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Berghuis v. Thompkins: The Supreme Court's "New" Take on Invocation and Waiver of the Right to Remain Silent

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BERGHUIS v. THOMPKINS: THE SUPREME COURT'S "NEW" TAKE ON INVOCATION AND WAIVER OF THE RIGHT TO REMAIN SILENT

INTRODUCTION

"You have the right to remain silent. Anything you say can and will be used against you in a court of law." Anyone who has ever watched an episode of *Law and Order* has inevitably heard an actor, posing as a police officer, rattle off this phrase while handcuffing a suspect. Unfortunately, few viewers likely stop and think about the meaning of this phrase, and even fewer appreciate the constitutional protections supposedly guarded by *Miranda* warnings such as this. It should come as no surprise that many American citizens do not know how to utilize the two fundamental protections, the right to remain silent and the right to counsel, outlined by the Supreme Court in *Miranda v. Arizona*.[1] Many suspects taken into custody will either unknowingly waive one or both of these rights or ineffectively attempt to invoke them, resulting in incriminating statements being admitted against them later in court. The Supreme Court recently added to the jurisprudential confusion with its decision in *Berghuis v. Thompkins*.[2]

In *Berghuis v. Thompkins*, the majority, consisting of five Justices, held that a suspect who wishes to invoke his right to remain silent must do so unambiguously and failure to do so may result in an implied waiver of that right.[3] With respect to the facts of the case, the Court found that the defendant, Thompkins, failed to invoke his right to remain silent by remaining almost entirely silent during two hours and forty-five minutes of interrogation, and thus his three affirmative responses to questions near the end of that interrogation were admitted against him at trial.[4] The Court further found that Thompkins' failure to effectively invoke this right coupled with his responses to the three questions after an extended period of time amounted to a waiver of his right to remain silent.[5] Justice Sotomayor, joined by three other Justices, wrote a compelling dissenting opinion, attacking the majority's opinion for

1. 384 U.S. 436 (1966).
2. 130 S. Ct. 2250 (2010).
3. *Id.* at 2264.
4. *Id.* at 2256–57.
5. *Id.* at 2262–63.

reducing the *Miranda* burden with respect to the waiver issue and inappropriately reaching the invocation issue altogether.[6]

This Note evaluates the merits of the *Berghuis v. Thompkins* majority and dissenting opinions, the impact of these principles on *Miranda* jurisprudence, and the practical repercussions of this opinion for both courts and law enforcement officials. The first section of this Note looks at the history behind *Miranda* protections, including pre-*Miranda* protections for suspects in custody, *Miranda v. Arizona* itself, and courts' interpretations of *Miranda* in the years following the landmark decision. The second section looks at the *Berghuis v. Thompkins* decision, evaluating and comparing the majority and dissenting opinions. The third and final section of this Note analyzes the substance of the *Thompkins* decision, addressing concerns with the law applied by the majority, the Supreme Court's deviation from *Miranda*'s originally strong protections, and the outlook for the future of the standard outlined in *Thompkins*.

I. THE HISTORY OF THE *MIRANDA* FRAMEWORK

From its earliest cases dealing with suspects' rights, the Supreme Court has relied on various constitutional amendments, rules, and policies to exclude inappropriately obtained statements and regulated their admission with a variety of standards and tests. As a result, *Miranda* jurisprudence has become somewhat convoluted. An understanding of this history, however, is necessary for a full appreciation of the actual impact of cases like *Berghuis v. Thompkins*. For this reason, this Note begins with a discussion of that history.

A. Origin of Miranda *Rights*

1. Earliest Protections for Suspects

In one of the earliest cases regarding confessions used to obtain convictions, the Supreme Court, relying nearly completely on common law principles, determined confessions obtained through coercion were inadmissible as unreliable against that suspect.[7] Over a decade later, the Court switched from a "reliability" standard and instead relied on the Fifth Amendment prohibition against self-incrimination to bar the admission of improperly obtained and involuntary statements of suspects in custody.[8] The

6. *Id.* at 2266 (Sotomayor, J., dissenting) ("[The majority's] propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation." (citation omitted)).

7. Hopt v. Utah, 110 U.S. 574, 585 (1884).

8. Bram v. United States, 168 U.S. 532, 543 (1897). Although the reasoning is very similar to the analysis employed in *Miranda v. Arizona*, in the period after *Bram* and up until the actual

Supreme Court then again switched gears in 1936 and turned to the Fourteenth Amendment's Due Process Clause to exclude statements induced through coercion.[9] The Court began to apply a totality of the circumstances approach to determine if a statement was freely given,[10] but it continually struggled to define the exact circumstantial factors that affected the voluntariness of the defendant's statement.[11] Some contextual features included personal characteristics of the defendant, whether or not the accused had been warned of his right to remain silent and obtain legal counsel, as well as physical and psychological pressures.[12]

The Supreme Court continued to grapple with this extremely flexible analysis, and this struggle became very obvious in *Spano v. New York*.[13] In that case, the defendant was questioned by numerous officers over a period of eight hours, and his requests to speak with his retained counsel were repeatedly denied.[14] The Court reversed his conviction after a discussion of the circumstances surrounding the defendant's confession.[15] Ultimately, it was the concurring opinion of Justice Douglas that highlighted concerns that the suspect was denied access to counsel while in custody.[16] Joined by Justices Black and Brennan, the three reiterated distress that "[d]epriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."[17] In a separate concurrence, also joined by Justices Black and Brennan, Justice Stewart articulated that the denial of counsel alone was enough to render the confession inadmissible.[18] *Spano* dealt with due process issues because, in that case, the defendant had been formally charged at the time he made the

Miranda decision, the Supreme Court rarely relied on the Fifth Amendment as grounds for excluding statements made by suspects while in custody. *See* discussion *infra* notes 9–24.

9. Brown v. Mississippi, 297 U.S. 278, 286 (1936) (finding that statements made by suspects after prolonged periods of physical torture were inadmissible).

10. *E.g.*, Fikes v. Alabama, 352, U.S. 192, 197 (1957); Payne v. Arkansas, 356 U.S. 560, 567 (1958).

11. *See* Culombe v. Conneticut, 367 U.S. 568, 604–05 (1961) (plurality opinion) ("The notion of 'voluntariness' is itself an amphibian.").

12. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (considering defendant's mental stability and possible insanity); *Payne*, 356 U.S. at 564 (considering defendant's education level and food deprivation); Watts v. Indiana, 338 U.S. 49, 52–53 (1949) (plurality opinion) (noting that the accused was denied access to friends, family, and counsel for an extended period of time).

13. 360 U.S. 315 (1959).

14. *Id.* at 322–23.

15. *Id.* at 324.

16. *Id.* at 325 (Douglas, J., concurring).

17. *Id.*

18. *Id.* at 326 (Stewart, J., concurring).

statements at issue,[19] but it can be argued it was the four Justices' concurring opinions that set the stage for the overhaul of the system for evaluating such confessions, with or without official indictment.

Immediately following *Spano*, the Supreme Court began to rely on the Sixth Amendment right to the assistance of counsel to exclude confessions obtained during police interrogations.[20] *Massiah v. United States* was one of these early post-*Spano* cases.[21] In that case, the Supreme Court reiterated where the suspect has been formally indicted, that suspect should be afforded counsel during interrogation.[22] The Court in *Escobedo v. Illinois*, relying on *Massiah*, applied these protections to a suspect who had not formally been indicted and found the suspect should have been afforded counsel during investigation.[23] However, this protection, as it applied to criminal investigations, was short lived. As Justice Stewart noted in *Escobedo*, the majority's position of excluding investigative confessions represented an arguably inappropriate expansion of the protective language of the Sixth Amendment.[24] By distinguishing the case from the situation in *Massiah*, he made a strong argument against using the Sixth Amendment to protect suspects' statements made during the investigatory phase.[25]

It was apparent that suspects in custody faced many of the same, if not more, of the coercive pressures from interrogators as police tactics developed, and as such, still needed some kind of protection. Moreover, the courts needed a standard by which to evaluate whether or not confessions obtained at that stage were in fact admissible and made under conditions that did not violate the defendant's rights. Thus, the Supreme Court turned again to the Fifth Amendment protection against self-incrimination.[26]

19. *Spano*, 360 U.S. at 316 (majority opinion).

20. *See* Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964); Massiah v. United States, 377 U.S. 201, 205–06 (1964).

21. 377 U.S. 201.

22. *Id.* at 206.

23. 378 U.S. at 492 ("[W]hen the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.").

24. *Id.* at 493–94 (Stewart, J., dissenting) (arguing that the majority had imported "into [the] investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings").

25. *Id.*

26. U.S. CONST. amend V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

2. Reliance on the Fifth Amendment and *Miranda v. Arizona*

After ruling in *Malloy v. Hogan* that the Fifth Amendment protection against self-incrimination was applicable to the states through the Fourteenth Amendment,[27] the Supreme Court was free to apply that protection to criminal suspects in *Miranda v. Arizona*.[28] Utilizing that Fifth Amendment protection, a five-member majority of the Supreme Court articulated that the prosecution must show that it honored and used "procedural safeguards" to protect that privilege.[29] Specifically, the Court announced any suspect in custody must be warned of his right to remain silent and right to counsel, and that any statement made may be used in his prosecution.[30] The Court went on to caution that after the warnings have been given, if the suspect "indicates *in any manner, at any time* prior to or during questioning, that he wishes to remain silent, the interrogation *must* cease."[31] Focusing specifically on the right to remain silent, the Court outlined that a suspect must be informed of this right "in clear and unequivocal terms."[32] This clarity was crucial, according to the Court, to ensure that the suspect understood and effectively considered his rights and the consequences of waiving those rights, prior to making any statement.[33] Although not as relevant to the discussion here, the Court did hold the same was true for a suspect's right to counsel, and as such, police interrogators were required to respect any request for such assistance.[34]

After outlining the content and importance of these warnings, the Court moved to a discussion of waiver.[35] Reiterating the high standard of proof with respect to the waiver of constitutionally protected rights, the Court indicated "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[36] Very pertinently to the discussion here, the Court noted that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[37] Moreover, the Court indicated that lengthy interrogations met by an uncommunicative suspect would serve as

27. 378 U.S. 1, 6 (1964).
28. 384 U.S. 436 (1966).
29. *Id.* at 444.
30. *Id.*
31. *Id.* at 473–74 (emphasis added).
32. *Id.* at 467–68.
33. *Id.* at 467–69.
34. *Miranda*, 384 U.S. at 472.
35. *Id.* at 475.
36. *Id.* (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)); *see also* Carnley v. Cochran, 369 U.S. 506, 516 (1962) ("Presuming waiver from a silent record is impermissible.").
37. *Miranda*, 384 U.S. at 475.

strong evidence against a finding of waiver.[38] The four dissenting Justices argued that the warning requirements would hinder police interrogations and discourage confessions.[39] Although the majority attempted to address this concern by citing to similar successful practices in foreign jurisdictions,[40] this response did not seem to satisfy or quiet critics, especially in the years directly following the decision.

*B. Post-*Miranda *Jurisprudence: Limiting the Scope of the Landmark Decision*

There is conflicting data and serious dissent among scholars regarding the actual empirical effect of *Miranda*. Some authorities argue that the warning requirement hindered police efforts and imposed substantial costs on society as a whole.[41] Others argue that these hindrances were fictions developed by those resisting the expansion of Fifth Amendment protections to include police interrogations.[42] Even Congress took part in this movement against *Miranda*, and two years after the decision, it enacted a statute that mandated that confessions in federal criminal trials be judged on voluntariness.[43] However,

38. *Id.* at 476.

39. *Id.* at 505 (Harlan, J., dissenting). This argument, that it is necessary to enable officers to conduct effective interrogations, is still a very tenable argument today. *See, e.g.*, Charles Weisselberg & Stephanos Bibas, Debate, *The Right to Remain Silent*, 159 U. PA. L. REV. PENNUMBRA 69, 79 (2010), http://www.pennumbra.com/debates/pdfs/Thompkins.pdf ("We should not stand in the way of interrogation techniques that produce truthful confessions so long as they do not create an unacceptable risk of producing false ones.").

40. *Miranda*, 384 U.S. at 488–89 (majority opinion) (noting that countries such as England, Scotland, and India all incorporate such safeguards without a marked detrimental effect on police practice). Additionally, the Court relied heavily on the experience of the Federal Bureau of Investigation's practice of providing similar warnings prior to interrogation as persuasive that *Miranda* warnings would be effective when enforced at the state and local level. *Id.* at 483–86.

41. *See, e.g.*, Paul G. Cassell, Miranda*'s Social Cost: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 437–38 (1996) (suggesting that as many as 3.8% of convictions in "serious criminal cases" are lost because of *Miranda*). Professor Cassell would likely applaud the Court's decision in *Thompkins*, because his primary suggestion for reducing these "costs" was eliminating waivers and questioning cutoffs. *Id.* at 494–496.

42. *See, e.g.*, Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502–03 (1996) (responding to Professor Cassell's statistics by attacking his methodology and suggesting the actual percentage is much smaller).

43. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210–11, *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000). Specifically, this legislation was intended to limit a court's ability to rely on Federal Rule of Criminal Procedure 5, requiring that a defendant taken into custody must be presented before a magistrate judge in a timely manner. *See* Mallory v. United States, 354 U.S. 449, 451–53 (1957); McNabb v. United States, 318 U.S. 332, 341–42 (1943). This, however, had the same effect of limiting a court's ability to judge a statement's admissibility on anything other than voluntariness, and

the Supreme Court, in *Dickerson v. United States*, held that *Miranda* first and foremost announced a constitutional rule.[44] Reminding that "Congress may not legislatively supersede [its] decisions interpreting and applying the Constitution," the Court held that *Miranda* trumped Congress's legislation on this point and invalidated the statute.[45]

1. Waiver after *Miranda*

Evaluating the substance of the opinion, *Miranda* does not appear to be as drastic as some may have feared. After all, the Court could have placed much more serious limitations on statements taken in police custody in the absence of an attorney. Instead, the Court provided for a waiver procedure, allowing that suspects were free to make statements in the absence of counsel if they had been advised of and understood their rights.[46]

Additionally, later cases expounded on the waiver concept, further reducing the "dangerous" consequences and impact of *Miranda* warnings. Despite the *Miranda* Court's emphasis of a "heavy burden," in *North Carolina v. Butler*, the Court seemed to soften its standard for such waivers, holding that neither an express nor written statement of waiver was required to show that a suspect had in fact waived his rights.[47] While still standing by *Miranda*'s "knowingly and voluntarily" standard, the Court went on to say that silence, coupled with conduct demonstrating an understanding and wish to waive, might be enough.[48] However, by reaffirming that "the prosecution's burden is great," the *Butler* Court did not stray too far from *Miranda*'s holding.[49] Although the Supreme Court continued to reiterate the informed and voluntary requirements for waiver,[50] numerous federal circuits, following *Butler* to the letter, have found that particular conduct under certain circumstances was enough to show implied waiver.[51]

regardless, the Supreme Court has consistently reiterated the limited impact of Section 3501(a). *See* Corley v. United States, 129 S. Ct. 1558, 1562 (2009).

44. 530 U.S. 428, 432 (2000).

45. *Id.* at 437, 444.

46. Miranda v. Arizona, 384 U.S. 436, 475 (1966). While the Court did provide for a waiver procedure, the strict language of Miranda indicates that a waiver could not be easily established. *Id.* Many courts and scholars rely on a literal interpretation of this language when criticizing the allegedly drastic diversion the Supreme Court has taken from *Miranda* protections in recent years. *See* discussion *infra* Part III.C.

47. 441 U.S. 369, 373 (1979).

48. *Id.*

49. *Id.*

50. *See* Moran v. Burbine, 475 U.S. 412, 421 (1986); Tague v. Louisiana, 444 U.S. 469, 471 (1980) (per curiam).

51. *See, e.g.*, United States v. Smith, 218 F.3d 777, 781 (7th Cir. 2000) (finding waiver where defendant refused to sign *Miranda* form then immediately proceeded to talk to police officers).

Even where *Miranda* rights are shown to have been knowingly and voluntarily waived, courts retain the authority to exclude a statement made under such extreme conditions that it would be inadmissible because of due process protections. The *Dickerson* Court, relying on language in *Miranda*, explained the warning created a safeguard for suspects in police interrogations, where coercion inherently "blurs the line between voluntary and involuntary statements."[52] For this reason, the majority in *Miranda* added the specific protections through the Fifth Amendment right against self-incrimination but never abandoned the voluntariness requirement.[53] But the Court has also, assumedly in light of *Miranda* protections, limited the strength of this protection, holding a suspect's statement may not be found to be involuntary without a finding of coercive police behavior.[54] However, courts still rarely relied on the due process limitation to conclude a suspect involuntarily waived his right to remain silent.[55]

2. Invocation after *Miranda*

More important for the purposes of this analysis, and also more challenging for courts, is the situation where a defendant invokes his *Miranda* rights. This situation differs seriously from the situation where a defendant simply waives his rights in one important, practical respect: if the suspect invokes his right and then confesses, something changed his mind, whereas where there is no invocation, the suspect likely always wanted to communicate with police. The burden is therefore on the prosecution to show that police coercion was not responsible for that change. In that context, the Supreme Court has analyzed the issue of waiver and confused the distinction and relationship between waiver and invocation issues. It is important to note at the outset that the right to remain silent and the right to counsel are two distinct rights, and although the two are inevitably intertwined, waiver is treated differently depending on the right at issue. Additionally, the Supreme Court, when addressing issues or applications of law with respect to one of the

52. Dickerson v. United States, 530 U.S. 428, 435 (2000) (citing Miranda v. Arizona, 384 U.S. 436, 439 (1966)).

53. *Id.* at 434 ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily.").

54. Colorado v. Connelly, 479 U.S. 157, 167 (1986). In support of that limitation, Chief Justice Rehnquist reiterated a caution against "expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries'." *Id.* at 166 (quoting Lego v. Twomey, 404 U.S. 447, 488–89 (1972)).

55. *See, e.g.*, United States v. Kelley, 953 F.2d 562, 565–66 (9th Cir. 1992) (finding a suspect suffering from heroin withdrawal was still capable of giving a voluntary statement). However, the Supreme Court again reiterated valid waivers must be made knowingly and voluntarily, consistent with the holding in *Miranda*. Colorado v. Spring, 479 U.S. 564, 573 (1987).

Miranda rights, often fails to effectively explain its analysis or identify whether the law applies exclusively to one of the rights, further confusing the relationship. Because the right to remain silent was specifically at issue in *Thompkins*, the background here focuses primarily on that right.

Invocation of the right to remain silent has created many questions for the courts, especially, how the police are to proceed once a suspect does in fact invoke his right to remain silent. In *Michigan v. Mosley*, the Supreme Court, interpreting language from *Miranda*, held a suspect's right to remain silent, and thus cut off questioning, must be "scrupulously honored" by interrogators.[56] However, the Court strayed from a close, literal interpretation of *Miranda*, finding that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion" did not forever prohibit questioning of a suspect.[57] Instead, the Court limited this to mean that police may return to questioning "after the passage of a significant period of time" and a new reading of *Miranda* rights.[58] However, the Court failed to define what actually constituted "a significant period of time," and it still appeared to be true that police were unable to persist in questioning directly following an invocation of rights.[59] Lower courts have attempted to interpret what kind of time is required before agents may resume questioning, with most articulating that there needs to be some span of time or "cooling off period" before the suspect may be reread his *Miranda* rights and questioning may resume.[60]

Most pertinent to the discussion of *Thompkins* is the question of when the right to silence is invoked. Courts have struggled to decide these kinds of cases without any clear definition of invocation requirements, and this specific issue had never reached the Supreme Court until now.[61] However, the Court faced this same question with respect to the right to counsel in *Davis v. United States*.[62] In that case, the Court held that officers may continue to question a defendant who has made an ambiguous or equivocal request for counsel, relying on the established premise that officers are free to question a suspect after a valid waiver.[63] Justice O'Connor, writing for the majority, reiterated that where "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking his right to counsel, [Court]

56. 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 436).

57. *Id.* at 100–02 (quoting *Miranda*, 384 U.S. at 473–74).

58. *Id.* at 106.

59. *See id.* at 105.

60. *Compare* Charles v. Smith, 894 F.2d 718, 726 (5th Cir. 1990) (finding "a few minutes" is not enough time before resuming questions), *with* Grooms v. Keeney, 826 F.2d 883, 884, 886 (9th Cir. 1987) (finding four hour break between questioning was sufficient).

61. *See* discussion *infra* Part III.A.1.

62. 512 U.S. 452, 454 (1994).

63. *Id.* at 459.

precedents do not require the cessation of questioning," shifting the burden to the suspect to make such an "unambiguous request."[64] However, as the Court pointed out, this right is fundamentally different from the right to remain silent in that once a suspect has invoked his right to counsel, questioning may not continue until an attorney is present.[65] Such is not the case with respect to the right to remain silent, where police may continue the interrogation after a sufficient period of time has elapsed.[66] The Court went on to reason that if police were required to cease interrogation in the face of an "ambiguous" request for counsel, this would hinder police efforts,[67] the same concern articulated by some of the *Miranda* critics.

Many courts, expanding the *Davis* holding, have utilized the unambiguous standard in determining if a suspect has invoked his right to remain silent, despite the fact that the Supreme Court had never squarely addressed the issue.[68] At the federal level, "every circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*."[69] Unfortunately, but unsurprisingly, none of these courts provided sufficient reasoning as to their decision, and the little reasoning that a few courts provided has been criticized as "cursory."[70] Most states have followed suit in an equally unsatisfactory fashion, and any state that adopted the *Davis* standard did so with respect to both of the *Miranda* protections.[71] It is against this convoluted backdrop that the Supreme Court decided *Berghuis v. Thompkins*.

II. *BERGHUIS V. THOMPKINS*

A. Facts of the Case

Van Chester Thompkins was suspected of a shooting at a shopping mall in Michigan, in which one victim died.[72] Two Michigan officers travelled to Ohio, to where Thompkins had fled and was being held, to interview him.[73]

64. *Id.*

65. *Id.* at 458; *see also* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

66. *See* Michigan v. Mosley, 423 U.S. 96, 103 (1975); *see also supra* text accompanying notes 56–60.

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

68. *See* discussion *infra* Part III.A.1.

69. Bui v. DiPaolo, 170 F.3d 232, 239 (1st Cir. 1999); *see also* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 785 (2009) (noting that no federal appellate court had limited *Davis* only to the right to counsel).

70. *See* Strauss, *supra* note 69, at 786.

71. *Id.* at 825–29 app. (providing a detailed list of the states that have applied *Davis* to the right to remain silent).

72. Berghuis v. Thompkins, 130 S. Ct. 2250, 2256 (2010).

73. *Id.*

The interrogation took place in an eight-foot by ten-foot room and lasted nearly three hours.[74] At the outset of the interrogation, Thompkins was read his *Miranda* rights from a form and asked to read the last warning, regarding his right to counsel, and Thompkins complied.[75] However, when asked to sign the form indicating that he understood these rights, Thompkins declined.[76] The record contained conflicting evidence as to whether Thompkins verbally confirmed that he understood these rights, and the interrogation began.[77] Thompkins never said that he wished to remain silent or wanted an attorney, but officers attested that he did remain "largely silent" during the entire interrogation.[78] Thompkins gave a few limited responses, such as "yeah," "no," and "I don't know," and communicated by nodding his head.[79] However, two hours and forty-five minutes into the interrogation, Thompkins responded affirmatively by answering "yes" to three direct questions from the officers: "Do you believe in God?," "Do you pray to God?," and "Do you pray to God to forgive you for shooting that boy down?"[80] After these questions, Thompkins still refused to give a written confession, and the interrogation ended.[81]

Thompkins was charged with various counts, including first degree murder, and moved to suppress his statements, claiming he had invoked his right to remain silent, which required the officers to stop the interrogation, and had not waived his right to remain silent, thus his statements were involuntary.[82] The trial court denied his motion, and when the jury found him guilty on all counts, Thompkins was "sentenced to life in prison without parole."[83] The Michigan Court of Appeals rejected Thompkins' appeal, finding that he had not invoked his right to remain silent, but rather waived his right.[84] Thompkins' appeal to the Michigan Supreme Court was subsequently denied.[85] Thompkins then filed a petition for a writ of habeas corpus, governed by the Antiterrorism and Effective Death Penalty Act of 1996

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Thompkins*, 130 S. Ct. at 2256.
79. *Id.* at 2256–57.
80. *Id.* at 2257.
81. *Id.*
82. *Id.*
83. *Id.* at 2257–58.
84. People v. Thompkins, No. 242478, 2004 WL 202898, at *1 (Mich. Ct. App. Feb. 3, 2004).
85. People v. Thompkins, 683 N.W.2d 676, 676 (Mich. 2004).

(hereinafter "AEDPA"),[86] in the United States District Court for the Eastern District of Michigan.[87] That court rejected Thompkins' motion, finding that the Michigan Court of Appeals' determination that he had waived his right was not unreasonable, as required by the AEDPA.[88] Thompkins was granted a certificate of appealability.[89] The United States Court of Appeals for the Sixth Circuit reversed the district court's denial of the petition because the state court's decision was both an unreasonable application of law and an unreasonable determination based on the evidence.[90] That court relied heavily on the fact that Thompkins had remained nearly silent for the first two hours and forty-five minutes of the interrogation, and according to the court, this clearly should have demonstrated to the officers that "Thompkins did not wish to waive his rights."[91] The Supreme Court then granted certiorari.[92]

B. The Majority Opinion

In his opinion for the majority, Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, first addressed the invocation issue.[93] Thompkins argued that by remaining silent for a sufficient period of time, he had invoked his right to remain silent, and therefore the officers should have stopped the questioning prior to his incriminating responses; Justice Kennedy discredited this argument as "unpersuasive."[94] After acknowledging this presented a novel issue for the Court, Justice Kennedy indicated there was "no principled reason" not to apply the *Davis* standard.[95] He then transitioned quickly into a brief discussion of the policy concerns, specifically noting that an unambiguous waiver requirement reduces the need for police to make a judgment in cases where it may not be completely clear if the right has actually been invoked by the suspect.[96] Justice Kennedy

86. 28 U.S.C. § 2254 (2006). The AEDPA provides that a court cannot grant a petition for a writ of habeas corpus unless the state court's ruling involved a misapplication of established federal law or an unreasonable determination based on the presented evidence. *Id.* § 2254(d).

87. Thompkins v. Berghuis, No. 05-CV-70188-DT, 2006 WL 2811303, at *1 (E.D. Mich. Sept. 28, 2006).

88. *Id.* at *13–14.

89. Thompkins v. Berghuis, No. 05-70188, 2006 WL 3086916, at *2 (E.D. Mich. Oct. 30, 2006).

90. Thompkins v. Berghuis, 547 F.3d 572, 581 (6th Cir. 2008).

91. *Id.* at 585–88.

92. Berghuis v. Thompkins, 130 S. Ct. 48, 48 (2009).

93. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010).

94. *Id.* at 2259.

95. *Id.* at 2260; *see also The Supreme Court, 2009 Term—Leading Cases: Fifth Amendment*, 124 HARV. L. REV. 189, 195 (2010) [hereinafter *Fifth Amendment*] ("As a matter of practical jurisprudence, the Court was wise to keep the application of invocation rules consistent across the *Miranda* rights.").

96. *Thompkins*, 130 S. Ct. at 2260.

concluded, "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. . . . [H]e did neither, so he did not invoke his right to remain silent."[97]

The majority opinion continued with the issue of whether Thompkins waived his right to remain silent.[98] Although Justice Kennedy found *Miranda* language could indicate waivers must be explicit, he followed up by enumerating the various cases that, according to the majority, reduced the impact of this "heavy burden."[99] The majority validated implied waivers, so long as those waivers honored the knowingly and voluntarily requirements outlined in post-*Miranda* cases.[100] Because Thompkins was read his *Miranda* rights and at least indicated he could read and understand English, the majority determined he understood the right he waived.[101] Additionally, the majority placed importance on that fact that Thompkins did answer the detectives' questions when he could have chosen to remain silent.[102] Finally, there was nothing to indicate the statements were coerced, and therefore the majority concluded Thompkins knowingly and voluntarily, and therefore effectively, waived his right to remain silent.[103] Thompkins also further contended that even if his three responses did constitute a waiver of his right to remain silent, the detectives were required to discontinue questioning until they had obtained that waiver.[104] Specifically, he contended the detectives impermissibly obtained his responses, which constituted a waiver, because they continued to question him during the extended period before he gave those responses.[105] However, Justice Kennedy quickly dismissed this argument by relying on *Butler* and finding that police may continue to question suspects until that suspect either invokes or waives his right to remain silent.[106] In conclusion, the Court held that suspects like Thompkins who have not effectively invoked their right to remain silent waive that right by voluntarily replying to police interrogation.[107]

C. Justice Sotomayor's Strongly-Worded Dissent

In her dissenting opinion, Justice Sotomayor, joined by Justices Stevens, Ginsburg, and Breyer, tackled the majority's opinion and rationale head on:

97. *Id.* (citations omitted).
98. *Id.*
99. *Id.* at 2260–61; *see* discussion *supra* Part I.B.1.
100. *Thompkins*, 130 S. Ct. at 2260–61.
101. *Id.* at 2262.
102. *Id.* at 2263.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Thompkins*, 130 S. Ct. at 2263–64 (2010).
107. *Id.* at 2264.

> Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so.[108]

According to the dissenting Justices, Thompkins was entitled to relief, regardless of the invocation issue, if the prosecution could not establish he waived his right, and so they began their analysis there.[109] The dissenters reiterated the heavy burden that the prosecution must satisfy to show waiver, especially when that waiver is implied, specifically noting that the *Miranda* court determined "mere silence is not enough."[110] Relying on *Butler*, Justice Sotomayor indicated that when waiver is implied, as it was in Thompkins' case, that burden is even heavier for the prosecution to satisfy.[111] These principles, derived from *Miranda* and *Butler*, when applied to Thompkins' circumstances should lead to one obvious conclusion, according to the Justices.[112] They explained Thompkins' refusal to sign the *Miranda* form, in conjunction with his overall silence, should be enough to establish not necessarily that he invoked his right, but at least that he did not waive it, especially in light of the complex, conflicting record and testimony of the interrogating officers.[113] Justice Sotomayor criticized the majority's conclusion that Thompkins' actions over the three-hour interrogation constituted waiver as "objectively unreasonable."[114]

For the dissenting Justices, the analysis should have stopped there.[115] Because the issue could have been decided without announcing the new rule

108. *Id.* at 2278 (Sotomayor, J., dissenting).

109. *Id.* at 2268; *see also* Brief for the Nat'l Ass'n of Criminal Def. Lawyers & the Am. Civil Liberties Union as Amici Curiae in Support of Respondent at 8–12, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470) (arguing the precedential and practical reasons for a "waiver first" policy, which would require police to obtain a waiver before initiating interrogation).

110. *Thompkins*, 130 S. Ct. at 2269 (Sotomayor, J., dissenting) (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)). Justice Sotomayor went on to indicate the *Butler* pronouncement was exceedingly close to a per se rule that silence was not enough to establish waiver, thus reinforcing her proposition that the case before the Court should have one obvious conclusion: Thompkins did not waive his right to remain silent. *Id.*

111. *Id.*

112. *Id.* at 2270; *see also* Weisselberg & Bibas, *supra* note 39, at 73 ("The majority found an implied *Miranda* waiver on an extreme set of facts.").

113. *Thompkins*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting).

114. *Id.* at 2271. As Justice Sotomayor pointed out, the argument for a finding of implied waiver under these circumstances is weak; it is even weaker when considered in conjunction with case law that supports the notion that officers should be required to obtain waiver before interrogation starts. *See* Brief for the Nat'l Ass'n of Criminal Def. Lawyers & the Am. Civil Liberties Union as Amici Curiae in Support of Respondent, *supra* note 109, at 15.

115. *Thompkins*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting).

on invocation, the majority allegedly violated principles of judicial restraint.[116] Specifically, the dissent articulated that the question of whether or not the Michigan Court of Appeals unreasonably applied *Miranda* laws, as required by the AEDPA, could be decided on the waiver issue alone.[117] Agreeing with the Sixth Circuit Court of Appeals, Justice Sotomayor advocated that because Thompkins was entitled to relief under the AEDPA, there was no need to address his claim on the grounds of invocation.[118] Despite this, she continued on to tackle the invocation issue, noting how "flatly" the majority's unnecessary invocation pronouncement contradicted basic and longstanding *Miranda* principles.[119] The dissenters disagreed with the majority's ruling for multiple reasons. First, Justice Sotomayor criticized the majority's "novel application" of *Davis*.[120] She pointed out that *Davis* involved the right to counsel, not the right to remain silent, which was at issue in this case, and the suspect in *Davis* expressly waived his *Miranda* rights.[121] Although the dissenters maintained that the invocation issue need not be decided by the Court, if they were to apply a rule, it would be the "scrupulously honored" standard promulgated in *Mosley*.[122] Thus, if at any time a suspect indicated that he wishes to remain silent, the police must discontinue questioning.[123] Justice Sotomayor specifically noted that sitting in silence in the same manner as Thompkins did and other similar behaviors cannot be understood to mean anything other than an intent to remain silent.[124]

She also countered the majority's argument that the *Davis* standard provides police interrogators with a bright line rule, arguing *Mosley* is more appropriate and workable in practice, as evidenced by its successful and effective application over the past thirty-five years.[125] Most importantly, the dissenters attacked the application of *Davis* as unworkable in practice.[126] As

116. *Id.* Under the AEDPA's "deferential standard," the Supreme Court can, and should, decline to answer constitutional questions not necessary to the resolution of the issue before the Court. *Id.*; *see also* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984) (citing a string of precedent supporting the rule of judicial restraint).

117. *Thompkins*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting). Justice Sotomayor also articulated that because the Sixth Circuit Court of Appeals declined to decide the invocation issue, 547 F.3d 572, 588 (6th Cir. 2008), the Supreme Court was free to remand that issue without deciding it. *Id.* at 2274 n.6.

118. *Id.* at 2271.

119. *Id.*

120. *Id.* at 2274.

121. *Id.* at 2275.

122. *Id.* (citing Michigan v. Mosley, 423 U.S. 96, 104 (1975)); *see also supra* text accompanying notes 56–60.

123. *Thompkins*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting).

124. *Id.* at 2275–76.

125. *Id.* at 2276.

126. *Id.*

they noted, warning a suspect he has the right to remain silent is "unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected."[127] Additionally, they advocated that police, in the face of an ambiguous statement, are free to ask for clarification to determine whether or not the suspect wishes to invoke his right to remain silent rather than simply foreclosing that right at even slightly ambiguous statements.[128] According to Justice Sotomayor, the rule announced by the majority had been utilized by lower courts, resulting in the admission of statements procured after seemingly unambiguous invocations of the right to remain silent.[129] The dissenters believed the majority's ruling simply endorsed such misguided admissions.[130]

III. A CRITICAL LOOK AT THE IMPACT AND FUTURE OF *BERGHUIS V. THOMPKINS*—WAS THE MAJORITY'S CONCLUSION REALLY NOVEL?

This section discusses numerous issues relating to the Supreme Court's *Berghuis v. Thompkins* decision. These issues include criticisms of the majority opinion, the relationship and impact of *Thompkins* with respect to *Miranda*, and an outlook on the future precedential value of the *Thompkins* standard. It is important to note that waiver and invocation are two completely distinct issues with respect to the right to remain silent, although the two issues are inevitably intertwined. Courts often do not effectively discuss the issues in a clear manner, causing confusion between the two. This analysis, while addressing the waiver issue, focuses more on the invocation issue and unambiguous standard, as this was the novel issue in this case and the more controversial pronouncement by the Court.

A. Application of the Davis *Standard to the Right to Remain Silent*

Despite the fact that Justice Sotomayor did not believe it was necessary for the majority Justices to address the invocation rule, she criticized the application of *Davis* to Thompkins' case.[131] Justice Sotomayor pointed out the very obvious issue with that application: "*Davis* involved the right to counsel, not the right to silence."[132] However, Justice Kennedy seemed to simply ignore that distinction, casually announcing that there was no reason not to apply *Davis* with little other satisfactory explanation.[133] It is difficult to

127. *Id.*
128. *Id.*
129. *Thompkins*, 130 S. Ct. at 2277 (2010) (Sotomayor, J., dissenting).
130. *Id.* at 2277–78.
131. *Id.* at 2273–76.
132. *Id.* at 2275.
133. *Id.* at 2260 (majority opinion).

understand why the majority would expand *Davis* in such a manner without at least first addressing concerns about the separation of the two rights.

1. Lower Courts Consistently Applied the *Davis* Standard to the Right to Remain Silent

Even prior to the Court's opinion in *Berghuis v. Thompkins*, this application of *Davis* to the right to silence had been considered by various lower courts and scholars.[134] As a matter of law, the right to remain silent and the right to counsel are two completely distinct rights.[135] Additionally, some scholars have suggested that the right to remain silent is the principal right protected by the *Miranda* decision, and the right to counsel is secondary insofar as it further enables a suspect to invoke that right.[136] Practically, the application of one standard to two different rights has the potential to produce extremely discordant results.[137] As mentioned above, the right to counsel requires police to permanently discontinue questioning until the suspect does have access to his counsel; this is not the case for the right to remain silent.[138] Because the majority in *Thompkins* expanded the *Davis* ruling to the right to remain silent, suspects are required to assert their right in such an unambiguous manner,[139] but because police may ignore any "ambiguous" requests, the questioning can continue and suspects may essentially be coerced into making an incriminating statement. As one scholar noted, this places police in a "win-win situation."[140]

Unfortunately, no court that has expanded *Davis* in this manner has provided a sufficient explanation as to why this standard is appropriate for both rights. One possibility though is that the courts are much more protective of the right to counsel, and thus, it seems natural that the standard for the more rigidly guarded right would be adequate for the secondary right to remain

134. *See, e.g.*, United States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995); Medina v. Singletary, 59 F.3d 1095, 1100–01 (11th Cir. 1995); State v. Bacon, 658 A.2d 54, 65 (Vt. 1995).

135. *See Thompkins*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975). *But see* Solem v. Stumes, 465 U.S. 638, 648 (1984) (suggesting that the two distinct rights could, and possibly should, operate under the same set of rules).

136. Strauss, *supra* 69, at 786.

137. *Id.* However, the flip side of this argument is that a unified standard actually creates more simplicity for police officers to apply one standard to the two rights in "closely related situations." *Fifth Amendment*, *supra* note 95, at 196.

138. *See supra* Part I.B.2.

139. *See Thompkins*, 130 S. Ct. at 2260 (majority opinion).

140. Strauss, *supra* note 69, at 818. Courts consistently cite a desire to remove police from "questionable" situations where they are required to make a determination about a request. *See Thompkins*, 130 S. Ct. at 2260 (noting that allowing unambiguous requests would require police to make "difficult decisions" about a suspect's intent). However, when police are in a position to make those crucial determinations, it further disadvantages suspects. *See* Strauss, *supra* note 69, at 818.

silent.[141] *Edwards v. Arizona* dealt with such requests for counsel during an interrogation.[142] After noting that "additional safeguards are necessary when the accused asks for counsel," the Court announced that a suspect, after requesting counsel, may not be re-questioned by police unless counsel is made available to him.[143] Of course the suspect may reinitiate conversation with the police, but unless this occurs, all questioning must be cut off indefinitely.[144] Recently, the Supreme Court limited this in *Maryland v. Shatzer*.[145] There, the Court held that police may re-question a suspect when there has been a sufficient break in custody.[146] However, compare the necessary break after a request for counsel, at the least a matter of days, to the break required after an invocation of the right to remain silent. In *Michigan v. Mosley*, the Court held a two-hour break after a suspect indicated he wished to remain silent was a sufficient period of time for officers to reinitiate questioning.[147] Although the two dissenting Justices in *Mosley* made a compelling argument that such a short break in questioning was insufficient to protect suspects from the coercive atmosphere of a custodial setting,[148] courts have consistently interpreted this to mean that after a brief break in questioning, a suspect may again be interrogated without violation of basic *Miranda* principles. This stark contrast—two hours versus a minimum fourteen day period—demonstrates the importance courts place on the right to counsel and may provide an explanation, albeit a somewhat unsatisfactory one, as to why these two rights, though distinguishable, could governed by the same standard.

2. Was *Davis* Wrongly Decided?

Not only might *Davis* be an inappropriate standard for cases like Thompkins', but many scholars advocate that *Davis* itself was wrongly decided and should be overruled for the right to counsel as well.[149] First, *Davis* has

141. The Supreme Court always adopted "more stringent" standards with respect to the right to counsel, consistently requiring that an invocation of the right to counsel "operates as an absolute bar" on any further interrogation by police. Strauss, *supra* note 69, at 781.

142. 451 U.S. 477, 478 (1981).

143. *Id.* at 484–85.

144. *Id.*

145. 130 S. Ct. 1213 (2010).

146. *Id.* at 1223–24 (finding that a fourteen-day release from custody was sufficient).

147. 423 U.S. 96, 104 (1975).

148. *Id.* at 118 (Brennan, J., dissenting).

149. *See, e.g.*, Strauss, *supra* note 69, at 803–04; *see also* Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (articulating practical concerns, even prior to the *Davis* ruling, about requiring unambiguous requests and how this works against certain groups). These concerns were flatly rejected by the majority in *Davis*. 512 U.S. 452, 460–61 (1994) (recognizing that the unambiguous standard "might disadvantage some suspects," but placing this secondary to the importance of effective law enforcement).

been attacked on the same grounds with respect to both the right to counsel, which it was promulgated for, and with respect to the right to remain silent: it is inconsistent with the suspect protections outlined in *Miranda v. Arizona*.[150] In an article that pre-dates the Supreme Court's decision in *Thompkins*, Professor Marcy Strauss challenged *Davis* and discredited major meritorious arguments in favor of requiring unambiguous invocations.[151] She argued that rather than indicating uncertainty about the suspect's willingness to talk, ambiguity could indicate a suspect is actually unsure of how to proceed in the interrogation setting, he is intimidated by the circumstances, or he fears the repercussions of asserting his rights.[152] However, these reasons do not justify foreclosing an attempted invocation as an unsuccessful one and could have dangerous consequences for unsure or indecisive suspects.[153] Additionally, it is unclear that allowing ambiguous statements to qualify as invocations would disrupt or thwart effective police practices in the manner Justice Kennedy cautions.[154] More importantly, allowing police to ignore allegedly ambiguous requests seriously inhibits a suspect's ability to protect himself from self-incrimination.[155] The *Davis* standard clearly created some serious questions in the minds of scholars, and the problems they have identified are only exacerbated by courts' application of that standard to the right to remain silent.

B. The Call for Miranda *Warning Reform*

1. The Counterintuitive Problem: Why isn't Silence Enough?

As the dissent pointed out, the warning "you have the right to remain silent" indicates that a suspect may in fact remain silent.[156] It is uncontested that Thompkins did remain primarily silent during the first two hours and

150. *See* Strauss, *supra* note 69, at 803–04.

151. *Id.* The three specific arguments addressed by Professor Strauss are that ambiguous requests indicate a suspect is unsure he actually wants to invoke that right, law enforcement interests should allow interrogation to proceed in the face of ambiguity, and any cost-benefit analysis requires unambiguous requests. *Id.* at 803–15.

152. *Id.* at 804–05.

153. *Id.* at 804–08.

154. *Id.* at 809–14.

155. *Id.* at 806–08.

156. Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting). In support of this argument, Amici Curiae cited to the lingual definition of the term "indication," relied upon very heavily in *Miranda* jurisprudence, to show that a suspect may invoke his right by simply remaining silent. Brief for the Nat'l Ass'n of Criminal Def. Lawyers & the Am. Civil Liberties Union as Amici Curiae in Support of Respondent, *supra* note 109, at 26–27 ("'Indication' is a broad concept, denoting 'something (as a signal, sign, suggestion) that serves to indicate.' Plainly, one 'sign' a suspect can offer that he 'wishes to remain silent' is to do just that—remain silent." (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1150 (1986))).

forty-five minutes of his interrogation;[157] however, Justice Kennedy deemed that behavior insufficient to establish Thompkins wished to invoke his right.[158] In defense of the majority's conclusion, Thompkins did respond sporadically to a few questions of the officers during that time, rather than remaining completely silent.[159] There were conflicting stories regarding the actual interrogation, and it was suggested that Thompkins responded with a few head nods and "yeah" or "no" in response to questions completely irrelevant to the crime.[160] If this is true and Thompkins remained silent in response to relevant questions about the alleged crime, this raises a whole new issue. Unfortunately, because police are allowed to continue to question suspects until they have successfully invoked their right to remain silent, it is unlikely and impracticable that a suspect would actually sit in complete and total silence in the face of ongoing, extended interrogation by officers. Based on the standards set by the majority Justices in *Thompkins*, it is rare that a suspect's silence will be enough to invoke that right, and at the very least should require an amended *Miranda* warning that adequately informs suspects of the behavior that is expected of them if they wish to successfully invoke their right to remain silent.

Professor Strauss addressed this issue in her critique of *Davis*.[161] In that article, she identifies various categories of suspect statements that have consistently been determined as ambiguous by courts.[162] One of those categories addressed by Professor Strauss was simple silence.[163] In one sense, this could be viewed as the "ultimate invocation," because the suspect is acting on what they wish to do—remain silent.[164] Additionally, like Justice Sotomayor noted, typical *Miranda* warnings actually advise suspects that they may in fact simply remain silent.[165] Like Professor Strauss points out, courts

157. *See Thompkins*, 130 S. Ct. at 2267 (Sotomayor, J., dissenting) (noting the officers characterized the interrogation as "very, very one-sided" and admitted Thompkins remained "largely" silent).

158. *Id.* at 2260 (majority opinion).

159. *See id.* at 2256–57.

160. *See id.*; Brief for the Nat'l Ass'n of Criminal Def. Lawyers & the Am. Civil Liberties Union as Amici Curiae in Support of Respondent, *supra* note 109, at 27–28 (attacking the responsive characterization of the Thompkins' behavior during the interrogation as "inappropriately selective").

161. Strauss, *supra* note 69, at 803–15.

162. *Id.* at 787–88.

163. *Id.* Other categories identified by Professor Strauss include questions concerning the right, the use of words such as "maybe" or "could," logical hedges, requests to do something besides speak, vague comments about cooperativeness, comments that indicate an unwillingness to discuss specific topics, and comments which are ambiguous due to other actions or comments. *Id.* She challenges the courts' labeling of these kinds of statements as "ambiguous." *Id.*

164. *Id.* at 792.

165. *Thompkins*, 130 S. Ct. at 2267–68 (Sotomayor, J., dissenting).

are generally hesitant to find that silence constitutes an unambiguous invocation.[166] These inconsistent and counterintuitive findings are understandably a cause for concern for many scholars like Strauss and represent yet another argument not only against the expansion of *Davis*, but in favor of *Miranda* warning reform altogether.

2. Confusion with the Right to Cut Off Questioning

In a recent article, Professor Laurent Sacharoff addresses this confusion and advocates the right to remain silent actually refers to two distinct rights: the right to remain silent and the right to cut off questioning.[167] According to Professor Sacharoff, the Supreme Court never differentiates the two, although clearly confirming their existence, thus creating this confusion.[168] Professor Sacharoff correctly views the right to remain silent as a liberty which may be protected until that right is waived by the suspect.[169] Although Professor Sacharoff disagrees with the waiver terminology used by the *Thompkins*' Court, he allows that regardless, the majority's opinion is probably correct in that a suspect may either remain silent or speak, where speaking effectively "waives" the suspect's liberty to remain silent.[170] However, Professor Sacharoff disagrees with the *Thompkins* holding with respect to the sub-right to cut off police questioning.[171] He argues that the *Thompkins*' holding requires the right to cut off questioning be unambiguously invoked by unambiguously invoking the right to remain silent.[172] Professor Sacharoff's primary concern is that this sub-right is not represented in the current "right to remain silent"

166. Strauss, *supra* note 69, at 792; *see, e.g.*, Commonwealth v. Sicari, 752 N.E.2d 684, 695 (Mass. 2001) (finding that a thirty to forty minute period of silence was insufficient), *cert. denied*, 534 U.S. 1142 (2002); Green v. Commonwealth, 500 S.E.2d 835, 838–39 (Va. Ct. App. 1998) (finding that a two and a half hour silence was insufficient). *But see* State v. Rossignol, 627 A.2d 524, 527 (Me. 1993) (finding that a suspect had sufficiently invoked his right to remain silent when he refused to answer a set of questions over a twenty minute period). In a recent case, the Massachusetts Supreme Court found that a suspect did effectively invoke his right to remain silent by nodding his head in response to the direct question "So you don't want to speak?" and not speaking. Commonwealth v. Clarke, 461 Mass. 336, 343–44 (2012). *Clarke* may have identified the very narrow scope of circumstances where a suspect can invoke his right without speaking under *Thompkins*.

167. Laurent Sacharoff, Miranda*'s Hidden Right*, ALA. L. REV. (forthcoming) (manuscript at 4), *available at* http://ssrn.com/abstract=1711410; *see also Fifth Amendment*, *supra* 95, at 196–97 (arguing there is a right to cut off questioning which exists separately from the two traditional *Miranda* rights).

168. Sacharoff, *supra* note 167 (manuscript at 5).

169. *Id.* (manuscript at 35).

170. *Id.* (manuscript at 33–34).

171. *Id.* (manuscript at 44–45).

172. *Id.* (manuscript at 45).

Miranda warning, leaving suspects unaware of this right and how best to protect it.[173]

Professor Sacharoff advocates "aligning" these two sub-rights as a possible solution.[174] This would require police to obtain a waiver before questioning suspects, clearing up confusion between the separate waiver and invocation requirements for the two sub-rights.[175] Moreover, this would shift the burden of obtaining a waiver to the police, better protecting suspects' rights in a manner more faithful to *Miranda*.[176] Professor Sacharoff laments that the Court accomplished this harmony that he encourages; however, it did so by moving in the opposite direction.[177] While his analysis is critical of the *Thompkins* holding, it does clarify Justice Sotomayor's concerns about the "counterintuitive" character of the majority's holding.[178]

But even if the Court were to distinguish the right to cut off questioning from the right to remain silent, there still may not be room for consensus between the majority and dissent in *Thompkins*. Justice Sotomayor took issue with the majority insofar as the five Justices concluded that the police were correct to question Thompkins during the lengthy interrogation despite the fact he remained relatively silent over that period.[179] Essentially, the heart of this problem was Thompkins' ability to cut of questioning, not his ability to remain silent. Effectively, Justice Sotomayor argued that by remaining silent, Thompkins invoked his right to cut off questioning.[180] Even if she had addressed these two aligned rights in the dissent, Justice Kennedy and the majority Justices disagreed, arguing that Thompkins' actions and words, or lack thereof, were altogether insufficient to invoke the right to remain silent, which would have terminated the interrogation.[181] The ultimate point of dissent here is the level of action or words required to invoke this right, whether it be to remain silent or to cut off questioning.

Taking an Ocham's Razor approach to this concern may provide some insight: the Court could simply rewrite the warnings that officers must give to

173. *Id.* (manuscript at 44–45) (noting this disadvantages unknowing suspects).

174. Sacharoff, *supra* note 167 (manuscript at 42).

175. *Id.*

176. *Id.*; *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CA. L. REV. 1519, 1577–90 (2008) (arguing that *Davis* and current police practices reduced the true *Miranda* safeguards that suspects waive their rights before questioning to a requirement that suspects now invoke their right to cut off questioning).

177. Sacharoff, *supra* note 167 (manuscript at 42). *But see Fifth Amendment*, *supra* note 95, at 194 (arguing that if the right to cut off questioning is tied to both traditional *Miranda* rights, the Court was correct to apply one standard to both rights to promote consistent protection of all three rights).

178. Berghuis v. Thompkins, 130 S. Ct. 2250, 2278 (2010) (Sotomayor, J., dissenting).

179. *Id.* at 2266.

180. *See id.* at 2273.

181. *Id.* at 2260 (majority opinion).

suspects.[182] Justice Sotomayor was correct to imply that the phrase "you have the right to remain silent" very apparently does not convey "you must unambiguously and almost surely affirmatively convey that you wish to remain silent," even to the most educated of suspects.[183] While the *Miranda* protections have changed significantly since the landmark decision, the actual warnings issued to suspects have remained relatively unchanged. The brunt of *Miranda* was to ensure that suspects in custody "be adequately and effectively apprised of [their] rights."[184] The Court would only be reaffirming its adherence to *Miranda* if it had taken the extra step to reword the warnings. This obvious disjunct between the warnings and the actual constitutional protections embodied in their words may be contributing to the more resounding criticism that *Berghuis v. Thompkins* is another step in the direction away from *Miranda v. Arizona*.

C. Faithfulness to Miranda*—Is* Miranda *"Dead"?*

Another concern with respect to *Berghuis v. Thompkins* is the Court's faithfulness to the *Miranda* opinion and protections. Although the bulk of this analysis focuses on the invocation issue because this was the new issue before the Supreme Court in *Thompkins*, it is also necessary to address the issue of waiver.[185] Scholars disagree as to how exactly the waiver and invocation of the right to remain silent interact, but there is a general consensus that the *Thompkins* Court significantly reduced the burden required to establish waiver, although this trend is not a new one.[186] What is most interesting is that the majority of recent courts that have relied on *Thompkins* have utilized the majority's holding with respect to the waiver issue in making their decision.[187] Although the Court addressed a novel issue in *Thompkins* with respect to invocation, this case represents a culmination of more recent *Miranda*

182. The Court entertained the idea that these spoken warnings may not be the most effective means of conveying these rights. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

183. *See Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).

184. *Miranda*, 384 U.S. at 467.

185. Note that Justice Kennedy, writing for the majority, addressed the waiver issue secondarily, yet more extensively. *Thompkins*, 130 S. Ct. at 2260–63. However, Justice Sotomayor, writing for the dissent, believed that the waiver issue was the only issue necessary to resolve this case. *Id.* at 2268, 2273 (Sotomayor, J., dissenting).

186. *See* Charles Weisselberg, *Elena Kagan and the Death of* Miranda, HUFFINGTON POST (June 1, 2010, 02:45 PM), http://www.huffingtonpost.com/charles-weisselberg/elena-kagan-and-the-death_b_596447.html (labeling the *Thompkins* decision a "death blow" to *Miranda*).

187. Most courts rely on *Berghuis v. Thompkins* as a recent reiteration by the Supreme Court that the burden for the prosecution is not as great as it has been interpreted to be based on the language in *Miranda v. Arizona*. *See, e.g.*, United States v. Oliver, 630 F.3d 397, 409 (5th Cir. 2011); United States v. Huggins, 392 F. App'x 50, 57 (3d Cir. 2010); Treesh v. Bagley, 612 F.3d 424, 433 (6th Cir. 2010); Hall v. Thomas, 611 F.3d 1259, 1285 (11th Cir. 2010).

jurisprudence that has "retreated" from the strict waiver showing required under a literal interpretation of the Court's language in *Miranda*.[188]

This criticism that the Supreme Court has strayed from the strong protections outlined in *Miranda*, however, is not a new one. As noted above, the Court, in the years following the decision in *Miranda*, consistently whittled away at the strength of that holding.[189] The safeguards outlined and authorized by *Miranda* were enacted to combat the inherent pressures of police interrogation.[190] As a practical point, it is questionable how effective *Miranda* warnings actually are, and there is strong evidence that police investigators commonly utilize a variety of strategies and tactics to circumvent *Miranda*'s strong protections.[191] Officers also question suspects in a manner that elicits an implied waiver or persuade suspects that it is in their best interest to waive their rights.[192] These techniques are designed by police to "overcome a suspect's resistance and to induce him or her to confess," with little regard for the accuracy of the statement or guilt of the suspect.[193] It is these concerns that justify the need for safeguards like *Miranda* warnings in the first place.

Most agree, including Professor Charles Weisselberg, that the interrogation pressures are still a concern today.[194] Professor Weisselberg comes to the pessimistic conclusion that, "[a]s a prophylactic device to protect suspects' privilege against self-incrimination . . . *Miranda* is largely dead."[195] In support of this, he offers numerous statements that courts have held to be insufficient to invoke protection under the *Davis* standard.[196] Echoing this harsh criticism, Professor Strauss goes so far as to criticize the lengths, she argues, judges take to classify seemingly unambiguous statements as insufficient invocations

188. *Thompkins*, 130 S. Ct. at 2261 ("[T]his 'heavy burden' is not more than the burden to establish waiver by a preponderance of the evidence." (citing Colorado v. Connelly, 479 U.S. 157, 168 (1986))).

189. *See supra* Part I.B.

190. Miranda v. Arizona, 384 U.S. 436, 448 (1966) ("Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.").

191. For example, police in a self-reported survey admit to isolating the suspect in a small room, identifying contradictions in the suspect's story and trying to establish rapport with the suspect to build the suspect's trust. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 389 (2007).

192. *Id.* at 383.

193. *Id.*

194. *See* Weisselberg, *supra* note 176, at 1529–37.

195. *Id.* at 1591.

196. *Id.* at 1580–81; *see, e.g.*, People v. Stitely, 108 P.3d 182, 195–96 (Cal. 2005) ("I think it's time for me to stop talking."); United States v. Banks, 78 F.3d 1190, 1196–98 (7th Cir. 1996) ("I don't have nothing to say."), *vacated on other grounds sub nom.* Mills v. United States, 519 U.S. 1190 (1996).

under *Davis*.[197] Professor Weisselberg specifically cites the increase in implied waivers as a factor in the decline in the strength of *Miranda* protections.[198] More importantly, he concludes that the court system, law enforcement interests, and the legislature all stand in the way of "fixing" *Miranda*.[199]

Interestingly enough, during a recent question and answer session at the University of Denver, a student confronted Justice Sotomayor with a very pointed question regarding *Thompkins*' impact on *Miranda*.[200] Justice Sotomayor explained her dissenting opinion saying, "I dissented on the basis that the Court's prior cases had commanded that a waiver of the right to remain silent had to be more explicit."[201] However she followed this up by emphatically answering "no," that the Supreme Court was not eroding *Miranda* protections.[202] She articulated those Justices in the majority truly believed they were correct in their interpretation of the Court's precedent and the constitutional protections, declining to ascribe those kind of ulterior motives to the Justices with whom she did not agree.[203] In light of resounding accusations that the *Thompkins* decision has effectively killed *Miranda* protections, it is surprising that Justice Sotomayor would make such an impartial statement regarding the future of *Miranda*.

The *Thompkins* decision lacks any thoughtful discussion or consideration of how these interrogation pressures affect suspects in practice. In the sense that the majority does not account for these implications, *Thompkins* is contrary to *Miranda*.[204] However, considering Professor Weisselberg's pronouncement that *Miranda* is "dead" predated the Court's opinion in *Thompkins*, it is possible *Thompkins* is just the proverbial nail in the coffin. Realistically, the Supreme Court is simply affirming, or at least sanctioning, the general digression from *Miranda*'s strict protections. But in *Miranda*, the Court itself noted the possibility that these warnings were not the best means of protecting a suspect's constitutional rights, which implicitly sanctions a different framework of safeguards.[205] It may be incorrect to say that *Miranda*

197. Strauss, *supra* note 69, at 787–802.

198. Weisselberg, *supra* note 176, at 1581–82.

199. *Id.* at 1589–99.

200. Justice Sonia Sotomayor, Address at the Univ. of Denver Sturm Coll. of Law (Aug. 26, 2010), *available at* http://www.c-span.org/flvPop.aspx?src=archive/sc/sc082610_sotomayor1.flv&msg=You+are+watching+the+C-SPAN+Networks+LIVE&start=121.287&end=-1.

201. *Id.*

202. *Id.*

203. *Id.*

204. Weisselberg & Bibas, *supra* note 39, at 73. The primary practical implication is the rise in implied waivers under extended periods of questioning, like the circumstances in *Thompkins*. *Id.* at 76.

205. 384 U.S. 436, 457 (1966).

is dead; the constitutional protections addressed by the Court are very real rights given to suspects. It is the warning system outlined by the Court that is now incongruent with those rights.[206]

Miranda warnings may be merely symbolic, but this should encourage the courts to turn to reform ideas because, regardless of the status of *Miranda*, there must be some viable protections in place for suspects. One suggestion that would ensure accurate accounts of interrogations and encourage honest police practice is videotaped confessions.[207] Very few jurisdictions require videotaped interrogations, but there is evidence that police officials support this kind of electronic recording.[208] Electronically recorded interrogations would provide verifiable proof of the questioning for courts to evaluate, however this alone does not remedy the problem at a basic level. Any incriminating statement must be made voluntarily in order to comport with the Sixth Amendment; it is not entirely clear that videotaping ensures this. Courts need workable standards for evaluating the voluntariness of the suspect's statement.[209] While it is not so obvious that *Thompkins* represents a serious divergence from recent *Miranda* jurisprudence, so long as the cases favor law enforcement, a strong argument can be made that cases such as *Thompkins* and *Davis* are unfaithful to the constitutional protections supposedly afforded to suspects.

D. Future of Berghuis v. Thompkins

In the months immediately following the Supreme Court's decision in *Berghuis v. Thompkins*, lower courts have had little time or opportunity to apply its precedent in practice. This section examines the precedential value of *Berghuis v. Thompkins*, concluding lower courts will likely have an easy time straightforwardly applying the majority's unambiguous invocation requirement.

1. Unlikely to be Challenged

It remains unclear how judges will interpret the opinion, but it is likely the decision in *Thompkins* will have little practical impact because, as suggested

206. In his response to Professor Weisselberg's concerns, Professor Bibas argues that *Miranda*'s warnings have always "map[ed] poorly onto the kinds of compulsion that produce false confessions and the categories of people likely to confess falsely." Weisselberg & Bibas, *supra* note 39, at 77.

207. *See id.* at 80.

208. Kassin et al., *supra* note 191, at 396 (noting only 16% of respondents worked in a jurisdiction that required taped interrogations, although 81% reported they favored taping interrogations from start to finish).

209. Along the same lines, Professor Weisselberg advocates for "judicial oversight through richer and more nuanced voluntariness determinations." Weisselberg & Bibas, *supra* note 39, at 85.

earlier, the majority basically affirmed what the lower courts had been doing for years—expanding *Davis* to the right to remain silent, effectively making it more difficult for suspects to assert that right.[210] It is hard to imagine any erroneous or outrageous application of the *Thompkins* rule that would justify this issue ever reaching the Supreme Court again anytime soon, let alone overruling it.

It is important to note that this was a decisive decision, with five Justices writing for the majority and four siding with the dissent.[211] Justice Sotomayor's dissenting opinion might have been the better written opinion, simply because she was responsive to the majority's points and defensive of her own position. However, even considering the close split and the drastic divergence from *Miranda*, it is unlikely that this issue will be addressed again soon now that the Supreme Court has established a clear standard that is straightforward and instructive for lower courts.[212]

2. Recent (but Few) Limitations

The Ninth Circuit surprisingly limited the application of *Thompkins* in a recent opinion, *Hurd v. Terhune*.[213] In that case, the defendant was convicted of murdering his wife.[214] After the shooting, he was taken into custody, read his *Miranda* rights, and subsequently questioned by police.[215] The defendant willingly recounted his version of the story, but when asked to reenact how the actual shooting occurred, he refused.[216] The defendant additionally refused to take a polygraph examination.[217] The defendant moved to suppress his statements, arguing that by refusing to participate in the reenactment or the polygraph test, he had invoked his right to remain silent.[218] The trial court denied his motion, finding his attempted invocations were insufficient to effectively invoke his Fifth Amendment protections.[219] Thus, the prosecution was able to utilize the defendant's statements and refusals to cooperate as

210. *See supra* Part III.A.1.

211. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2255 (2010).

212. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."). The *Thompkins* decision has been applauded as "promot[ing] doctrinal consistency among the prophylactic rights *Miranda* established and show[ing] incredible deference to the need for rules capable of practical application by police." *Fifth Amendment*, *supra* note 95, at 194.

213. 619 F.3d 1080 (9th Cir. 2010).

214. *Id.* at 1082.

215. *Id.* at 1083.

216. *Id.* at 1083–84.

217. *Id.*

218. *Id.* at 1084.

219. *Hurd*, 619 F.3d at 1084.

evidence of his guilty during trial, and the jury found him guilty of first-degree murder.[220]

On appeal, the Ninth Circuit judges rejected the California appellate court's ruling that the "defendant [had] no right to remain silent selectively."[221] The court reiterated that during questioning, a suspect may invoke his right to remain silent at any time, even after he has waived that right or been responsive to questions.[222] More pertinently, the court, interpreting *Thompkins*, concluded that where the suspect's silence or refusal is unambiguous, as now required, that may not be used by the prosecution at trial to establish that defendant's guilt, as was the case here.[223] The court found, disagreeing with the lower California court, the defendant's responses were "objectively unambiguous in context."[224] Because the defendant's refusals were clear and the officers understood those refusals, the court concluded that he had successfully invoked his right to remain silent and thus his refusal was inappropriately admitted at trial.[225]

The court in *Hurd* clearly believed the defendant's behavior met the "unambiguous" standard.[226] However, this is somewhat surprising because prior to the Supreme Court's decision in *Thompkins*, there had been a trend in the lower courts to narrowly construe the requirement, finding that invocations were unambiguous more often than not.[227] It is likely though that *Hurd* is an exception. Of all the courts that have addressed *Berghuis v. Thompkins* over the past few months, very, very few have distinguished their facts from the situation in *Thompkins*.[228] Additionally, *Hurd* is the only instance where a federal court distinguished itself and found that a suspect's invocation was sufficient under the *Thompkins* standard.[229] Because these cases represent such a small minority of all the cases that have since addressed *Thompkins*, it is acceptable to consider them exceptions, leaving intact the prediction that most courts will straightforwardly and narrowly construe the "unambiguous" requirement.

220. *Id.*

221. *Id.* at 1086 (quoting People v. Hurd, 62 Cal. App. 4th 1084, 1093 (1998)).

222. *Id.* at 1087.

223. *Id.* at 1088.

224. *Id.* at 1088–89 (noting the defendant refused by saying "I don't want to," "No," and "I can't").

225. *Hurd*, 619 F.3d at 1088–89.

226. *See id.*; *see also* Commonwealth v. Clarke, 461 Mass. 336, 343 (2012) (finding *Thompkins* did not actually require a verbal invocation, but instead explicit "nonverbal expressive conduct" is sufficient to invoke the right to remain silent).

227. *See* cases cited *supra* note 196.

228. State v. Monroe, No. A10-715, 2010 WL 3307087, *3 (Minn. Ct. App. Aug. 24, 2010); People v. Reyes, No. D047521, 2010 WL 3026227, at *13 (Cal. Ct. App. Aug. 4, 2010).

229. 619 F.3d at 1088–89.

IV. CONCLUSION

It is clear the Supreme Court has significantly strayed from the strong language and protection in *Miranda* with its decision in *Berghuis v. Thompkins*.[230] Scholars have been highly critical of the diversion, and rightfully so; the unambiguous standard has very real, harsh consequences for suspects in custody. However, courts, including the Supreme Court itself, have been digressing from *Miranda*'s strict safeguards, specifically with respect to the waiver requirement, for years, and this process began very quickly after the decision in *Miranda v. Arizona*. Nearly all lower federal courts imported the *Davis* standard to the right to remain silent prior to the decision in *Thompkins*. Although this expansion has been highly criticized, it paved the way for the Supreme Court's decision in *Thompkins*. When taken in this historical context, the Court's pronouncement seems much less significant because it is what the lower courts have already been doing for years. While this may seem like a nearly complete divergence from *Miranda* that renders the *Miranda* warning "you have the right to remain silent" completely ineffective, the majority Justices in *Miranda* indicated the warning system used today is just one alternative.[231] Rather, resistance to the decision in *Thompkins* is a likely a result of Justice Kennedy's insufficient explanation of his application of *Davis*—he, like the lower courts, provided no legitimate reasoning in support of the Court's unambiguous requirement. In contrast to Justice Sotomayor's well written dissent, the majority opinion appeared even less persuasive. However, because the Supreme Court simply sanctioned a trend in the lower courts, it is unlikely that *Thompkins* and the right to remain silent will be critically addressed by the Supreme Court again in the foreseeable future.

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230. 130 S. Ct. 2250 (2010).

231. 384 U.S. 436, 467 (1966). ("[W]e cannot say that the Constitution necessarily required adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.").

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