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***Salinas v. Texas*: Silence, Linguistic Pragmatics, and the Failure of the Supreme Court**

On December 18, 1992, two brothers, Juan and Hector Garza, were shot dead in their home in Houston. No one witnessed the murder, but a neighbor saw someone flee in a dark-colored car.[[1]](#footnote-1) With some investigation, the police were led to Genovevo Salinas. Salinas was told that he was a suspect in the murder and was asked to come to the police station “to take photographs and to clear [himself] as [a] suspect.”[[2]](#footnote-2) He was put in an interview room, but was not placed under arrest. The police asked him questions for approximately an hour, during which, Salinas answered questions and helped the police in their investigation. Salinas, upon being asked if his shotgun “would match the shells recovered at the scene of the murder,”[[3]](#footnote-3) fell silent. This silence, prosecutors contended at his subsequent trial for murder, was an admission of guilt. They argued that an innocent person would have rejected the notion that evidence would show him guilty of murder.[[4]](#footnote-4) Salinas appealed his guilty verdict arguing that silence should not be admissible in court as evidence of guilt under the Fifth Amendment’s protection against self-incrimination. By 2013, this question had reached the Supreme Court in the case *Salinas v. Texas.* The Court, in a 5-4 decision, opined that silence—or one’s failure to answer a question after previously speaking—could be admitted into court as evidence of one’s guilt if he did not expressly invoke his Fifth Amendment right to be silent.

Many academic papers have analyzed the legal and political consequences as well as the linguistic and psychological detriments of allowing silence to be admitted into court as a confession of one’s guilt after one has been placed under arrest and read the infamous custodial “*Miranda* warnings.” Until recently, there has not been a Supreme Court case that has allowed an applicative look at the use of silence as an admission of guilt before a person has been put under arrest. With *Salinas v. Texas,* I have the opportunity to extend the scholarly discussion into this realm, comment on linguistic and psychological theories of silence, and advocate a position on the admission of silence in a criminal trial: that the Court’s decision in *Salinas v. Texas* fails to recognize significant linguistic problems of using silence as an admission of guilt and should be reversed to recognize and protect the rights of citizens under the Fifth Amendments.

First, linguistic understandings of silence have determined silence as having semantic and pragmatic uses in language, which the practice of accepting silence as an admission of guilt incorrectly ignore. Silence has two main communicative functions in linguistics.[[5]](#footnote-5) The first function is as semantics. Saying that silence has a semantic function means that silence “carries grammatical and indexical meaning [and] may replace different elements in a sentence.”[[6]](#footnote-6) Within the correct context, silence has strong semantic meaning. Muriel Saville-Troike presents two example of semantic meaning. The first is a didactic or “fill-in-the-blank” use of silence.[[7]](#footnote-7) For instance, if a teacher asks her class “This is a ––?,” and is clearly pointing to a pen, it means “what is this?”[[8]](#footnote-8) With the context provided by the speaker, one can know what is being communicated by the silence. The second semantic use of silence that Saville-Troike demonstrates is silence in the completion of an utterance, especially when the “topic is a particularly delicate one or the word which would be used is taboo, or when the situation is emotionally loaded and the speaker is ‘at a loss’ for words.”[[9]](#footnote-9) Given the following statement, a response of silence would have a strong meaning: “I am coming to town tomorrow and am looking for a place to stay; may I stay with you?” Silence, in this example, would normally be construed as a negative answer to this question. This use of silence is particularly relevant to *Salinas*. In *Salinas*, the defendant’s failure to respond to the question, “will your shotgun match the shells found at the crime scene” seems to have a semantic quality of meaning of “yes,” but the defendant, being very uncomfortable, emotional, and afraid, cannot muster a response.

Silence also has a pragmatic function. Linguistic pragmatics is defined as “the study of the inferences that we draw about meaning from the circumstances in which communication occurs.”[[10]](#footnote-10)Individuals listening to speech ascribe meaning to silence in various circumstances, even when silence was not intended to convey any meaning at all, because, as Adam Jaworski argues, silence depends on “ostensive-inferential” communication, meaning that silence is much weaker in conveying what a person wants to say since listeners must infer meaning from the silence.[[11]](#footnote-11)Jaworski effectively argues that, in pragmatics, much more than in semantics, the context of a situation rather than just the context of one’s speech is extremely important. Saville-Troike determines that pragmatic silence can be a result of one’s role in a group, one’s status in a society, the fact that a situation creates the need for attitudinal silence (silence to convey respect or dislike), or a psychological effect of the situation (including fear). Janet Ainsworth argues that silence is particularly “context-dependent,” and that understanding one’s silence is “truly impossible without the discursive an interactional context to give it meaning.”[[12]](#footnote-12)

Since the determination of the meaning of silence is so context-dependent, even when the meaning is apparently clear, I argue that it is improper to admit silence into evidence as having linguistic meaning. As Ainsworth aptly notes, “even when silence is quite deliberate on the part of the non-speaker, its ascribed meaning by external observers may be quite different from its internal intended meaning.”[[13]](#footnote-13)In her work written prior to the decision in *Salinas v. Texas*, Ainsworth writes that one of the deficiencies of law in the use of silence is when it construes a confession from silence. She notes correctly that current evidentiary rules allow prosecutors to say that silence is “tacit adoptive admission of the truth of [an] accusation” when it is expected that someone object to such an accusation.[[14]](#footnote-14) There are two main linguistic problems from interpreting this silence as a legal confession: 1) “what counts as an accusation is often unclear;” and 2) “what kind of response is warranted [is] even less clear.”[[15]](#footnote-15)The Federal Evidentiary code attempts to solve for this problem by allowing silence as evidence only when it can be proven that the defendant heard the accusation and could have responded, and that with the context of the situation, would have been expected that one would deny the charges.[[16]](#footnote-16) However, this attempt does not solve linguistic issues with the evidentiary use of silence as a confession.

As to the first problem Ainsworth identifies, that what one understands as an accusation is variable depending on the contexts, one could encounter accusations that are direct and indirect, and could, in certain social contexts, feel that one does not have to respond to certain questions or utterances.”[[17]](#footnote-17)An example of an accusation that could be construed as such is when a pronoun is used instead of a person’s name or the defendant’s name. Given the situation in *Salinas* that the defendant was asked not whether *his* shotgun would match shells at the scene, but asked whether he knew that *someone’s* shotgun matched the shells at the scene, the role of silence becomes a lot more ambiguous. In this situation, the question would be accusatory in a way that is very indirect and where a response may not be warranted. Does silence mean that he knows whose shotgun matches or that he knew that his shotgun matched or neither?

This is where the second problem with silence as a legal confession comes into play. What is the proper response in this situation? Ainsworth writes that the answer to this question can be found in a linguistic-psychological phenomenon called “adjacency pairs.” Adjacency pairs is the academic name for the natural turn-taking of people in conversation. In these pairs, the first object is a statement, and the second is a statement or speech act in response to the first.[[18]](#footnote-18) Ainsworth notes Anita Pomerantz’ study on adjacency pairs which analyzed what would be the “preferred” and “dispreferred” responses as the second object in the pair.[[19]](#footnote-19) The conclusion that Ainsworth gets from Pomerantz’s study is that silence is an “expected” and valid response to an accusation even if someone contests the accusation.[[20]](#footnote-20) This has various implications for the current case. First, and most importantly, this means that a concrete policy to admit silence as a confession, even when the context is known and a defendant has the opportunity to respond, is improper because silence is a normal response. Secondly, even if silence is admitted on a case-by-case basis, the ability to definitively decide that this evidence means what a prosecutor would like it to mean is impossible, and is certainly impeachable given the ability to present linguistic evidence. The linguistic and psychological evidence on adjacency pairs suggests that the interpretation of silence as a confession can be extremely misleading.

So far, I have shown that determining whether silence has a semantic or pragmatic function is dependent on context, though much more so in pragmatics. Since policemen, lawyers, and juries can often misunderstand contextual situations, it is difficult to give a semantic or pragmatic meaning to silence in many cases. I have argued, with the help of Ainsworth’s article and Pomerantz’ study, that linguistic and psychological problems arise with understanding silence as a confession since determining what is an accusation and what are the proper responses to that accusation is difficult and variable. Using purely linguistic and psychological evidence, it is therefore improper to admit silence as an admission of guilt. This claim is independent of the fact that the current case involves pre-custodial silence; linguistic cognition does not change simply by being put under arrest and read warnings. I will now turn to a discussion of how existing literature on *Miranda* warnings and the right to remain silent, as well as the linguistic evidence just presented, can inform our political and legal understanding of the dilemma of admitting silence into evidence.

*Salinas* is an extremely interesting case because it involves pre-custodial silence. Before looking at constitutional issues surrounding that case in particular, I will survey the case law and literature surrounding admitting post-*Miranda* warnings silence into evidence. The constitutional principle that affirms the rights in the *Miranda* warnings is the Fifth Amendment’s protection against self-incrimination, which reads: “no person…shall be compelled in any criminal case to be a witness against himself.”[[21]](#footnote-21) The Constitution does not explicitly say that one shall have the right to remain silent, let alone the right against self-incrimination, but the Court has long established that the right against self-incrimination is inherent in the meaning of the Fifth Amendment and that this right extends beyond a trial to any interaction with law enforcement. *Miranda v. Arizona,* the landmark case for which the warnings read upon arrest are named, establishes that no statements, whether self-incriminating or not, can be admitted as evidence in court unless a person has been “clearly informed that he has the right to remain silent.”[[22]](#footnote-22) The majority argues that this is necessary because the interrogation environment exists for the sole purpose of subjugating the accused to the will of the interrogator.[[23]](#footnote-23) The *Miranda* warnings, therefore, are a response to the adversarial nature of interrogations. They serve the purpose of emphasizing to the accused that they have rights against self-incrimination, rights that each person is not assumed to know he has. The right to remain silent and the right to an attorney are the only two legal mechanisms the accused have to thwart the power of an interrogator.

What does the “right to remain silent” actually mean? The right to remain silent has a literal meaning: the right to remain silent means you must *stay* silent. Once you begin to speak with law enforcement, you have “waived” your right to remain silent. In a significant body of case law, the Supreme Court decided, wrongly in my opinion, that the right to remain silent ends the moment one begins talking to police. If someone has not talked to police and has chosen, after hearing his *Miranda* warnings, that he wishes to remain silent, his remaining silent cannot be used against him in court. This precedent was established in *Wainwright v. Greenfield.* However, if someone has been talking to police in an interrogation and then receives an accusatory question to which he is silent, he is not actually protected from self-incrimination simply by being silent. In fact, being silent contributes to self-incrimination. In *Moran v. Burbine,* the Court wrote that someone could only waive their right to remain silent if their speaking was voluntary and not coerced, and if they fully understood “both the nature of the right being abandoned and the consequences of the decision to abandon it.”[[24]](#footnote-24) Solan and Tiersma argue in *Speaking of Crime* that cognitive studies have shown that people fail to understand and comprehend the *Miranda* warnings.[[25]](#footnote-25) They note that people with low cognitive ability, those who do not speak English as a first language, juveniles, and people who have trouble hearing can often fail to understand the warnings.[[26]](#footnote-26) Goldstein, et. al. writes about juvenile comprehension of the *Miranda* warnings and argues that the warnings are complicated both in vocabulary and in sentence structure, and are thus hard for juveniles who are under-educated to comprehend.[[27]](#footnote-27) If the Supreme Court demands that someone must completely understand their right to remain silent and what it means to waive it, then, as Solan and Tiersma argue, many people are not waiving their rights in accordance with legal doctrine because many people do not know what the warnings mean.[[28]](#footnote-28)

Beyond the fact that people simply do not understand the warnings and the gravity of their relinquishing their rights by talking in an interrogation, many people are unaware that silence is not a defense from interrogation. When it comes to the “right to remain silent,” a word like “remain” is prototypically similar to “be.” Should we really fault a suspect for understanding the right to remain silent as the right to be silent, and subsequently being silent in response to an accusatory question? I think not. In the current system, the only way that the accused can actually prevent silence from being self-incriminating at that point is by expressly invoking a phrase similar to the following: “I would like to use my Fifth Amendment right against self-incrimination and not answer your questions” or, as it has colloquially become, “I plead the Fifth.” There is one major inconsistency in the Court’s logic here: if people do not know that they have rights preventing self-incrimination and do not understand the gravity of those rights, how could we assume that these people know the exact legal jargon that would prevent their silence from being taken as an admission of guilt? The Court, in *Minnesota v. Murphy* in 1984, affirmed that if someone “desires the protection of the privilege, he must claim it.”[[29]](#footnote-29) Such a conclusion is inconsistent with the spirit of the *Miranda* decision because those under arrest are not told that they need to expressly invoke the right or that they waive the right by beginning to engage with law enforcement. Treating silence as a confession in any circumstance does not take into question whether someone thought they were simply exercising their ordinary right not to speak, and therefore, should not be legally admissible.

There is only one relevant exception to the rule that one must expressly invoke his Fifth Amendment rights for silence not to be admissible. One need not invoke the Fifth Amendment principle if he has been coerced by a law enforcement entity to speak and thus coerced to waive his Fifth Amendment rights. In *Miranda,* the Court said that a suspect need not invoke his rights if he is subjected to the “inherently compelling pressures” of an interrogation.[[30]](#footnote-30) It would follow, then, that under circumstances where someone is compelled or pressured in a way that feels compelling, he would not need to invoke the privilege. This principle should apply whether one is under arrest or not. In all other circumstances, as *Murphy* affirms, a suspect has waived his right to be silent unless he “claims [that right] after being suitably warned.”[[31]](#footnote-31)As presented earlier, the Supreme Court has a very different understanding of what one’s being suitably warned means than does linguistic and psychological literature. Since in many situations suspects are not coerced into speaking and do not know that they have to invoke their right not to speak, this exception is not as expansive as it should be.

I have spent much time outlining the legal and linguistic dilemmas with the use of silence as a confession after someone has been placed under arrest to make an important point: if there are such large linguistic and legal issues with admitting silence after someone has been given their *Miranda* warnings, then there are even greater problems with the admission of silence as evidence of guilt *before* someone has been read their rights. People who agree to enter into a form of questioning or interrogation with police without being informed of rights have very little power to reject questions or protect themselves. This is partly due to the nature of interrogations, something that the majority in *Miranda* aptly addresses. Interviews are seen as different under the law for an important reason: someone who is being interviewed (and not interrogated) is *not* under arrest and is free to go at any time. Courts have long argued that the ability to leave the room at anytime should be protection enough from interrogators; indeed, in *Salinas v. Texas,* Justice Alito argued that the ability to leave gives Mr. Salinas no exception from having to explicitly state that he has Fifth Amendment rights and does not wish to speak.[[32]](#footnote-32) If the nature of interrogations follows into interviews, then this judgment should be rejected.

Interviews, in many circumstances, are as coercive as interrogations, even though they appear to be very different. As Davis and Leo argue, ever since the Court granted “protections against coercion” for suspects in interrogation with *Miranda* warnings and disincentivized the use of coercion by making evidence obtained through coercion inadmissible in trial, law enforcement officers have devised ways of going around the protections “while still inducing suspects to talk.”[[33]](#footnote-33) Many of their tactics relate to confessions after being arrested, but police have pre-arrest tactics too. Two are relevant in this case: 1. Officers can prolong the reading of *Miranda* warnings as long as someone is talking to them and appears to be doing so voluntarily, even though these officers plan to arrest the suspect at the end of the interview; and 2. Questioning can seem necessary to clear one’s name and police officers may seem sympathetic to helping that person, so he accepts an offer to be questioned. Davis and Leo posit that law enforcement officers ask suspects if they can “help” with an investigation, and that they come to the police station to “clear up” or “straighten out” the police’s understanding of events.[[34]](#footnote-34) This is an example of pragmatic implication, whereby the use of requests instead of demands creates a feeling that the police are being inviting and helpful.[[35]](#footnote-35) It also gives the impression that one is participating voluntarily. Another tool that police can use which is non-linguistic is waiting as long as they can to administer *Miranda* warnings.[[36]](#footnote-36) In *Salinas,* the police had planned to arrest Mr. Salinas on outstanding traffic warrants regardless of whether he gave incriminating evidence on the murder for which he was a suspect.[[37]](#footnote-37) In a situation where someone is convinced through law enforcement tactics that they are in a situation that is voluntary, suspects may begin to say things that they otherwise would not say. In the same situation, though it appears to be voluntary, many suspects will not “feel free to refuse.”[[38]](#footnote-38) So at the point that the interview turns to being adversarial, suspects may not feel like they can leave. When suspects are put into situations where they have voluntarily spoken and then realize that they are in an adversarial situation that they cannot escape, silence can be a natural reaction. In those circumstances, silence should not be admitted as evidence because it could have many different meanings, both semantic and pragmatic. From an analysis of only what is said in an interrogation before a suspect is silent and the context, courts probably cannot understand the coercion a suspect may feel. Pre-custodial interviews, which by their nature do not require *Miranda* warnings, should therefore be given more heightened scrutiny than *Miranda*-like cases.

Using all of the evidence presented so far, I turn directly to *Salinas* and the failure of the majority in determining that silence should be admitted into evidence even if it is obtained prior to *Miranda* warnings. Justice Alito’s decision has three arguments. First, he finds that one must expressly invoke the right against self-incrimination to have it. Second, he argues that since Salinas voluntarily agreed to talk to the police, he cannot claim that he was coerced into questioning and thus, would need to invoke his rights to have them. Third, Alito posits that one does not “invoke the privilege by remaining silent.”[[39]](#footnote-39) To the first point, as presented above, a person cannot be assumed as knowing that he must invoke the privilege of remaining silent especially if not read his *Miranda* rights. This is true even when a person is read warnings because they do not include a reminder to expressly invoke the privilege. On Salinas’ speaking voluntarily, Alito is rebutted by significant evidence, presented in Davis and Leo’s paper on pragmatic implications, that situations may appear voluntary even when they are coercive. Salinas probably did not feel that he had a choice in being questioned, and knowing that he may be confronted with accusations. Lastly, Alito’s claim that remaining silent is not a protection and that this silence can therefore be used as evidence of guilt fails to account for the varying uses of and ambiguities surrounding the meaning of silence. The majority cites precedent to arrive at their decision, including *Murphy,* which presented earlier states that one who wants Fifth Amendment protection “must claim it.”[[40]](#footnote-40) They cite *Roberts v. U.S.* as saying that the Fifth Amendment’s protection is not invoked by staying silent.[[41]](#footnote-41)Alito’s decision does rest on some precedent and, at times, the Court has held very similar views on the admission of silence. But precedents are merely decisions that have come before, and in a larger constitutional argument, relying on tradition rather than on the best arguments for a decision is a fallacy. With the linguistic evidence presented and the legal arguments of the dissenting four justices, this precedent, and thus *Salinas v. Texas,* needs to be overturned.

Justice Breyer and the dissenting Justices correctly argue that one’s silence should not be admitted into evidence based on legal and precedential reasoning. Breyer starts by trying to show that the majority has misinterpreted its case law by quoting the following from *Miranda*: “it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation…[The] prosecution may not…use at trial *the fact that he stood mute* or claimed his privilege in the face of accusation.”[[42]](#footnote-42) In Breyer’s opinion, the case law is actually in the dissents favor. The majority argues that a rule that allows for the admission of silence “would undermine the basic protection that the Fifth Amendment provides.”[[43]](#footnote-43) If one indeed has a right against self-incrimination interpreted as a right to remain silence, then there should be a distinction between talking and silence. Breyer argues that the accused has the “impossible” choice of answering a question and possibly revealing incriminating evidence or not answering the question and having that implicitly incriminate him/herself,[[44]](#footnote-44) a set-up which nullifies the Fifth Amendment. Breyer argues that *Quinn v. U.S.* correctly identifies that there is “no ritualistic formula…necessary in order to invoke the privilege.”[[45]](#footnote-45) The only times when the court has made the explicit invocation of the privilege necessary is when it is unclear that one is invoking his privilege or when it is important that the questioner know he is invoking his privilege. Neither of these circumstances applies in *Salinas*. Furthermore, the dissent argues that Salinas “would likely not have used the precise words…to invoke his rights because he would not likely have been aware of technical legal requirements.”[[46]](#footnote-46)Altogether, the legal arguments of the dissent better captures the link between linguistics and constitutional principles, and is, in my opinion, the correct holding.

But what is most interesting about the dissent is that they bring in the linguistic problem with interpreting silence. Breyer asks: “Can one fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment’s privilege?” His answer is “yes.”[[47]](#footnote-47) However, contrary to Breyer, I believe that, based on the semantic and pragmatic roles of silence, you cannot fairly interpret meaning *or* non-meaning from silence. In the very circumstance that *Salinas* identifies, one could reasonably interpret that his silence was an admission, but you can never be sure.. In the law, when a fact cannot be easily determined, the benefit of the doubt must be given to the defendant.

Given the multiple linguistic interpretations of silence, linguistic studies on silence in legal contexts, psychological studies on comprehension of *Miranda* warnings and on interrogation situations, and sound legal and constitutional arguments, *Salinas v. Texas* is a faulty decision and must be overturned. I believe, like the dissent does, that the majority misinterpreted some of the precedent and case law—unfortunately, in the Supreme Court, often no more arguments are allowed. But there is no doubt that linguistics and psychology can better inform these justices in their decisions, which can lead them not only to better practical judgments, but also to better constitutional judgments. If I could propose any solution to prevent silence from being admitted into a courtroom as evidence of an admission, it is that those who are questioned need to be told that they have the right to stop and not speak with investigators at any time. Additionally, both people interviewed before and after being arrested must be told that they need to explicitly invoke the privilege from the Fifth Amendment to have it after they’ve begun talking. Our legal system must treat me, a student educated in my Miranda rights, equally to any other person in this country. With the decision in *Salinas* and extension of its predecessors, the law fails to do just that.

*This paper represents my own work in accordance with University regulations*.

/s/ Matthew L. Saunders

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43. *Salinas v. Texas,* Dissent, 3. [↑](#footnote-ref-43)
44. *Ibid*. [↑](#footnote-ref-44)
45. *Ibid,* quoting *Quinn v. United States*, 349 U.S. at 164.9. [↑](#footnote-ref-45)
46. *Salinasv. Texas*, 570 U.S. \_\_\_ (2013), Dissent, 10. [↑](#footnote-ref-46)
47. *Ibid,* 12. [↑](#footnote-ref-47)