11-1-2011

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TURNING MIRANDA RIGHT SIDE UP: POST-WAIVER INVOCATIONS AND THE NEED TO UPDATE THE MIRANDA WARNINGS

Joshua I. Hammack*

INTRODUCTION

In *Miranda v. Arizona,* the Supreme Court sought to protect the constitutional privilege against compulsory self-incrimination. It did so by, among other things, requiring that interrogators inform suspects of the right to remain silent before conducting a custodial interrogation. In the forty-five years since *Miranda* was decided, the right to remain silent has been frequently litigated, creating a body of law that is difficult to understand, often unfair to criminal suspects seeking to invoke the right, and largely contrary to the *Miranda* Court’s intention. The Supreme Court’s recent decision in *Berghuis v.*

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* Juris Doctor Candidate 2012. I would like to thank Professor Richard W. Garnett for graciously assisting in the development of this Note; Heather LaDue for listening to countless hypotheticals regarding warnings, waivers, and invocations, and even reading drafts of this Note, without kicking me to the curb; Spencer Durland for reviewing drafts and generously sharing his thoughts and suggesting additions; and Emily Martin for her editing wizardry.

2 See id. at 457.
3 See id. at 479.
4 See infra Part II. For example, because the Court’s unambiguous invocation requirement disavows any assessment of the suspect’s intent, those who use colloquial language and, more troublingly, those who are scared or feel powerless will often not be held to have invoked their rights. See Sandra Guerra Thompson, *Evolving Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 664 (2006). Moreover, groups that have historically been powerless in society—including women and ethnic minorities—are “far more likely than others to adopt indirect speech patterns” and “attempt to invoke their rights by using speech patterns that the law refuses to recognize.” Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 261 (1993).
5 Compare *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2261 (2010) (stating that the “main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel”), with Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV.
Thompkins\(^6\) compounds these concerns in two ways. First, although the Court placed a new and demanding requirement on invocations of the right to remain silent,\(^7\) the Court did not require officers to inform suspects of that requirement. Second, despite *Miranda*’s “implicit promise,”\(^8\) suspects’ post-waiver silence in custodial interrogations can be used against them at trial.\(^9\) In *Berghuis*, the Court held that such silence is not an invocation of the right because it is not “unambiguous.”\(^10\) To remedy the current warnings’ failures,\(^11\) the Court could reexamine this stance on silence, reconsider the use of clarifying questions, or provide a more robust right to counsel in custodial interrogations. More directly, it could update the *Miranda* warnings so that they accurately reflect its precedents and inform suspects of the requirements placed on invocations. What is clear is that something must change to ensure that the “transcendent right”\(^12\) *Miranda* sought to protect is actually—and adequately—protected.

Before proceeding to the analysis and argument, a few words about terminology may prove useful. Two terms in particular are of great importance and deserve express definition: exercise and invocation. As used throughout this Note, the “exercise” of the right to remain silent includes any time that a criminal suspect may simply remain silent without having that silence used against him. For purposes of this Note, there are just two such circumstances: Post-warning

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\(^6\) 130 S. Ct. 2250 (2010).
\(^7\) See id. at 2260 (requiring that invocations of the right to remain silent be unambiguous).
\(^8\) 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.”).
\(^9\) See, e.g., Commonwealth v. Womack, 929 N.E.2d 943, 952 (Mass. 2010) (holding that the convicted defendant’s silence in response to the interrogator’s question regarding his reason for standing outside a store before the crime was committed “was not an exercise of his right to remain silent, but a failure to respond to a particular question” and was thus “admissible in evidence . . . and subject to comment”) (citations omitted).
\(^10\) Berghuis, 130 S. Ct. at 2260 (2010).
\(^11\) See infra Part II.
but pre-waiver silence and post-invocation silence. Regarding the former instance of silence, the suspect may remain silent—and prosecutors cannot use such silence in court—because the suspect has not yet waived his right to do so. Regarding the latter instance, a suspect may, at any time, “invoke” his right to remain silent.\textsuperscript{13} A valid invocation is an affirmative and unambiguous statement of the desire to use the right\textsuperscript{14} and differs from an “exercise” in one important respect—namely, an “invocation” requires that police end the interrogation.\textsuperscript{15} Because of this requirement, no post-invocation silence can be used at trial.\textsuperscript{16} Further, the fact of an invocation itself cannot be used against the suspect.\textsuperscript{17} Under this scheme, to be sure that his post-waiver silence is not used against him, the suspect must “invoke” his right to remain silent.

To demonstrate the inadequacy of the current warnings, this Note uses the facts presented in \textit{Berghuis v. Thompkins}, often with subtle variations. In that case, police suspected that Van Chester Thompkins, Jr. was involved in a shooting that left one man dead and another injured.\textsuperscript{18} A year after the shooting, Thompkins was arrested and taken in for questioning.\textsuperscript{19} He received the \textit{Miranda} warnings but refused to sign a form stating that he understood them.\textsuperscript{20} Still, officers began interrogating him.\textsuperscript{21} For two hours and forty-five minutes, Thompkins remained “almost completely silent” in the face of continuous police questioning.\textsuperscript{22} Finally, the following exchange occurred:

\textbf{Detective:} Do you believe in God?

\textsuperscript{13} See \textit{Berghuis}, 130 S. Ct. at 2262.
\textsuperscript{14} See \textit{id.} at 2260; \textit{infra} Part I.C.
\textsuperscript{15} This requirement holds true regardless of when the suspect invokes (i.e., pre- or post-waiver). See \textit{Berghuis}, 130 S. Ct. at 2260 (stating that both the right to remain silent and the right to counsel protect the Fifth Amendment privilege against compulsory self-incrimination “by requiring an interrogation to cease when either right is invoked”); see also \textit{Michigan v. Mosley}, 423 U.S. 96, 103 (1975) (“The critical safeguard identified in the passage at issue is a person’s ‘right to cut off questioning.’”) (quoting \textit{Miranda v. Arizona}, 384 U.S. 436, 474 (1966)).
\textsuperscript{16} See \textit{infra} notes 80–83 and accompanying text.
\textsuperscript{17} See \textit{infra} note 81 and accompanying text.
\textsuperscript{18} \textit{Berghuis}, 130 S. Ct. at 2256.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 2256–57 (claiming that Thompkins gave “limited verbal responses . . . such as ‘yeah,’ ‘no,’ or ‘I don’t know,’” communicated by nodding his head, and stated that he “‘didn’t want a peppermint’ . . . and that the chair he was ‘sitting in was hard’”); see also \textit{id.} at 2267 (Sotomayor, J., dissenting) (adding that the officers characterized the interrogation as “‘very, very one-sided’ and ‘nearly a monologue’”).
Thompkins: Yes.
Detective: Do you pray to God?
Thompkins: Yes.
Detective: Do you pray to God to forgive you for shooting that boy down?
Thompkins: Yes.  
Thompkins's affirmative answers gave police the incriminating statement they sought. Those statements were presented at trial, and Thompkins was convicted of murder, assault with intent to commit murder, and other gun charges.

Part I uses these facts to explain the current system of warnings, waivers, and invocations, and argues that the current process has departed from Miranda's intention by failing to provide suspects a full understanding of their rights. Part II demonstrates that the current warnings are unfair, especially to suspects who have waived their rights, because they provide no guidance regarding how to invoke one's rights. Part III presents several alternative solutions to remedy this unfairness and better protect suspects, ultimately concluding that an amendment to the warnings is the simplest and most effective solution. Finally, Part IV demonstrates how new, more complete warnings should look.

I. THE RIGHT TO REMAIN SILENT

"[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."  

To fully appreciate how the current warnings fall short of Miranda's noble goal, one must understand what prompted the warnings in the first place. The warnings themselves constitute the "what" of the decision, while the Court's reasoning forms the "why." Once this information is established in subsection A, subsections B and C address the Court's recent holdings regarding waivers and invocations, respectively. In light of these holdings, the warnings' content no longer satisfies their purpose.

23 See id. at 2257 (majority opinion).
24 Id. at 2258.
A. The Required Warnings and Their Purpose

The custodial interrogation atmosphere carries a “badge of intimidation . . . destructive to human dignity”26 and “trades on the weakness of individuals.”27 For these reasons, the Miranda Court believed that a criminal suspect had to receive “full warnings of constitutional rights”28 to ensure that his statements were “truly the product of free choice.”29 As such, the Court required police to provide four specific warnings, prior to any questioning, to an individual in custody:

[T]hat 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.30

These four warnings have become the “primary protection afforded [to] suspects” in custodial interrogations.31 Together, they form the “what” of the Miranda Court’s decision. Perhaps the more important consideration, however, is the “why.” A return to the “why” of the Miranda decision is appropriate for two reasons: (1) if the warnings have been rendered ineffective, their underlying purpose might be grounds to update the warnings or otherwise alter our method of protection, and (2) the warnings’ justification emphasizes what they protect—the “transcendent right”32 to remain silent. In short, the warnings were meant to provide the foundational rules of custodial interrogations and to ensure that suspects and interrogators would operate on a “level playing field.”33 The warnings serve these purposes in a variety of ways.

First, the warnings protect suspects by serving an informative function; they increase a suspect’s awareness of his constitutional rights. The Miranda Court formulated the warnings to “adequately and effectively” apprise a suspect of his right to remain silent34 and to

26 Id. at 457.
27 Id. at 455.
28 Id. at 445 (emphasis added).
29 Id. at 457.
30 Id. at 479.
32 Strauss, supra note 12, at 817.
34 Miranda, 384 U.S. at 467 (emphasis added).
"assure a continuous opportunity to exercise it."35 Through this appraisal and assurance, the warnings protect the suspect "from being compelled to incriminate himself in any manner."36 Their recitation "dispel[s] whatever coercion is inherent in the interrogation process" by providing a suspect with a "full comprehension of the rights to remain silent and request an attorney."37 Thus, the warnings' primary function is informative.38 The Miranda Court sought to combat coercion specifically by increasing suspects' knowledge. Moreover, the Court believed that this knowledge would empower suspects to exercise their rights if they desired to do so.

Secondly, the Miranda warnings empower suspects to assert control in custodial interrogations by requiring the interrogator—the more powerful party—to remind the suspect of the power he retains39 (i.e., the power to refuse to answer questions or to cut off questioning once it has begun). The warnings are thus a verbal reminder—to

35 Id. at 444.
36 Id. at 476; see also George C. Thomas III, Laying Bare the Failure of Criminal Procedure Doctrine, 4 CRIM. L.F. 535, 546 (1993) ("The promised practical benefit [of Miranda] was to enable defendants to refuse to answer questions when that was what they wanted to do.").
37 Moran v. Burbine, 475 U.S. 412, 427 (1986) (emphasis added). The Supreme Court recently reiterated that the warnings' "main purpose . . . is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010) (emphasis added).
38 See Mark A. Godsey, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, 90 MINN. L. REV. 781, 802 (2006) ("The two right to silence warnings help to dissipate coercion by informing the suspect of [his] rights. The warnings let [him] know that while it may appear that the interrogators hold all the cards, [he] holds a trump card embossed with the power of the Fifth Amendment . . . . Certainly, suspects today feel less pressure and are in a better position to control their destinies in the stationhouse interrogation room than they would be without knowing of their right to remain silent or of the consequences of speaking.").
39 "Miranda operates by exacting an exclusionary cost for noncompliance," and "avoidance of that cost is the principal reason for police to follow the Miranda requirements." Steven D. Clymer, Are Police Free to Disregard Miranda?, 112 YALE L.J. 447, 551 (2002). The interrogator is thus free to ask questions without giving the warnings if he so desires, but the suspect's unwarned statements cannot be used against him in court. See id. at 475. It is, after all, "the use of compelled statements, not their acquisition, that the [Fifth Amendment] prohibits." Id. Thus, at least insofar as the interrogator is seeking material that can be used against the suspect at trial, he must first provide the warnings. See Dickerson v. United States, 530 U.S. 428, 443-44 (2000) ("[U]nwarned statements may not be used as evidence in the prosecution's case in chief."); Michigan v. Mosley, 423 U.S. 96, 99-100 (1975) ("[U]nless law enforcement officers give certain specified warnings before questioning a person in custody, . . . any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary.").
both suspects and interrogators—that constitutional rights are in play, and that those rights cannot be ignored or trampled.\textsuperscript{40} In this regard, the warnings serve a dual function: they reassure the suspect that his rights must be honored if he chooses to exercise them, and they remind police that, no matter how much they believe they need a confession, they may not obtain it by whatever means (i.e., they must at all times operate within the bounds of the Constitution).

Finally, the warnings are significant for their effect on criminal prosecutions. They effectively "increase the probability that a person's response to police questioning will be intelligent and voluntary."\textsuperscript{41} Thus, the recitation of the warnings, when coupled with a valid waiver of rights, "creates a presumption of voluntariness and admissibility."\textsuperscript{42} Quite simply, when a suspect is informed of and fully understands his rights, his choice to answer questions may confidently be called "voluntary"; any fear of coercion is allayed because the suspect knew he had the power not to answer.\textsuperscript{43} From this perspective, the warnings are "intended to dispel enough compulsion to allow a suspect to reflect on whether to talk or remain silent,"\textsuperscript{44} and to ensure that whatever the suspect says may be used at his trial.\textsuperscript{45}

\textsuperscript{40} See Howard & Rich, supra note 33, at 703.

\textsuperscript{41} Doyle v. Ohio, 426 U.S. 610, 620–21 (1976) (Stevens, J., dissenting).

\textsuperscript{42} See Godsey, supra note 38, at 790; see also Thomas, supra note 36, at 546–47 (1993) ("If the police follow the Miranda procedure, prosecutors can be almost assured of the admissibility of the confession . . . .").

\textsuperscript{43} Professor Godsey has suggested that the Court has moved away from its "original compulsion theory" and has instead used the warnings to determine the voluntariness of a confession. See Godsey, supra note 38, at 810–11. This description may be accurate. However, one cannot ignore the important connection between the Court's willingness to assume that post-warning statements are voluntary and its belief that the warnings have reduced the coercive power of interrogators by informing suspects of their rights. In truth, the latter seems to have caused the former. In other words, because the Court believes that the warnings are effective in informing suspects of their constitutional rights and empowering them to exercise those rights, it assumes that post-warning statements are voluntarily made. Professor Godsey highlights an important consideration in the foregoing analysis: If the Court does believe the warnings ensure that statements are voluntary, "a logical connection should exist between the concept of voluntariness and the content of the warnings themselves." \textit{Id.} at 812. This concern resurfaces in Parts II.A.3, III.B, and IV.

\textsuperscript{44} John T. Parry, Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez, 39 Ga. L. Rev. 733, 813 (2005).

\textsuperscript{45} Here, it is important to note what \textit{Miranda} is not. It "is not designed to promote the fair ascertainment of truth at a criminal trial . . . ." Thomas, supra note 36, at 550. The truth or falsity of the confession is irrelevant. The important consideration is only that the confession is uncoerced, uncompelled, and voluntary. \textit{Miranda} is thus "a protector of free choice." \textit{Id.}
In Berghuis, all parties agreed that Thompkins received the appropriate warnings.\textsuperscript{46} Before the interrogation, officers allowed him to read a card with five warnings printed on it.\textsuperscript{47} After Thompkins read the fifth warning aloud to prove that he could read and understand English, officers read him the four warnings \textit{Miranda} requires.\textsuperscript{48} Clearly, the officers satisfied the “what” of \textit{Miranda}; however, it remains to be seen if the “what” still satisfies the “why.”\textsuperscript{49}

\section*{B. Valid Waivers and Why They Are Required}

For a criminal defendant’s statement during a custodial interrogation to be admissible at trial, the prosecution must demonstrate that he “knowingly and voluntarily” waived his \textit{Miranda} rights.\textsuperscript{50} For the waiver to be “voluntary,” it must be “the product of a free and deliberate choice rather than intimidation, coercion, or deception.”\textsuperscript{51} For it to be “knowing,” the suspect must first have “a \textit{full} awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”\textsuperscript{52} In short, the suspect must have received sufficient information to make an informed decision.\textsuperscript{53} Here, the warnings’ informative function is of paramount importance, as the warnings convey what the \textit{Miranda} Court believed to be “the minimum information necessary to make these decisions”\textsuperscript{54} (i.e., to waive and speak, simply remain silent, or invoke and end the interrogation).

A valid waiver need not be express; it can be implied by the circumstances.\textsuperscript{55} However, even an implied waiver must be both “volun-

\textsuperscript{46} See Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010).
\textsuperscript{47} \textit{Id.} at 2256. The fifth warning informed Thompkins of his continuing “right to decide . . . to use [his] right to remain silent” during the interrogation. \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} That is precisely the question addressed in this Note—whether the warnings adequately inform suspects of their constitutional right to remain silent, so that suspects fully understand that right and can freely choose to waive, exercise, or invoke it. For an explanation of why the current warnings fail in significant respects, see \textit{infra} Part II.
\textsuperscript{50} Berghuis, 130 S. Ct. at 2260.
\textsuperscript{51} \textit{Id.} (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).
\textsuperscript{52} \textit{Id.} (emphasis added).
\textsuperscript{54} \textit{Id.} at 1563–64. To drive home his point that the warnings provide the \textit{minimum} information necessary, Professor Weisselberg notes “that officers are not required to provide \textit{additional} information that might enable suspects to make a \textit{more} informed choice.” \textit{Id.} at 1564 (emphasis added). Thus, the warnings are “a \textit{minimum} though not necessarily sufficient condition for an informed decision.” \textit{Id.}
\textsuperscript{55} See Berghuis, 130 S. Ct. at 2261.
A court may presume that an individual has made a "deliberate choice" sufficient to establish an implied waiver where the prosecution shows that the Miranda warnings were given, that the accused had a "full understanding" of his rights, and that he then "act[ed] in a manner inconsistent with their exercise." Significantly, in determining whether there has been an implied waiver of rights, courts do not view the suspect's intent. Instead, the analysis is limited to whether the suspect deliberately made a statement with full knowledge of his rights.

Because waivers may be implied by the suspect's responses to police, interrogators are not required to obtain waivers before beginning interrogations. Instead, they may question any suspect who has not invoked his rights. If, in the course of that questioning, the suspect makes "an uncoerced statement to the police," he has impliedly waived his right to remain silent. In essence, the court may find that the suspect waived his right and freely chose to speak to police precisely because he did speak with police. Still, the Supreme Court has been persistent—at least in its language—in its use of the term "full." It has asserted that the warnings provide suspects with a full comprehension of their rights, and it requires a full understanding of those rights before inferring a waiver from the circumstances. But, as Berghuis demonstrates, courts tend to readily find waivers.

The Berghuis Court found that Thompkins had impliedly waived his right to remain silent. Officers initially gave him time to silently read the five warnings printed on the card. They then asked him to read the fifth warning aloud and, satisfied that he understood English,
read him the remaining four. On this set of facts, the Court was confident that Thompkins understood his rights, despite his unwillingness to sign the form stating as much. Thus, the Court held, “Thompkins’s answer to [the detective’s] question about whether Thompkins prayed to God for forgiveness for shooting the victim [was] a ‘course of conduct indicating waiver’ of the right to remain silent.”

Although the Miranda Court stated that “a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained,” the Berghuis Court held that the incriminating statement itself was the uncoerced statement necessary for an implied waiver. Because there was no basis to find coercion, the Court believed Thompkins’s statement was voluntary; if he had wanted to remain silent, he could have simply said nothing in response to the question or invoked his right to remain silent. These are the only two means the Court provided to protect against a finding of waiver: silence or invocation. Seemingly any verbalized response, then, aside from an invocation of rights, would have become a waiver of the right to remain silent. This holding, as described by Justice Sotomayor, “mark[s] a substantial retreat from the protection” provided by Miranda, because it disregards the fact that Miranda and its progeny were premised on the belief that custodial interrogations are inherently coercive.

C. Post-Waiver Invocations

Even where there has been a valid waiver of Miranda rights, the suspect retains control over the course of the interrogation. At all times, the suspect holds the power to revoke his prior waiver by invoking the right to remain silent. Such invocations protect against com-

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68 See id.
69 See id.
70 Id. at 2263 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).
72 See Berghuis, 130 S. Ct. at 2263.
73 See id.
74 See id. For an explanation of why simply remaining silent in response to the third question about his belief in God may not have actually been in Thompkins’s best interest, see infra Part II.C.
75 As described in Part I.C, the invocation must in fact be unambiguous.
76 Berghuis, 130 S.Ct. at 2266 (Sotomayor, J., dissenting).
77 See id. at 2272; Miranda v. Arizona, 384 U.S. 436, 467 (1966).
78 See Berghuis, 130 S. Ct. at 2262; id. at 2268 (Sotomayor, J., dissenting).
pulsory self-incrimination "by requiring an interrogation to cease,"79 on the assumption that any statement taken post-invocation is necessarily the product of compulsion and a violation of the suspect's free choice.80 Invocations of the right to remain silent cannot be used against a criminal defendant in court.81 Such an allowance would be an impermissible punishment of the exercise of a constitutional right.82

To invoke his right to remain silent, a suspect must unambiguously express his desire to do so.83 An ambiguous statement, or no statement at all, will not necessitate ending the interrogation.84 This unambiguous invocation requirement establishes what the Berghuis Court called "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity.'"85 The requirement ensures that police do not have to

79  Id. at 2260, 2263–64 (majority opinion).
80  See Miranda, 384 U.S. at 474.
81  See id. at 468 n.37; United States v. Goldman, 563 F.2d 501, 503 (1st Cir. 1977) (stating that the prosecution could not introduce evidence or comment on the defendant's invocation of his right to remain silent).
82  See Miranda, 384 U.S. at 468 n.37.
83  See Berghuis, 130 S. Ct. at 2260; see also Thompson, supra note 4, at 662 (stating, prior to the Berghuis decision, that "[i]f a suspect clearly invokes the right to silence, the police must immediately cease the interrogation."). This is the central holding of Berghuis. The Miranda Court had stated that the interrogation must end if the suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent." Miranda, 384 U.S. at 473–74 (emphasis added). Thus, Berghuis's unambiguous invocation requirement is not what the Miranda Court had in mind, at least insofar as it did not mean "in any manner, so long as it is unambiguous." As Professor Strauss argues, by adding the unambiguous requirement, the Court has "gone astray from what was intended in Miranda." Strauss, supra note 12, at 774.
84  See Berghuis, 130 S. Ct. at 2260.
85  Id. (quoting Davis v. United States, 512 U.S. 452, 458–59 (1994) (alterations in original). Justice Sotomayor disagreed that this inquiry was objective and argued that many cases demonstrated that the very act of distinguishing "clear" from "ambiguous" was a subjective exercise. See id. at 2277 (Sotomayor, J., dissenting). In any event, as with waivers, the invocation inquiry is intentionally divorced of concern for the suspect's intent. The focus is entirely on what the police may have reasonably understood from the suspect's statements, not what he intended when he made them. See Davis v. United States, 512 U.S. 452, 459 (1994) (speaking about the right to counsel, whose unambiguous invocation requirement now applies with equal force to the right to remain silent, and stating that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," interrogators are not required to end the interrogation).
guess at a suspect’s intent, and also protects against the suppression of a voluntary confession any time a suspect uses ambiguous language.86

In practice, “unambiguous” has proven to be a difficult standard for suspects to meet. Short of “I plead the Fifth,”87 few post-waiver statements have been described as “unambiguous” in this context.88 For example, the following statements have been deemed ambiguous:

“I don’t want to tell you guys anything to say about me in court.”89
“[I]f you’re not going to talk real talk, then we shouldn’t talk.”90
“I don’t want to talk about it.”91

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86 See Berghuis, 130 S. Ct. at 2260.
87 Anderson v. Terhune, 516 F.3d 781, 787 (9th Cir. 2008) (en banc). The case came from the state court on the defendant’s petition for writ of habeas corpus. Id. at 783–84. Interestingly, the state court had struggled with whether even “I plead the Fifth”—the seemingly least ambiguous statement one could make in an attempt to invoke his Fifth Amendment privilege—was unambiguous. See id. at 787 (“In the present case, the defendant’s comments were ambiguous in context . . . .”) (quoting the state court’s opinion). Initially, the Ninth Circuit accepted the state court’s conclusion that the statement was, in fact, ambiguous. See Anderson v. Terhune, 467 F.3d 1208, 1213 (9th Cir. 2006) (“[T]he state-court conclusion is a reasonable determination of the facts.”). Upon rehearing en banc, however, the Ninth Circuit reversed its decision and “‘I plead the Fifth’ was finally found to plead the Fifth.” Strauss, supra note 12, at 799.
88 As Professor Strauss has explained, “court decisions have made it extremely difficult for suspects who wish to assert their rights to do so. Judges have gone to extraordinary lengths to classify even seemingly clear invocations as ambiguous invocations which can be ignored by police.” Strauss, supra note 12, at 775.
90 See Barnes v. State, 696 S.E.2d 629, 632 (Ga. 2010).
91 See People v. Williams, 233 P.3d 1000, 1023 (Cal. 2010), cert. denied, 131 S. Ct. 1602 (2011). Interestingly, the same phrase has been held to be an unambiguous invocation as well. See Commonwealth v. Green, No. 0803, 2010 WL 3038733, at *6 (Mass. Super. Ct. June 25, 2010). In People v. Williams, the statement occurred in the course of a fast-paced exchange between the defendant and the officer. See Williams, 233 P.3d at 1023. The California Supreme Court held that the statement was insufficient to invoke the right to remain silent because it was an expression of the defendant’s passing frustration with officers. Id. Thus, in context, it viewed the statement as ambiguous. This rationale is problematic, because the reason for the suspect’s statement should be irrelevant; the question is merely whether the statement is unambiguous, not whether it is unambiguous and prompted by a desire to end the interrogation. See Strauss, supra note 12, at 790 (“[T]he motive for the suspect in invoking the right to remain silent is irrelevant. It could be from a ‘desire’ not to speak or it may not. In other words, a suspect who says, ‘I really, really want to speak to you, but I won’t,’ should be deemed to be invoking his right. The motive for not speaking—be it a desire not to, the advice of attorney, fear, or even ‘shock’—is irrelevant.”). On this point, the Ninth Circuit seems to have taken a very strong stance: “Using ‘context’ to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant,
"I'm not going to talk about nothin'." 92
"I just don't think that I should say anything." 93
"I don't think I can talk . . . I guess I don't want to discuss it right now." 94

"I'm done. This is over." 95

Merely remaining silent, of course, is per se ambiguous. 96 Further, statements expressing an unwillingness to talk about certain topics will generally not be construed as "an unambiguous invocation of the right to remain silent on all matters." 97 Courts have even gone so far as to hold that a soft-speaking suspect should know that when an officer speaks in "a louder voice over him," his statement has not been "clearly conveyed" because the officer could not hear it, thus rendering the statement ambiguous. 98 Finally, adding language such as "I

but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence."  Terhune, 516 F.3d at 787.

92 See United States v. Sherrod, 445 F.3d 980, 982 (7th Cir. 2006). Here, the Seventh Circuit held that the statement, in context, was a "taunt" or "provocation" as much as an invocation of rights. Id.

93 Burket v. Angelone, 208 F.3d 172, 200 (4th Cir. 2000); see also United States v. Peters, 435 F.3d 746, 751 (7th Cir. 2006) (stating that the Burket court considered the phrase to be ambiguous).

94 See Strauss, supra note 12, at 791 n.91 and accompanying text.

95 State v. Saeger, No. 2009AP2133-CR, 2010 WL 3155264, at *2 (Wis. Ct. App. Aug. 11, 2010) ("Taken in context, it was reasonable for the detectives to conclude that his statement was merely a fencing mechanism to get a better deal—one that would free him of exposure to federal charges. We acknowledge that a reasonable person could also read his statement to mean that he actually wanted to invoke his right to remain silent . . . . [H]owever, since there are reasonable competing inferences that could be drawn from the statement, the statement is equivocal as a matter of law and is therefore insufficient to invoke the right to remain silent."). For a more exhaustive list of examples, see Weisselberg, supra note 53, at 1580–81.


98 See United States v. Clark, 746 F. Supp. 2d 176, 186 (D. Me. 2010). This allowance seems to encourage officers to speak over suspects if they know the suspects may be trying to invoke their rights, because the very act of speaking over them makes their statements ambiguous and renders their attempted invocation ineffective.
think,”99 “I guess,”100 or “maybe”101 will often make an otherwise unambiguous statement ambiguous.102 Therefore, unambiguous invocations require very direct language, such as “[I am] not answering any questions because I don’t have to. I got the right to remain silent.”103

In Berghuis, Thompkins failed to invoke his right to remain silent because he never said “that he wanted to remain silent or that he did not want to talk with the police.”104 Unlike most criminal suspects, however, Thompkins did not have a post-waiver opportunity to invoke his right to remain silent. He waived his right by answering “yes” to the third question,105 and that response was also his incriminating statement. Still, Thompkins failed to affirmatively indicate that he did not want to speak to the interrogators. As such, he did not invoke—or even ambiguously attempt to invoke—his right to remain silent.106

II. UNFAIR CONSEQUENCES OF THE COMPLICATED SYSTEM

“To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.”107

The unambiguous invocation requirement is not something a criminal suspect is likely to understand on his own, and it is perhaps even less likely that interrogators will inform him of the require-
ment. However, the very reason for the warnings was the Court's belief that the suspect should not be required or assumed to understand his rights on his own. Under the current system, suspects may be adequately warned of their rights' existence, but that information may be denied any practical post-waiver effect since the warnings include no information regarding their use. In short, knowing of the right to remain silent is not enough to call the warnings fair or adequate because suspects still do not know how to use that right during the course of an interrogation. In this respect, the warnings' inadequacy results in three related and unfair results: Suspects do not know how to invoke their rights, their attempted invocations are ignored, and they unwittingly incriminate themselves by simply remaining silent after having waived their right to do so.

A. Suspects Do Not Know How To Invoke Their Rights

The Berghuis Court held that a suspect who knows that his Miranda rights may be invoked at any time "has the opportunity to reassess his . . . immediate and long-term interests." While technically true, this claim is meaningless if the suspect cannot act upon his reassessment. Suspects are generally given no guidance on how to invoke their rights, and the required warnings certainly do not inform them that they must do so unambiguously. Thus, when a suspect reassesses the situation and decides that he should not answer any more questions, he must rely on his own knowledge of the system to effectuate his desire. A system in which the suspect must have significant knowledge of his legal rights during an interrogation is clearly unfair. Therefore, the Court held that the Miranda warnings should inform suspects of how to invoke their rights post-waiver.

108 Cf. Berghuis, 130 S. Ct. at 2276 (Sotomayor, J., dissenting) (noting that the Miranda warnings "give no hint" that suspects need to unambiguously invoke the right to remain silent and speculating that police are unlikely to inform suspects of the Court's new requirement).
109 For a full discussion of the "why" behind Miranda, see supra Part I.A.
110 Berghuis, 130 S. Ct. at 2264.
111 Professor Rodes's discussion of due process protections applies with equal force to the current state of the Miranda warnings. See Robert E. Rodes, Greatness Thrust upon Them: Class Biases in American Law, 28 AM. J. JUR. 1, 10 (1983) ("They are intended to secure justice, . . . [b]ut they create in practice a machinery of power that is accessible only to people who are familiar with it and know how to manipulate it—or to those who can afford to hire such people."). In short, the Miranda warnings achieve just results for those who have a good deal of understanding of and familiarity with their rights. But this result is nonsensical; many people lack a high level understanding of their constitutional rights, and this is precisely the class Miranda sought to protect, inform, and empower. To be truly fair, the warnings should also inform suspects of how to invoke their continuing rights post-waiver. Without such knowledge, interrogators may continue to rely on the fact that "uncertainty about the process as a
knowledge about his rights—or significant luck\footnote{See Nicole Black, Silence is no longer golden, THE DAILY RECORD, http://web\cache.googleusercontent.com/search?q=cache:AOAPF3ZaCLIJ:nylawblog.typepad.com/suigeneris/criminal_law/+Miranda+jurisprudence+complicated&cd=6&hl=en&ct=chnk&gl=us (June 7, 2010) ("[W]hen it comes to Miranda rights, the jurisprudence has become so complicated, that the invocation of those rights requires specific words... In order to successfully invoke Miranda rights, an accused must either accidentally stumble on the correct choice of words or take a course to learn about the proper way to protect one's constitutional rights.")}—in order to successfully invoke the right to remain silent post-waiver violates "the promise of Miranda at its most basic level—to truly protect the right to remain silent."\footnote{Id. at 824.} Indeed, "[t]hat right should not only be the province of those fortunate enough or educated enough to say the right words. The promise belongs to all."\footnote{Id. at 792.} Approximately eighty percent of suspects waive their rights and agree to speak with police,\footnote{Id. at 822.} but "almost no suspects [invoke] their rights after a valid waiver."\footnote{Id. at 775.} This fact is troubling because it means that very few suspects fully utilize "what Miranda so carefully guaranteed"—control over whether and when to speak to police.\footnote{Id. at 798.} This underutilization may be because "court decisions have made it extremely difficult for suspects who wish to [invoke] their rights to do so."\footnote{Id. at 822 (emphasis added). Professor Strauss also states that it is "almost impossible for a suspect to [invoke] the right to remain silent after the waiver of rights," despite the fact that Miranda "embraced" the idea that a suspect may choose not to talk to police during an interrogation. \textit{Id.} at 798.} In fact, it may be that "the only logical explanation for this statistic is that the rules for [invoking] ... the right to remain silent have become so difficult that almost no one is able to do it."\footnote{Id. at 822 (emphasis added). Justice Sotomayor noted that "the Miranda warnings give no hint that a suspect should use [the Court's] magic words, and there is little reason to believe that police—who have ample incentives to avoid invocation—will provide such guidance." Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting).} If a suspect is unable to invoke his right to remain silent post-waiver,
"Miranda’s promise . . . is an empty one."\textsuperscript{121} And if he is unable to do so because the warnings failed to apprise him of the complex and demanding requirements placed on invocations, the warnings have indeed failed to serve Miranda’s "why."\textsuperscript{122}

In Berghuis, Thompkins was told that he had "the right to decide at any time before or during questioning to use [his] right to remain silent."\textsuperscript{123} The Court believed this warning "made clear" that his right to remain silent "could be asserted at any time."\textsuperscript{124} However, the Court's language here is surprisingly imprecise. Nothing about being told of a continuing ability to use the right to remain silent informs the suspect that he must assert that right. In truth, a suspect may well believe that he is using his right when he simply remains silent after the interrogator asks a question he does not wish to answer. Indeed, even judges have struggled with this concept.\textsuperscript{125} Thus, supposing Thompkins had wished to use his right to remain silent instead of answering the third question—and thus avoid making an incriminating statement—he might have simply remained silent. However, his silence would not have counted as an invocation,\textsuperscript{126} and the interrogation would have continued in spite of the attempt. This possibility directly results from his lack of knowledge regarding how to invoke his rights.

\textbf{B. Those Seeking to Invoke Their Rights Are Ignored}

Ample evidence suggests "that criminal suspects often use equivocal or colloquial language in attempting to invoke their right to silence."\textsuperscript{127} Because courts readily call such language ambiguous,\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{121} Strauss, supra note 12, at 775.
\item \textsuperscript{122} See supra Part I.A.
\item \textsuperscript{123} Berghuis, 130 S. Ct. at 2256 (emphasis added). This additional warning is not at all uncommon. In fact, eighty percent of jurisdictions include some variation of this very warning. See Weissselberg, supra note 53, at 1566. Nor is the warning misplaced, as suspects do have a continuing right to remain silent. See Miranda, 384 U.S. at 444–45; Berghuis, 130 S. Ct. at 2263–64 ("If the . . . right to remain silent is invoked at any point during questioning, further interrogation must cease.") (emphasis added). However, the warning is inadequate because it provides no guidance on how the suspect may use his right post-waiver. More specifically, it fails to tell the suspect how he may use his right without incriminating himself. See infra Part II.C.
\item \textsuperscript{125} See, e.g., Soffar v. Cockrell, 300 F.3d 588, 603 (5th Cir. 2002) (Moss, J., dissenting) ("What in the world must an individual do to exercise his constitutional right to remain silent beyond actually, in fact, remaining silent?").
\item \textsuperscript{127} The same result would obtain if he had made an ambiguous statement (e.g., "I don’t think I should talk anymore").
\item \textsuperscript{128} Berghuis, 130 S. Ct. at 2277 (Sotomayor, J., dissenting).
\end{itemize}
these attempts are properly ignored by the police.\textsuperscript{129} Certain groups will feel the effects of this reality more severely than others. Ambiguous speech styles—such as indirect and polite speech (e.g., "Do you think I should answer that?") or hedged and softened speech (e.g., "Maybe I shouldn't say anything")—are more likely to be used by "powerless" groups, such as the less educated or those of lower socioeconomic status.\textsuperscript{130} Those who are "better educated and more affluent" are likely to "have a clearer understanding of their rights" and "will be inclined to assert them more directly."\textsuperscript{131} However, even among that group, "it is inevitable that people [will] react to custodial interrogation with some degree of intimidation," and "[i]t is normal to respond to intimidation by sounding meek or tentative rather than precise, clear, and assertive."\textsuperscript{132} Indeed, "most common interrogation techniques operate by instilling [the] belief" that the suspect is "in a position of powerlessness in the stationhouse."\textsuperscript{133} The unfortunate result, then, may be that only "hardened" criminals who are accustomed to the interrogation setting will be able to assert their rights.

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 89–95 and accompanying text.
\item See Davis v. United States, 512 U.S. 452, 459 (1994) ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."); id. at 461 ("[W]e decline to adopt a rule requiring officers to ask clarifying questions."). Thus, interrogators are not required to end the interrogation or ask clarifying questions; they are free to ignore the ambiguous statement and continue asking questions.
\item LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 60–61 (2005). Speaking in the context of the right to counsel, the Supreme Court has also recognized that its unambiguous invocation requirement may disadvantage certain groups. See Davis, 512 U.S. at 460 ("We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.").
\item SOLAN & TIERSMA, supra note 130, at 60.
\item Strauss, supra note 12, at 806. Perhaps more problematic is the fact that, to the everyday person, "[t]he use of hedges or modal verbs and even questions . . . [is] typically treated as unambiguous. For example, if a customer tells a waitress, 'I think I'll take a tuna sandwich,' virtually all would interpret that as a clear enough request for a tuna sandwich. . . . Yet, in the hostile, frightening environment of an interrogation setting, the police can ignore such comments . . . ." Id. at 807.
\item Weisselberg, supra note 53, at 1589. As a result, suspects may use ambiguous language "[t]o avoid offending those in power . . . but tentative assertions of rights will not be recognized as invocations under an 'unambiguous or unequivocal' standard." Id.
\end{enumerate}
\end{footnotesize}
with sufficient clarity to constitute an invocation. Given the setting, any other person—rich or poor, educated or uneducated—is likely to feel intimidated and may attempt to invoke his right to remain silent with ambiguous language as a result. Such an attempt will have absolutely no effect.

Knowing that his wishes have been ignored, such a suspect “may well see further objection as futile and confession (true or not) as the only way to end his interrogation.” Indeed, when interrogators ignore a sincerely attempted but ambiguous invocation of the right to remain silent, the probability that the suspect will attempt to reassert that right in the future is remote. Professor Strauss summed up this result succinctly:

After all, the suspect does not say to himself, “Oh yes, I must say it more clearly, that’s why they ignored me. Next time, I’ll say ‘I am invoking my right to remain silent’ and all will be well.” Rather, the police officer’s response reinforces those feelings of hopelessness and intimidation that cause the ambiguous request in the first place.

This result is especially troubling, as suspects’ inability to invoke their constitutional rights because of the intimidating interrogation environment is exactly what the *Miranda* Court sought to prevent.

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134 See Strauss, supra note 12, at 806.

135 See Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010) (“If an accused makes a statement concerning the right to counsel [or of silence] ‘that is ambiguous or equivocal’ or makes no statement, the police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his . . . *Miranda* rights . . . .” (quoting Davis v. United States, 512 U.S. 452, 459 (1994)) (citations omitted)).

136 Id. at 2278 (Sotomayor, J., dissenting). Professor Strauss also voiced this concern: “A suspect who felt that he had asserted his right to end the interrogation but was ignored will now be convinced that any further attempt to assert his rights will be futile. No wonder suspects so often not only continue to respond to questions, but often soon thereafter make incriminating statements.” Strauss, supra note 12, at 798.

137 See Strauss, supra note 12, at 798; see also Thompson, supra note 4, at 664–65 (stating that the Court has “opted for a regime that [will] allow the police deliberately to ignore a suspect’s attempts to invoke the *Miranda* rights, a practice that in and of itself can increase the coercive atmosphere *Miranda* was intended to dispel”).

138 Strauss, supra note 12, at 815.

139 See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (stating that the warnings must be provided to combat “the inherently compelling pressures” of the custodial interrogation environment, “which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”).
C. Suspects Unwittingly Incriminate Themselves by Remaining Silent

There is a specific and rarely discussed instance when an individual’s silence may be used against him in court, and when the jury is permitted to make inferences about his state of mind, and even his guilt, from such silence. Recall that, post-waiver, a suspect must unambiguously invoke his right to remain silent to avoid answering a potentially incriminating question. Assume, instead, that the suspect merely remains silent in the face of such a question. That instance of silence will always be ambiguous and is thus never an invocation. Because it has come post-waiver, it is admissible in evidence at trial and available for the prosecutor’s comment. In speaking of such silence, the prosecutor is not commenting on the suspect’s invocation of a constitutional right precisely because, as defined by the Supreme Court, there has been no invocation.

Indeed, it would make little sense, given the requirements placed on invocations, to disallow the use of that silence in court; unambiguous invocations are required after waivers, and silence simply cannot be called unambiguous. However, this use of post-waiver silence violates the implicit promise of Miranda’s second warning—that, unlike what the suspect says, his silence cannot be used against him in a court of law. While it is true that a suspect could also reason from the

140 See supra Part I.C.
141 See supra note 96 and accompanying text.
142 See, e.g., United States v. Goldman, 565 F.2d 501, 504 (1st Cir. 1977) (stating that the defendant’s “silent response to a particular question” was given “enhanced probative value” by the fact that he spoke on some subjects); Commonwealth v. Womack, 929 N.E.2d 943, 951 (Mass. 2010) (holding that the defendant’s silence was a failure to respond to a particular question, not an invocation of the right to remain silent, and was thus admissible in evidence); Commonwealth v. Senior, 744 N.E.2d 614, 621 (Mass. 2001) (holding that the prosecutor’s statements about the defendant’s silence when asked where he had been drinking were permissible because the defendant had not invoked his right to remain silent); People v. Parker, No. 290941, 2010 WL 3656019, at *5 (Mich. Ct. App. Sept. 21, 2010) (“Where a defendant decides to speak and waive his Miranda rights, anything he says, or does not say, is admissible until he invokes his right to silence.”), appeal denied 797 N.W.2d 162 (Mich. 2011). Cases involving the introduction of post-waiver silence to establish guilt have been admittedly rare, but there is little reason for that rarity to continue. Unless there has been an invocation, post-waiver silence is a usable and relevant piece of the interrogation. There is no constitutional justification for refusing to use it. As such, a proliferation of these kinds of cases can perhaps be expected.
143 See supra note 8 and accompanying text; see also United States v. Hale, 422 U.S. 171, 182–85 (1975) (White, J., concurring) (“Surely [the defendant] was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.”).
first *Miranda* warning that his post-waiver silence may be used against him.\(^{144}\) That reasoning requires a full understanding of one’s rights and the consequences of waiver, an understanding which many suspects do not have.\(^{145}\) Additionally, when a suspect is told he may “use” his right to remain silent at any time, he has no reason to believe that his “use” may in fact be used against him. Finally, the contradictory messages that flow from the first and second warnings only demonstrate the weaknesses of the *Miranda* warnings themselves. Depending on his starting point, it is reasonable for the suspect to conclude both that his silence may be used against him and that it cannot be so used. This confusion may cause suspects who intend to invoke their rights to simply remain silent and, in so doing, actually incriminate themselves. For example, if Thompkins had simply remained silent after the detective’s third question, his silence may have been introduced as evidence against him in court.\(^{146}\) The prosecutor could have commented on that silence in his opening or closing statement, directing the jury to infer that Thompkins had something to hide, or that he had a guilty conscience.

There may not be empirical evidence to suggest that suspects who remain silent post-waiver actually intend to invoke their rights and cut off questioning. But common sense tells us that if the suspect knew

\(^{144}\) The first *Miranda* warning provides that the suspect has a right to remain silent. If the suspect voluntarily waives that right, he can reason that he is no longer able to merely remain silent in the interrogation. The inference made from the second warning would no longer apply. However, this conclusion would not necessarily be so simple or reasonable when the suspect has been told, as Thompkins was, that he may use his rights at any time, especially when he has been given no guidance on how he may use them. See Weisselberg, *supra* note 53, at 1566 (claiming that eighty percent of jurisdictions include a warning which provides that the suspect may use or assert his rights at any time).

\(^{145}\) *Id.* at 1563 (“The best evidence is now that a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey.”).

\(^{146}\) Thompkins’s hypothetical silence after the third question could have been introduced at trial if the court found that he had previously waived his right to remain silent. While the Supreme Court found that Thompkins’s answer to the third question constituted a waiver of rights, it hinted that his other responses may have also been sufficient to establish waiver. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010) (“This [finding of waiver] is confirmed by the fact that before [the three questions] Thompkins had given sporadic answers to questions throughout the interrogation.”). In fact, his affirmative answers to the first two questions in the series may have been sufficient to constitute waiver as well. If the court concluded that there had been a valid waiver of rights prior to that hypothetical instance of silence, Thompkins’s silence could have been introduced as substantive evidence of his guilt. See *State v. Aguero*, 791 N.W.2d 1, 11 (N.D. 2010) (“The testimony about [the defendant’s] post-*Miranda* silence . . . was used as substantive evidence of his guilt.”).
how to invoke his rights and that his silence could be used against him in court, he would properly invoke his right instead of merely remaining silent and incriminating himself. The suspect who merely remains silent understands that he should not respond to the question, and he does not want to answer it precisely because he fears that his response may incriminate him. He is, of course, unaware that his silence in that instance is only marginally better than a more direct manifestation of his guilty conscience or that, in fact, jurors are free to treat them as functional equivalents.

There is a high probability that jurors will negatively view a criminal defendant’s silence in the face of an accusation or potentially incriminating question. As the Supreme Court noted in United States v. Hale,\textsuperscript{147} silence has “probative weight where it persists in the face of an accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.”\textsuperscript{148} The fact that prosecutors are introducing post-waiver silence into evidence and commenting on it during their opening and closing statements\textsuperscript{149} only reinforces the logical conclusion that such silence has an effect on the jury, as it seems safe to conclude that prosecutors generally do not include random or irrelevant information in their attempts to persuade juries of defendants’ guilt. Thus, even though we cannot directly see how frequently instances of post-waiver silence tip the scales in the prosecution’s favor, we at least know that prosecutors sometimes believe they do. Any allowance of such evidence that comes at the expense of a constitutional right—or, more precisely, that results from a suspect’s ignorance of how to invoke a constitutional right—is problematic, as it represents the current warnings’ failure to achieve the purposes for which they are required.\textsuperscript{150} Further, by allowing a suspect to remain silent without ever warning that such silence can be used against him, we have established a system that preys on the suspect’s ignorance to establish his guilt.\textsuperscript{151} That result is

\textsuperscript{147} 422 U.S. 171 (1975).
\textsuperscript{148} Id. at 176.
\textsuperscript{150} See supra Part I.A.
\textsuperscript{151} In this instance, the system is not preying on the suspect’s ignorance of his rights. In fact, it directly informs him of his constitutional right to remain silent. However, it leaves him to infer the consequences of his post-waiver silence and entirely fails to inform him of how he may invoke his right to remain silent post-waiver if he desires to do so. Thus, the system preys on his ignorance of the invocation process and the consequences of his silence.
violative of the very “fair-trial principles” at the heart of the *Miranda* decision.  

III. ALTERNATIVE SOLUTIONS

“[O]ur system of justice is not founded on a fear that a suspect will exercise his rights. ‘If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.’”

The current system of warnings does not adequately inform suspects of how they may use their rights. In particular, suspects who have initially chosen to waive the right to remain silent have no guidance regarding how they may later invoke it. Thus, such suspects have their intentions ignored or, worse, unwittingly incriminate themselves by merely remaining silent in the belief that they are using their rights. Because *Miranda*’s warnings have failed in this respect, “the time has come to begin the search for alternative remedies.” Several alternatives could solve this complicated problem and ensure that suspects who decide to waive their rights are treated fairly and have their wishes honored. Either the Court could reexamine its precedents regarding post-waiver silence, clarifying questions, or the presence of counsel, or it could amend the now inadequate warnings.

152 Berghuis v. Thompson, 130 S. Ct. 2250, 2278 (2010) (Sotomayor, J., dissenting). A situation in which whatever the suspect does—speak or remain silent—can be used against him at trial can hardly be called fair. See State v. Hassel, 696 N.W.2d 270, 274 (Wis. Ct. App. 2005) (“[W]hen both silence and statements can be used against a defendant as evidence of guilt, the right against self-incrimination becomes impossible to invoke because anything the accused does is evidence for the State.”).


154 Thompson, supra note 4, at 650.

155 The *Miranda* Court invited Congress and the States to devise alternative methods of protecting the rights it sought to protect, with the only requirement being that such methods be “at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.” *Miranda* v. Arizona, 384 U.S. 436, 467 (1966); see also David A. Strauss, *Miranda, the Constitution, and Congress*, 99 Mich. L. Rev. 958, 969 (2001) (“The *Miranda* opinion itself famously suggested that the precise rules established by that case were subject to being modified by congressional or state legislation, so long as the legislation provided protection equivalent to that provided by the *Miranda* rules themselves.”). Thus, any change to the warnings could come from the Supreme Court or practically any other branch of government. See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030, 1054 (2001) (“[P]rophylactic rules and incidental rights are fully open to revision by Congress, federal executive action, and state legislative, executive or judicial action.”).
Each of the suggested methods may result in more suspects invoking their rights and ending interrogations. As such, each may result in fewer confessions. But each also moves closer to Miranda’s goal of fully informing suspects of their rights and ensuring that confessions are the products of individuals’ free choice.

A. Solutions That Require a Reexamination of Precedent

1. Treat All Instances of Silence as Invocations

First, and most disruptively, the Supreme Court could hold that all instances of post-waiver silence are affirmative invocations of the right to remain silent. This holding would fundamentally alter the current method of invocation by requiring interrogators to cease questioning in the face of what is now seen as ambiguous conduct. In effect, such a holding would overrule Berghuis by allowing an ambiguous act to constitute an invocation. The Court could avoid this problem definitionally; it could continue to require unambiguous invocations but hold that silence is not ambiguous. In other words, the Court could count silence itself as an “unambiguous invocation” of the right to remain silent. Either way, post-waiver silence would be inadmissible in evidence, just as current invocations are inadmissible.

Still, the Supreme Court will always “have the final say as to whether alternative prophylactic rules and rights provided by legislators, law enforcement agencies, and state judges sufficiently protect the Bill of Rights in a manner the Court can effectively oversee.” For a closer examination of Congress’s potential role in reformulating the warnings, see Strauss, supra note 12, at 960 (“The conclusion that Miranda is as legitimate as other well-established constitutional principles does not entail, however, that Congress is precluded from modifying it.”); id. at 974 (“[O]nce constitutional rights are understood, as they must be, as partly but inevitably ‘prophylactic’ in nature, there should be no objection, in principle, to Congress’s playing a role in their elaboration.”). Regardless, the examination of precisely which branch should alter the warning is beyond the scope of this Note. As such, this Note proceeds on the assumption that the change will come from the Supreme Court.

For an explanation of why such an increase in post-waiver invocations is not a result we should seek to avoid, see infra note 190 and accompanying text.

Because the suspect has already waived his right to simply remain silent, the Court is unable to describe an instance of post-waiver silence as merely an exercise of the right without also saying that it will require interrogators to cease the interrogation (i.e., the Court must call it an invocation). Although the suspect has a continuous right to remain silent, his post-waiver use of that right necessitates an invocation—some showing that he wishes to revoke his previous waiver.

See Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (holding that invocations of the right to remain silent must be unambiguous).
silent would thus be protected from having that silence used against them in court because no post-warning silence could be used in court.

While *Miranda* may overprotect the Fifth Amendment privilege against self-incrimination,\textsuperscript{160} counting silence itself as an invocation would dramatically overprotect the right to remain silent. It would require interrogators to stop the interrogation even when the suspect had no intention of doing so. This result would be especially anomalous given that those who actually intended to invoke but used ambiguous language in their attempt could still be ignored. Further, such a rule would be contrary to common sense; the ability to remain silent in response to the interrogator’s question is precisely what the suspect previously waived. Thus, it makes little sense to end interrogations on the basis of mere silence. More troublesome, however, is the unworkable standard this approach would create for interrogators. For example, an officer faced with such silence would have to answer difficult questions such as: “How long must the suspect persist in his silence before it becomes an invocation?”; “Is the suspect actively thinking about the question, or is he attempting to assert his rights?”; and “Is the suspect simply uncomfortable with this particular question, or embarrassed by the fact that I am asking it?”—which raises another problematic question, “Can I just move on?”\textsuperscript{161} Thus, without a requirement of clarifying questions, which would essentially force the suspect to make a clear statement of his intent, this approach would substantially overprotect the right to remain silent and diminish the utility of custodial interrogations. For these reasons, the Court is not likely to reexamine its position in *Berghuis*, nor should it, because a simpler, less disruptive, and equally effective solution is available.\textsuperscript{162}

\textsuperscript{160} See Klein, *supra* note 155, at 1033 (“A prophylactic rule potentially overprotects the constitutional clause at issue . . .”).

\textsuperscript{161} Indeed, the existence and difficulty of such questions animated the majority’s position in *Berghuis*. See *Berghuis*, 150 S.Ct. at 2260 (“If 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 unclear intent and face the consequences of suppression ‘if they guess wrong.’” (quoting *Davis v. United States*, 512 U.S. 452, 461 (1993))).

\textsuperscript{162} See *infra* Part III.B. Additionally, the Court’s unambiguous invocation requirement should not be reexamined, because an invocation “entitles a suspect to action by another party”—namely, it requires officers to end the interrogation—and so “it seems only fair that the suspect be required to communicate a request for that action clearly.” The Supreme Court, 2009 Term—Leading Cases, 124 Harv. L. Rev. 179, 197 (2010).
2. Require Interrogators to Ask Clarifying Questions

In Berghuis, Justice Sotomayor stated that the Court's clear-statement rule, coupled with its failure to adopt even the "straightforward mechanism" of requiring officers to ask clarifying questions after a suspect makes an ambiguous statement regarding his right to remain silent, ensures that "some poorly expressed requests [to remain silent] will be disregarded." While the requirement of clarifying questions has not gained traction in the Supreme Court, other courts do require officers to ask clarifying questions.

As previously mentioned, a requirement that interrogators ask clarifying questions would better protect suspects' ability to invoke their right to remain silent when they intend to do so. This result is primarily achieved in two ways. First, clarifying questions eliminate the scenario in which a suspect—who is always the weaker party—is required to assume a position of power and assert his rights. Instead, they force the more powerful party—the interrogator—to ask a direct question regarding the suspect's desire or intent. Second, by doing so, they allow the suspect to "unambiguously" express his desire to invoke his right to remain silent by simply answering "yes" or "no."

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163 Berghuis, 130 S.Ct. at 2277 (Sotomayor, J., dissenting) (alteration in original) (quoting Davis v. United States, 512 U.S. 452, 467 (1994) (Souter, J., concurring)). This disregard is problematic in itself. See supra Part II.B.

164 See, e.g., State v. Winkler, No. 08-11-0262, 2010 WL 3834876, at *3 (N.J. Super. Ct. App. Div. Aug. 24, 2010) ("When a defendant makes an ambiguous assertion of his right to remain silent, the police must stop the questioning until the ambiguity has been resolved.").

165 "Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." Davis v. United States, 512 U.S. 452, 461 (1994) (commenting, obviously, on the right to counsel, but in language equally applicable to the right to remain silent).

166 See Miranda v. Arizona, 384 U.S. 436, 468 (1966) (stating that the warnings are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere" because "[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damming and will bode ill when presented to a jury").

167 See Thompson, supra note 4, at 664 ("[T]he whole point of asking for clarification . . . is that the suspect is then forced to answer the question more definitely.") (emphasis added).

168 For example, a "yes" or "no" response will always unambiguously express the suspect's desire if an officer must ask questions such as: "Are you saying that you no longer wish to speak with me?"; "Do you want to continue speaking with me?"; or "Would you like to end this interrogation?"
In this manner, clarifying questions would better protect suspects’ constitutional rights. However, like the previous alternative, the Supreme Court has already expressly rejected this approach.\textsuperscript{169} Given stare decisis and the Court’s general approach to \textit{Miranda} cases,\textsuperscript{170} there are strong reasons not to adopt the requirement. In asking the clarifying questions, officers may be signaling to the suspect that invocation is wise or in his best interest, or at the very least that he ought to reconsider his desire to speak with them if he had not done so already. Such a result would counter the \textit{Miranda} Court’s understanding of the interrogation environment, which it acknowledged was necessarily adversarial.\textsuperscript{171} For this reason, there again remains a simpler and less disruptive alternative that would equally protect suspects’ desires.\textsuperscript{172}

3. Require Counsel for Suspects Prior to All Interrogations

The Supreme Court could require that suspects have an attorney present for all custodial interrogations.\textsuperscript{173} Attorneys would be able to counsel their suspect-clients and ensure that they appropriately invoke their rights when they desire to do so.\textsuperscript{174} Thus, the inclusion of attorneys would undoubtedly serve \textit{Miranda}’s purpose.\textsuperscript{175} As Professor Duke states, however, “putting lawyers in the interrogation room,

\begin{footnotes}
\item[169] See \textit{Davis}, 512 U.S. at 461.
\item[170] See \textit{Dickerson v. United States}, 530 U.S. 428, 443–44 (2000) (stating that the Court has consistently attempted to reduce the impact \textit{Miranda} has on legitimate law enforcement while reaffirming its core holding that unwarned statements cannot be used in the prosecution’s case-in-chief).
\item[171] See \textit{Miranda}, 384 U.S. at 469 (explaining that the warning providing that anything a suspect said could be used against him in court would “serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest”).
\item[172] See infra Part III.B. Significantly, the proposal to amend the warnings would allow a suspect to act on a reassessment he had made on his own, without being prompted to reconsider his decision by officers’ questions.
\item[173] See generally Steven B. Duke, \textit{Does Miranda Protect the Innocent or the Guilty?}, 10 \textit{CHAP. L. REV.} 551, 566–69 (2007) (discussing potential changes intended to increase the reliability of confessions and reduce the pressures of interrogation); Klein, \textit{supra} note 155, at 1057–58 (considering methods of dispelling the compulsion inherent in custodial interrogation).
\item[174] In truth, the attorneys would fulfill the informative function where the \textit{Miranda} warnings proved inadequate. An attorney familiar with the process and knowledgeable about the requirements could inform his suspect-client of the necessary specificity, so that when the suspect wanted to invoke his right to remain silent, he could.
\item[175] See Klein, \textit{supra} note 155, at 1058 (“[P]utting attorneys in the interrogation room would fulfill all three functions of the prophylactic rule . . . ”).
\end{footnotes}
would gravely curtail the utility of police interrogation."\(^{176}\) Indeed, such a change might effectively end all custodial interrogations, as lawyers would frequently advise their clients to invoke their rights and remain silent. Since the Supreme Court has maintained that the fruits of custodial interrogations (i.e., confessions) are an "unmitigated good,"\(^{177}\) this requirement is unlikely to be adopted. If the Court acknowledges the problems identified in this Note, it is likely to look elsewhere for the solution.

B. Update the Miranda Warnings

When the \textit{Miranda} Court formulated its four required warnings, it acknowledged its inability to foresee all the alternatives for better protecting the right to remain silent and noted that future changes might be acceptable.\(^{178}\) The \textit{Miranda} Court also believed that only an "\textit{effective} and express explanation" of rights could assure that suspects would be "truly in a position to exercise [them]."\(^{179}\) The current

\(^{176}\) Duke, \textit{supra} note 173, at 567.


\(^{178}\) \textit{See Miranda}, 384 U.S. at 467.

\(^{179}\) \textit{Id.} at 473 (emphasis added). Professor Weisselberg has argued that no "system of standardized warnings can empower suspects to assert their rights." Weisselberg, \textit{supra} note 53, at 1524–25; \textit{id.} at 1563–77. The absoluteness of his statement seems exaggerated, and the Supreme Court is unlikely to overrule \textit{Miranda} in the very near future. It might, however, embrace an improved warning system. \textit{See} M.K.B. Darmer, \textit{Lessons from the Lindh Case: Public Safety and the Fifth Amendment}, 68 \textit{Brook. L. Rev.} 241, 284 (2002) ("While it is unthinkable that the Court would soon reconsider wholesale its recent decision reaffirming \textit{Miranda}, incremental reformulations and doctrinal shifts are not only plausible, but perfectly consistent with the Court's past practice."); Michael C. Dorf & Barry Friedman, \textit{Shared Constitutional Interpretation}, 2000 \textit{Sup. Ct. Rev.} 61, 61–64 (2000) (stating that the \textit{United States v. Dickerson} majority "reassured the legal community and the nation at large that this pillar of the Warren Court's criminal procedure revolution [(i.e. \textit{Miranda v. Arizona})] would remain standing" and that the Court "ma[de] clear that \textit{Miranda} is here to stay"). And perhaps we should not want it any other way. \textit{See} Thomas, \textit{supra} note 36, at 549 ("[F]or all my disillusionment with \textit{Miranda}, I would not wish it overruled because the warnings may, in a small but significant number of cases, cause suspects to resist being coerced into confessing."). In any event, we are likely stuck—for better or worse—with a system of standardized warnings. \textit{See} Godsey, \textit{supra} note 38, at 786 (suggesting that there may be no "politically palatable method by which suspects could be advised of their rights other than the suggested procedure of having police officers recite the warnings"). Thus, \textit{Miranda} may in fact be a "straightjacket" in the sense that warnings will always be required, but just not in the sense that only the four warnings required by the \textit{Miranda} Court are permissible (i.e., additional warnings could be added). \textit{See} \textit{id.} at 787; Dorf & Friedman, \textit{supra}, at 64 ("The four particular warnings set forth in
warnings do not meet this requirement because they do not effectively inform suspects of how to invoke the right to remain silent post-waiver.\textsuperscript{180} The warnings' constancy,\textsuperscript{181} despite \textit{Miranda}'s evolving application,\textsuperscript{182} suggests that the current warnings fall short. As Professor Godsey notes, the warnings are not up-to-date and, in light of recent holdings like \textit{Berghuis}, no longer "provide suspects with sufficient information to make an 'informed choice.'"\textsuperscript{183}

Explanatory statements and additional warnings would better satisfy \textit{Miranda}'s requirements and could be used to supplement the current warnings.\textsuperscript{184} In particular, statements regarding how a suspect

\textit{Miranda} are not constitutionally required 'in the sense that nothing else will suffice to satisfy constitutional requirements.'" (quoting Dickerson v. United States, 530 U.S. 428, 442 (2000))). The warnings can be supplemented, and any amendment to the current warnings which might better empower suspects to invoke their rights when they desire to do so should be added, even if it will not completely empower them and would not represent the optimum protection if we were to start from scratch.

\textsuperscript{180} Indeed, the current warnings do not even "reasonably convey" how a suspect may use his rights post-waiver. Howard & Rich, \textit{supra} note 33, at 705 (emphasis added). Whatever the test, a warning system that informs the suspect that he has a continuous right, and then operates under a rule whereby he is required to speak in particular language to use it in a specific circumstance (e.g. by requiring him to unambiguously invoke it post-waiver), cannot be called adequate unless it also informs the suspect of that requirement or otherwise ensures that he knows how he may use the right in that circumstance.

\textsuperscript{181} See Godsey, \textit{supra} note 38, at 782–83 ("The Supreme Court has often stated that the \textit{Miranda} warnings requirement is a prophylactic rule that can change and evolve. However, in spite of forty years of legal developments and practical experience, the content of these famous four warnings has \textit{never} been modified or even been subjected to systematic scrutiny." (emphasis added)); \textit{id}. at 825 ("Since \textit{Miranda} was decided in 1966, courts and scholars have devoted little substantive attention to the content of the warnings. In this time, however, much has changed[. . .[but] the content of the warnings has remained static, failing to keep pace with the dramatic changes in its environs.").

\textsuperscript{182} See Howard & Rich, \textit{supra} note 40, at 706. Professor Belsky argued long ago that the increased complexity of the criminal justice system, coupled with then-recent Supreme Court decisions, has "lessened, rather than increased, protection for suspects." Martin H. Belsky, \textit{Whither Miranda?}, 62 \textit{TEX. L. REV.} 1341, 1360 (1984) (reviewing Liva Baker, \textit{Miranda: Crime, Law and Politics} (1983)). The warning system may thus "lull us into believing that we are protecting the rights of individuals against the state[,]" but, truly, it only "masks changes both in the criminal justice system and in our society." \textit{id}. at 1361.

\textsuperscript{183} Godsey, \textit{supra} note 38, at 817.

\textsuperscript{184} Any change made to the current warnings "should ensure that [they] remain consistent with and continue to reflect the evolving legal principles that support and justify their existence, and . . . reaffirm that they remain effective in upholding and enforcing the constitutional rights of suspects." \textit{id}. at 783. The addition of a warning informing suspects of how to invoke their rights would in fact legitimize the warnings system itself, as "[t]here can be no legitimate justification for a warning and waiver
may invoke his right to remain silent post-waiver could be added to inform him that he must clearly state his desire to rely on his rights. Indeed, this would be the simplest approach to removing the unfairness inherent in the current system. It would not require any case to be overruled; it would not produce difficult questions for police to answer, and it would not reduce the utility of custodial regime unless we administer warnings in a way that suspects understand, and unless we provide a meaningful opportunity for suspects to exercise free will in the stationhouse.” Weisselberg, supra note 53, at 1590. Significantly, under this analysis, it is the suspect’s opportunity to exercise his free will that should be protected. To truly have a “meaningful opportunity” to exercise his free will post-waiver, a suspect must know how to invoke his rights.

See Editorial, Speaking Up to Stay Silent, N.Y. TIMES, June 2, 2010, at A24, available at http://www.nytimes.com/2010/06/02/opinion/02ved2.html?_r=1&partner=rss&emc=rss (arguing for, among other things, a change to the Miranda warnings to include a statement that the suspect must clearly speak of his desire to invoke his rights); SCOTUS Guts Miranda; Law Enforcement Warning Needs Rewrite, THE HOME OF SDP123A DOT COM (Jun. 2, 2010), http://www.sdp123a.com/index.php?option&task=view&id=SDP123A.com (“[T]he Miranda warning that police read to suspects prior to interrogating them simply must be edited to include explicit instructions on what suspects must do to [invoke] their right to remain silent. It is patently ludicrous—to say nothing of obviously unfair—to inform a suspect of his right to remain silent only to keep him in the dark as to what standard he has to meet in order to legally avail himself of said right. The Miranda warning is clearly the appropriate place for that knowledge to be communicated.”).

“Miranda is based on fairness in the sense that it is unfair and unethical for officers to obtain confessions when a suspect simply does not understand his rights.” Daniel J. Croxall, Comment, Inferring Uniformity: Towards Deduction and Certainty in the Miranda Context, 39 McGEORGE L. Rev. 1025, 1041 (2008). Insofar as an additional warning would increase a suspect’s understanding of how he may invoke his right post-waiver, it would help to ensure that he only speaks voluntarily, a result Miranda requires. See supra Part I.A. Such a warning would also strike the appropriate balance between individual rights and law enforcement by ensuring that suspects know what interrogators already understand—that invocations must be unambiguous. As things stand today, “the balance between law enforcement and suspects’ rights, established forty years ago by the Miranda decision, has been lost to law enforcement.” Daria K. Boxer, Miranda with Precision: Why the Current Circuit Split Should Be Solved in Favor of a Uniform Requirement of an Explicit Warning of the Right to Have Counsel Present During Interrogation, 37 Sw. U. L. Rev. 425, 446 (2008).

See The Supreme Court Looks at Miranda and Ethics, ETHICS ALARMS, http://ethicsalarms.com/2010/06/02/2012/ (June 2, 2010 6:24 PM) (“If the suspect knows he can stop the questioning at any time, there seems nothing unfair about the police questioning him until he does. The interrogation is not coercion if the suspect has the power to end it, and knows that.”).

See supra Part III.A.1 for an explanation of why holding that silence may count as an invocation would achieve these two results. See supra Part III.A.2 for an explanation of why requiring clarifying questions may remedy the latter problem.
interrogations. Importantly, there is no reason to believe that merely knowing how to invoke their rights will somehow increase suspects' desire to do so. The only real change would be that those who wish to invoke their rights would now know how. This result better protects suspects' ongoing right to remain silent and would probably result in more invocations (and thus the necessitated conclusion of more interrogations). However, the increase would be attributable to those who want and intend to invoke their rights—those who would have otherwise used ambiguous language or conduct in their attempt to invoke their rights but now know better. Additional invocations from this group are not results we should seek to avoid, as “[t]he *Miranda* decision represents the viewpoint that the suspect's choice to remain silent . . . is not an evil to be avoided but an acceptable option.”

Additionally, a statement explaining when silence can and cannot be used against a suspect at trial could be added to the current warnings. Such a warning would make explicit *Miranda's* implicit promise and ensure that suspects fully understand the consequences of their decision to speak or remain silent both pre- and post-waiver. These two supplemental warnings would more accurately reflect modern Supreme Court holdings, thus furthering the *Miranda* Court's goal of fully apprising the suspect of his right to remain silent and ensuring his ability to use it throughout the interrogation process, without negatively affecting interrogators' ability to do their jobs. A fuller and more precise warning stands to benefit all participants of our criminal justice system. Most importantly, it benefits the individuals by striking a new balance between the modern, sophisticated law enforcement system and the public at large. "Simultaneously, an

189 See *supra* Part III.A.3 for an explanation of why requiring the presence of an attorney in the interrogation room would produce this result.

190 Strauss, *supra* note 12, at 824; see Croxall, *supra* note 186, at 1041 (“The very purpose of the *Miranda* warnings is to apprise the suspect of his rights. Arguing that it is a negative that more persons will invoke their rights if clearer warnings are given seems to suggest that 'hiding the ball' is a good thing and that we, as a society, do not want people to exercise their protective rights. This cannot be true.”). In fact, it may also be that more complete warnings will result in more suspects agreeing to speak to police, at least initially, as suspects would be reassured that they could later invoke without penalty. See Duke, *supra* note 173, at 558 (“We must also consider the possibility that the warnings actually *induce* some suspects to talk rather than to remain silent. The warnings implicitly suggest to the suspect that the police are respectful of the suspect's rights, that the police are not only law-abiding, but that they are also fair and objective.”).

191 See *supra* note 8 and accompanying text.

192 See *supra* notes 34–35 and accompanying text.
unambiguous . . . warning furthers the interests of law enforcement, for administrating such a warning will ensure admissibility of confessions.”

Thus, more complete warnings would benefit suspects by including the information they need to make an informed assessment of their ongoing desire to speak or remain silent. Additional warnings would also bolster the presumption that post-warning statements are voluntarily made, because the suspect knew how to protect his rights and of the consequences of speaking versus remaining silent. All society stands to lose are convictions based on incriminating evidence derived from failed invocation attempts and confessions that occur after a suspect would have invoked his right to remain silent if he had known how to do so.

IV. THE OPTIMAL SOLUTION: AMENDING THE WARNINGS

“It is not admissible to do a great right by doing a little wrong . . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.”

Perhaps it was once true that there was “nothing deceptive or prejudicial to the defendant in the Miranda warning[s],” but that is simply no longer the case. Though the warnings inform suspects of the existence of their right to remain silent, the value of such knowledge is severely undermined by the warnings’ failure to provide guidance on how to invoke the right. In other words, the current

193 Boxer, supra note 186, at 445. There is reason to believe that more comprehensive warnings would protect all individuals—both the innocent and the guilty. See Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, 114 Harv. L. Rev. 430, 451–74 (2000). But see Stephanos Bibas, The Right to Remain Silent Helps Only the Guilty, 88 Iowa L. Rev. 421, 428 (2003) (“Seidmann and Stein’s claim is that the right induces guilty suspects to remain silent, because they know that juries will not infer guilt from silence (though police will). Without a right to remain silent, they claim, guilty suspects would concoct (credible) false alibis, leading juries to discount innocent suspects’ alibis. . . . The argument . . . supposes that guilty suspects care most about maximizing their chances of winning at trial, when in fact trials are rare and guilty suspects know it.”).
196 See Weisselberg, supra note 53, at 1592 (arguing that “[a]s a prophylactic device to protect suspects’ privilege against self-incrimination, . . . Miranda is largely dead” because it “sometimes locates warnings and waivers within the heart of a highly structured interrogation process, provides admonitions that many suspects do not understand, and appears not to afford many suspects a meaningful way to assert their Fifth Amendment rights”) (emphasis added).
warnings, even if completely understood, leave a gap in the suspect's knowledge sufficient to render it implausible to say that he has acted "with a full understanding of his . . . rights." This treatment of suspects is unfair and, in truth, represents a societal failure. As currently formulated, the warnings no longer "bear[ ] . . . resemblance to the 'fully effective' prophylaxis . . . Miranda requires." Justice Sotomayor acknowledged this problem in her dissent in Berghuis and noted that police are unlikely to provide the guidance necessary to ensure that suspects actually know how to invoke their rights. Indeed, there is no reason to rely on police to spontaneously and generously provide such guidance out of their own concern for suspects' constitutional rights. The time has come to amend the warnings; it is time to turn Miranda right side up again. A simple update in light of Supreme Court decisions regarding waivers and invocations, along with a statement about the use of silence in court, would better inform suspects of their rights and ensure that confessions occur as the product of free choice, not as the result of confusion, ignorance, or trickery. Having reached this conclusion, the amendments' content must be addressed. This Note is by no means the first to call for modifications to the Miranda warnings. However, previously suggested amendments do not address the post-waiver invocation problems this Note identifies. Thus, previous suggestions might inadvertently exacerbate this

198 Miranda, 384 U.S. at 480 ("The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956))).
199 Berghuis, 130 S. Ct. at 2273 (Sotomayor, J., dissenting) (citation omitted); see also Anthony J. Franze, Death by a Thousand Cuts: Miranda and the Supreme Court's 2009-10 Term, Harv. L. & Pol'y Rev. Online, http://hlpronline.com/2010/09/death-by-a-thousand-cuts-miranda-and-the-supreme-court's-2009-10-term/ (September 24, 2010) ("[A]lthough the Court has not overturned Miranda, it has whittled away at the decision bit by bit, transforming a bold effort to protect suspects' constitutional rights into a hollow ritual.").
200 See Berghuis, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).
201 See id. at 2278 ("Today's decision turns Miranda upside down.").
202 Cf. Godsey, supra note 38, at 820 ("[A] substantial modification of the warnings is presently called for to bring them in line with contemporary law and understanding.").
203 See, e.g., id.; Strauss, supra note 12, at 823.
204 See supra Part II. For example, Professors Godsey and Strauss addressed the current warnings' failure "to inform the suspect that if [he] invokes his right to remain silent no adverse inferences will be drawn" and argued that this failure results
particular problem. For example, Professor Godsey has suggested the
addition of the following warning:

If you choose to talk, you may change your mind and remain silent
at any time. If you choose to remain silent, on the other hand, you
will not be penalized in any way. . . . [Y]our silence will not be used
against you as evidence to suggest that you committed a crime sim-
ply because you refused to speak.205

Similarly, Professor Strauss suggests adding: “If you decide to . . .
stay quiet, that choice will not be used against you in any way.”206
These warnings would further confuse—or, worse, mislead—suspects
regarding the impact of post-waiver silence, as each indicates that
merely remaining silent will result in no penalty. This, however, is not
the case; post-waiver silence can be used in court against the sus-
pect.207 Further, these warnings provide no guidance whatsoever on
how to invoke the right to remain silent. Professor Strauss’s suggested
warning—“You have the right to remain silent and you may state at
any time that you don’t wish to talk to us during the interrogation and
we will stop asking you questions”208—comes much closer to provid-
ning such guidance, but even it does not apprise the suspect of the
need for clarity. As such, it too could result in attempted invocations
being ignored.209 Because this Note directly addresses the unambigu-
ous invocation requirement210 and the use of post-waiver silence at

in a tentativeness about invoking one’s rights. Strauss, supra note 12, at 807. How-
ever, in light of more recent Supreme Court holdings, such as Berghuis, it is even
more important to inform the suspect of how he must invoke his right to remain
silent—and thus find himself in the scenario in which his silence will result in no
adverse consequences.

205 Godsey, supra note 38, at 818.
206 Strauss, supra note 12, at 823.
207 See supra Part II.C.
208 See Strauss, supra note 12, at 823.
209 For the dangers of such a result, see supra Part II.B. For a more cynical and
humorous, but intentionally unrealistic, suggested modification of the warnings, see
Susan R. Klein, No Time for Silence, 81 Tex. L. Rev. 1387, 1345 (2003) (“[W]e are
going to continuously harass you, short of behavior a court might later find shocking,
until you talk to us, but your attorney may be able to get some of your statements
excluded, at least until cross-examination of your testimony and the government’s
rebuttal case . . ..”).
210 While this concern has been addressed elsewhere, even the solution proposed
there was problematic. See The Supreme Court, 2009 Term—Leading Cases, 124 Harv. L.
Rev. 179, 194 (2010) (noting that the Berghuis decision “may require a change the
Court did not consider”—namely, “amending the Miranda warnings themselves to
more accurately inform suspects of their rights”). There, the suggestion was to add
“[I]f you do not wish to answer any questions, you may ask that questioning cease at
any time” to the required warnings. Id. at 198. There are two problems with this
trial, the warnings suggested here necessarily look very different from these previously suggested modifications.

To ensure that suspects understand how to invoke their right to remain silent post-waiver, a warning should be added to provide specific guidance regarding the unambiguous invocation requirement. Several variations could undoubtedly serve this purpose, but the warning should at least include the following information: “After you have waived your right to remain silent, you retain the ability to invoke it—and end the interrogation—at any time. However, to do so, you must state your desire in clear and unambiguous language.” Such a warning would cover the basic requirements of the current invocation process and ensure that suspects who desire to invoke their rights will have the requisite knowledge to do so. And, unlike the use of clarifying questions, which might seem like advice regarding the wisdom of reassessing one’s prior waiver, the additional information provided in this warning would merely ensure that a suspect could act on a reassessment he has already made on his own.

Additionally, because suspects are unlikely to understand that their post-waiver silence can in fact be used against them,\textsuperscript{211} or that an invocation of the right to remain silent cannot be so used,\textsuperscript{212} a warning should be added to clearly inform suspects of the circumstances under which post-waiver silence can and cannot be used against them in court. Such a warning should convey the following information: “After waiving your right to remain silent, anything you say, and even your silence, can be used against you in court. However, an invocation of your right to remain silent cannot be used against you in any manner.” This information would both inform and empower suspects, as the knowledge that one’s invocation cannot be used at his

\textsuperscript{211} See supra Part II.C.
\textsuperscript{212} See Strauss, supra note 12, at 807 (“Suspects are never told (or at least are not required to be told) that their refusal to talk cannot be used against them in a court of law.”); Godsey, supra note 38, at 818 (expressing concern over the fact that the “implicit promise” of Miranda—that silence will not be used against suspects in court—is not true, at least “from the perspective of most suspects, ‘implicit in the warnings’ and calling for a clear statement that no penalty will attach to a suspect’s decision to invoke his right to remain silent”).
trial will allay his fear of invoking\textsuperscript{213} and make him more comfortable asserting his rights. Thus, the suspect may confidently invoke his right whenever he pleases by unambiguously expressing his desire to do so.

Combined, these two suggested warnings would inform the suspect that he must use clear language if he wants to invoke his right, that there may be negative consequences of merely remaining silent post-waiver (i.e., without invoking), and that invocations of the right to remain silent cannot carry negative consequences. With these modifications, the *Miranda* warnings might resemble the following:

"You have the right to remain silent. You also have the right to an attorney. If you cannot afford one, one will be appointed to you at no expense. If you waive these rights, anything you say, and even your silence, can be used against you in a court of law. You may invoke either right and end the interrogation at any time, but you must clearly and unambiguously express your desire to do so. Such an invocation cannot be used against you in court."

**Conclusion**

The *Miranda* Court sought to protect suspects' "continuous opportunity" to exercise the right to remain silent.\textsuperscript{214} The Supreme Court's recent decision in *Berghuis v. Thompkins* has significantly curtailed this opportunity by creating a situation in which suspects do not know how to invoke the right to remain silent post-waiver. Further, because of the Court's unambiguous invocation requirement, interrogators may ignore a suspect's common sense attempts to rely on this right.\textsuperscript{215} Worse, such attempts may be used against the suspect at trial, allowing the jury to infer a guilty conscience, and even guilt, from attempts themselves. This result does indeed "turn *Miranda* upside down."\textsuperscript{216} However, this is largely so because the Court did not seize its opportunity to update the required warnings and bring them in line with its new requirements. Thus, simple warnings should be added to better inform suspects of their continuing rights, how to invoke them post-waiver, and the consequences both of remaining silent and choosing to invoke. Such amendments would return the

\textsuperscript{213} See Strauss, *supra* note 12, at 808 ("[S]ome individuals might be tentative in requesting their rights out of fear that this assertion will actually harm them or be construed in an adverse manner.").


\textsuperscript{215} For example, neither remaining silent nor expressing a desire to remain silent in—according to a fairly pro-prosecution standard—"ambiguous" terms will count as an invocation, and yet both seem to be common sense attempts at an invocation.

warnings to the fair-trial principles on which they were based\(^2\) by ensuring that those who have reassessed the circumstances and no longer wish to speak to police will know how to do so effectively.

\(^{217}\) Id.