Rethinking *Miranda*: The Post-Arrest Right to Silence

Stephen Rushin*

Some scholars have recently observed that Miranda *protections are under attack. At its core,* Miranda *requires law enforcement to inform a criminal suspect of her constitutional rights before custodial interrogation in order to protect her privilege against self-incrimination. But today,* Miranda *warnings inform individuals of only a small subset of their actual Fifth Amendment rights, partially due to ambiguity in the current doctrine. Perhaps no area of Fifth Amendment doctrine is more ambiguous than a suspect's right to silence during post-arrest interrogation.*

This Comment explores the selective invocation of the right to silence during custodial interrogations. I define selective invocation as the ability of a suspect to exercise her right to silence on a question-to-question basis after an earlier waiver of Miranda *rights. State and federal courts have split on the issue of whether a criminal suspect may selectively invoke the right to silence in this way. I argue, however, that a rule permitting criminal suspects to selectively invoke the right to silence accords with constitutional doctrine and public policy considerations. Further, I argue that suspects ought to bear the burden to explicitly invoke the right to silence during interrogation. Lastly, to avoid due process concerns arising from such burdens on suspects, I argue* Miranda *warnings should be expanded to bridge the current information asymmetry between law enforcement and citizenry. In total, I contend that these policy proposals would benefit law enforcement and comprehensively protect a criminal suspect's Fifth Amendment rights.*

Copyright © 2011 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* J.D., University of California, Berkeley, School of Law, expected May 2011. Special thanks to Professor Tamara Lave for her initial guidance. I am also very grateful for the hard work of the editing staff at the *California Law Review*, especially Kimpo Ngoi and Brooke Tomlinson.

Introduction 152
I. The Steady Abrogation of a Defendant's Post-Arrest Right to Silence 154
A. The Implied Waiver of the Right to Silence During Custodial Interrogation 154
B. *Doyle* and *Anderson*: Protecting Only Silence at Trial 158
II. The *Caruto* Case Study 160
III. The Divergent Views on the Common Law Doctrines of Invocation, Selective Invocation, and Omissions 163
A. Definition of Selective Invocation 163
B. The Widespread Disagreement on the Definition of Selective Invocation 163
1. Denying the Right of Selective Invocation as Inconsistent with the Concept of Waiver 163
2. Recognizing the Right to Selective Invocation in Limited Application 166
C. Searching for Agreement on a Statement that Qualifies as a Protected or Explicit Invocation of the Right to Silence 167
D. Inconsistency as a Backdoor to Admit Otherwise Protected Silence 169
IV. Rethinking *Miranda*: A Proposal that Comports with Policy Considerations and Judicial Precedent 170
A. Strict Application of the *Anderson* and *Doyle* Doctrines 170
B. Selective Invocation Accords with Constitutional and Public Policy Concerns 171
C. Placing the Burden of Invocation on the Suspect Protects Effective Administration of Law Enforcement 174
D. Forming Comprehensive *Miranda* Warnings to Inform Suspects of Their Right to Silence and Selective Invocation 175
Conclusion 177

INTRODUCTION

Several recent cases have redefined the relationship between law enforcement and criminal suspects during custodial interrogation.[1] This has led some scholars to observe that protections afforded under *Miranda v. Arizona*[2] are under attack.[3] *Miranda* requires law enforcement to inform criminal

1. *See, e.g.*, Transcript of Oral Argument at 3–4, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (No. 08-1470); North Carolina v. Butler, 441 U.S. 369 (1979) (holding that a defendant may impliedly waive *Miranda* rights in some cases).

2. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing procedural safeguards for custodial interrogation to secure the privilege against self-incrimination).

3. *See, e.g.*, Charles Weisselberg, *Obama's Justice Department Sticks a Fork in Miranda – Why?*, HUFFINGTON POST (Feb. 25, 2010), http://www.huffingtonpost.com/charles-weisselberg/obamas-justice-department_b_476973.html.

suspects of their constitutional rights before custodial interrogation[4] in order to protect suspects from self-incrimination.[5] In reality, however, *Miranda* warnings only inform suspects of a small subset of their actual Fifth Amendment rights, partially due to ambiguity in the current doctrine. Indeed, perhaps no area of Fifth Amendment doctrine is more ambiguous than a suspect's right to silence during custodial interrogation.

This Comment analyzes issues surrounding the invocation[6] and selective invocation[7] of the Fifth Amendment right to silence, many of which have never been addressed by the Supreme Court. For instance, after a criminal defendant is arrested, waives her *Miranda* rights, and begins answering questions in response to interrogation, can she later re-invoke her right to silence without fear that the government may use such invocation as evidence of guilt at trial? Can she selectively invoke the right to silence from one question to the next? And what must a defendant say or do to selectively invoke her right to silence? Even though state and federal appellate courts have split on these issues,[8] there is a surprising dearth of legal scholarship on the subject.

In principle, I argue that a rule permitting criminal suspects to selectively invoke the right to silence after an earlier waiver of their *Miranda* rights accords with constitutional doctrine and public policy considerations. Further, I argue that to mitigate potentially undue strain on law enforcement, suspects should bear the burden to explicitly invoke the right to silence during interrogation. Finally, to avoid due process concerns, *Miranda* warnings should also be expanded to accurately and completely notify suspects of their right to selective silence, their right to silence without the inference of guilt, and their obligation to affirmatively assert silence if they so choose.

I have divided this Comment into four parts. Part I discusses the common law doctrine regarding a defendant's right to remain silent, focusing

---

4. *Miranda*, 384 U.S. at 444 (defining custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

5. *Id.*

6. I define "invocation" of the right to silence as a suspect's assertion or use of her right to silence during custodial interrogation.

7. I define "selective invocation" of the right to silence as a suspect's assertion or use of her right to silence during custodial interrogation on a question-by-question basis.

8. *See, e.g.*, United States v. Burns, 276 F.3d 439 (8th Cir. 2002) (noting that if a person receives *Miranda* warnings and affirmatively waives the right to remain silent, any subsequent silence can be used against her); People v. McReavy, 462 N.W.2d 1, 7 (Mich. 1990) (holding that failure to answer certain questions during interrogation may be used as evidence of guilt at trial, unless the defendant clearly invokes her Fifth Amendment right to silence); State v. Torres, 858 A.2d 776, 785 (Conn. App. Ct. 2004) (holding that the defendant's selective invocation of the right to silence is not "protected silence"); *cf.* United States v. Caruto, 532 F.3d 822, 824 (9th Cir. 2008) (holding that a defendant may waive her right to silence at the beginning of an interrogation and later invoke her right to silence—an act that the prosecution may not use at trial as evidence of guilt); United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) (holding that a criminal suspect has a limited right to selective invocation).

specifically on the development of the implied waiver and the distinction between omissions and inconsistencies in testimony. Part II presents a detailed description of the Ninth Circuit's holding in *Caruto*—an important and timely case presenting a unique factual scenario not yet addressed by the U.S. Supreme Court. *Caruto* raises several questions stretching the current boundaries of the right to silence. Part III details the federal circuit and state appellate courts' divergent treatment of a defendant's complete and selective invocation of her right to remain silent. Finally, Part IV articulates a three-part policy proposal favoring (1) selective invocation rights, (2) explicit invocation requirements, and (3) a modification of current *Miranda* warnings.

I.
THE STEADY ABROGATION OF A DEFENDANT'S POST-ARREST RIGHT TO SILENCE

The Fifth Amendment protects an individual's privilege against self-incrimination, commonly defined as the guarantee that a person may not be required to answer questions that will aid in convicting her of a crime.[9] This Comment focuses on the narrow application of a defendant's Fifth Amendment privilege against self-incrimination in a limited post-arrest situation where (1) the suspect has waived her *Miranda* rights thereby agreeing to custodial interrogation, and (2) the suspect has waived and subsequently re-invoked her *Miranda* right to silence, only to have the prosecutor use that subsequent invocation of silence as evidence of guilt or for impeachment at trial. The following two Sections address the common law doctrine for each of these topics; the first analyzes the implied waiver of the right to silence during custodial interrogation, and the second discusses the use of silence as evidence of guilt at trial.

A. The Implied Waiver of the Right to Silence During Custodial Interrogation

The Supreme Court has generally held that a defendant may impliedly waive her right to counsel through her actions or words during custodial interrogation.[10] An explicit waiver of the right is not necessary, and a recent Supreme Court case, *Berghuis v. Thompkins*,[11] extended this doctrine of implied waiver from the right to counsel to its counterpart—the right to silence.

The implied waiver of the right to counsel first appeared in *North Carolina v. Butler*, where the Court found that an explicit waiver of *Miranda* was not invariably necessary to prove a defendant relinquished her right to counsel.[12] Instead, *Butler* established that a suspect may impliedly waive

9. R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 1 (1997).

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

11. Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

12. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

counsel so long as the defendant both understands her rights and recognizes that her conduct establishes a waiver.[13] When the defendant in that case was brought in for questioning with the Federal Bureau of Investigation, the interrogating agents read the defendant his *Miranda* rights and then asked him to sign a waiver form.[14] The defendant responded, "I will talk to you but I am not signing any form."[15] When notified of his right to a lawyer, however, the defendant said nothing and thereafter made incriminating statements.[16] At trial, the defendant attempted to suppress the evidence of the incriminating statements by arguing he had not waived his right to counsel at the time of the statements.[17] The trial court disagreed, finding that the statement was made voluntarily after an effective waiver of counsel.[18]

The Supreme Court agreed with the trial court, holding that while an explicit agreement strongly corroborates a waiver of *Miranda* rights, it is neither necessary nor sufficient to establish waiver: "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."[19] While the Court noted that simple silence alone is not enough to waive *Miranda*, it nevertheless found that when silence is "coupled with an understanding of his rights and a course of conduct indicating a waiver," a court may infer an implied waiver.[20] The burden rests upon the prosecution to prove that a suspect surrendered her right to silence, a waiver of which can be inferred from the suspect's words "or actions."[21] As the *Butler* court noted, *Miranda* only states that a court must determine whether a suspect chose to speak freely and voluntarily.[22]

Butler established the baseline for the implied waiver doctrine—a suspect's words and actions, taken together, may impliedly waive *Miranda* rights during custodial interrogation. While *Butler* only applies to the assertion of the right to counsel, the Supreme Court recently extended the doctrine of implied waiver to the right to silence in a Michigan case, *Berghuis v. Thompkins*.[23]

In *Berghuis*, a detective read the defendant, Van Chester Thompkins, a form explaining his *Miranda* rights before the interrogation began,[24] and

13. *Id.*
14. *Id.* at 370–71.
15. *Id.* at 371.
16. *Id.*
17. *Id.*
18. *Id.* at 371–72.
19. *Id.* at 373.
20. *Id.*
21. *Id.*
22. *Id.* at 374 (citing Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
23. Berghuis v. Thompkins (*Berghuis II*), 130 S. Ct. 2250 (2010).
24. Thompkins v. Berghuis (*Berghuis I*), 547 F.3d 572, 576 (6th Cir. 2009), *rev'd*, 130 S. Ct. 2250 (2010).

Thompkins orally confirmed his understanding of his rights.[25] Nonetheless, like the defendant in *Butler*, Thompkins refused to sign a form acknowledging that the officers had read him his rights.[26] However, unlike the defendant in *Butler*, Thompkins remained generally silent to all questions asked for "at least" two hours and forty-five minutes, giving occasional verbal and nonverbal responses.[27] These responses included nodding of the head, looking up, or simply stating, "I don't know."[28] And after two hours and forty-five minutes, the detective asked Thompkins whether he believed in God.[29] At this point, Thompkins's eyes "well[ed] up with tears" and he gave an incriminating response that suggested he took part in the shooting.[30] The detective testified to these events at trial,[31] and Thompkins was convicted.[32] The admission of the inculpating statements was upheld in the Michigan Court of Appeals, which noted that Thompkins never asserted his right to remain silent since he sporadically talked to the officers.[33] According to the court, those sporadic statements to the officers indicated the statements were made voluntarily.[34]

The Sixth Circuit overturned the Michigan Court of Appeals,[35] relying on the Supreme Court's decisions in *Butler*, *Miranda*, and *Michigan v. Moseley*[36] in arguing that the state failed to satisfy its heavy burden of demonstrating that Thompkins committed some action consistent with waiver.[37] As the court concluded, "Thompkins's persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights."[38]

The Sixth Circuit decision seems logical—after all, how can a court presume that a person waived his right to silence when he remained generally silent for multiple hours in the face of continuous questioning? But Michigan, with the support of the U.S. Solicitor General, appealed the case to the U.S. Supreme Court.[39] In a five-to-four decision, the Court held that Thompkins not only failed to invoke his right to remain silent, but also then waived his right to

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 578–79.
32. *Id.* at 574.
33. *Id.* at 579.
34. *Id.*
35. *Id.* at 581.
36. Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'").
37. *Berghuis I*, 547 F.3d at 588.
38. *Id.*
39. Weisselberg, *supra* note 3; *see Berghuis II*, 130 S. Ct. 2250.

silence at the point he answered the detective's question about his belief in God.[40]

In reaching this decision, the *Berghuis* majority leaned heavily on prior decisions regarding the invocation and waiver of the right to counsel.[41] In *Davis v. United States*, the Court held that an effective invocation of the right to counsel must be made unambiguously.[42] Applying this line of reasoning to the right to remain silent, the *Berghuis* Court stated that even if a suspect in custodial interrogation is silent for several hours, any "uncoerced statement establishes an implied waiver of the right to remain silent."[43] As a result of *Berghuis*, the suspect not only bears the burden to notify the police if she wishes to invoke the right to silence, but also must invoke the right clearly and unequivocally.

The *Berghuis* majority discerned several practical and administrative benefits from its holding. For example, a rule permitting suspects to invoke the right to silence ambiguously would disadvantage law enforcement.[44] Police would be forced "to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'"[45]

Justice Sotomayor's dissenting opinion scolded the majority for its "substantial retreat from the protection against compelled self-incrimination that [*Miranda*] has long provided during custodial interrogation."[46] She contended that the majority "downplay[ed] record evidence that Thompkins remained almost completely silent and unresponsive throughout that session."[47] While Justice Sotomayor acknowledged that *Butler* established the doctrine of implied waiver of *Miranda* rights, she emphasized that the government ought to bear the burden to prove that a suspect impliedly waived her rights.[48] Most importantly, Justice Sotomayor stressed the present disconnect between the literal language used in *Miranda* warnings and their actual, legal application.[49] In *Berghuis*, the defendant was only notified of his right to remain silent—he was never told that he was responsible for affirmatively invoking such a right.[50] Ironically, the Court posited that Thompkins could only invoke his right to silence by speaking[51]—a holding with potentially serious and unforeseen consequences. For example, a person could conceivably remain completely silent in the face of hours of custodial interrogation, operating under the

40. *Berghuis II*, 130 S. Ct. 2250.
41. *Id.* at 2259–64.
42. *Id.* at 2259 (citing Davis v. United States, 512 U.S. 452, 459 (1994)).
43. *Id.* at 2262.
44. *Id.* at 2260.
45. *Id.* (citing *Davis*, 512 U.S. at 461).
46. *Id.* at 2266 (Sotomayor, J., dissenting).
47. *Id.*
48. *Id.* at 2272.
49. *Id.* at 2274–75.
50. *Id.* at 2274.
51. *See id.* at 2266.

assumption that such an action affirmatively invokes her right to silence. The police may be permitted to continue interrogation indefinitely until such a person finally answers a single question, at which point the police may be able to argue under *Berghuis* that the individual impliedly waived her right to silence.

In total, the default rule created by the *Berghuis* case is an admittedly simple rule to apply: suspects bear the burden to affirmatively and clearly invoke their right to silence. Nonetheless, when coupled with the uncertainty of the current selective invocation doctrine, the *Berghuis* holding may fundamentally undermine the protections offered by *Miranda*.

B. Doyle *and* Anderson*: Protecting Only Silence at Trial*

The implied waiver doctrine limits a suspect's exercise of the Fifth Amendment during interrogation, but what evidence from interrogation can prosecutors use at trial without violating the Fifth Amendment right to protected silence? In *Doyle v. Ohio*, the Supreme Court held that prosecutors may not use protected silence as evidence of guilt at trial, as it would infringe upon a defendant's right to due process.[52] However, the Court in *Anderson v. Charles* limited this protection by drawing a fine distinction between omissions and factual inconsistencies—a defendant who remains silent during interrogation versus one who makes statements that are ultimately contradicted at trial.[53]

The *Doyle* Court held that although *Miranda* warnings contain no explicit assurance that silence will not carry a penalty, due process nevertheless protects a suspect's exercise of the privilege against self-incrimination.[54] Consequently, the *Doyle* decision prevents prosecutors from using a suspect's proper exercise of privilege against self-incrimination as evidence of guilt at trial.[55] In that case, two criminal defendants were arrested and charged with selling ten pounds of marijuana to an informant.[56] At trial, both defendants claimed the informant had framed them,[57] but their account of the events "presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it."[58] The evidence presented at each defendant's trial was identical, and during cross-examination, the prosecutor attempted to impeach the defendants by asking why they had never told this version of events to the arresting officer.[59] Both defendants were convicted in separate trials,[60] and the Court of Appeals of Ohio upheld the convictions.[61] In affirming

52. Doyle v. Ohio, 426 U.S. 610, 611 (1976).
53. *See* Anderson v. Charles, 447 U.S. 404 (1980) (per curiam).
54. *Doyle*, 426 U.S. at 611.
55. *Id.* at 619.
56. *Id.* at 611.
57. *Id.* at 613.
58. *Id.*
59. *Id.*
60. *Id.* at 611.
61. *Id.* at 615.

the jury's convictions, the court held that the defendants' failure to articulate their account of the events to the police undermined their credibility, thus making the prosecution's usage of the impeachment evidence appropriate.[62]

The U.S. Supreme Court subsequently reversed the Ohio Court of Appeals, holding that because *Miranda* informs a defendant that she has the right to remain silent and her words may be used against her, the admission of the defendants' silence for impeachment purposes violated due process.[63] The difference between silence and inconsistency served a central role in the *Doyle* Court's decision. The State argued that the discrepancy between the defendants' silence during interrogation and the exculpatory story at trial gave rise to an inference of fabrication.[64] The State also argued that prosecutors desperately need the right to use such discrepancies for impeachment purposes, as the "prosecution usually has little else with which to counter such an exculpatory story."[65] The Court, however, rejected the notion that discrepancies between testimony at trial and silence during interrogation gave rise to an inference of fabrication, concluding that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[66] The Court further stated that *Miranda* warnings contain an implicit assurance that the decision to remain silent during interrogation will carry no penalty.[67] For the purposes of this Comment, *Doyle* established two important constitutional principles: first, mere silence after *Miranda* warnings cannot be admitted as evidence of inconsistency at trial for the purpose of impeaching a witness; and second, because criminal defendants rely upon the limited *Miranda* warnings received before interrogation, common law doctrine ought to fairly reflect such reliance.

The boundaries of the *Doyle* doctrine were soon tested in *Anderson*, where a criminal defendant made post-*Miranda* statements during interrogation that were factually inconsistent with testimony at trial.[68] The defendant in that case was arrested in Michigan for driving a stolen car, which the police determined belonged to a recent murder victim.[69] The defendant was accordingly charged with murder.[70] During interrogation, and after receiving notification of his *Miranda* rights, the defendant claimed he had stolen the car in Ann Arbor, about two miles from a local bus station.[71] However, at trial the defendant contradicted his earlier statement, claiming he had stolen the car from Kelly's

62. *Id.* at 615.
63. *Id.* at 617–18.
64. *Id.* at 616.
65. *Id.*
66. *Id.* at 617.
67. *Id.*
68. Anderson v. Charles, 447 U.S. 404, 404 (1980) (per curiam).
69. *Id.*
70. *Id.*
71. *Id.* at 405.

Tire Company, directly adjacent to the bus station.[72] At cross-examination, the prosecution used the conflicting statements to impeach the defendant, accusing him of fabricating the new story and pointing out the factual inconsistencies between the two accounts as support.[73] The defendant was convicted of murder and the Michigan Court of Appeals upheld the conviction.[74] The Sixth Circuit subsequently reversed the conviction, relying on the protection afforded to defendants under *Doyle*.[75]

The Supreme Court reversed the Sixth Circuit's decision, distinguishing the factual circumstances of *Doyle* from those of *Anderson*.[76] Unlike *Doyle*, where the defendants made no statements to officers after arrest, the defendant in *Anderson* made explicit statements contradicting his testimony at trial. In one version, the defendant stole the car two miles from the bus station, while in the other version he stole the car from the business next door to the bus station.[77] The Court found that *Miranda* warnings only protect a defendant's right to remain silent,[78] and thus inquiries into factually inconsistent statements make fair use of a defendant's voluntary statements when he has received *Miranda* warnings.[79] Hence, *Anderson* establishes a simple principle: while the government cannot use silence during interrogation for impeachment purposes, it may use voluntary statements that are factually inconsistent.

While *Doyle* and *Anderson* established the basic doctrine for the right to silence after arrest, these cases failed to address several important points. For instance, where should courts draw the line between factual inconsistencies, omissions, and mere silence? Once a suspect has waived her right to remain silent during interrogation, may she selectively invoke the right to silence on a question-by-question basis? If so, what must a suspect say to selectively invoke her right to silence during interrogation? Finally, can any invocation of the right to silence be used during the case-in-chief? The next Section evaluates these emerging legal issues and the subsequent split between state and federal circuits on whether a defendant may selectively invoke her right to silence after an earlier waiver.

II.
THE *CARUTO* CASE STUDY

A recent Ninth Circuit case, *United States v. Caruto*,[80] exemplifies the growing uncertainty surrounding selective invocation. In *Caruto*, a criminal

72. *Id.*
73. *Id.* at 405–06.
74. *Id.* at 406.
75. *Id.* at 406–07.
76. *Id.* at 408–09.
77. *Id.* at 407 n.2.
78. *Id.* at 407–08.
79. *Id.* at 408.
80. United States v. Caruto, 532 F.3d 822 (9th Cir. 2008).

suspect undergoing custodial interrogation waived her *Miranda* right only to later invoke the right to silence, which prosecutors introduced as evidence of guilt at trial.[81] Because *Caruto* is typical of the cases currently dividing state and federal appellate courts, I use it as a case study to underscore (1) the legal uncertainty about a suspect's ability to selectively invoke the right to silence after an affirmative *Miranda* waiver, (2) the fine distinction between omissions and inconsistencies in a defendant's post-arrest statements, and (3) the legal uncertainty about the necessary declaration a defendant must make to affirmatively invoke (or in some circumstances, to re-invoke) her right to silence during post-arrest interrogation.

Elide Caruto was arrested in Calexico, California, in February 2006 after Customs and Border Protection officers discovered seventy-five pounds of cocaine in the gas tank of her truck.[82] Before her interrogation, Caruto signed a written waiver of her *Miranda* rights, including the right to silence, and subsequently offered information pertaining to an alibi in response to questions from Immigration and Customs Enforcement (ICE) agents.[83] Minutes later, Caruto invoked her right to counsel and the questioning ceased.[84] Caruto offered a significantly more elaborate alibi at trial, although not factually inconsistent with the story she told the officers prior to re-invoking her *Miranda* rights.[85] Therefore, the *Caruto* case addressed "for the first time the application of [*Doyle*] . . . to a situation in which a defendant makes a limited statement and then invokes her *Miranda* rights."[86] The Supreme Court has not addressed this unique circumstance.[87]

At trial, the prosecution used the perceived "inconsistency" in Caruto's testimonies to discredit her story, claiming that Caruto's failure to offer her alibi to the officers during interrogation demonstrated her guilt.[88] Over the defense's objections, the district court allowed the prosecution to use Caruto's omissions as incriminating evidence during the case in chief;[89] Caruto was subsequently found guilty and sentenced to 168 months in federal prison.[90] On appeal, the Ninth Circuit considered the proper relation between *Caruto*'s unique factual scenario and the principles established by *Doyle* and *Anderson*. Before doing so, however, the court contrasted the facts of *Caruto* with those of a similar case—*United States v. Ochoa-Sanchez*.[91] In *Ochoa*, a suspect was

81. *Id.*
82. *Id.* at 824.
83. *Id.*
84. *Id.*
85. *Id.* at 825–27.
86. *Id.* at 828.
87. *Id.*
88. *Id*. at 826–27.
89. *Id*. at 826.
90. *Id*. at 827.
91. United States v. Ochoa-Sanchez, 676 F.2d 1283 (9th Cir. 1982).

arrested on drug charges, waived his *Miranda* rights, and gave a statement during interrogation.[92] There, the defendant's story at trial differed significantly from the story he told during interrogation—at trial, the defendant argued that he had been set up.[93] The prosecutor pointed out these discrepancies in cross-examination and in closing arguments, claiming the defendant had not acted like an innocent person.[94] Because the defendant had chosen to waive his right to silence, the *Ochoa* court reasoned that any discrepancies between post-arrest statements and trial testimony were admissible to test credibility.[95] Despite the defendant's claims that his initial story was not necessarily contradictory to his trial testimony, the court found the discrepancy to be tantamount to an inconsistency, not an omission.[96] The court, therefore, determined that the statement was admissible under *Anderson*.[97]

Hearing the case of *Caruto* de novo and within the context of *Ochoa*, the Ninth Circuit held that a prosecutor's use of a defendant's omission during interrogation, which only existed due to her invocation of the right to counsel under *Miranda*, constitutes a violation of due process.[98] In distinguishing *Caruto* from *Ochoa*, the Ninth Circuit explained that Caruto actually invoked her right to counsel to end the interrogation, demonstrating a clear and unequivocal invocation of the right to silence.[99] The prosecution admitted that the alleged inconsistencies were omissions due to the assertion of the right to counsel.[100] Relying upon *Doyle*'s protection of any inconsistency or omission derived from a short and incomplete interview, the Ninth Circuit found that the prosecution's attempt to infer meaning from protected silence directly violated the principles of judicial precedent.[101]

In total, *Caruto* offers a fascinating case study because it touches on several significant issues affecting the post-arrest, custodial interrogation right to silence. By protecting Caruto's re-invocation of the *Miranda* right to counsel, the Ninth Circuit effectively extended *Doyle*'s protection of a defendant's right to silence. The *Caruto* protection, however, also tests the boundaries of the *Anderson* distinction between unprotected, factually inconsistent statements and protected omissions. However, since Caruto's request for counsel operated as a full invocation of silence, the court only briefly addressed the topic of selective invocation. Because circuit courts diverge on this contentious issue, Part III details the common law doctrine

92. *Id*. at 1284–87.
93. *Id*. at 1285.
94. *Id*. at 1287 n.3.
95. *Id*. at 1286.
96. *Id*. at 1286–87.
97. *Id*. at 1287.
98. United States v. Caruto, 532 F.3d 822, 824 (9th Cir. 2008).
99. *Id*. at 829.
100. *Id*. at 830.
101. *Id.* at 830–31.

relating to invocation, selective invocation, and omissions.

III.
THE DIVERGENT VIEWS ON THE COMMON LAW DOCTRINES OF INVOCATION, SELECTIVE INVOCATION, AND OMISSIONS

A. Definition of Selective Invocation

State and appellate courts have defined the phrase "selective invocation" differently. Some use the phrase to describe a suspect's right to cease all interrogation at any point, while other courts use the term to refer to a suspect's right to refuse to answer an individual question. The right to end interrogation at any point has been well established since *Miranda*, which held that once warnings have been given and an individual indicates—in any manner and at any time—that she wishes to remain silent, the interrogation must cease.[102] "The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."[103] However, the latter version of the right, that a suspect may refuse to answer any particular question, is poorly defined in common law doctrine. Further, courts have split on whether any invocation—either full or partial—may be used as evidence of guilt or for impeachment at trial.

The next Section explores selective invocation, defined as the ability of a suspect to selectively answer only certain questions after an earlier waiver of *Miranda* rights during custodial interrogation.

B. The Widespread Disagreement on the Definition of Selective Invocation

In *Caruto*, where the defendant ended all further interrogation at the point she requested counsel, the Ninth Circuit recognized that a suspect could invoke her right to silence during interrogation even after an earlier waiver.[104] But what would have happened if Caruto had told the interrogating agents that she did not want to answer one particular question? Would detectives be permitted to bring up such a request as evidence of guilt at trial, either through impeachment or in opening and closing arguments? Courts have taken opposing views on this issue.

1. Denying the Right of Selective Invocation as Inconsistent with the Concept of Waiver

Some state courts and federal circuits—including the First, Seventh, and Eighth Circuits—have held that once a suspect waives the right to silence during post-arrest custodial interrogation, any subsequent invocation or re-

102. Miranda v. Arizona, 384 U.S. 436, 473–74 (1966).
103. *Id.* at 468 n.37.
104. *Caruto*, 532 F.3d at 829.

invocation of silence is admissible at trial. In *State v. Talton*, the Supreme Court of Connecticut held that it would be "manifestly illogical" to allow a suspect to claim the right to silence for some parts of interrogation after she had waived the right to silence at the beginning.[105] The court reconciled this view with *Doyle* by noting that "[o]nce an arrestee has waived his right to remain silent, the *Doyle* rationale is not operative because the arrestee has not remained silent . . . . By speaking, the defendant has chosen unambiguously *not* to assert his right to remain silent."[106]

In *Talton*, the defendant refused to answer one particular question during post-arrest interrogation, after initially waiving the right to silence.[107] The detective who conducted the interrogation relayed this key fact to the jury when he testified at trial,[108] and the court viewed the use of a waiver as dispositive. Since the defendant affirmatively waived his right to remain silent, the court determined any later hesitation or unwillingness to answer a question to be admissible evidence.[109] According to the court, "[w]hile a defendant may invoke his right to remain silent at any time, even after he has initially waived his right to remain silent, it does not necessarily follow that he may remain 'selectively' silent."[110] Put differently, the Supreme Court of Connecticut interpreted a waiver of the right to silence as unitary: once a defendant has waived the right to silence in post-arrest interrogation, she has the option of either answering all questions in full or affirmatively invoking her right to silence and ending the conversation all together. Under this view, a suspect would not be permitted to waive her right to silence, and then selectively invoke the right for a "single offensive question."[111]

Many other state and federal courts have shared this view. For instance, the Eighth Circuit in *State v. Burns* held that where a suspect initially waives her right to silence but "subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused."[112] In *Burns*, the defendant waived his right to remain silent and began answering interrogation questions.[113] At some point during the interrogation, the defendant failed to answer a particular question,[114] and eventually the defendant refused to answer

105. State v. Talton, 497 A.2d 35, 44 (Conn. 1985).

106. *Id.* (emphasis added).

107. *Id.* at 43.

108. *Id.*

109. *Id.*

110. *Id.* at 44.

111. *See* State v. Smart, 756 S.W.2d 578, 581 (Mo. Ct. App. 1988) ("If the privilege is reasserted, it is not available to avoid a single offensive question, but to cease all questioning . . . .").

112. United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002) (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

113. *Id.* at 441.

114. *Id.*

any more questions and ended the interview.[115] The interrogating agent testified at trial that the defendant had not answered a particular question and that he cut off the interview.[116] The defendant challenged the admission of the agent's testimony as violating his Fifth Amendment right to remain silent; as the defendant pointed out, the *Miranda* waiver he signed explicitly provided that he was permitted to "'stop talking at any time.'"[117] Nonetheless, the Eighth Circuit found admissible at trial any statement or silence made after a waiver.[118]

In one manner, the Eighth Circuit appears to go a step further than the Connecticut Supreme Court's decision in *Talton*. The *Talton* court acknowledged that an individual has a right to remain silent at any point during interrogation—even after a waiver—without fear that such silence will be used against her.[119] Thus, *Talton* permits the re-invocation of the right to silence after waiver, but posits that such an invocation must end the entire interrogation and deny the defendant the opportunity to selectively invoke the right to silence.[120] The Eighth Circuit in *Burns*, by comparison, suggests that after a waiver, a suspect has no chance to re-invoke the right to silence without fear that such a decision will be used as evidence in trial.

The First[121] and Seventh[122] Circuits have generally agreed with the Eighth Circuit, arguing that a defendant has no constitutionally protected right to selectively invoke the right to silence. Additionally, other states, including California,[123] Florida,[124] Missouri,[125] Michigan,[126] and Wisconsin,[127] have come to similar conclusions. Thus, many courts have hesitated to recognize the legitimacy of a suspect's selective invocation of the right to silence. Some of these courts, like *Talton*, have argued that a suspect may *completely* invoke the right to silence and cease all interrogations, but not *selectively* invoke the right to silence. Other courts, like *Burns*, have permitted prosecutors to use *any*

---

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 422.
119. State v. Talton, 497 A.2d 35, 43–44 (Conn. 1985).
120. *Id.*
121. *See* United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977).
122. *See* Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984).
123. *See* People v. Hurd, 73 Cal. Rptr. 2d 203, 209 (Ct. App. 1998) (holding that "[a] defendant has no right to remain silent selectively" and that any subsequent silence after a waiver may be used for impeachment purposes).
124. *See* Thomas v. State, 726 So. 2d 357, 358 (Fla. Dist. Ct. App. 1999) (stating that police testimony that defendant had no response to one question in the middle of an interview was not an impermissible comment on defendant's right to remain silent).
125. *See* State v. Smart, 756 S.W.2d 578, 581 (Mo. Ct. App. 1988) (holding that once a suspect waives the right to silence during interrogation, comment at trial on later re-invocation of silence is permissible).
126. *See* People v. McReavy, 462 N.W.2d 1, 3–4 (Mich. 1990) (noting that silence to one question is not an affirmative invocation of the right to silence after a waiver).
127. *See* State v. Wright, 537 N.W.2d 134, 137–38 (Wis. Ct. App. 1995) (stating that a suspect cannot selectively invoke the right to silence without a clear, affirmative indication).

invocation of silence after a waiver as evidence of guilt.

2. Recognizing the Right to Selective Invocation in Limited Application

Conversely, the First, Fourth, Ninth, and Tenth Circuits have recognized some cognizable right to selective invocation, although this right has often been tempered by stringent invocation requirements. The Tenth Circuit noted that "when 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*."[128] Similarly, in *United States v. Harrold*, the Tenth Circuit cited a Sixth Circuit opinion to support the proposition that a suspect's willingness to answer some questions but refusal to answer others "does not preclude him from arguing that a violation of [*Doyle*] occurred" when a prosecutor admits his invocation of silence as guilt.[129] In reaching its conclusion, the court focused upon the language and role of *Miranda* warnings, emphasizing that when a suspect relies upon a warning that he may refuse to answer specific questions, "he has been induced by the government to do so and his silence may not be used against him."[130]

The Ninth Circuit has recognized the ability to selectively waive the Fifth Amendment's right to silence for some questions, but not for others.[131] In *United States v. Lorenzo*, the Ninth Circuit addressed whether the waiver of *Miranda* is revocable—a question analogous to the right of selective invocation.[132] There, the suspect initially acknowledged his *Miranda* rights, but refused to answer a particular line of questioning by informing the officers that he had "no response."[133] The *Lorenzo* court recognized that "a suspect may, if he chooses, selectively waive his Fifth Amendment rights by indicating that he will respond to some questions, but not to others."[134] Despite this recognition, the Ninth Circuit felt that the suspect failed to take the proper steps to fully invoke his right to silence.[135] Since the suspect had already waived his *Miranda* rights, the court found that answering "no comment" failed to reassert his right to silence.[136] Although recognizing that a criminal suspect's waiver and reassertion of her right to silence during interrogation is protected by the *Doyle* doctrine, the Ninth Circuit set an extremely high bar for invocation in a

128. United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993) (citing United States v. Harrold, 796 F.2d 1275, 1279 n.3 (10th Cir. 1986)).

129. *Harrold*, 796 F.2d at 1279 n.3 (citing Hockenbury v. Sowders, 718 F.2d 155, 159 (6th Cir. 1983)).

130. *Id.*

131. United States v. Lorenzo, 570 F.2d 294, 297–98 (9th Cir. 1978) (citing Egger v. United States, 509 F.2d 745, 747 (9th Cir. 1975)).

132. *Id.* at 295, 297–98.

133. *Id.* at 296.

134. *Id.* at 297–98.

135. *Id.* at 298.

136. *Id.*

situation where a defendant does not understand the implications of his actions.

The Fourth Circuit has gone further, holding in *United States v. Ghiz* that a suspect's refusal to answer specific questions in the course of an interview is inadmissible under *Doyle*.[137] And the First Circuit has agreed, citing *Ghiz* as persuasive on the issue of selective invocation.[138]

In sum, the common law on selective invocation remains unsettled. The Fifth, Seventh, and Eighth Circuits hesitate to recognize the selective invocation of the Fifth Amendment right to silence after an earlier waiver, but the First, Fourth, Ninth, and Tenth Circuits recognize some basic right to selective invocation. With such a wide disparity between jurisdictions, the burden now falls on the Supreme Court to clarify this unsettled doctrine.

C. Searching for Agreement on a Statement that Qualifies as a Protected or Explicit Invocation of the Right to Silence

On the most general level, the Supreme Court has held that a suspect's invocation of the right to silence must be "'scrupulously honored.'"[139] Nonetheless, the Court in *Berghuis* held that a criminal suspect must invoke her right to silence during custodial interrogation clearly and explicitly.[140] Still, the exact definition of an explicit invocation remains unclear. In the *Caruto* case study, for instance, the Ninth Circuit noted that the exercise of a *Miranda* request for counsel was an effective means to invoke silence, thereby preventing the prosecutor from referencing such an action at trial.[141] But what if Caruto had said that she "preferred not to answer" a particular question, or that she "did not want to answer" a set of questions? Would these statements be sufficient to qualify as an explicit assertion of the right to silence or would the prosecutor be permitted to use these statements as evidence of guilt at trial? Courts have split on these issues. While *Berghuis* provides some insight, there remains uncertainty regarding the "magic words" a criminal suspect must use to successfully assert her right to silence.

Indeed, multiple courts have found that statements reflecting uncertainty or doubt as to a defendant's intent fall short of an affirmative exercise of the right to silence. In *People v. Spencer*, the Court of Appeals of Michigan held that a defendant's unwillingness to answer a question because "'[t]he less I say, the better I think I'll be,'" did not constitute an exercise of his right to remain silent.[142] The *Spencer* opinion distinguished this statement from a clear invocation because it "merely expressed a desire to limit his responses."[143]

137. United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974).
138. Booton v. Hanauer, 541 F.2d 296, 298 (1st Cir. 1976).
139. Michigan v. Mosley, 423 U.S. 96, 104 (1975).
140. Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).
141. United States v. Caruto, 532 F.3d 822, 830–31 (9th Cir. 2008).
142. People v. Spencer, 397 N.W.2d 525, 528 (Mich. Ct. App. 1986).
143. *Id.*

Unsurprisingly, this same court simply reinforced its earlier holding in *People v. Hampton* that a simple refusal to make an inculpating statement when prompted to do so was not an assertion of the right to remain silent.[144] Hence, it seems that anything short of a clear, unequivocal, and direct invocation may be construed as a mere refusal or an unwillingness to answer questions.

Surprisingly, a liberal standard for recognizing invocation may not provide significantly more protection to defendants. In *Bradley v. Meachum*, the Second Circuit held that a defendant need only show some indication that she intends to invoke the right to silence during custodial interrogation, rather than an explicit statement.[145] Many courts have followed suit, but in attempting to apply this liberal and indeterminate standard have reached disparate and unpredictable results. In *State v. Taft*, for example, the Appellate Court of Connecticut, citing the Second Circuit's *Bradley* opinion, found that simple silence or shrugging in response to a question did not constitute "some indication" that the defendant wanted to exercise the right to silence.[146] However, in *Jones v. State*, the Supreme Court of Mississippi held that a defendant's statement that he "'prefer[s] not to speak on that'" was a sufficiently clear assertion of the right to silence, thereby invoking the right.[147] The court held that the defendant left "little ambiguity" about his desire to remain silent.[148]

On the whole, courts have set a high threshold for explicit invocation, but it remains unclear what exactly a suspect must say or do to explicitly invoke silence. Contributing to this lack of clarity is the *Miranda* warning's failure to inform criminal suspects of the exact words they must use to invoke their right to silence. In many ways, this formalistic standard accords with the Supreme Court's decision in *United States v. Davis*, which held that a defendant's request for counsel during custodial interrogation must be made unambiguously to stop questioning.[149] *Davis* emphasized the need for a clear and administratively simple rule.[150] And while *Berghuis* has extended the *Davis* rationale to the right to silence, uncertainty remains regarding the exact wording a criminal suspect must use to successfully assert her right to silence.

---

144. People v. Hampton, 361 N.W.2d 3, 4 (Mich. Ct. App. 1984).

145. Bradley v. Meachum, 918 F.2d 338, 342–43 (2d Cir. 1990).

146. State v. Taft, 593 A.2d 973, 975 (Conn. App. Ct. 1991).

147. Jones v. State, 461 So. 2d 686, 699 (Miss. 1984).

148. *Id.*

149. United States v. Davis, 512 U.S. 452, 459 (1994). *Davis* rejected empirical evidence that demonstrated this standard would disadvantage some suspects, particularly women, who are less likely to make such a clear articulation. *Id.* at 460–61. Thus, the Court has been unwilling to alter constitutional requirements for the invocation of the *Miranda* right to counsel, even in light of strong sociolinguistic research that indicates some segments of American society are far less likely than other groups to make unequivocal and assertive statements. *See, e.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

150. *Davis*, 512 U.S. at 460–61.

D. Inconsistency as a Backdoor to Admit Otherwise Protected Silence

The Supreme Court has already spoken authoritatively on the use of omissions and inconsistencies between interrogation and trial testimony. In *Anderson*, the Court declined to extend the *Doyle* rule to situations where a defendant waived his *Miranda* rights and gave a post-arrest statement that was factually inconsistent with his testimony at trial.[151] But once a defendant has taken the stand and given factually contradictory testimony, how can a prosecutor go about impeaching the defendant? Can the prosecutor use the existence of inconsistency in a defendant's testimony as a backdoor to admit otherwise inadmissible and protected silence during interrogation? At least one appellate court has carved out such an exception to the *Doyle* doctrine.

The Fifth Circuit held in *Lofton v. Wainwright* that if a suspect does take the stand and contradicts his earlier statements in interrogation, then any choice to assert silence and end the interrogation becomes admissible.[152] There, the defendant was arrested on a robbery charge and Mirandized;[153] he then impliedly waived his *Miranda* rights and began answering questions.[154] Soon after, the defendant admitted involvement in the robbery before requesting a lawyer, thereby ending the interrogation.[155] However, the alibi he offered at trial was factually inconsistent with his answers given during interrogation.[156] Therefore, the trial court permitted the prosecutor to question the defendant on both the inconsistency in his testimony *and* the exercise of his right to silence,[157] causing the defendant to claim his rights under *Doyle* were violated.[158]

The Fifth Circuit disagreed with the defendant's claim, holding that the trial court's decision was a valid attempt that "aid[ed] in the quest for the truth."[159] The court in *Lofton* further reasoned that the prosecution could admit evidence of the defendant's silence during interrogation because it was probative as to the defendant's credibility.[160] Overall, the Fifth Circuit carved out a narrow and meaningful exception to the *Doyle* doctrine in cases where a suspect gives inconsistent testimony at trial, possibly giving prosecutors a means of sidestepping the protections afforded by *Doyle*.

---

151. *See* Anderson v. Charles, 447 U.S. 404, 404 (1980) (per curiam).
152. Lofton v. Wainwright, 620 F.2d 74, 78–79 (5th Cir. 1980).
153. *Id.* at 75.
154. *Id.*
155. *Id.*
156. *Id.* at 77.
157. *Id.* at 76.
158. *Id.* at 76–77.
159. *Id.* at 77.
160. *Id.* at 78–79.

IV.
RETHINKING *MIRANDA*: A PROPOSAL THAT COMPORTS WITH POLICY CONSIDERATIONS AND JUDICIAL PRECEDENT

In light of the foregoing cases, I argue that the right to silence ought to be rethought and clarified in a manner comporting with policy considerations and relevant judicial precedent. First, courts should enforce the *Anderson* and *Doyle* doctrines in a manner that strictly recognizes the distinction between omissions and inconsistencies. Such inconsistencies in testimony should not be used as a backdoor to admit otherwise inadmissible evidence of silence during interrogation. Second, affording defendants the right to selective invocation of silence aligns with constitutional and public policy concerns. Third, to avoid ambiguity and misinterpretation of a suspect's intent, invocation and selective invocation should only be recognized when the suspect affirmatively asserts her right to silence. Any other rule, whereby a person may "impliedly invoke" the right to silence, creates uncertainties that could hinder law enforcement. And fourth, to alleviate due process concerns, *Miranda* warnings should be expanded to notify suspects of their *Doyle* right to silence without the inference of guilt, of their right to selective silence, and of their obligations to explicitly invoke silence should they so choose. This would bridge the information asymmetry between law enforcement and citizenry.

A. Strict Application of the Anderson *and* Doyle *Doctrines*

Courts should enforce the *Anderson* and *Doyle* doctrines in a manner that carefully distinguishes between omissions and inconsistencies. Most importantly, inconsistencies in testimony should not be used as an excuse to admit otherwise inadmissible evidence of silence during interrogation, and courts should not permit prosecutors to comment on any silence by the defendant during interrogation, even if the silence was the result of selective invocation. These policy proposals align with the Court's concern in *Doyle* that silence during interrogation is "insolubly ambiguous."[161]

First, the argument advanced in *Lofton*, that protected silence ought to be admissible to impeach if a suspect has made inconsistent statements,[162] is out of line with previous precedent. More specifically, the court's insistence in *Lofton* that admission of silence would "aid in the quest for the truth"[163] is doctrinally unsupportable. *Doyle* rejected the notion that silence during interrogation has probative value, despite the state's argument that silence should be admissible for impeachment purposes not to prove guilt, but to "present to the jury all

161. Doyle v. Ohio, 426 U.S. 610, 617 (1976).
162. *Lofton*, 620 F.2d at 77.
163. *Id.*

information relevant to the truth."[164] The Court plainly rejected this argument, noting "there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation."[165] By referring to silence as "insolubly ambiguous," the Court seems fundamentally concerned that a jury could misunderstand or misinterpret evidence of silence during interrogation. In fact, the Court was so concerned with a jury misunderstanding the ambiguity involved in the exercise of silence that it found it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[166]

Admittedly, proponents of *Lofton* may contend that silence has more probative value when viewed in concert with evidence of inconsistency. But this fundamentally undermines the central holding of *Doyle*, which reasoned that there was an implicit assurance in *Miranda* warnings that the exercise of legal rights would carry no penalty. Hence, permitting the admission of silence in the narrow circumstances proscribed by *Lofton* violates a suspect's reasonable expectations. Further, the court in *Lofton* never clearly articulated how the existence of an inconsistency in testimony justifies the abrogation of a suspect's fundamental due process rights.

Second, on a policy level, the admission of silence for impeachment purposes after a demonstration of inconsistency does not improve the probative value of the silence, as suggested in *Lofton*.[167] If anything, it increases the chances that the silence will prejudice the defendant. When viewed in conjunction with inconsistencies in testimony, no matter how insignificant, a jury is more likely to view a legitimate exercise of the *Miranda* right to silence as suspicious. This is the exact problem the Court hoped to avoid in *Doyle*—juries drawing unfair and prejudicial conclusions from the ambiguous exercise of a protected right. Overall, courts should strictly enforce the *Anderson* and *Doyle* distinctions between inconsistencies and omissions, and the *Anderson* doctrine should not be used as a backdoor to admit evidence of silence for impeachment purposes.

B. Selective Invocation Accords with Constitutional and Public Policy Concerns

Courts should permit criminal suspects to selectively invoke their right to silence in post-arrest custodial interrogations. Such a rule would effectively balance the competing interests of law enforcement and the Fifth Amendment privilege against self-incrimination.

First, this rule would remove potential hindrances that would otherwise prevent criminal suspects from cooperating and sharing information with law

164. *Doyle*, 426 U.S. at 617.
165. *Id.* at 617 n.8.
166. *Id.* at 618.
167. *Lofton*, 620 F.2d at 78.

enforcement. Should a criminal defendant have no right to selectively invoke, she would have little motivation to talk to law enforcement officers. Imagine a criminal suspect who was involved in a crime and is thus reluctant to cooperate with police officers. Now imagine this suspect is fully informed of her rights and obligations during custodial interrogation. In a jurisdiction permitting prosecutors to use selectively invoked silence as evidence of guilt at trial, this suspect would have little motivation to speak to officers at all. At the point that she begins speaking to officers, she risks impliedly waiving her right to silence under *Butler* or *Berghuis*. More importantly, any decision by this suspect to stop talking could be used to imply guilt. If she has anything to hide, this suspect benefits from invoking silence from the minute she walks into the interrogation room, ending the conversation before it ever starts, and preventing crucial information from being disclosed.

If the suspect is in a jurisdiction permitting selective invocation of the right to silence, however, officers could assure her that she can end the conversation (or not answer a particular question) at any point. Were this message communicated during the *Miranda* warnings, a well-informed suspect may reason that she will endure minor disadvantage in speaking to law enforcement—if she does not want to talk about a specific issue, she need only say so. Admittedly, however, this argument remains only theoretical. More research is needed to test the effectiveness of selective invocation in compelling a suspect's cooperation.

Second, a rule favoring selective invocation accords with constitutional guarantees. As the Court recognized in *Miranda*, "[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[168] *Mosley* later echoed this call to protect free will from the threat of intimidation and indefinite consequences, holding that a suspect's invocation of the right to silence should be "'scrupulously honored.'"[169]

The decisions in *Miranda* and *Mosley* demonstrate that the Court is fundamentally concerned with and recognizes the interdependence of (1) voluntariness and (2) protecting a suspect's privilege against self-incrimination.[170] According to *Malloy v. Hogan*, a suspect's statements should only be admissible when they are made as an "unfettered exercise of his own will."[171] *Doyle* further buttressed this proposition, interpreting the privilege against self-incrimination to include the protection of a suspect's exercise of

168. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

169. Michigan v. Mosley, 423 U.S. 96, 104 (1975).

170. It is worth noting that the *Miranda* Court stressed that "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460.

171. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

the right to silence without an "insolubly ambiguous" inference of guilt.[172]

Much like the Court's recognition in *Doyle*, selective invocation is no less "insolubly ambiguous" than any other type of invocation. As the Court acknowledged, any attempt to exercise silence may be nothing more than an assertion of a suspect's fundamental rights.[173] This comports with the implied assurance in *Miranda* warnings that silence will carry no penalty.[174] Before interrogation, a law enforcement officer only communicates a small handful of rights to the suspect via *Miranda* warnings—the right to retain counsel, the right to silence, and notification that anything she says may be used against her.[175] Suspects rely upon these representations when making decisions, causing the Court in *Doyle* to conclude it would be fundamentally unfair and prejudicial to allow prosecutors to infer guilt from an exercise of the privilege against self-incrimination.[176]

Third, the right of selective invocation alleviates the inequitable situation the Court recently sanctioned in *Berghuis* by permitting criminal suspects who have impliedly and unknowingly waived their right to silence to re-invoke this right. The facts of *Berghuis* illustrate a cautionary example. The suspect never gave an explicit waiver of *Miranda*, but instead remained generally silent for hours; nonetheless, his eventual answer to one single question impliedly waived his *Miranda* rights, even though he may not have realized as much.[177] In jurisdictions not permitting re-invocation of the right to silence without the inference of guilt, the suspect's refusal to answer any additional questions thereafter would be admissible evidence in trial. All answers or invocations made after a waiver of *Miranda* would be considered part of an "otherwise admissible conversation."[178] Once again, this situation would permit prosecutors to infer guilt from a voluntary, explicit exercise of the right to silence, thereby undermining the basic principles of *Doyle* and ignoring the fundamental concerns with a suspect's intent.

In practice, "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[179] A rule denying selective invocation rights can be used to admit and exploit "insolubly ambiguous" exercises of the privilege against self-incrimination, violating the most fundamental principles underlying *Miranda*, *Doyle*, and *Mosley*. Further, a denial of the rule may also harm the administration of law enforcement. As such, a rule favoring *Doyle* protection for selective invocation rights aligns with constitutional and public policy considerations.

---

172. Doyle v. Ohio, 426 U.S. 610, 617–18 (1976).
173. *Id.*
174. *Id.* at 618.
175. *Id.* at 617.
176. *Id.* at 619–20.
177. Berghuis v. Thompkins, 130 S. Ct. 2250, 2256–57, 2262–63 (2010).
178. United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002).
179. Miranda v. Arizona, 384 U.S. 436, 455 (1966).

C. Placing the Burden of Invocation on the Suspect Protects Effective Administration of Law Enforcement

A rule permitting selective invocation seems plausible, but it does raise at least one major policy concern: How do we know when a suspect has invoked her rights? I argue that criminal suspects should bear the burden to affirmatively and explicitly invoke their right to silence as suggested in *Berghuis*, and additionally I argue *Miranda* warnings should be fundamentally altered to notify criminal suspects of their obligation to invoke their right to silence clearly and explicitly. This policy proposal would alter the current information asymmetry between law enforcement and criminal suspects, and may further alleviate concerns expressed by some scholars that explicit invocation requirements disadvantage women.[180]

My argument that criminal suspects ought to bear the burden to explicitly and clearly invoke their right to silence is doctrinally consistent with the Court's concern for effective law enforcement. However, one of the most serious arguments that may be levied against this rule is its potential impact on women. Professor Janet Ainsworth, a law professor at Seattle University School of Law, has explored sociolinguistic research indicating that during interrogations men were more likely to speak assertively and directly, while women more frequently adopted deferential speech patterns.[181] Hence, Ainsworth argued that "[b]ecause majority legal doctrine governing a person's rights during police interrogation favors linguistic behavior more typical of men than of women, asking the 'woman question' reveals a hidden bias in this ostensibly gender-neutral doctrine."[182] Thus, Ainsworth argued that only a *per se* invocation rule requiring police to end interrogation upon any type of request or mention of counsel, however ambiguous, would protect women and men equally.[183]

Nevertheless, the Court found Ainsworth's argument unpersuasive in *Davis*. Justice O'Connor's majority opinion reasoned that "[i]n considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement."[184] Police officers must decide whether they may question a criminal suspect. Hence, the Court in *Davis* found that Ainsworth's *per se* rule would force police officers "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though [she] has not said so, with the threat of suppression if they guess wrong."[185] What, after all, would qualify as a "reference by the suspect to

180. *See* Ainsworth, *supra* note 149.
181. *Id.* at 262.
182. *Id.*
183. *Id.* at 306–07, 320.
184. Davis v. United States, 512 U.S. 452, 461 (1994).
185. *Id.*

a desire for counsel"[186] under Ainsworth's standard? The Court appears fundamentally concerned about impairing law enforcement's ability to effectively question criminal suspects. Further, *Davis* seems to suggest that constitutionally, concerns about effective law enforcement outweigh concerns about disparate effects on women.

But the Court's solutions in *Davis* and *Berghuis* of placing the burden of explicit invocation on the criminal suspect still seems unsatisfying in light of the deep-seated inadequacies of current *Miranda* warnings. As the majority in *Davis* posited, "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves."[187] But based upon current *Miranda* warnings, how would a criminal suspect intuitively understand that she must speak to invoke her right to silence? To alleviate this information asymmetry, the next Section discusses comprehensive changes to current *Miranda* warnings that could address Ainsworth's concerns while protecting the effective administration of law enforcement.

D. Forming Comprehensive Miranda *Warnings to Inform Suspects of Their Right to Silence and Selective Invocation*

The typical *Miranda* warning today does not accurately convey to criminal suspects the full scope of their rights. Information asymmetry separates law enforcement from criminal suspects—law enforcement is trained in the complexities of *Miranda*, while the average citizen knows little about the doctrine. This imbalance of knowledge gives law enforcement an advantage that it could potentially exploit. To remedy this concern, I argue that current *Miranda* warnings should include a warning about the right to silence and invocation, so that suspects are notified of the steps they must take to invoke silence and their *Doyle* right to protected silence.

Some courts have expressed skepticism about the argument that *Miranda* waivers should evolve to ensure that a suspect understands the laws relating to her alleged criminal actions or interrogation. For instance, the Supreme Court of New Jersey held in *State v. McKnight* that "[n]owhere does *Miranda* suggest that the waiver of counsel at the detectional stage would not be 'knowing' or 'intelligent' if the suspect did not understand the law."[188] Professor James J. Tomkovicz, a law professor at the University of Iowa College of Law, agrees, pointing out that "[t]he policies of the [F]ifth [A]mendment privilege do not demand rationality, intelligence, or knowledge, but only a voluntary choice not to remain silent."[189] These points are reflected within current doctrine, since local law enforcement agencies are not required to offer the exact same

186. *See* Ainsworth, *supra* note 149, at 301.

187. *Davis*, 512 U.S. at 460.

188. State v. McKnight, 243 A.2d 240, 251 (N.J. 1968).

189. James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1049 (1986).

Miranda warnings as other law enforcement agencies.[190] *Miranda* warnings need only "reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"[191]

It is unclear why any jurisdictions accept this variation of the *Miranda* doctrine, as such flexibility afforded to law enforcement only exacerbates the information asymmetry between them and criminal suspects: not only does law enforcement have more knowledge than the average suspect about *Miranda* requirements, but *Miranda* warnings also need not completely and accurately communicate this information to suspects before interrogation. Hence, law enforcement is placed in an advantageous position, with opportunities to exploit.

On a public policy level, such an information imbalance raises serious concerns. After the conservative holding in *Berghuis*, a suspect's general silence in the face of interrogation, coupled with a failure to affirmatively end the interrogation, may be used as evidence of an implied waiver of the right to silence.[192] Expecting suspects to intuitively grasp such counterintuitive concepts is troubling when "many suspects naturally believe, albeit incorrectly, that remaining silent will make them 'look guilty' and will be used against them as evidence of guilt."[193]

To resolve these problems, I argue that current *Miranda* warnings should be modified to include a comprehensive right to silence and selective invocation warning. Professor Mark A. Godsey of the University of Cincinnati College of Law has made a similar proposal, arguing that the current instructions ought to be "buttressed by a new 'right to silence' warning that provides something to the effect of: 'If you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.'"[194] Godsey argued that *Miranda* warnings should be expanded to include a warning regarding the right to silence, a right to re-invoke silence, and a more detailed explanation of the right to counsel.[195] I argue, however, that *Miranda* should be expanded even further to include a notification of the steps necessary to invoke silence. Although Godsey's proposal offers an idealistic and far-reaching upheaval of *Miranda* warnings, it neither addresses nor contemplates a situation similar to *Berghuis*, where a suspect impliedly (or even unknowingly) waives her right to silence. In

190. *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 202–03 (1989) (noting that "'the "rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant'" (alterations in original) (quoting California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam))).

191. *Id.* at 203 (alterations in original) (quoting *Prysock*, 453 U.S. at 361).

192. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010).

193. Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 793 (2006).

194. *Id.* at 783–84.

195. *Id.*

the same spirit of comprehensiveness, *Miranda* warnings should ideally warn criminal suspects with a statement to the effect of: "If you choose to invoke your right to silence or counsel, you must do so clearly and explicitly by affirmatively stating your intention to exercise that right."

At least one *Miranda* scholar argues that the Fourteenth Amendment's Due Process Clause requires the government to provide notice to citizenry before depriving them of liberty interests.[196] The additions discussed above would directly address Due Process Clause concerns by ensuring that defendants adequately understand their rights and obligations should they want to invoke the right to silence. With such a specific instruction, suspects would be well informed of their rights in a manner that is "sufficiently broad to ensure that the suspect is . . . in the driver's seat and controls her own destiny with respect to the interrogation and the conditions under which she may agree to talk to the police."[197]

CONCLUSION

The foundation of *Miranda* and the Fifth Amendment is currently under attack, as suspects are less aware than ever of the rights they possess during interrogations. For instance, courts cannot expect suspects to intuitively grasp recently introduced concepts, such as the doctrine of implied waiver of the right to silence articulated in *Berghuis*. This lack of awareness is partially due to circuit court splits on issues like selective invocation and the right to silence, making suspects' rights during interrogation doctrinally unclear. Further, despite the changing rights and obligations afforded to criminal defendants since the inception of *Miranda*, "the content of these famous four warnings has never been modified or even been subjected to systematic scrutiny."[198] *Miranda* warnings should evolve "as we gain new insights into their effectiveness (or lack thereof)."[199]

To remedy the uncertainty surrounding the current right to silence, I offer a multifaceted proposal. First, courts should consistently honor the distinction between inconsistencies and omissions to avoid the admission of protected silence for impeachment purposes. Second, criminal suspects should be permitted to selectively invoke silence after an earlier waiver; and in possessing such a right of invocation, they should bear the burden of making an explicit assertion. Third, to protect due process rights, law enforcement ought to adequately inform suspects of their Fifth Amendment rights. Finally, current *Miranda* rights should be amended to accurately communicate the evolving rights and obligations afforded to suspects.

---

196. George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1091, 1113–14 (2001).

197. Godsey, *supra* note 193, at 824–25.

198. *Id.* at 782–83.

199. *Id.*

The right to silence is fundamental to preserving fairness within our justice system. During custodial interrogation, police temporarily deprive suspects of individual freedom,[200] "us[ing] sophisticated tactics . . . to pressure suspects to confess,"[201] and this right to silence is an essential safeguard afforded to criminal suspects to protect against possible self-incrimination. Rather than lamenting the continued erosion of Fifth Amendment protections, courts should view *Miranda* as a dynamic, and not static, doctrine—one that should be continually altered by the courts to reflect our changing conception of the privilege against self-incrimination.

200. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
201. Weisselberg, *supra* note 3.