear, it precludes the risk of surprising law enforcement after starting down an exculpatory path.[240] It puts investigators on notice about the interviewees' intentions; they can then evaluate how incriminating the testimony might be, offer immunity, or accept the subject's limited disclosures.[241]

The Ninth Circuit has already protected the noncustodial selective silence of a defendant who made such a conditional invocation.[242]

---

[236] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[237] *See* Salinas v. Texas, 133 S. Ct. 2174, 2182 (2013) (plurality opinion).

[238] *Cf.* United States v. Lorenzo, 570 F.2d 294, 134 (9th Cir. 1978).

[239] *Cf. Salinas*, 133 S. Ct. at 2180 (noting that "it would have been a simple matter" for Salinas to invoke the privilege).

[240] *See* United States v. Bonner, 302 F.3d 776, 783–84 (7th Cir. 2002).

[241] *See Salinas*, 133 S. Ct. at 2179 (requiring a subject to "claim" the privilege's protections "assures that the Government obtains all the information to which it is entitled" and allows it to either argue that the testimony could not be self-incriminating or displace the risk of self-incrimination with a grant of immunity).

[242] *See* Egger v. United States, 509 F.2d 745, 745 (9th Cir. 1975), *cited in* United States v. Lorenzo, 570 F.2d 294, 297–98, 298 n.1 (9th Cir. 1978).

B. The Sufficient Indication Requirement

When a subject who has made a conditional invocation encounters a question that he does not want to answer, he cannot simply fall silent.[243] As a matter of course, once the government has asked a question, it will elicit a response—even if that response is passive.[244] Law enforcement should not be left wondering whether an interviewee is thinking about a question, answering it, or attempting to move past it. Therefore, if the subject desires to protect his silence, he must make a sufficient reference to his prior selective invocation.

The standard here should be the same as the standard for general noncustodial invocation and custodial selective invocation: the reference must be "unambiguous," but need not contain any formalistic words or phrases.[245] The *Salinas* plurality interpreted *Thompkins* broadly; that interpretation guides here as well. [246] Upon sufficient indication that the subject wishes not to answer a question, any adjacent conduct is protected from disclosure at trial.[247]

Salinas attempted to remain selectively silent in a noncustodial interview. But when he fell literally silent, his surrounding conduct became admissible evidence, because he had not overtly claimed his Fifth Amendment protections.[248] If he had made a conditional invocation of the Self-Incrimination Clause at the beginning of the interview, then made sufficient reference to that invocation when asked about his shotgun, his behavior when met with the question would have been protected.

C. The Impeachment Exception

This Note's proposal does not enable defendants to game the criminal process.[249] As in the custodial setting, if a defendant testifies at trial, he

---

[243] *See Salinas*, 133 S. Ct. at 2181–82 (citing Berghuis v. Thompkins, 560 U.S. 370 (2010)).

[244] *Id.* at 2190 (Breyer, J., dissenting); Griffin, *supra* note 3, at 727.

[245] *Thompkins*, 560 U.S. at 381; Quinn v. United States, 394 U.S. 155, 162 (1955); Hoffman v. United States, 341 U.S. 479, 485–86 (1951); *see also* Minnesota v. Murphy, 465 U.S. 420, 427 (1984); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[246] *See Salinas*, 133 S. Ct. at 2182 (plurality opinion). *But see id.* at 2189 (Breyer, J., dissenting).

[247] Doyle v. Ohio, 426 U.S. 610, 618 (1976); *cf.* Hurd v. Terhune, 619 F.3d 1080, 1089 (9th Cir. 2010); United States v. Jumper, 497 F.3d 699, 705 (7th Cir. 2007); United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974).

[248] *Salinas*, 133 S. Ct. at 2178 (plurality opinion); *cf.* United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002); United States v. Lorenzo, 570 F.2d 294, 298 (9th Cir. 1978).

[249] *Cf. Jumper*, 497 F.3d at 705 (noting that there was no concern about the defendant gaining an improper advantage in the criminal process because he did not testify at trial).

transforms his noncustodial selective silence into omissions and opens the door for impeachment.[250] "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do."[251]

The conditional invocation and sufficient reference requirements create a fair opportunity for noncustodial interviewees to protect their selective silence. Under this framework, the interests of law enforcement, the individual, and society are balanced fairly.

V. CONCLUSION

The Self-Incrimination Clause is more than a formality for the criminally manipulative and obviously guilty—it shields from prejudice and protects against the "inquisitorial system of criminal justice."[252] Under the Supreme Court's liberal construction of the Clause, most circuits protect custodial selective silence,[253] and noncustodial invocation of the Clause is protected as well.[254] It naturally follows from these two doctrines that noncustodial selective silence should be protected as well.

Such protection encourages both efficient investigation and open communication between the state and the accused. It also combats insidious or subversive use of silence against the subject. A balanced system which requires clear signals by the individual and still allows fair investigation by the state is best suited for addressing this complex Fifth Amendment issue.

---

[250] Anderson v. Charles, 447 U.S. 404, 409 (1980); *cf.* Grieco v. Hall, 641 F.2d 1029, 1036 (1st Cir. 1981). *But see supra* note 124 (discussing a unique case from the Tenth Circuit).

[251] Raffel v. United States, 271 U.S. 494, 499 (1926).

[252] Griffin v. California, 380 U.S. 609, 614 (1965).

[253] *See, e.g.*, Hurd v. Terhune, 619 F.3d 1080, 1088–89 (9th Cir. 2010); *Jumper*, 497 F.3d at 706.

[254] *See* Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (quoting United States v. Monia, 317 U.S. 424, 427 (1943)); Kitai-Sangero, *supra* note 202, at 89 (discussing Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013)).