WHEN SILENCE OUGHT TO BE GOLDEN: WHY THE SUPREME COURT SHOULD UPHOLD THE SELECTIVE SILENCE DOCTRINE IN THE WAKE OF *SALINAS V. TEXAS*

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I. INTRODUCTION

The scene unfolds like this: "[P]etitioner [l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up. After a few moments of silence, the officer asked additional questions, which petitioner answered."[1] That scene will now end like this: "[I]t would have been a simple matter for him to say he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment."[2]

This situation is a classic example of pre-*Miranda*[3] noncustodial selective silence, meaning the suspect chose not to answer a particular question but answered others throughout a voluntary interview by law enforcement officers.[4] The scene displayed above formed the facts of *Salinas v. Texas*, in which the defendant voluntarily agreed to be interviewed by the police. Accordingly, the defendant was not administered his *Miranda* rights prior to the interview.[5] The Supreme Court ruled that Salinas's failure to answer any given question could be used against him at trial because he never invoked his Fifth Amendment right against self-incrimination.[6] In essence, the Court determined that in the context of a noncustodial interview, one's silence does not affirmatively invoke the Fifth Amendment right to remain silent.[7]

Consider another situation—one left untouched by the Court—in which a defendant exercises selective silence during a post-*Miranda* custodial interrogation. Assume the suspect has been taken into custody and read his *Miranda* rights, which he waives.

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[1] Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (citations omitted) (internal quotation marks omitted).

[2] *Id.* at 2180.

[3] *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (instituting mandatory warnings to protect an arrestee's privilege against self-incrimination during a custodial interrogation).

[4] For this Note's definition and illustrative examples of selective silence see *infra* Part II.B–C.

[5] *Salinas*, 133 S. Ct. at 2178.

[6] *See id.* at 2180 ("Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.").

[7] *See id.* at 2182 ("A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.").

Then, the suspect proceeds to answer questions during an ensuing custodial interrogation. Subsequently, however, the suspect refuses to answer one or multiple questions. Can the accused's exercise of selective silence be used against him at trial as evidence of his guilt? Does *Miranda* distinguish this situation from the noncustodial interview in *Salinas*? These are questions the Supreme Court has yet to answer, but four circuit courts have concluded that the selective silence doctrine bars the use of this silence as evidence of guilt at trial.[8]

The selective silence doctrine preserves an arrestee's right to refuse to answer certain questions or to take certain actions—for example, submit to a polygraph[9]—as requested by interrogators during post-*Miranda* interrogations without fear that these refusals will be used against him at trial.[10] The doctrine, however, currently does not protect selective silence in either noncustodial or pre-*Miranda* custodial situations.[11] The circuit courts that uphold the doctrine conclude that a defendant's selective silence during a post-*Miranda* custodial interrogation cannot be used as substantive evidence of his guilt[12] or, in certain circuits, for impeachment.[13] Thus, an arrestee's silence is protected,

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[8] *See, e.g.*, Hurd v. Terhune, 619 F.3d 1080, 1088–89 (9th Cir. 2010) (holding that a suspect has the right to remain selectively silent by choosing to answer some questions and refusing to answer others without the risk of that silence being used against him at trial); United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995) (noting that the prosecution may not use a suspect's silence after waiving *Miranda* as substantive evidence of his guilt); United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993) (holding that a suspect may refuse to answer certain questions and still be confident that *Doyle* will protect his silence); United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974) (concluding that a suspect who in any way demonstrates his reliance on *Miranda* may not have his silence used against him).

[9] *See Hurd*, 619 F.3d at 1084, 1089 (rejecting the prosecution's use of the defendant's refusal to take a polygraph and to reenact the incident in question).

[10] *Id.* at 1087; *see also* United States v. May, 52 F.3d 885, 890 (10th Cir. 1995) (noting that a defendant's partial silence does not preclude him from claiming his due process rights have been violated).

[11] *See* United States v. Harrold, 796 F.2d 1275, 1279 (10th Cir. 1986) (concluding that references to defendant's pre-*Miranda* silence was permissible but reference to his post-*Miranda* silence was not).

[12] *E.g.*, *id.* at 1280 n.5, 1281 (concluding the government impermissibly used the defendant's silence for impeachment purposes and as substantive evidence of his guilt, but that this use was harmless); *Canterbury*, 985 F.2d at 486 (concluding the prosecution can only impeach with a defendant's prior inconsistent statements, not his silence); *see also infra* Part II.B.*4* (discussing impeachment versus substantive use of silence).

[13] *See Hurd*, 619 F.3d at 1090–91 (holding that the inference of guilt from use of defendant's silence had an injurious effect on the jury's verdict).

notwithstanding his waiver of *Miranda* rights prior to the start of the interrogation. Two circuit courts, however, have concluded that use of defendant's selective silence is appropriate at trial to prove guilt.[14] These circuits contend that once a defendant waives his *Miranda* rights, any subsequent silence during the interrogation is admissible.[15] The Eighth Circuit has gone so far as to conclude that the suspect's refusal to answer additional questions is also admissible at trial as substantive evidence of his guilt.[16]

The split over the selective silence doctrine grows wider, exemplified by the Eighth Circuit's ruling in *United States v. Burns*[17] and the Ninth Circuit's ruling in *Hurd v. Terhune*.[18] In *Burns*, the defendant waived his *Miranda* rights and responded to questions in a custodial interrogation that related to an alleged scheme of credit card fraud.[19] When the police inquired further and asked whether the defendant had recruited others to participate in the scheme, the defendant stared silently back at those questioning him.[20] After failing to answer this particular question, the defendant answered subsequent questions but eventually decided to end the interrogation.[21] At trial, the district court admitted testimony of the defendant's silence to the question regarding whether he recruited of others into the scheme and of his eventual refusal to answer additional questions.[22] The Eighth Circuit affirmed this ruling and held that the defendant's silence in response to one question, and the eventual ending of the

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[14] *See* United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002) (maintaining that admission of defendant's silence in response to one question during an interrogation did not violate due process); United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977) (concluding that because the defendant had answered questions after waiving his right to remain silent, reference to his silence was admissible at trial).

[15] *See Burns*, 276 F.3d at 442 (ruling that once a defendant waives *Miranda*, the whole conversation is admissible, including his silence); *Goldman*, 563 F.2d at 503 (concluding that the defendant's selective silence was not an invocation of his right to remain silent and thus is admissible evidence at trial).

[16] *See Burns*, 276 F.3d at 442 (holding that when a defendant waives *Miranda*, any subsequent refusal to answer additional questions may be noted by the prosecution at trial).

[17] *Id.*

[18] *Hurd*, 619 F.3d at 1087.

[19] *Burns*, 276 F.3d at 441.

[20] *Id.*

[21] *Id.*

[22] *Id.*

interrogation, were all part of an otherwise admissible conversation, the admission of which did not violate the defendant's due process rights.[23]

The Ninth Circuit, on the contrary, held that selective silence was not part of an otherwise admissible conversation.[24] In *Hurd*, the defendant was arrested and read his *Miranda* rights, which he waived.[25] The police then questioned the defendant about the murder of his wife, and the defendant was initially responsive; when the police asked him to take a polygraph and reenact the shooting, however, he refused.[26] At trial, the state used the defendant's refusal to submit to a polygraph or reenact the shooting as evidence of his guilt.[27] The Ninth Circuit reversed and ruled the refusals to be inadmissible under the Supreme Court's ruling in *Doyle v. Ohio*, which established that a defendant's post-*Miranda* custodial silence could not be used against him for impeachment purposes at trial.[28]

This Note concurs with the Ninth Circuit's holding and contends that arrestees should have the right to remain selectively silent during a post-*Miranda* custodial interrogation and that use of this silence to impeach defendants or as substantive evidence of their guilt should be prohibited at trial. First, it contends that the selective silence doctrine accords with the Fifth Amendment right against self-incrimination and the Fourteenth Amendment's Due Process Clause. Further, it asserts that the doctrine aligns with Supreme Court precedent, is supported by the public policy considerations that originally led to the institution of the *Miranda* warnings, and promotes the goal of protecting an individual's privilege against self-incrimination. Finally, it concludes that the Court should uphold the protection of post-*Miranda* silence by distinguishing pre-*Miranda* silence in non-custodial and custodial situations from selective silence in post-*Miranda* custodial interrogations. By distinguishing the latter interrogations from

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[23] *Id.* at 442.

[24] Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010).

[25] *Id.* at 1083.

[26] *Id.* at 1083–84.

[27] *Id.* at 1084.

[28] *Id.* at 1088; *see also* Doyle v. Ohio, 426 U.S. 610, 619 (1976) ("[T]he use for impeachment purposes of a petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.").

the former situations, the Court would draw a bright-line rule to limit the reach of the selective silence doctrine's protection.

Part II of this Note provides a background of the doctrine of selective silence, beginning with the development of the right to remain silent and the Court's interpretation of this right. Additionally, Part II outlines the circuit split surrounding the doctrine. Part III argues that the Supreme Court should distinguish post-*Miranda* selective silence from the situation presented in *Salinas*. It advocates for a mirandized arrestee's right to remain selectively silent and offers both constitutional and public policy reasons for upholding the doctrine. Part IV concludes with a brief summary of this Note and calls for the Supreme Court to resolve this growing divergence among the circuit courts.

II. BACKGROUND

A. THE RIGHT TO REMAIN SILENT AND *MIRANDA*

The Fifth Amendment's broad "right to remain silent"[29] originated in three separate privileges:

> [T]he defendant's privilege, which precluded the prosecution from compelling a criminal defendant to be a witness at his own trial. There was the witness's privilege, which granted to any witness in any legal proceedings the right to refuse to answer specific questions that might tend to incriminate him in a subsequent criminal case . . . . And there was the suspect's privilege, which prohibited the government from using involuntary statements that were elicited from the defendant by pretrial coercion.[30]

The history of this last privilege must be told to understand the purpose and necessity of *Miranda*.

1. The Road to Miranda. Fear that the government would use coercive police tactics to elicit a suspect's involuntary confession

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[29] *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[30] ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, at 5 (2008).

plagued the American justice system throughout the nineteenth and early twentieth centuries.[31] Of central concern was police use of the "third degree," a term which "came to connote prolonged interrogation, possibly accompanied by force or threats of force."[32] In 1936, the landmark case of *Brown v. Mississippi* confronted such coercive police tactics, and the Supreme Court resolutely declared that a defendant's confession obtained through "third degree practices will fail due process."[33] The defendants in *Brown* had been brutally tortured in order to obtain confessions to an alleged rape.[34] The Court held that because the convictions rested on confessions obtained from violence, the resulting trial was merely a "pretense" and thus violated the Due Process Clause.[35] Rooted in the Fifth Amendment, the due process voluntariness test employed by the Court in *Brown* is applicable to the states through the Fourteenth Amendment.[36]

Despite this powerful ruling in *Brown* aimed at ending "third degree" practices, the Supreme Court's rulings in the three decades after *Brown* and leading up to *Miranda* were unpredictable regarding what constituted a voluntary custodial confession.[37] The Court created a laundry list of factors to use when evaluating the voluntariness of a confession, which included the characteristics of the suspect, the conditions of detention, access to a lawyer, and the manner of interrogation.[38] The Court's failure to create an unambiguous test contributed to inconsistent rulings in state courts.[39] Additionally, in the three decades leading

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[31] *See* LAWRENCE S. WRIGHTSMAN & MARY L. PITMAN, THE *MIRANDA* RULING: ITS PAST, PRESENT, AND FUTURE 30–33 (2010) (examining the Supreme Court's focus on involuntary confessions in the early twentieth century through a discussion of Supreme Court decisions).

[32] WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 14 (2001).

[33] Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[34] *Id.* at 282–83.

[35] *Id.* at 286.

[36] *See* WHITE, *supra* note 32, at 39–40 (noting that while the Court did not refer to the due process voluntariness test in *Brown*, the Court was employing this test prior to *Miranda*).

[37] WRIGHTSMAN & PITMAN, *supra* note 31, at 33.

[38] *See id.* at 33–34 (discussing the "totality of the circumstances" approach the Court attempted to employ with the due process voluntariness test).

[39] *See id.* at 34 ("This failure to be explicit led to a disturbing inconsistency in rulings by lower courts.").

up to *Miranda*, the Court covered a wide variety of situations in its thirty-six opinions on the voluntariness of confessions, with some confessions being upheld as voluntary and others being thrown out.[40] This irregularity resulted in the state courts picking and choosing authority to either admit or exclude a confession as desired.[41] By the 1960s, however, state court rulings became more consistent, and the court shifted its focus from curbing physically abusive interrogation practices[42] to addressing interrogation practices that imposed psychological pressures on suspects.[43] The due process involuntariness test proved to be an ineffective tool in resolving this concern, as determining which police interrogation practices should be admissible became increasingly more difficult.[44]

In addition to the growing concern about abusive psychological interrogation tactics, the Court issued two major rulings in 1964 that advance suspects' rights:[45] *Massiah v. United States*[46] and *Escobedo v. Illinois*.[47] The Court held in *Massiah* that if a suspect has been indicted, any incriminating statements the suspect has made absent counsel are inadmissible at trial, as their admission would violate a suspect's Sixth Amendment right to the assistance of counsel in his defense.[48] Additionally, in *Escobedo*, the Court held the police's refusal to allow an arrestee to consult with an attorney during his interrogation violated his Sixth Amendment right to counsel and any incriminating statement elicited by the police during that interrogation could not be used against the defendant at trial.[49] Thus, by 1964, the Court had laid the

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[40] *Id.*

[41] *Id.* at 33.

[42] *See* WHITE, *supra* note 32, at 48 (noting that the Warren Court also grew concerned with regulating interrogation tactics that relied on psychological pressures).

[43] *Id.*

[44] *Id.* at 47–48.

[45] *See* WRIGHTSMAN & PITMAN, *supra* note 31, at 37–39 (discussing the Court's shift towards granting more rights to suspects).

[46] 377 U.S. 201 (1964); *see also* WRIGHTSMAN & PITMAN, *supra* note 31, at 37–39 (discussing the Court's shift towards granting more rights to suspects).

[47] 378 U.S. 478 (1964).

[48] *Massiah*, 337 U.S. at 205–06.

[49] *Escobedo*, 378 U.S. at 490–91.

foundation for one of its most significant rulings protecting suspects' rights during an interrogation: *Miranda v. Arizona*.[50]

2. The Miranda *Warning.* The decision that became *Miranda v. Arizona* began as actually four consolidated cases, each involving the "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."[51] The Court began its opinion in *Miranda* with an extensive background discussion of the manuals police used to train interrogators in obtaining confessions through psychological pressure.[52] In addition, the Court recognized that even if police did not employ the "third degree," these psychological techniques still exacted too "heavy [of a] toll on individuals and tracks on the weakness of individuals."[53] Further, the Court determined that there was a pressing need to establish procedural safeguards during interrogations to ensure that statements made therein were truly the product of a suspect's free will.[54] Accordingly, the Court established the following procedural safeguards to protect suspects:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[55]

The Court additionally specified:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any

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[50] *See, e.g.*, WRIGHTSMAN & PITMAN, *supra* note 31, at 37–40 (discussing the Supreme Court cases that led to the *Miranda* decision).

[51] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[52] *See id.* at 448–55 (discussing interrogation qualities such as "privacy" and "patience and perseverance," which led to successful interrogations and confessions).

[53] *Id.* at 455.

[54] *Id.* at 458.

[55] *Id.* at 479.

> manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[56]

The Court further stated that the *Miranda* warnings must be given "when a individual is taken into custody or otherwise deprived of his freedom . . . in any significant way," as the privilege against self-incrimination is in imperil in these situations.[57] Finally, the Court concluded that if an interrogation is held without an attorney present, and the suspect confesses, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived . . . his right to . . . counsel."[58]

These all-familiar *Miranda* warnings and rights were subject to criticism on both sides of the debate. Several defendants'-rights commentators believed that the warnings were inadequate because *Miranda* did not require a suspect's lawyer to be present at all times for interrogations, and thus police would play the dual—and oft-conflicting—roles of interrogator and constitutional rights protector.[59] The critics of *Miranda*, on the contrary, contended that *Miranda* unduly burdened police and shielded guilty suspects.[60] The concerns of the latter commentators proved to baseless, as studies performed in the 1960s and 1970s demonstrated that the police were able to comply with *Miranda* while still obtaining confessions.[61] Still, other questions lingered after *Miranda* regarding the waiver and invocation of the *Miranda* rights.

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[56] *Id.* at 444–45.

[57] *Id.* at 478–79; *see also, e.g.*, Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 789 (noting that each warning within the *Miranda* warning plays a role in dispelling the inherent pressures within the interrogation room); PAUL RUSCHMANN, MIRANDA RIGHTS 18 (2007) (discussing the procedural safeguards laid out by the Court in *Miranda*).

[58] *Miranda*, 384 U.S. at 475.

[59] WHITE, *supra* note 32, at 56–57.

[60] *Id.* at 57.

[61] *Id.* at 60.

3. Waiver and Invocation. The Court addressed the issue of waiver in *North Carolina v. Butler*, where it held that a suspect did not have to explicitly waive his right to remain silent but rather his behavior and statements could properly indicate waiver.[62] Additionally, the Court held in *Connecticut v. Barrett* that a suspect who makes oral incriminating statements, despite refusing to give a written statement, without counsel present may still be found to have waived his right to remain silent.[63] Because the *Miranda* warning was administered to the defendant, and he only requested that a lawyer be present for the written statement, the defendant's oral statements given after his waiver of *Miranda* were deemed admissible.[64]

With respect to invocation of the right to remain silent, the Court held in *Michigan v. Mosley* that a suspect may invoke his right to remain silent at any time during the interrogation and that this invocation of *Miranda* must be "scrupulously honored" by the ceasing of the interrogation.[65] Further, the Court ruled this requirement to "scrupulously honor" an invocation counteracts the coercive nature of police interrogations, but the termination of an interrogation after a suspect invokes his *Miranda* rights is not indefinite in nature.[66] The police can attempt to interrogate the suspect again if a reasonable amount time passes between the invocation and the second interrogation attempt.[67]

In addition to *Mosley*, the Court recently concluded in *Berghuis v. Thompkins* that a suspect must unequivocally and unambiguously invoke his right to remain silent.[68] The Court reasoned that "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's under intent and face

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[62] *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("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.").

[63] *See* Connecticut v. Barrett, 479 U.S. 523, 529 (1987) ("[The defendant's] limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with the authorities.").

[64] *Id.* at 529–30.

[65] Michigan v. Mosley, 423 U.S. 96, 103–04 (1975) (citing Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

[66] *Id.* at 102–04.

[67] *Id.* at 106.

[68] Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010).

the consequence of suppression 'if they guess wrong.' "[69] Consequently, the Court ruled the defendant in *Berghuis*, who had remained largely silent during the interrogation, except for inculpatory statements made after nearly three hours of interrogation, did not invoke "unambiguously" and "unequivocally" his right to remain silent.[70]

Beyond these questions surrounding waiver and invocation, *Miranda* also generated uncertainties regarding the use of a suspect's omissions and inconsistent statements in a post-*Miranda* custodial interrogation. The Court addressed several of these concerns in *Doyle v. Ohio*.[71]

B. THE DEVELOPMENT OF THE SELECTIVE SILENCE DOCTRINE

1. Doyle v. Ohio *and Omissions.* At issue in *Doyle* was not the use of selective silence as this Note defines selective silence.[72] *Doyle*, like *Miranda*, was a group of consolidated cases that each concerned "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest."[73] The Court only narrated the facts surrounding the case of Doyle, a defendant who had been arrested for selling marijuana and claimed at trial that it was a "frame-up," though he had not told the "frame-up" story to the interrogators.[74] The Court in *Doyle* provided the necessary language that laid the foundation for the selective silence doctrine.[75] In *Doyle*, the state contended that, out of necessity, it should have the right to cross-examine the defendant about his reason for giving an exculpatory story at trial but failing to give this same story during a post-arrest

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[69] *Id.* at 382 (quoting Davis v. United States, 512 U.S. 452, 461 (1994)).

[70] *Id.* at 375–76, 382.

[71] 426 U.S. 610 (1976).

[72] *See supra* Part I (defining selective silence as the right to remain selectively silent on a question-to-question basis or the right to refuse to take an action requested by an interrogator after waiving *Miranda* rights).

[73] *Doyle*, 426 U.S. at 611 (1976).

[74] *Id.* at 612–13.

[75] *See id.* at 618 ("[I]t 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.").

interrogation.[76] The state did not suggest the defendant's silence could be used as substantive evidence of his guilt but sought to use it only for impeachment purposes.[77]

The Court declared, however, that "[s]ilence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[78] In addition, the Court concluded that the *Miranda* warnings might not expressly assure suspects that their silence during an interrogation will not be used at trial, but that such assurance is implicit in the issuance of these warnings.[79] The Court's holding in *Doyle* clearly denounced the use of omissions in interrogations for impeachment purposes,[80] and while the defendants' situation in *Doyle* differs factually from the situation with which this Note is concerned, the holding of *Doyle* demonstrates the Court's inclination that a defendant's reliance on *Miranda* warnings and subsequent silence should to be earnestly protected at trial.

2. Anderson v. Charles *and Inconsistencies in Testimony.* In *Anderson v. Charles*, the Court declined to extend *Doyle* to the impeachment of a defendant's testimony with prior inconsistent statements made during a custodial interrogation.[81] In *Anderson*, the defendant gave inculpatory responses during an interrogation surrounding his involvement in a car theft and murder.[82] At trial, the defendant told a different account of the events surrounding the stolen car, and the prosecutor confronted the defendant with his prior inconsistent statements.[83] The Court held that *Doyle* was inapplicable to the situation at hand because *Doyle* concerned the use of a criminal defendant's prior silence for impeachment at trial; it did concern inquiries into prior inconsistent statements on

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[76] *Id.* at 616–17.

[77] *Id.* at 617; *see also infra* Part II.B.*3* (discussing the difference between the substantive use of silence and the use of silence for impeachment purposes).

[78] *Doyle*, 426 U.S. at 617; *see also infra* Part II.B.*3* (discussing the difference between the substantive use of silence and the use of silence for impeachment purposes).

[79] *Doyle*, 426 U.S. at 618.

[80] *See id.* (noting that such use would be "a deprivation of due process").

[81] Anderson v. Charles, 447 U.S. 404, 409 (1980) (per curiam).

[82] *Id.* at 404–05.

[83] *Id.* at 405–06.

cross-examination.[84] The Court further noted that while "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version . . . . *Doyle* does not require any such formalistic understanding of 'silence' . . . ."[85] The Court, therefore, declared the use of defendant's post-*Miranda* omissions for impeachment purposes to be impermissible at trial[86] but the use of prior inconsistent statements made under the same circumstances to be permissible.[87]

3. Silence Used for Adoptive Admissions Versus Impeachment. In addition to the issues surrounding the use of omissions and inconsistent statements, questions also persist about whether an accused's silence can be used as substantive evidence for an adoptive admission of guilt, for impeachment purposes, or neither.[88] An adoptive admission arises when a defendant fails to answer an implied accusation that one would normally expect an innocent person to refute, for example: "Tell me about the burglary you committed."[89] Federal Rule of Evidence 801(d)(2)(B) governs the use of adoptive admissions[90] and allows the adoption to be used as "substantive evidence of guilt[ ] to prove the truth of the adopted accusation."[91] The Court has identified four preconditions to admitting adoptive admissions: (1) the adopted statement was heard and understood by the party against whom it is offered; (2) the party was at liberty to respond; (3) the circumstances naturally called for a response; and (4) the party failed to respond.[92]

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[84] *Id.* at 408.

[85] *Id.* at 409.

[86] Doyle v. Ohio, 426 U.S. 610, 619 (1976).

[87] *Anderson*, 447 U.S. at 409.

[88] 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:48, at 397–403 (3d ed. 2007).

[89] *See id.* § 8:47, at 390–91 ("[T]he occasion and nature of the statement were such that he would likely have replied if he did not mean to accept what was said.").

[90] FED. R. EVID. 801(d)(2)(B).

[91] GEORGE FISHER, EVIDENCE 499 (3d ed. Supp. 2013); *see also* 4 MUELLER & KIRKPATRICK, *supra* note 88, § 8:47, at 386 (examining adoptive admissions under Rule 801(d)(2)(B)).

[92] FISHER, *supra* note 91, at 499; 4 MUELLER & KIRKPATRICK, *supra* note 88, § 8:47, at 390–91.

Miranda warnings, however, change the notion that an innocent person would negate an inculpatory statement.[93] Once a suspect is advised of his right to remain silent, it is no longer natural for him to speak.[94] In addition, the *Miranda* warnings carry an implicit assurance "that silence will carry no penalty,"[95] thus using a suspect's silence against him would be "fundamentally unfair."[96] This distinction when applied to the three standard levels of police inquiry—persons not in custody, arrestees in custody but not Mirandized, and arrestees in custody and Mirandized—has engendered uncertainty about whether a defendant's silence in each of these three situations can be used as substantive evidence of his guilt, for impeachment purposes, or neither.[97]

The Supreme Court has ruled that when a person is not in custody, his silence can be used to impeach his credibility,[98] or it can be used as substantive evidence of his guilt as an "adoption" under 801(d)(2)(B).[99] The Court, however, has yet to rule on whether the government may use a defendant's silence as substantive evidence of his guilt where the defendant was in custody but not Mirandized at the time of the interrogation,.[100] Currently, the circuit courts are split on the issue, with the Second[101] and Ninth[102] Circuits concluding that the suspect's

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[93] *See* FISHER, *supra* note 91, at 499 (explaining how *Miranda* warnings disrupt the presumption that an innocent suspect would speak in the face of an acquisition). *See generally* 4 MUELLER & KIRKPATRICK, *supra* note 88, § 8:48.

[94] *See* 4 MUELLER & KIRKPATRICK, *supra* note 88, § 8:48, 397–98 (noting silence in response to custodial questioning by officials is, in a sense, involuntary because the person is in custody); FISHER, *supra* note 91, at 499 (contending that when authorities advise a suspect of *Miranda*, it is no longer natural for him to speak).

[95] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[96] FISHER, *supra* note 91, at 499.

[97] *Id.* at 499–501.

[98] *See* Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (concluding a defendant's noncustodial silence can be used to impeach him).

[99] Salinas v. Texas 133 S. Ct. 2174, 2180 (2013) (holding a defendant's noncustodial silence can be used as substantive evidence of his guilt).

[100] FISHER, *supra* note 91, at 501.

[101] *See* United States v. Flecha, 539 F.2d 874, 877 (2d Cir. 1976) (holding that even though a defendant was not read his *Miranda* rights, being arrested implies to a suspect that his silence will be "golden").

[102] *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1027–33 (9th Cir. 2001) (en banc) (holding that the prosecution's comment on the defendant's post-arrest, pre-*Miranda* silence was in violation of the defendant's constitutional rights).

silence may not be used as an "adoption" and the Eighth Circuit[103] concluding that it can be used against the suspect at trial. Although a circuit split currently exists regarding this scenario, commentators seem to believe that the Supreme Court would permit the substantive use of a defendant's pre-*Miranda* custodial silence.[104]

In *Doyle*, the Supreme Court explicitly stated that where a defendant is in custody and has been Mirandized the defendant's complete silence could not be used to impeach him.[105] The Supreme Court has not ruled on whether post-*Miranda* custodial silence could be used as substantive evidence of guilt, though the Court's precedent seems to indicate that post-*Miranda* custodial silence likely cannot be used as substantive evidence against a defendant at trial.[106] Thus, the Court seems to have drawn a distinction between pre-*Miranda* and post-*Miranda* silence by more vigorously protecting post-*Miranda* silence. However, the Court has focused on complete silence rather than selective silence. Accordingly the lower courts were left to navigate the issue of selective silence and have widely diverged on whether selective silence should be protected.

C. THE CIRCUIT SPLIT SURROUNDING THE RIGHT TO REMAIN SELECTIVELY SILENT

1. Rejecting the Right to Selective Silence. The First[107] and Eighth[108] Circuits have both generally ruled that once an arrestee is read his *Miranda* rights and chooses to waive those rights, any

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[103] *See* United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding because there was no government action inducing the defendant's silence, the silence can be used substantively against the defendant).

[104] *See, e.g.*, FISHER, *supra* note 91, at 508 (predicting the Court would permit substantive use of pre-*Miranda* custodial silence).

[105] *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976) ("[T]he use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.").

[106] *See* Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) (concluding a defendant's post-*Miranda* custodial silence could not be used as substantive evidence of his sanity); FISHER, *supra* note 92, at 500–01 (discussing three previous cases that indicate the Court would likely rule a defendant's silence in a post-*Miranda* custodial situation could not be used against him).

[107] United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977).

[108] United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002).

subsequent selective silence can be used against the arrestee at trial. The First Circuit was among the first of circuits to hold post-*Doyle* that a defendant in custody who waives his *Miranda* rights and subsequently answers a majority of the questions during an interrogation risks having his silence to certain questions used against him at trial.[109] However, the court stated that it did not need to decide whether the Fifth Amendment allowed a suspect to selectively answer because it held that the defendant's failure to answer was not a re-assertion of his right to remain silent.[110] Thus, the court interpreted an initial waiver of the right to remain silent as a comprehensive waiver to any objection of the use at trial of any silence during the interrogation.[111]

The Eighth Circuit agreed with the First Circuit's holding but expanded upon it by ruling that the an arrestee's re-invocation of his right to remain silent after his initial waiver is admissible at trial.[112] In *Burns*, the defendant waived his *Miranda* rights and began answering questions related to the crime charged.[113] He refused to answer one specific question but subsequently answered other questions.[114] The defendant, however, eventually decided to end the interrogation and re-invoked his right to remain silent.[115] The court held, like the First Circuit, that the defendant did not invoke his constitutional right to remain silent by refusing to answer one question, and thus his silence in response to that one question could be used against him.[116]

Then, the court went one step beyond the First Circuit and held that, because the accused initially waived his right to remain silent, his subsequent refusal to answer one question and the ultimate re-invocation of his right to remain silent and end of the interrogation were all part of "an otherwise admissible conversation between the police and the accused" that could be used against the defendant at trial.[117] This opinion and its

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[109] *Goldman*, 563 F.2d at 503–04.
[110] *Id.* at 503–04 n.3.
[111] *Id.* at 504.
[112] *Burns*, 276 F.3d at 442.
[113] *Id.* at 441.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 442.
[117] *Id.* (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

language is likely the strongest rejection of the selective silence doctrine by any of the circuit courts.[118] Beyond the circuit courts, several state courts have also rejected the selective silence doctrine, including Connecticut,[119] Florida,[120] and Michigan.[121] The states courts that reject the selective silence doctrine vary in their approaches; some agree with the First Circuit, while others go one step further and follow the Eighth Circuit's ruling that both selective silence and the re-invocation of the right to remain silent are admissible. Ultimately, the state and circuit court rulings that reject the selective silence doctrine demonstrate the skepticism of some courts to recognize the use of selective silence at trial as a violation of *Doyle*.

2. Affirming the Selective Silence Doctrine. By contrast, a larger number of the circuit courts—including the Fourth,[122] Seventh,[123] Ninth,[124] and Tenth[125]—have acknowledged the right to remain selectively silent in some fashion. The Fourth Circuit recognized this right in *United States v. Ghiz*, which was decided pre-*Doyle*, by holding that a defendant who in any manner demonstrates he is relying on his understanding of *Miranda* is protected from having his silence to certain questions used against him at trial.[126]

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[118] *Cf.* United States v. Andjúar-Basco, 488 F.3d 549, 556 (1st Cir. 2007) (distinguishing *Burns* based on the challenged testimony in *Burns*, which simply referred to the defendant's refusal to answer any further questions, and the challenged testimony at issue in *Anjuar-Basco*, where the prosecution specifically referred to the defendant's exercise of his constitutional right to remain silent, which the court concluded carried a clear inference of culpability).

[119] *See* State v. Talton, 497 A.2d 35, 44 (Conn. 1985) ("While 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.' ").

[120] *See* Thomas v. State, 726 So. 2d 357, 358 (Fla. Dist. Ct. App. 1999) (per curiam) (noting that the reference to defendant's failure to answer one question after waiving his right to remain silent and answering other questions did not violate his due process rights under *Doyle*).

[121] *See* People v. McReavy, 462 N.W.2d 1, 7 (Mich. 1990) (holding that defendant's failure to answer certain questions regarding the crime did not violate his constitutional rights because the defendant had waived his right to remain silent).

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

[123] United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995).

[124] Hurd v. Terhune, 619 F.3d 1080, 1088 (9th Cir. 2010).

[125] United States v. Harrold, 796 F.2d 1275, 1279 (10th Cir. 1986).

[126] *Ghiz*, 491 F.2d at 600.

The Seventh Circuit in *United States v. Scott* agreed with the Fourth Circuit's holding but additionally relied on *Doyle* to conclude that a suspect "may speak to the agents, . . . refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him."[127] The Seventh Circuit concluded in *Scott* that because the prosecution only used the defendant's inconsistent statements as between his testimony at trial and his story given in response to interrogation, the defendant could not claim a *Doyle* violation.[128]

Like the Fourth and Seventh Circuits, the Tenth Circuit held in *United States v. Harrold*, and has reinforced in subsequent opinions,[129] that a suspect has the right to claim a *Doyle* violation when his "partial silence" during a post-*Miranda*, custodial interrogation is used against him at trial.[130] In *Harrold*, two IRS officers had questioned the defendant on separate occasions about his alleged tax evasion.[131] The defendant argued that the prosecution's questioning at trial regarding his refusal to answer certain questions during the two pre-indictment investigations violated his due process rights.[132]

The Tenth Circuit drew an important distinction between the two investigations based on the fact that the defendant had been read his *Miranda* rights in the second investigation but not in the first.[133] The court reasoned that because in the first investigation the defendant was not read his *Miranda* rights, he was not relying on government action—the *Miranda* warning—and consequently the use of his silence during that particular pre-*Miranda* investigation was not in error.[134] Conversely, the court then stated that the reference to the second investigation was in violation of the Fifth Amendment, but concluded the error was harmless based

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[127] *Scott*, 47 F.3d at 907 (citing United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993)).

[128] *Id.*

[129] *See* United States v. May, 52 F.3d 885, 890 (10th Cir. 1995) (reinforcing its ruling in *Canterbury*); *Canterbury*, 985 F.2d at 486 (noting that a defendant's "partial silence" does not preclude him from claiming a *Doyle* violation).

[130] *Harrold*, 796 F.2d at 1279.

[131] *Id.* at 1278–79.

[132] *Id.* at 1278.

[133] *Id.* at 1278–79.

[134] *Id.* at 1279.

on other incriminating evidence.[135] Thus, the Tenth Circuit in *Harrold* demonstrates the importance of determining whether an arrestee has been read his *Miranda* rights when evaluating the constitutionality of using his selective silence during an investigation at trial. Employing this important distinction, the Ninth Circuit recently resolved an unusual selective silence situation.

3. The Ninth Circuit: Hurd v. Terhune. The Ninth Circuit's recent ruling in *Hurd v. Terhune* to uphold the selective silence doctrine contains the most in-depth, timely discussion of the selective silence doctrine.[136] The case presented a novel use of the selective silence doctrine. Due to *Hurd*'s significance, this subsection will explore *Hurd*'s facts and opinion with more detail than the previous cases.

On April 16, 1993, Dale R. Hurd's wife, Bea, was tragically killed by a single gunshot wound to her chest.[137] That same day the police arrested Hurd, administered to him the *Miranda* warnings, and interrogated him about his wife's death.[138] Hurd was initially responsive and recounted his version of the incident, but when the police asked him to submit to a polygraph examination, Hurd declined based on his belief that polygraphs are unreliable.[139] The interrogator next asked Hurd to reenact the shooting, which he also refused to do.[140] The interrogator, after repeated recommendations to Hurd to take a polygraph and to demonstrate the events, which Hurd consistently again denied, suggested "that Hurd would go to jail for being uncooperative."[141]

Prior to trial, Hurd moved to suppress his refusals, arguing they were invocations of his right to remain silent.[142] The trial court denied his motion, concluding that he did not properly invoke his Fifth Amendment right because he had offered explanations and responses "instead of flat refusals."[143] At trial,

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[135] *Id.* at 1279 n.3, 1280.
[136] Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010).
[137] *Id.* at 1083.
[138] *Id.* at 1083–84.
[139] *Id.*
[140] *Id.* at 1084.
[141] *Id.*
[142] *Id.*
[143] *Id.*

the prosecution made repeated references to Hurd's refusals in its opening and closing statements and referred to those refusals as evidence of his guilt.[144] Hurd was convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole.[145]

Hearing the case *de novo*, the Ninth Circuit concluded that the prosecution's repeated references to Hurd's refusals to reenact the shooting and to take a polygraph constituted a *Doyle* error.[146] The court first noted that *Miranda*, in fact, indicates that a suspect has the right to remain selectively silent by allowing a suspect to volunteer certain statements but also end the interrogation at any time.[147] Discussing *Doyle*, the Court explained that *Doyle* specifies that suspects have the right to remain silent without fear that this silence will carry a penalty at trial.[148] The court then distinguished the Supreme Court's recent ruling in *Berghuis v. Thompkins*.[149] In *Berghuis*, the defendant had remained largely silent throughout his interrogation but had given "intermittent answers to the officer's questions."[150] After nearly three hours of interrogation, the suspect made an inculpatory statement, which the prosecution used against him at trial.[151] The Supreme Court ruled that because the suspect had never properly invoked his right to remain silent, the inculpatory statement could be used against him at trial.[152] The Ninth Circuit in *Hurd* noted, however, that in *Berghuis* the suspect's silence to a large majority of the questions was not used against him at trial, and that the Supreme Court did not deem this silence to be admissible.[153]

Further, the court determined that when a suspect remains largely silent during the interrogation, the interrogation does not have to immediately end,[154] but when a suspect answers questions

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[144] *Id.*

[145] *Id.* at 1082. It should be noted that this was Hurd's second trial; the first trial resulted in a hung jury and mistrial. *Id.*

[146] *Id.* at 1084–85, 1088.

[147] *Id.* at 1085–86 (quoting Miranda v. Arizona, 384 U.S. 436, 445, 473–74 (1966)).

[148] *Id.* at 1086.

[149] *Id.* For a discussion on *Berghuis* see *supra* Part II.A.*3*.

[150] Berghuis v. Thompkins, 130 S. Ct. 2250, 2256–57 (2010).

[151] *Id.* at 2257.

[152] *Id.* at 2263.

[153] *Hurd*, 619 F.3d at 1086 (citing *Berghuis*, 130 S. Ct. at 2257–58).

[154] *Id.* at 1088.

selectively, his refusal or silence to certain questions should be inadmissible as evidenced of guilt.[155] The Court explained that whether the suspect has invoked his Fifth Amendment right is irrelevant because using a suspect's silence to police questioning as evidence of his guilt at trial is fundamentally unfair.[156] In line with this assertion, the court held that the Prosecution's use of Hurd's refusals to reenact the incident or take a polygraph was in error.[157] Concluding that Hurd's refusals were "unambiguous in content," the Court emphasized that "neither the Constitution nor *Miranda* require a suspect to invoke his right to silence in a particular way."[158] Finally, the Ninth Circuit concluded that this error was not harmless because the prosecution's "comments on Hurd's silence were extensive and stressed an inference of guilt to the jury."[159]

In sum, *Hurd* presents an interesting and novel selective silence situation. Unlike selective silence as traditionally understood—the refusal or muteness to certain questions—*Hurd* demonstrates that selective silence also encompasses a suspect's refusals to act at the interrogator's requests. It also is pertinent that the Ninth Circuit is the first circuit court to address the Supreme Court's recent holding in *Berghuis*, which the court distinguishes from the selective silence doctrine by noting that the silence is inadmissible but that inculpatory answers given in the larger context of silence were admissible.

Ultimately, the *Hurd* case demonstrates the extensive split between the circuit courts on the rights of a suspect regarding his choice to answer questions or not during Post-*Miranda* custodial interrogation. While the Ninth Circuit holds that a suspect's silence is always protected, the Eighth Circuit concludes that not only may the suspect's intermittent silence be used against him but also that the suspect's re-invocation of his Fifth Amendment right to remain silent is admissible as evidence of guilt. With such

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[155] *Id.*
[156] *Id.*
[157] *Id.* at 1089.
[158] *Id.*
[159] *Id.* at 1090.

a wide divergence among the circuit courts, the Supreme Court now has the responsibility to reconcile this unsettled doctrine.[160]

III. ANALYSIS

The Supreme Court should follow the Ninth Circuit's precedent in *Hurd v. Terhune* and uphold the selective silence doctrine, as it protects suspects' constitutional rights without hindering law enforcement activities or police interrogations.[161] First, the selective silence doctrine is necessary to protect the Fifth Amendment's full privilege against self-incrimination, as demonstrated by the implicit right to silence conferred by the right against self-incrimination.[162] Further, the doctrine aligns with the Due Process Clause of the Fourteenth Amendment by ensuring a defendant's silence that is "insolubly ambiguous" in a Post-*Miranda* interrogation is not used as evidence of his guilt at trial.[163] Second, the selective silence doctrine best comports with Supreme Court precedent on silence and public policy concerns relating to police interrogations.[164] Adhering to its precedent on post-*Miranda* silence, the Court should draw a sharp distinction between pre- and post-*Miranda* selective silence and only allow a defendant the benefit of post-*Miranda* custodial selective silence.

A. SELECTIVE SILENCE AND THE CONSTITUTIONAL RIGHT TO REMAIN SILENT

1. Fifth and Fourteenth Amendment Protections. As Harvard law professor Alan Dershowitz accurately reminded, "Any effort to

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[160] *See, e.g.*, Stephen Rushin, Comment, *Rethinking* Miranda*: The Post-Arrest Right to Silence*, 99 CALIF. L. REV. 151, 167 (2011) (discussing the need for the Court to settle the selective silence doctrine circuit split).

[161] *See infra* Part III.B (refuting the argument that the selective silence would hinder custodial interrogations).

[162] *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile . . . *Miranda* warnings contain no express assurance that silence will carry no penalty, such assumance is implicit to any person who receives the warnings.").

[163] *See id.* at 617 (noting that post-arrest silence is insolubly ambiguous based on the *Miranda* warnings).

[164] *See infra* Part II.A.*2* (discussing Supreme Court precedent on custodial silence); *infra* Part III.B (contending the selective silence doctrine relieves, public policy concerns with custodial interrogations).

interpret a constitutional provision must *begin* with its text."[165] The Fifth Amendment's right against self-incrimination, like other constitutional provisions, is sparse and open-ended.[166] The provision states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[167] Read "literally and narrowly," this provision confers a limited right that does not include the right to remain silent.[168] The Fifth Amendment only directly prohibits an individual from being "a witness against himself" in "any criminal case," meaning it only expressly prohibits the government from forcing a defendant to testify at his own criminal trial.[169] Nevertheless, the framers likely intended a broader interpretation, as the right was expected to evolve through its application to the facts of each particular case.[170] With these principles in mind, the Court has often stated that the Fifth Amendment should "be accorded liberal construction in favor of the right it was intended to secure."[171] Through this liberal construction, the Fifth Amendment right against self-incrimination also has come to protect the right to remain silent in the face of police interrogation.[172] Both the "due process-voluntariness" test[173] and the *Miranda* warnings administered to suspects are rooted in this constitutional right to remain silent.[174]

The selective silence doctrine secures the fundamental purposes of the right to remain silent. If a suspect cannot remain selectively silent during an interrogation, and if his re-invocation of *Miranda*

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[165] DERSHOWITZ, *supra* note 30, at 25.

[166] *Id.*

[167] U.S. CONST. amend. V.

[168] DERSHOWITZ, *supra* note 30, at 29.

[169] *Id.*

[170] *See id.* at 32 ("In other words, the constitutional text did not exhaust its intended or understood meaning. Its future applications were left 'to be evolved from the facts of each particular case'—a process well know to the common-law framers of the Constitution.").

[171] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[172] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings . . . . [T]he process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak . . . .").

[173] *See* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (noting that use of confessions obtained through physical coercion fails due process).

[174] *Miranda*, 384 U.S. at 478–79 (establishing the procedural warnings that must be administered prior to a custodial interrogation to secure a defendant's Fifth Amendment right and satisfy due process).

can be used against him, the suspect is forced to choose between answering questions that undermine his right against self-incrimination or having his silence used as evidence of his guilt should he choose not to answer. This quandary runs counter to the objectives of *Miranda* and the "due process-voluntariness" test. Affording suspects the right to remain selectively silent would resolve this inconsistency in law regarding silence. The police would be assured that any answers suspects offer are voluntary, and suspects would be guaranteed what *Miranda* implicitly promises—that their silence will be protected. [175]

Beyond the Fifth Amendment, using a suspect's selective silence as an adoptive admission of his guilt or to impeach him at trial is not in accord with the Due Process Clause of the Fourteenth Amendment. As the Court held in *Doyle*, using post-*Miranda* silence would violate the Due Process Clause in two distinct ways.[176] First, by administering *Miranda* warnings to a suspect, his subsequent silence may be consistent with his exculpatory trial testimony.[177] Upon receiving *Miranda* warnings, a suspect's silence becomes "insolubly ambiguous" and may simply be an indication that he is exercising his right to remain silent, not that he is withholding inculpatory evidence.[178] Second, it would be "fundamentally unfair" to impeach a defendant with his silence because the *Miranda* warnings carry an implicit assurance that a suspect's "silence will carry no penalty."[179]

The *Doyle* Court addressed a suspect's complete silence to an exculpatory story during a post-*Miranda* custodial interrogation;[180] however, the same principles noted in *Doyle* apply in the selective silence context. A suspect's silence to a particular question could, as the *Doyle* Court stated, simply be an exercise of his *Miranda* right to remain silent and not an attempt to withhold

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[175] *See* Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.").

[176] *Id.* at 617–20; *see also* Frank R. Herrmann & Brownlow M. Speer, *Standing Mute at Arrest as Evidence of Guilt: The "Right to Silence" Under Attack*, 35 AM. J. CRIM. L. 1, 13 (2007) (discussing the *Doyle* Court basing its Fourteenth Amendment's Due Process Clause holding on two distinct grounds).

[177] *Doyle*, 426 U.S. at 617.

[178] *Id.* at 617–18.

[179] *Id.* at 618.

[180] *Id.* at 613.

incriminating evidence. Additionally, a suspect in a post-*Miranda* interrogation who has answered certain questions may still be operating under the implicit assurance that his silence to a particular question will carry no penalty. To later impeach this suspect with his silence would violate his due process rights and would be counter to the implied assurance afforded to suspects by *Miranda*. One could argue that the waiver of *Miranda* should preclude this implicit assurance, as the suspect is foregoing his Fifth Amendment privilege. But a waiver of *Miranda* should only indicate an understanding that any voluntary answers may be used against the suspect. This waiver need not prevent suspects from remaining selectively silent.[181]

2. Supreme Court Precedent and the Selective Silence Doctrine. The selective silence doctrine also aligns with Supreme Court precedent on the issues of waiver, invocation, and general post-*Miranda* custodial silence situations. First, in terms of waiver, a suspect in a selective silence situation has already initially waived his *Miranda* rights. As the Court declared in *Butler*[182] and later confirmed in *Berghuis*, the *Miranda* warning does not require a "formalistic waiver procedure."[183] While "courts must presume that a defendant did not waive his rights," waiver can still be inferred through the actions and statements of the defendant.[184] This threshold for waiver coincides with the selective silence doctrine, because it should be clear to interrogators that the suspect has waived his *Miranda* rights when he has chosen to answer certain questions but not others. Thus, that a suspect has initially waived his *Miranda* rights should not be a hindrance to police interrogations if the suspect is allowed to remain selectively silent.

Related to the Court's precedent on waiver, the selective silence doctrine also does not complicate the Court's holding in *Colorado v. Spring*.[185] In *Spring*, the Court declared that the police were not required to inform suspects about the substance of their imminent

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[181] *See* Hurd v. Terhune, 619 F.3d 1080, 1088 (9th Cir. 2010) (ruling a suspect can remain selectively silent during an interrogation and that silence is inadmissible at trial).

[182] North Carolina v. Butler, 441 U.S. 369, 374–76 (1979).

[183] Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010).

[184] *Butler*, 441 U.S. at 373.

[185] 479 U.S. 564 (1987).

interrogation.[186] Therefore, under *Spring*, a suspect may waive his *Miranda* rights despite not knowing whether he actually wishes to discuss the subject matter at hand. The Court in *Spring* was likely concerned with protecting the police tactic of not informing suspects about the subject of interrogation in order to obtain truthful statements.[187]

Nevertheless, if a suspect is not afforded the ability to decline to speak on a topic, and must also fear that this refusal will be used as an inference of his guilt, the suspect might be inclined to either completely end the interrogation or give compulsory answers. If a suspect completely ends the interrogation, then the police are prevented from obtaining any further helpful statements. If a suspect feels forced to answer questions relating to a particular subject matter, this compulsion would violate the "due process voluntariness" test, one of the core doctrines observed by *Miranda*.[188] Both results are averted through the selective silence doctrine.

The selective silence doctrine also comports with the Court's precedent on invocation. Under the doctrine, a suspect's refusal to answer particular questions does not equate to an invocation of *Miranda* to end the interrogation. The Court in *Berghuis* mandated that suspects unambiguously and unequivocally invoke their *Miranda* rights to end an interrogation.[189] While the police must still "scrupulously hono[r]" any invocation of *Miranda*,[190] *Berghuis* has set such a high standard for invocation to end the interrogation that it is unlikely an officer will confuse a suspect's choice to remain silent to a particular question as an attempt to invoke *Miranda* for purposes of ending the interrogation. Therefore, the contention that allowing suspects to be selectively silent will have the practical effect of confusing interrogators, who

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[186] *Id.* at 576.

[187] *See id.* at 576–77 (" '[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' " (alteration in original) (quoting Moran v. Burbine, 475 U.S. 412, 422 (1986))).

[188] *See* Miranda v. Arizona, 384 U.S. 436, 464–65 (1966) ("The voluntariness doctrine . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.").

[189] Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).

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

will not know if they are in defiance of the selective silence doctrine by continuing questioning[191] is unfounded. The police can continue to question the suspect until the suspect actually invokes his *Miranda* rights to end the interrogation.[192] Accordingly, selective silence affords suspects their constitutional right to silence, but does not frustrate the principles underlying the Court's precedent on invocation.

The Court's earlier decisions on post-*Miranda* silence in general also align with the selective silence doctrine. For example, in *Wainwright v. Greenfield* the Court reinforced the protection of suspects' silence in a post-*Miranda* custodial interrogation by ruling this silence could not be used to impeach the defendant's defense.[193] In *Wainwright*, the suspect was arrested and read his *Miranda* rights, but he refused to speak to the police until he could speak to an attorney.[194] At trial, the suspect pled not guilty by reason of insanity, but the prosecutor attempted to rebut this defense by arguing the suspect's refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that would be inconsistent with a plea of insanity.[195] Disagreeing with the use of the suspect's silence, the Court ruled the prosecutor's attempts to impeach the insanity defense based on the suspect's post-*Miranda* silence violated his Fourteenth Amendment due process rights under *Doyle* by denying him the implied assurance that his "silence will carry no penalty."[196] This holding demonstrates the Court's willingness to protect post-*Miranda* custodial silence and further reveals the need to reinforce this protection. By upholding the selective silence doctrine, the Court would strengthen the protections afforded to post-*Miranda* custodial silence.

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[191] *See, e.g.*, Gerardo Schiano, Note, *"You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 191–92 (2012) (contending that if a suspect is able to invoke his right to remain silent to a specific question, the suspect's invocation may not be clear to the interrogating officer).

[192] *See* Hurd v. Terhune, 619 F.3d 1080, 1088 (9th Cir. 2010) ("When a suspect remains 'largely silent' in response to officers' questions, the interrogation does not automatically have to cease.").

[193] Wainwright v. Greenfield, 474 U.S. 284, 295 (1986).

[194] *Id.* at 286.

[195] *Id.* at 287.

[196] *Id.* at 295.

B. PUBLIC POLICY CONCERNS AND THE SELECTIVE SILENCE DOCTRINE

Miranda has not completely resolved the public policy concerns surrounding custodial police interrogations.[197] While some commentators contend that the warnings provide all the necessary constitutional protections suspects should be afforded,[198] empirical evidence demonstrates that questions remain regarding psychological interrogation techniques that exact too heavy of a toll on suspects.[199] These coercive psychological techniques are inequitable to suspects and often lead to false confessions, which, in turn, may lead to erroneous convictions.[200] Considering the shortcomings of *Miranda*, the *Miranda* warnings should not be the only procedural protection in place to alleviate these public policy concerns. The selective silence doctrine ought to be another protection afforded to suspects during custodial interrogations.

Miranda is no longer a single case that established a procedural protection for custodial interrogations. It now encompasses an entire body of rules[201] that have weakened the original protection.[202] First, the Supreme Court's precedent on waiver has made it too easy for interrogators to demonstrate a valid waiver of *Miranda*. By concluding in *Butler* that suspects do not have to waive their *Miranda* rights in any specific fashion,[203] the Court opened the door to police interrogators being able to induce

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[197] *See* WHITE, *supra* note 32, at 76–101 (discussing how modern interrogators have been able to adapt to *Miranda* by creating new interrogation techniques).

[198] *See* Schiano, *supra* note 191, at 195 ("[S]uch techniques do not lessen the rights afforded to criminal suspects, as the suspects are still informed of their *Miranda* rights and are not prevented from asserting those rights.").

[199] *See* WHITE, *supra* note 32, at 78–91 (examining the psychological interrogation techniques used by interrogators to elicit waiver and confessions).

[200] WRIGHTSMAN & PITMAN, *supra* note 31, at 159.

[201] WHITE, *supra* note 32, at 76; *see, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010) (ruling that a suspect who remained largely silent during the questioning did not invoke his *Miranda* rights through this silence); Anderson v. Charles, 447 U.S. 404, 409 (1980) (per curiam) (holding that the use of a suspect's inconsistent statements as evidence of his guilt at trial does not violate *Doyle*); North Carolina v. Butler, 441 U.S. 369, 374–76 (1979) (determining an explicit waiver of *Miranda* is not necessary to infer the suspect waived his *Miranda* rights); Harris v. New York, 401 U.S. 222, 225–26 (1971) (ruling a suspect's past inconsistent statements could be used to impeach his testimony at trial).

[202] RUSCHMANN, *supra* note 57, at 84–85; WHITE, *supra* note 32, at 76.

[203] *See Butler*, 441 U.S. at 375–76 (concluding that *Miranda* does not need to be waived explicitly).

waiver.[204] The interrogation techniques employed by the police to induce waiver include administering the warnings in a neutral manner, de-emphasizing the significance of the warnings, telling suspects the interrogation is an opportunity to tell their side of the story, and persuading suspects that the interrogators are acting in their best interest.[205] And while suspects must waive their *Miranda* rights knowingly and intelligently,[206] police techniques used to induce waiver have diminished the value of this requirement.

In addition to police intentional attempts to induce waiver, suspects may also feel the need to waive out of fear of appearing guilty by remaining silent.[207] This tendency to waive despite the *Miranda* warnings is confirmed by empirical studies finding that roughly 80% of suspects waive their *Miranda* rights[208] and, as one particular study demonstrated, only about 4% later re-invoke their *Miranda* rights to end the interrogation.[209] The willingness to waive and speak to interrogators would likely surprise the writers of *Miranda*, but those justices did not account for police adapting their interrogation techniques to accommodate for *Miranda*.[210]

Even if suspects do not initially waive their *Miranda* rights, interrogators have also developed techniques to induce suspects to change their minds and waive *Miranda*. These techniques include isolating the suspect so he can change his mind, prompting the suspect to reconsider waiving *Miranda*, and questioning the suspect "outside *Miranda*."[211] The last technique, particularly,

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[204] WHITE, *supra* note 32, at 77.

[205] *Id.* at 78–91.

[206] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[207] *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1828 n.9 (1987) (discussing suspects' tendency to believe that their silence will be used against them at trial, notwithstanding the *Miranda* warnings); Godsey, *supra* note 57, at 796 (noting that fear of looking guilty "may constitute the type of compulsion that the Self-Incrimination Clause prohibits").

[208] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 860 tbl.3 (1996) (noting that 83.7% of the suspects waived); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl.3 (1996) (noting a waiver rate of 78%).

[209] Cassell & Hayman, *supra* note 208, at 860 tbl.3.

[210] *See* WHITE, *supra* note 32, at 78–91 (discussing the adaptive techniques developed by police interrogators).

[211] *See id.* at 91–99 (describing the various techniques employed by interrogators to get suspects to change their minds about invoking *Miranda*).

demonstrates the ability of interrogators to abuse *Miranda*. Questioning a suspect "outside *Miranda*" typically means the interrogator asks the suspect if he wants to talk "off the record," and if the suspect agrees, unbeknownst to him, his statements could potentially be used to impeach him.[212] The Court endorsed this practice in *Harris v. New York* when it ruled that statements obtained in violation of *Miranda* could be used to impeach the defendant if the defendant chooses to testify.[213] In *Harris*, the suspect had not been given the opportunity to waive his right to counsel during the interrogation, which was in violation of *Miranda*, but the Court concluded the violation did not prevent the prosecution from using statements offered in that unlawful context to impeach the suspect at trial.[214] Thus, by employing interrogation techniques to induce a suspect to reconsider waiving *Miranda*, the value of *Miranda* is further diminished.

An additional public policy concern is the likelihood that false confessions and subsequent false convictions remain significant problems within our criminal justice system. False confessions, however, are uniquely hard to estimate.[215] A substantial number of interrogations are not recorded and there is no official governmental agency that keeps track of interrogations.[216] Most empirical studies on false confessions are conducted as case studies.[217] For example, researchers Richard A. Leo and Richard J. Ofshe conducted a case study of sixty false confession cases.[218] Leo and Ofshe concluded that these false confessions were likely the result of poor, overzealous police practices.[219] The police can become so focused on closing cases that they will employ

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[212] *Id.* at 95–99.

[213] *See* Harris v. New York, 401 U.S. 222, 224–25 (1971) (concluding the prosecution is allowed to use the defendant's statements in violation of *Miranda* to impeach the defendant).

[214] *Id.* at 224.

[215] *See* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 560 (1998) (discussing the difficulty of estimating false confessions).

[216] *Id.*

[217] *See, e.g.*, Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 432–34 (1998) (conducting an empirical study on sixty cases of police-induced false confessions).

[218] *Id.* at 444.

[219] *Id.* at 440–41.

psychological coercive techniques to persuade suspects to give statements, which can result in eliciting a false confession.[220]

Likely, the public policy concerns surrounding induced waivers and false confessions will continue to subsist; however, by affording suspects additional procedural protections beyond *Miranda*, these public policy concerns can be eased. The selective silence doctrine would be an appropriate protection for this purpose. By allowing suspects to remain selectively silent, even if interrogators induce a suspect to waive his *Miranda* rights, the suspect can choose to remain silent to certain questions without fear that this silence will be used against him at trial. Further, a suspect may be less inclined to give a false confession if he does not have to answer every question posed by the interrogators. This protection is in accord with the underlying purposes of *Miranda*—to reduce psychological coercion and false confessions[221]—and would further protect suspects' constitutional right to remain silent.[222]

A probable criticism and public policy concern opposing the selective silence doctrine is that it would hinder the effective administration of custodial interrogations.[223] Specifically, it would allow suspects to provide only exculpatory statements while safely withholding information probative of their guilt.[224] This concern, however, is largely unfounded considering that police techniques used during interrogations are rather effective in coaxing suspects to speak,[225] and that the police have the additional duty to perform independent investigations outside of interrogations. A similar hindrance concern was raised after *Miranda* was instituted,[226] but research demonstrated that the administration of police

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[220] *Id.*

[221] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[W]ithout proper safeguards the process of in-custody interrogation of persons . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak . . . .").

[222] *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

[223] *See* Schiano, *supra* note 191, at 195 ("Allowing criminal suspects the advantage of selective silence during the interrogation process raises many practical concerns for law enforcement officials . . . in the performance of their duties.").

[224] *Id.* at 196 (noting that under the selective silence doctrine, suspects can give information that exonerated them and withhold incriminating evidence).

[225] *See* WRIGHTSMAN & PITMAN, *supra* note 31, at 70 ("[A]n estimated 80% of suspects agree[ ] to talk to the police detectives without restrictions."); WHITE, *supra* note 32, at 78–91 (discussing interrogation techniques that police use to induce waiver of *Miranda*).

[226] WHITE, *supra* note 32, at 57.

interrogations suffered negligible effect.[227] The police were able to obtain confessions, but still comply with the *Miranda* warning.[228] The same would likely be true of the selective silence doctrine, based on the coercive and successful interrogation techniques described above.

C. DISTINGUISHING PRE- AND POST-*MIRANDA* SITUATIONS

While the selective silence doctrine comports with the Court's precedent and the public policy concerns discussed above, the doctrine should be limited—too broad an application could potentially hinder police investigations. The Court must draw a bright line rule regarding when the doctrine applies. The appropriate line to draw is between pre- and post-*Miranda* custodial interrogations. Selective silence should only be afforded to suspects in a post-*Miranda* custodial interrogation because *Miranda* grants defendants an implied assurance of protected silence.[229] The Court in *Salinas* drew a bright line to declare that the defendant's silence to a particular question in a pre-*Miranda* non-custodial interview could be used against him at trial.[230] In doing so, the Court effectively prohibited the use of the selective silence doctrine in this particular situation.

While this holding may seem harsh, the Court correctly put a limit on the selective silence doctrine. The petitioner in *Salinas* voluntarily agreed to be interviewed and was not read his *Miranda* rights.[231] Therefore, when he remained silent in response to a particular question, there was no presumption that he relied on *Miranda* in choosing to remain silent.[232] As the Court declared in *Doyle*, *Miranda* warnings make any subsequent silence "insolubly ambiguous."[233] Because the petitioner's silence in *Salinas* is not afforded the presumption of "insoluble ambiguity" in the absence

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[227] *Id.* at 60.

[228] *Id.*

[229] *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) ("[E]very post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.").

[230] Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013).

[231] *Id.* at 2178.

[232] *See Doyle*, 610 U.S. at 617 (noting that post-*Miranda* silence may be the defendant relying on these warnings).

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

of *Miranda* warnings, the Court reached the appropriate conclusion in making the selective silence doctrine inapplicable to pre-*Miranda* non-custodial interviews.

In addition to pre-*Miranda* non-custodial selective silence, the Court should also exclude pre-*Miranda* custodial silence from the protection of the selective silence doctrine. There is currently a circuit split surrounding whether silence in this type of situation can be used against defendants as substantive evidence of guilt.[234] The Court has already concluded that silence in pre-*Miranda* custodial situations can be used to impeach defendants.[235] It should extend this rule to also allow selective silence in a pre-*Miranda* custodial interview to be used as substantive evidence of guilt. Like the suspects in the previous discussion on pre-*Miranda* non-custodial silence, suspects in pre-*Miranda* custodial situations are not afforded the same presumption of protected silence as suspects that have been administered their *Miranda* rights. While custodial interviews present more psychological pressure than non-custodial interviews, the administration of a suspect's *Miranda* rights is what informs the suspect that his silence is protected. And although a suspect may be operating under the assumption that *Miranda* protects him despite not being administered warning,[236] the *Miranda* warning provides a necessary bright line for police and the courts to know when silence has become "insolubly ambiguous."[237]

Custodial interrogations, under *Miranda* ruling, must begin with an administration of *Miranda*, primarily because custodial

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[234] *Compare* United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005) (finding that even though the defendant was under arrest, no governmental action induced his silence), *with* United States v. Flecha, 539 F.2d 874, 877 (2d Cir. 1976) (noting that many persons know, notwithstanding the lack of *Miranda* warnings, that their silence is "golden"), *and* United States v. Velarde-Gomez, 269 F.3d 1023, 1029 (9th Cir. 2001) (en banc) (holding that once a person is placed under arrest, that person has the right to stand silent, even if *Miranda* has not been administered).

[235] *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (ruling that in the absence of any governmental action to induce silence, using a suspect's silence to impeach him if he testifies at his own trial does not violate the Due Process Clause).

[236] *See Flecha*, 539 F.2d at 877 ("[I]t is clear that many arrested persons know, without benefit or warnings, that silence is usually golden.").

[237] *See Doyle*, 426 U.S. at 617 (concluding that *Miranda* warnings render any subsequent silence "insolubly ambiguous").

interrogations present the most potentially coercive situations.[238] While there might be heightened pressures in pre-*Miranda* custodial situations, these pressures do not present the same type of concerns that post-*Miranda* custodial interrogations pressures present. By limiting the selective silence doctrine to post-*Miranda* custodial interrogations, the Court would protect suspects' constitutional rights in the most vulnerable situations while not extending these protections too far as to render them overly protective of suspects.

IV. CONCLUSION

As the Fifth Amendment right against self-incrimination evolved to include pre-trial custodial interrogations, the Supreme Court has implemented procedural protections to assure suspects in custodial interrogations are not coerced.[239] The *Miranda* warning, with its foundations in the "due process voluntariness" test, is the Court's most significant protection, which was created to curb coercive psychological interrogation techniques that infringe on suspects' constitutional rights.[240] By informing suspects of their constitutional rights prior to the interrogation, the warnings were meant to enable suspects to exercise their constitutional right to remain silent without fear that this invocation will be used against them at trial.[241]

As the Court's subsequent precedent on the invocation and waiver of *Miranda* has developed, however, it has become increasingly easier for suspects to waive *Miranda*[242] and increasingly more difficult for suspects to later invoke *Miranda*.[243]

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[238] *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966) ("The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.").

[239] *See id.* at 478–79 (instating a procedural warning to inform suspects of their constitutional rights); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (implementing the "due process voluntariness" test for confessions).

[240] *Miranda*, 384 U.S. at 464–65.

[241] *Id.* at 478–79.

[242] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 375–76 (1979) (determining that *Miranda* rights do not have to be waived in any specific manner).

[243] *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010) (holding that a suspect must unambiguously invoke his right to remain silent to end the interrogation).

Additionally, police interrogation techniques have adapted around the *Miranda* warnings, diminishing the significance of this procedural protection.[244] In light of these developments, an additional protection should be offered to suspects in post-*Miranda* custodial interrogations.

As an additional procedural protection, the selective silence doctrine would advance the central goals of *Miranda* and further protect the constitutional rights of suspects. The doctrine assures suspects of their Fifth Amendment right to remain silent by defending what *Miranda* implicitly implies—that their silence will always be protected. Additionally, the selective silence doctrine comports with the Due Process Clause of the Fourteenth Amendment, as silence in a post-*Miranda* custodial interrogation is "insolubly ambiguous"[245] and therefore unreliable evidence for impeachment purposes or as substantive evidence of guilt. Beyond the constitutional protections, the selective silence doctrine would also help curb the continuing public policy concerns surrounding coerced statements and confessions. By allowing suspects to remain selectively silent, we ensure that suspects' statements are voluntary.

Ultimately, the Supreme Court must resolve the circuit split surrounding whether the selective silence doctrine is an appropriate procedural protection. Without Supreme Court action, the discrepancy surrounding whether there is a right to remain selectively silent will continue to trouble the criminal justice system.

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[244] *See* WHITE, *supra* note 32, at 78–91 (discussing the techniques developed by police interrogators to adapt to *Miranda*).

[245] *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976) (concluding that *Miranda* warnings render any subsequent silence "insolubly ambiguous").