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In Order to Be Silent, You Must First Speak: The Supreme Court Extends Davis's Clarity Requirement to the Right to Remain Silent in Berghuis v. Thompkins, 44 J. Marshall L. Rev. 423 (2011)

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IN ORDER TO BE SILENT, YOU MUST FIRST SPEAK: THE SUPREME COURT EXTENDS *DAVIS*'S CLARITY REQUIREMENT TO THE RIGHT TO REMAIN SILENT IN *BERGHUIS V. THOMPKINS*

HARVEY GEE*

> Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. . . . suspects will be legally presumed to have waived their rights even if they have given clear expression of their intent to do so. Those results . . . find no basis in *Miranda*. . . .[1]

I. INTRODUCTION

At 3:09 a.m., two police officers escorted Richard Lovejoy, a suspect in an armed bank robbery, into a twelve-foot-square dimly lit interrogation room affectionately referred to as the "boiler room." This room is equipped with a two-way mirror in the wall for viewing lineups. One officer informed Mr. Lovejoy that he had the right to remain silent; the right to counsel; and that if he could not afford counsel, one would be provided to him. He was also told that everything he said would be used against him. Mr. Lovejoy refused to sign the acknowledgement form presented to him. For the next four hours, the officers engaged in a one-sided interrogation of Mr. Lovejoy. He remained largely silent, with the exception of nodding his head once and saying "no," and remarking that his plastic

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1. Berghuis v. Thompkins, 130 S. Ct. 2250, 2277 (2010) (Sotomayor, J., dissenting).

chair was too hard.

Frustrated by the lack of answers, the officers called in their supervisor, who had a reputation for always getting a confession. The supervisor questioned Mr. Lovejoy for another three hours, at which point Mr. Lovejoy stated, "I think I need an attorney." Unrelentingly, the supervisor ignored the comment and bombarded Mr. Lovejoy with additional questions using deceptive information to mislead him about his knowledge of the crime under investigation. After a brief bathroom break, the questions resumed for an additional six and a half hours until Mr. Lovejoy confessed to being involved in the bank robbery.

Prior to trial, Mr. Lovejoy's public defender filed a motion to suppress the statement on the basis that the interrogation violated *Miranda v. Arizona*.[2] Defense counsel argued that Mr. Lovejoy made a request for counsel, and that his client's refusal to sign the *Miranda* form exercised his right to silence. However, the trial judge failed to make such a finding at the motion hearing, and the statements were admitted as evidence at trial.

The above fictional example may seem to be an outrageous violation of Mr. Lovejoy's constitutional rights under the Fifth Amendment, and should constitute reversible error,[3] but as this Article will illustrate, it is not a violation under current law.

The *Miranda* rights, known to all Americans who watch any amount of police drama television as the right to remain silent, the right to an attorney, the right to counsel if a suspect cannot afford one, and the admonishment that everything said will be used against an accused, have been eroding almost since their inception.[4] As Professor Stephen Saltzburg has observed, the police often believe that they can ignore the *Miranda* rules; "[t]he irony is that people know about *Miranda* from TV and think they have these rights."[5] Last term in *Berghuis v. Thompkins*,[6] the U.S. Supreme Court ruled that a criminal suspect's silence, even for a period of hours, is insufficient to invoke the right to remain silent. The *Thompkins* ruling requires defendants to expressly state that they are exercising their right to silence, thus creating another irony, one more profound—the Court found that silence alone was insufficient to invoke the right to remain silent.[7] Critical of the

2. 384 U.S. 436 (1966).

3. U.S. CONST. amend. V.

4. *See* Donald Dripps, *Miranda Caselaw Really Inconsistent?A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT 19, 23 (2000) (referring to Miranda rights as "known to every television viewer in the country.").

5. *Justices Consider Suspects' Rights in Case of Forced Grilling by Police*, L.A. TIMES, Grand Rapids Press, Dec. 5, 2002, at A8, *available at* 2002 WLNR 11909238.

6. 130 S. Ct. 2250 (2010).

7. *Id.*

Thompkins majority, Professor Charles Weisselberg argues that *Thompkins* rejected the fundamental principles of *Miranda* and leaves the rights of suspects unprotected.[8]

Interestingly, the *Thompkins* Court relied on the precedent set forth seventeen years ago in *Davis v. United States*.[9] There, the Court considered the degree of clarity necessary for a custodial suspect to invoke the *Miranda* right to counsel and held that after a suspect knowingly and voluntarily waives his rights, law enforcement officers may continue their questioning unless the suspect clearly requests an attorney.[10] The Court reasoned that although agents continued questioning Robert L. Davis after he stated, "I think I want a lawyer before I say anything else,"[11] the continued questioning did not violate his Fifth Amendment privilege against compulsory self-incrimination.[12] Under *Davis*, unless a suspect unambiguously requests counsel, law enforcement officers need not stop questioning him.[13] Until *Davis* re-emerged in *Thompkins*, the decision was cited by the Court only in a perfunctory manner in its own jurisprudence to reiterate the basic *Miranda* rules in the intervening years between 1994 and 2010.[14] Yet at the same time, the applicability of *Davis* has been robustly litigated in the circuit and state courts. *Davis* and *Thompkins* each signaled departures from the Fifth Amendment's requirement that the government bear the entire burden of

8. Charles Weisselberg & Stephanos Bibas, Debate, *The Right to Remain Silent*, 159 U. PA. L. REV. PENNUMBRA 69, 72 (2010).

9. 512 U.S. 452 (1994). Prior to *Davis*, the courts were divided on their requirements for invoking *Miranda*. Some courts have treated a suspect's ambiguous remarks regarding their *Miranda* rights as a clear invocation under *Miranda v. Arizona*. For example, in the past, it was the rule in California that an invocation need not be clear or obvious. These courts have consistently ruled that officers must terminate an interview if the suspect makes an ambiguous remark that merely indicates that he might be invoking his *Miranda* rights. *See, e.g.*, People v. Porter, 270 Cal. Rptr. 773, 775-76 (Cal. Ct. App. 1990) (reasoning that defendant's statements, while ambiguous as to whether he was invoking his *Miranda* rights, suggested that he did not wish to further discuss the case and police officers therefore should have ceased interrogation).

10. *Davis*, 512 U.S. at 461-62.

11. *Id.* at 455.

12. *See id.* at 459 (explaining that the suspect must express his desire to have counsel present with sufficient clarity so as to be understood by a reasonable police officer).

13. *See id.* at 459-60 (suggesting that a bright-line rule would provide constitutional protection without burdening police investigation).

14. *See* Alabama v. Brown, 513 U.S. 801 (1994); Dickerson v. United States, 530 U.S. 428 (2000); Texas v. Cobb, 532 U.S. 162 (2001); Corley v. United States, 129 S. Ct. 1558 (2009); Montejo v. Louisiana, 129 S. Ct. 2079 (2009); Maryland v. Shatzer, 130 S. Ct. 1213 (2010) (reviewing fundamental concepts governing *Miranda* jurisprudence).

protecting an individual's privilege against self-incrimination.[15] In 1966, *Miranda v. Arizona*[16] ruled that "[i]f the individual desires to exercise his privilege, he has the right to do so."[17]

This Article argues that *Thompkins* is a poorly reasoned decision. Moreover, the ruling transforms *Miranda*'s shield for the accused to protect oneself against coerced confessions into a sword to be wielded by police officers to bring suspects to their knees. Part two examines the continual whittling away of *Miranda v. Arizona* and offers an in-depth analysis of *Thompkins*. This section also explores the relationship between *Davis*, *North Carolina v. Butler*,[18] and *Thompkins*. Part three examines the future implications of *Davis* and *Thompkins* and offers a moderate solution where lower courts can follow the precedent set by *Thompkins*, yet still be faithful to the original motivations behind *Miranda*.

II. *BERGHUIS V. THOMPKINS*: SPEAK UP OR WAIVE YOUR RIGHT TO SILENCE

> [T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*.[19]—Justice Kennedy

> I believe a precautionary requirement that police 'scrupulously' hono[r] a suspect's right to cut off questioning is a more faithful application of our precedents than the Court's awkward and needless extension of *Davis*.[20]—Justice Sotomayor

As the jurisprudence on ambiguous requests for counsel has shown since 1994, the *Davis* decision allows the lower courts broad latitude to interpret or ignore ambiguous requests.[21] Strikingly, because the Court never expressly stated that its *Davis* ruling and rationale applied to pre-*Miranda* waiver situations as well as post-waiver requests, that case left open the question of when its

15. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 297-98 (2010) (discussing the *Davis* Court's finding that favored police officers in their assessment as to whether a suspect being interrogated had requested counsel).

16. 384 U.S. 436 (1966).

17. *Id.* at 480.

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

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

20. *Id.* at 2270 (Sotomayor, J., dissenting).

21. *See* David Aram Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 760 (2005) (arguing that *Davis*'s requirement of a clear invocation of *Miranda* allows police and the courts to ignore circumstantial evidence that may indicate a suspect's unexpressed intentions).

objective test applies.[22] Similarly, *Thompkins* leaves open the questions: (1) how long interrogators may question a suspect if they do not verbally state their right to silence; (2) whether its objective test applies in pre-waiver situations; and (3) whether a defendant's silence in response to questioning, without a clear invocation, is deemed admissible as substantive proof of guilt? Together, *Davis* and *Thompkins* are a deadly combination that places an already staggering *Miranda* against the ropes.

A. The Road from Miranda *to* Thompkins*: Three Lanes Merge into One*

In order to understand *Thompkins*, it is necessary to consider the gradual erosion of *Miranda* over two generations of litigation. *Miranda* was a watershed decision. Central to the *Miranda* decision was the strong interest in protecting suspects from coercion during interrogation.[23] Based on the Fifth Amendment privilege against self-incrimination, *Miranda* created a prophylactic rule to aid in judicial review of custodial interrogations.[24] If adequate warnings are not provided, then the confession is considered tainted.[25] Although the confession may not be voluntary, courts will at least have greater confidence in any confession that is obtained if the warnings are given.[26] *Miranda*'s core protections offer minimal protections against pernicious interrogation practices.[27]

The American public may not realize that when considered within its proper socio-historical context, *Miranda* was actually a manifestation of cases addressing gross police overreaching in interrogation rooms against poor, and often uneducated,

22. *See Davis*, 512 U.S. at 470-71 (Souter, J., concurring) (discussing the difficulty in distinguishing between initial waiver situations and post-waiver requests).

23. *See* Floralynn Einesman, *Confessions and Culture: The Interaction of* Miranda *and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 3 (1999) (arguing that *Miranda* recognized the "inherent coercion of incommunicado police interrogation" and acknowledged that police officers use "sophisticated psychological ploys" and trickery to induce a suspect's confession).

24. *See id.* (stating that previously, the Court protected against self-incrimination by applying the Fifth and Fourteenth Amendment right to due process and the Sixth Amendment right to counsel).

25. *Id.* at 2-3.

26. *See id.* (requiring *Miranda* warnings as an additional safeguard against potentially coerced confessions).

27. *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1217 (2001) (arguing that, despite the fact that police frequently obtain *Miranda* waivers, the substantive information contained in the warning provides the fundamental protection afforded to suspects being interrogated).

minorities across the county.[28] *Miranda* was supposed to address the problems with the police using psychological tactics to get confessions from suspects.[29] By preserving police interrogation as an investigative tool, it also represented a compromise between law enforcement and the rights of the accused.[30] However, some legal scholars claim that *Miranda* did not go far enough.[31] For

28. *See e.g.*, John H. Blume, Sheri Johnson & Ross Feldmann, *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 328 (2005) (exploring the parallels between *Brown* and *Miranda* and the Warren Court's failure to level the playing field for America's students and suspects); GARY L. STUART, *MIRANDA*: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT viii, 22 (2004) (observing that coerced confessions were common in America before *Miranda* and noting that the 1960s was a period of civil unrest for the criminal justice system); Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, Or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 62 (1998) (arguing that *Miranda* no longer serves as the brake upon overzealous law enforcement that its progenitors intended); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*:"Embedded" in Our National Culture?*, 2002 CRIME & JUST. 203, 218-19 (2002) (discussing cultural changes throughout history that might explain *Miranda*'s sympathy for suspects facing interrogation); George C. Thomas III, *Missing* Miranda*'s Story*, 2 OHIO ST. J. CRIM. L. 677, 686-87 (2005) (reviewing GARY L. STUART, *MIRANDA*: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT (2004) arguing that it failed to depict the true story behind *Miranda*); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 626-27 (1996) (discussing the historical evolution of the *Miranda* principles).

29. *See* Blume et al., *supra* note 28 (noting that *Miranda* grew out of painful history of cases addressing gross police over-reaching during the interrogation of suspects); Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHI.-KENT L. REV. 179, 183 (2010) (discussing how police interrogation tactics changed over time from physically coercive to psychologically coercive); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1027 (2001) (arguing that as interpreted today, *Miranda* does not meaningfully dispel compulsion inside the interrogation room).

30. *See* Stephen Schulhofer, Miranda v. Arizona*: A Modest But Important Legacy, in* CRIMINAL LAW STORIES 178-79 (Carol S. Steiker ed., 2006) (explaining the legacy of *Miranda*); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 128 (2009) (discussing police interrogation in light of *Miranda*); Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 16 (1986) (acknowledging the argument that *Miranda* fails to strike an appropriate balance between government and individual interests). Empirical studies have shown that *Miranda* has had minimal adverse effects, if any, on law enforcement. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 402 (1999) (suggesting that *Miranda*'s impact on law enforcement was minimal); Marcy Strauss, *Reinterrogation*, 32 HASTINGS CONST. L.Q. 359, 380 (1995) (discussing re-interrogations and the role of *Miranda*).

31. *See also* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 312 (2003) (arguing that American interrogation practices still need to be revamped today); Tracey Maclin, *Is Yale Kamisar As Good As Joe Namath?: A Look Back at Kamisar's "Prediction" of* Miranda v. Arizona, 2 OHIO ST. J. J.

example, Professor Weisselberg argues that since the landmark decision, "[t]he Court has formally transformed *Miranda* from a rule aimed at protecting suspects to one that protects police. *Miranda*'s safeguard for suspects are mostly symbolic."[32] It only provides an appearance of fairness.[33] In many cases, suspects submit to police interrogations despite the warnings.[34]

Still other commentators have correctly noted that post-*Miranda* decisions over the past several decades permit the circumvention of a suspect's ability to exercise his rights.[35] In fact, the Court began narrowing the scope of *Miranda* guarantees by limiting the application of the exclusionary rule to *Miranda* violations.[36] More specifically, the Court allowed the admission of statements obtained in violation of *Miranda* for the purpose of impeachment at trial[37] and limited the application of the exclusionary rule by creating a "public safety exception" to *Miranda*'s warning requirements.[38] In these cases, the Court

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CRIM. L. 33, 53-55 (2004) (referring to *Miranda* as a "compromise ruling").

32. Charles Weisselberg, *Elena Kagan and the Death of* Miranda, HUFFINGTONPOST.COM (June 1, 2010, 2:45 PM), http://www.huffingtonpost.com/charles-weisselberg/elena-kagan-andthedeath_b_596447.

33. *See* Slobogin, *supra* note 31, at 340.

34. *Id.* at 336; *but see* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996) (arguing that *Miranda* has hampered law enforcement efforts); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1058 (1998) (noting the lack of hard statistics showing the effects of *Miranda*). There are others who have determined that the effects of *Miranda* on confession rates are far from clear. *See* George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea For More (And Better) Empirical Evidence*, 43 UCLA L. REV. 821, 822-24 (1996) (stating that several studies sought to measure *Miranda*'s empirical effect, but that the results were inconclusive).

35. *See e.g.*, Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 563-65 (1998) (refuting the claim that false confessions rarely occur); White, *supra* note 27 (noting that false confessions occur despite the fact that *Miranda* waivers are common); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It-And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 179-82 (2007) (arguing that *Miranda* has been weakened over time); Thomas & Leo, *supra* note 28, at 688 (discussing the historical evolution of *Miranda* principles); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibilty of Police Deception in Interrogations of Juveniles*, 99 NW. U.L. REV. 971, 979 (2005) (questioning police interrogation practices when dealing with juveniles).

36. *See* Kamisar, *supra* note 35, at 178-82 (arguing that *Miranda*'s effect has been weakened over time).

37. *See* Harris v. New York, 401 U.S. 222, 223 (1971) (permitting the use of defendant's contradictory statements made to the police during interrogation to impeach credibility of his direct testimony at trial).

38. *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984) (permitting a waiverless confession by a suspect that led a police officer to a loaded gun in a

offered a limited reading of the *Miranda* protections with respect to interrogation, waiver, and invocation.[39] Further, *Miranda*'s scope in the context of waiver was narrowed in *Oregon v. Bradshaw*[40] when the Court examined a waiver of the right to counsel subsequent to invocation and found that the court must first determine whether the accused initiated further conversations with the interrogators, and if so, decide whether this constituted a knowing and intelligent waiver of *Miranda* rights.[41] These decisions have since blurred the bright-line rule originally established in *Miranda* and perhaps implicitly created a way to circumvent that rule.[42] As a result, it has become more difficult for both police officers and lower courts to know when a confession has been lawfully obtained.[43]

However, in *Edwards v. Arizona*[44] the strength and resilience of *Miranda* returned.[45] In *Edwards*, the Court fine-tuned the

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crowded supermarket).

39. *See* Anders v. California, 386 U.S. 738, 745 (1967) (stating that counsel is not required to brief the case against the client); *Harris*, 401 U.S. at 224 (stating that evidence barred by *Miranda* in a prosecutor's case-in-chief is not barred for all purposes); Michigan v. Tucker, 417 U.S. 433, 445-46 (1974) (stating that police did not abridge a suspect's privilege against self-incrimination by departing from the prophylactic standards of *Miranda*); Michigan v. Mosely, 423 U.S. 96, 102-03 (1975) (stating that *Miranda* does not require police to refrain from questioning a suspect for an indefinite duration once a suspect invokes their right to remain silent); *Quarles*, 467 U.S. at 654 (stating that *Miranda* warnings are not themselves rights protected by the Constitution).

40. 462 U.S. 1039 (1983).

41. *Bradshaw*, 462 U.S. at 1045-46 (holding that initiation of a conversation by the accused after invoking his right to counsel does not constitute a waiver of that right). The police must engage in a two-step process to determine whether the accused (1) initiated further conversation by asking, "[w]ell, what is going to happen to me now?" and (2) made a knowing and intelligent waiver of the right to counsel. *Id.* at 1046. In this case, Justice O'Connor demonstrated her willingness to accept a police officer's interpretation of a suspect's statement for effective interrogation and investigation. *Id.* Justice O'Connor sided consistently with conservative opinions that gave police officers the benefit of the doubt and interpreted a suspect's mention of counsel in an increasingly restrictive manner. *Id.*

42. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 142, 144 (Richard A. Leo & George C. Thomas III eds., 1998).

43. *See id.* (suggesting that *Miranda*'s original bright-line rule was easy for police to administer and that other than in situations of outright coercion, officers cannot know the limits in securing confessions).

44. 451 U.S. 477 (1981).

45. *See* David Lavey, Comment, United States v. Porter*: A New Solution to the Old Problem of* Miranda *and Ambiguous Requests for Counsel*, 20 GA. L. REV. 221, 239 (1985) (explaining that the steady erosion of *Miranda* came to an abrupt halt two years later in *Edwards v. Arizona*, where the Court

application of *Miranda* and created "a second layer of prophylaxis for the *Miranda* right to counsel."[46] The *Edwards* Court held that when an accused invokes the right to counsel, all questioning must cease until counsel arrives or until the accused initiates further conversation.[47] When an accused invokes his right to counsel, a valid waiver cannot be established by showing only that he responded to questioning; rather, the accused has to initiate further communication.[48] The Court further held that a waiver must not only be voluntary, but it must constitute a knowing and intelligent relinquishment of that right.[49] The applicability of the *Edwards* bright-line rule was further clarified by a wave of four cases: *Smith v. Illinois*,[50] *Connecticut v. Barrett*,[51] *Arizona v. Roberson*,[52] and *Minnick v. Mississippi*.[53]

Next, two important rulings were made a decade after *Davis*. First, in *United States v. Patane*,[54] during questioning of a man that was not given effective *Miranda* warnings, it was disclosed that he had a gun in his bedroom.[55] The Court found that *Miranda* posed no bar to the use of the physical evidence because, in their view, the Self-Incrimination Clause was implicated only when the government sought to use a suspect's statements against him.[56] Under *Patane*, any confessions obtained may be used to lead the police to physical evidence sufficient to convict.[57]

Second, *Missouri v. Seibert*[58] was a particularly egregious "outside of *Miranda*" interrogation case heard that same term. Seibert was convicted in state court of second degree murder.[59] At

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vigorously reaffirmed and strengthened *Miranda*'s bright-line philosophy).

46. *See Davis*, 512 U.S. at 458 (quoting McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991)).

47. *See Edwards*, 451 U.S. at 484 (explaining that a valid waiver cannot be established by showing that a suspect responded to further police-custodial interrogation after being advised of his rights).

48. *Id.*

49. *Edwards*, 451 U.S. at 482-84.

50. 469 U.S. 91, 91 (1984) (concluding that questioning must cease where nothing about the request for counsel or the circumstances leading up to the request was ambiguous).

51. 479 U.S. 523, 529 (1987) (holding that a suspect may give a limited or conditional waiver of *Miranda* rights).

52. 486 U.S. 675, 677-78 (1988) (holding that an invocation of counsel under *Edwards* is not offense specific).

53. 498 U.S. 146, 153 (1990) (holding that the protection of *Edwards* continues even after the suspect has consulted with an attorney).

54. 542 U.S. 630 (2004).

55. *Id.* at 635.

56. *Id.* at 634.

57. *Id.* at 636.

58. 542 U.S. 600 (2004).

59. *Id.* at 606. *Seibert* was not an isolated case. Ohio Police officers have used deliberate strategies without giving *Miranda* warnings to get a

issue was the police practice of failing to provide warnings of the right to silence and counsel until after a confession was obtained through interrogation.[60] The Court was to determine the admissibility of the repeated statements.[61] At trial, the interrogating officer revealed that he employed questioning techniques that required him to withhold *Miranda* warnings, to question Seibert, to then give *Miranda* warnings, and to repeat his question until he received the answer previously given.[62]

Justice David H. Souter wrote for the Court, which held that *Miranda* warnings given mid-interrogation that resulted in an unwarned confession were ineffective, and therefore, the confession was inadmissible at trial.[63] According to the majority opinion, the repeated statement was inadmissible "[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement . . . ."[64] The objective of the question-first tactic utilized by the police was to render *Miranda* warnings ineffective by waiting for an opportune time to give the warnings after the suspect confesses.[65] The majority recognized that "the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." [66] While *Seibert* may be considered a good case for the

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defendant to confess after the defendant stated that he would not voluntarily answer questions without an attorney to advise him. *See generally* Dixon v. Houk, 627 F.3d 553 (6th Cir. 2010) (discussing a coerced confession in a death penalty case).

60. *Siebert*, 542 U.S. at 604.

61. *Id.*

62. *Id.* at 604-06.

63. *Id.* at 604. The Sixth Circuit recently ruled in a capital case involving interrogators who employed a similar "outside *Miranda*" strategy. *Dixon*, 627 F.3d at 555. The police designed a strategy to get a coerced confession without giving *Miranda* warnings. *Id.* The confession would then be followed by the warnings given in a tape recording before the confession was recorded. *Id.* Based on this inverted sequence of events—refusal to answer after *Miranda* warnings and thereafter a recorded confession—the prosecution argued that the warnings after the initial confession made the confession "voluntary." *Id.* "The question is whether the police can cleanse what would otherwise be an inadmissible confession in this way." *Id.* Police interrogators often employ techniques and strategies causing innocent suspects to make false confessions. Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 38 (Saundra D. Westerverlt & John A. Humphrey eds., 2001); "Modern interrogation techniques and strategies are designed to break the resistance of rational people who know they are guilty, manipulate them to stop denying their culpability, and persuade them to confess." *Id.*

64. *Seibert*, 542 U.S. at 604.

65. *Id.* at 611.

66. *Id.* at 617.

criminal defense bar, any thoughts that the Court would similarly rule in subsequent cases were dispelled in future Court terms, especially last term.[67] As Professor Saltzburg has aptly noted, "*Miranda* has been since it was decided one of those cases where the court has been schizophrenic . . . . The court goes back and forth."[68]

More recently, *Miranda* sustained an especially hard beating in a trilogy of cases during the 2009-2010 term: *Maryland v. Shatzer*,[69] *Florida v. Powell*[70] and *Thompkins*. First, in *Shatzer* the Court created a break in custody exception to *Edwards*, holding that a defendant released from custody for a period of at least fourteen days loses the protections afforded by *Edwards* to suspects invoking their right to counsel.[71] Michael Shatzer was interrogated by the police multiple times.[72] In the first interrogation, while he was already in custody for a child sexual abuse offense, Shatzer invoked his *Miranda* right and declined to speak without an attorney when he was questioned about unrelated allegations.[73] He was accused of sexually abusing his son.[74] The interrogation ended, and Shatzer was released back into the general prison population.[75] Two and a half years later, while Shatzer was still incarcerated, the police reopened the investigation and questioned him without an attorney present despite Shatzer's prior invocation of *Miranda*.[76] During the interrogation and a polygraph examination taken a few days later, Shatzer made inculpatory statements.[77] He was charged and convicted of child sexual abuse of his son.[78]

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67. Some commentators have discussed the conservative turn of the Roberts Court. *See e.g.*, Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 26 (2009) (discussing the Roberts Court's decisions that employ the technique of post-racial discrimination); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1709 (2010) (stating that the Supreme Court will likely remain conservative for at least a decade); Roger Parloff, *On History's Stage: Chief Justice Roberts Jr.*, FORTUNE, Jan. 17, 2001, at 75 (discussing the history of the Robert's Court); Joan Biskupic, *O' Connor Retired From the Court, Not Discourse*, USA TODAY, Sept. 9, 2010, at 2A (discussing Justice O'Connor's reaction to the Court's conservative trend).

68. Curt Anderson, *Supreme Court Continues to Waver on* Miranda *Rights*, FORT WAYNE J. GAZETTE, June 29, 2004, at 6, *available at* 2004 WLNR 15181766.

69. 130 S. Ct. 1213 (2010).

70. 130 S. Ct. 1195 (2010).

71. *Shatzer*, 130 S. Ct. at 1223.

72. *Id.* at 1217-18, 1224.

73. *Id.* at 1217.

74. *Id.*

75. *Id.*

76. *Id.* at 1218.

77. *Id.*

78. *Id.*

Justice Antonin Scalia wrote for the Court, which held that the *Edwards* restriction on re-interrogation no longer applies after a break in custody lasting longer than fourteen days.[79] The Court distinguished the facts in *Edwards* and refused to extend the so-called *Edwards* "judicially prescribed prophylaxis" rule, and concluded that Shatzer's release into the general prison population did not constitute a break in custody for *Miranda* purposes.[80]

Second, in the seven-two majority opinion written by Justice Ruth Bader Ginsburg in *Powell*, the Court ruled that the Tampa Police's alternative wording of the *Miranda* warning is acceptable, even though it does not explicitly state that a suspect has a right to have an attorney present during questioning in the interrogation room.[81] In doing so, the Court overruled the Florida Supreme Court's finding that Kevin Powell's interview about a 2004 robbery, wherein he was told he had "the right to talk to a lawyer" before answering police questions, was inadequate to satisfy the requirements of *Miranda*.[82] The Florida court determined that the advice was misleading because it suggested that Powell could consult with an attorney only before the police started to question and failed to convey his right to have an attorney present during all questioning.[83] According to the opinion, Powell was told he had "the right to talk to a lawyer before answering any of [their] questions" and the "right to use any of [his] rights at any time [he] want[ed] during the interview."[84]

Justice Ginsburg wrote, "[a]lthough the warnings were not the clearest possible . . . they were sufficiently comprehensive when given a common sense reading." [85] However, Justice John Paul Stevens asserted in his dissent that Powell's warning was insufficient to protect his Fifth Amendment privilege given in its natural reading.[86] He reasoned that "an intelligent suspect could reasonably conclude that all he was provided was a one-time right to consult with an attorney, not a right to have an attorney present during questioning."[87]

79. *Id.* at 1223.
80. *Id.* at 1220-22.
81. *Powell*, 130 S. Ct. at 1200, 1206.
82. *Id.* at 1200.
83. *Id.* at1201.
84. *Id.*
85. *Id.* at 1205.
86. *Id.* at 1212 (Stevens, J., dissenting).
87. *Id.*

B. Berghuis v. Thompkins*: The Supreme Court Decision*

In *Thompkins*, the issue before the Court was whether Thompkins's privilege against self-incrimination was violated. [88] Van Chester Thompkin, Jr., was convicted of first-degree murder, assault with intent to commit murder, and several firearms related charges stemming from a shooting in Michigan.[89] Detective Helgert read the *Miranda* rules to Thompkins in an eight by ten foot room,[90] including the fifth warning, "You have the right to decide, at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."[91] Thompkins then declined to sign the *Miranda* form.[92] Thompkins never said that he wanted to remain silent, that he wanted to talk with police, or that he wanted an attorney.[93]

About two hours and forty-five minutes into the interrogation Helgert asked Thompkins, "Do you believe in God?" [94] Thompkins made eye contact with Helgert and said "Yes" as he began to get teary eyed. Helgert asked Thompkins if he prayed to God, and Thompkins answered "yes."[95] Thompkins also answered "yes" and looked away when Helgert asked, if he prayed to God to forgive him for shooting the boy down.[96] Thompkins was found guilty of, among other things, first-degree murder and assault.[97]

Justice Anthony M. Kennedy wrote for the Court, joined by Justices Alito, Thomas, Scalia, and Chief Justice Roberts. The Court was not persuaded by Thompkin's argument that he invoked his right to silence by not saying anything for a sufficient period of time (two hours and forty-five minutes), and that the interrogation should have ceased before he made his inculpatory statements.[98] Neither was the Court swayed by Thompkins argument that even if his three "yes" responses were not tantamount to any waiver of his right to silence under *Miranda*, the police should have obtained an express waiver prior to any questioning.[99]

Justice Kennedy began his analysis by citing to *Davis* and boldly stating that a request for counsel must be made

88. *Thompkins*, 130 S. Ct. at 2256.
89. *Id.* at 2257.
90. *Id.* at 2256.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 2257.
95. *Id.*
96. *Id.*
97. *Id.* at 2258.
98. *Id.* at 2259.
99. *Id.*

unambiguously before the police are required to end the interrogation.[100] Justice Kennedy acknowledged that while the Court had yet to determine whether an invocation of the right to remain silent can be ambiguous or equivocal, there was no reason to treat these two rights differently; he wrote, "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."[101] Referring to *Davis* for analytical support, Justice Kennedy then proceeded to discuss what he deemed to be good reasons to require an accused to invoke the right to remain silent unambiguously.[102] Even though he never explicitly mentions *Edwards* in his opinion, Justice Kennedy completely relied upon *Davis* and its interpretation of *Edwards*.[103]

Moving to the issue of waiver in *Thompkins*, Justice Kennedy unequivocally adopted the reasoning of *Butler* and found that there was sufficient evidence that Thompkins understood his rights; given that he answered Detective Helgerts's questions about whether he prayed to God for forgiveness for shooting the victim, his response was a "course of distinct indicated waiver." In the view of the majority, "he could have said nothing in response

100. *Id.*

101. *Id.* at 2260.

102. *Id.*

103. In *Davis*, Justice O'Connor, writing for the majority, addressed *Edwards* substantively. In refusing to extend *Edwards*, Justice O'Connor declared that the Court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue." *Davis*, 512 U.S. at 462. In coming to her narrowly-focused conclusion, Justice O'Connor rationalized that the mere act of informing suspects of their *Miranda* rights will be sufficient to overcome deficiencies and to protect against the coerced relinquishment of the right against self-incrimination. *Id.* To Justice O'Connor, a clarification approach was unnecessarily burdensome on law enforcement. *See generally* Cassell & Fowles, *supra* note 34 (suggesting that the fall in crime clearance rates in the years following *Miranda* was attributable in part to the new restrictions the decision imposed on police interrogations). She reasoned that police officers should not have to shoulder the burden of guessing whenever a suspect was invoking the right to counsel or not. *Davis*, 512 U.S. at 461. Justice O'Connor discussed how any requirement for officers to clarify ambiguous requests for counsel would have required cessation of questioning that would create barriers to police investigations stating, "[I]t would needless prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." *Id.* at 460. Further, Justice Kennedy echoes Justice O'Connor in *Thompkins* by suggesting that if officers are forced to make a difficult judgment call and guess wrong about the intent of the ambiguous statement, they risk suppression of an otherwise voluntary confession which "would place a significant burden on society's interests in prosecuting criminal activity." *Thompkins*, 130 S. Ct. at 2260.

to Helgert's questions or could have unambiguously invoked his *Miranda* rights and ended the interrogation" but it further noted that Thompkins gave sporadic answers to these questions.[104] Accordingly, the majority determined that Thompkins waived his right to remain silent by making an uncoerced statement to the police.[105] Thompkins was required to meet a higher threshold than the police.[106]

C. *Analysis of* Berghuis v. Thompkins

Thompkins was criticized by a number of legal scholars. Professor Erwin Chemerinsky criticizes the *Thompkins* Court for not following precedent and stare decisis because *Miranda* placed a heavy burden on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.[107] From his vantage point, requiring a suspect to specifically state that he is invoking the privilege against self-incrimination is inconsistent with the right to remain silent.[108]

Similarly, Professor Marcy Strauss argues that the *Davis* ruling, requiring that the right to remain silent be invoked unambiguously, strays from *Miranda*'s intent.[109] She asserts that police questioning can easily resume after an invocation of silence is made, unlike with a request for counsel, because there is no corresponding need for a stringent governing assertion of the right to remain silent.[110] While Professor Kit Kinports asserts that, "[I]t is difficult to reconcile any extension of *Davis* with a pragmatic approach to *Miranda* when all the police need to do in cases of ambiguity is ask the suspect to clarify her preferences."[111]

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104. *Id.* at 2263.

105. *Id.* at 2264.

106. *Id.* at 2263.

107. *See* Erwin Chemerinsky, Guest Column, *In* Berghuis v. Thompkins, *the Supreme Court Has Taken a Major Step to Lessening the Constitution's Protection Against Self-Incrimination*, SAN FRANCISCO DAILY J., June 14, 2010, at 7 (criticizing the *Thompkins* decision); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1458-60 (1985) (stating that law enforcement officers are given the responsibility to inform the suspect of his constitutional rights).

108. *See* Chemerinsky, *supra* note 107, at 7. Professor Chemerinsky further asserts that "*Thompkins* creates a strong presumption that confessions are admissible if obtained after questioning, unless there has been an explicit invocation of the right to remain silent." *Id.*

109. *See* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 773-74 (2009) (arguing that courts interpreting the right to remain silent have gone astray from what *Miranda* intended).

110. *Id.* at 773-75.

111. Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, SOCIAL SCIENCE RESEARCH NETWORK 38 (Aug. 27, 2010), http://ssrn.

I agree with these scholars. An accused should not be required to clearly state their exercise of their right to silence.[112] Unambiguously—silence is not speaking, pure and simple.[113] It is not too terribly difficult for a police officer to ascertain if someone wants to remain silent, he or she will say nothing and will not voluntarily engage in a conversation.[114] Police already have enough techniques to apply in integration, including showing false sympathy, reducing feelings of guilt that the suspect may hold, and exaggerating the consequences of the crime.[115] The *Miranda* warnings may be given, and the police may give the impression to the suspect that only written statements are admissible or that they would testify on the suspect's behalf.[116]

Remarkably, the *Thompkins* Court almost blindly adopted the reasoning and holding from *Davis* and *Butler* to the facts in *Thompkins*, without any attempt to distinguish those two factually and legally distinct cases. To begin, *Davis* is not a right to silence case; this is reflected in the opinion. Only two mentions of the

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com//abstract=1666868.

112. *See* Laurent Sacharoff, Miranda's *Hidden Right*, SOCIAL SCIENCES RESEARCH NETWORK, 27, Nov. 18, 2010, http://ssrn.com/abstract=1711410 (arguing that "'[i]t is unfair to require a suspect to invoke unambiguously a right he is unaware of. The requirement does not even make sense.").

113. *Contra* Steven Friedland, *Post* Miranda *Silence in the Wired Era: Reconstructing Real Time Silence in the Face of Police Questioning*, SOCIAL SCIENCES RESEARCH NETWORK, 4 (Sept. 15, 2010), http://ssrn.com/abstract =1677481 (stating that "[a] closer examination of 'silence' shows that it can be parsed and differentiated, from a void of conversation, to communicative silences constituting active listening, to a deeper withdrawal.").

114. An ambiguous request for counsel should be considered different from an invocation to remain silent. As easy as it is for law enforcement to ask for clarification of a defendant who may be requesting counsel, it is just as easy to interpret a defendant's not saying anything with their mouths as their intent or desire to be silent. This would be a more pragmatic approach to *Miranda*. Commonsense should dictate that a person who fails to utter even a sound is exercising their right to remain silent under *Miranda*. A similar argument was made in an amicus brief filed by the National Association of Criminal Lawyers and the American Civil Liberties Union. They argued that *Davis*'s requirement of an oral invocation statement requesting counsel,

> makes little sense in the right-to-silence context and should not be extended to that context. Such a "statement" is required with respect to the right to counsel simply because there is no other way to invoke that right. It is difficult to imagine how a suspect could signal that he wants to invoke his right to a lawyer without saying, "I want a lawyer" (or some variant).

Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondent, *Thompkins*, 130 S. Ct. 2250 (2010) (No. 08-1470), 2010 WL 342030 at *30.

115. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 787 (1997).

116. *Id.* at 786-87.

right to silence are made: "petitioner waived his rights to remain silent and to counsel, both orally and in writing" and "[a]fter a short break, the agents reminded petitioner of his rights to remain silent and to counsel."[117] But there is no further analysis. One commentator remarked, "[N]either the language nor logic of the *Davis* opinion suggests the appropriateness of applying its holding in the right-to-silence context."[118]

Had the *Thompkins* majority more completely considered the facts of *Davis*, as Justice Sotomayor did in her dissent, against those in *Thompkins* in greater detail, it would have realized the major factual differences between the cases.[119] Davis waived his right to remain silent and to counsel orally and in writing ninety minutes after his rights were read to him.[120] Whereas, Thompkins immediately declined to sign the *Miranda* forms after the rules were read aloud to him.[121] Later on, Thompkins refused to make a written confession.[122] Silence is arguably more definitive and certain than the statement, "I think I want a lawyer before I say anything else."[123] With this in mind, Detective Helgert should have reasonably concluded that Thompkins did not wish to speak. Instead, the questioning continued and after two hours and forty-five minutes,

> Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins *refused to make a written confession*, and the interrogation ended about 15 minutes later.[124]

Despite the stark contrasts between *Davis* and *Thompkins*, Justice Kennedy forced the application of the right to counsel to

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117. *Davis*, 512 U.S. at 455.

118. Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558, 574 (1998).

119. The Court conveniently cites to only sections of the *Davis* opinion that support its contentions, and disregards other parts. For example, the Court states that, "[t]his holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." *Thompkins*, 130 S. Ct. at 2263 (citing *Davis*, 512 U.S. at 460). But a review of that passage in *Davis* reveals that in the same paragraphs, the *Davis* Court also observed that "[a] suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Davis*, 512 U.S. at 460-61.

120. *Davis*, 512 U.S. at 454.

121. *Thompkins*, 130 S. Ct. at 2256.

122. *Id.* at 2257.

123. *Id.* at 2256.

124. *Id.* at 2257 (emphasis added).

the right to silence. Conflating the two, he failed to explain why making a judgment about whether a suspect has made an unambiguous request to remain silent is any less difficult than making a judgment about whether the suspect has made an ambiguous request. As a practical matter, it may be easier to ascertain whether a defendant wanted to remain silent than it would be to determine whether a suspect has made a clear, unambiguous request for counsel. Accordingly, the Court should have, but did not, afford Thompkins a broad interpretation of his exercise of his right to remain silent by essentially not saying anything. Because silence may be more easily implied, it should be held to a lower threshold than the right to counsel. *Davis*'s "clear statement" rule should not have been adopted in *Thompkins* based solely on the premise that both cases are fundamentally about the invocation of the same right to cut off questioning.

There are more differences; Davis was more expressive, and there was ambiguity as to whether or not he wanted an attorney. According to his interrogators,

> [We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said [']No, I'm not asking for a lawyer,' and then continued on, and said, No, I don't want a lawyer.[125]

Davis may have changed his mind, but Thompkins remained consistently silent for almost three hours, and refused to write out a confession. Again, this lengthy interrogation should have represented strong evidence that Thompkins exercised his right to remain silent. The facts of the case reflect that Helgert and his party continually questioned Thompkins for two hours and forty-five minutes, and Thompkins gave only a few limited verbal responses such as "yeah," "no," or "I don't know."[126] It was a one-sided monologue by Helgert.[127] Thompkins also refused a peppermint that was offered to him and relief from the hard chair he was sitting on.[128] These remarks should not have been interpreted as Thompkins's knowing and voluntary waiver of his right to remain silent.

As much as the *Edwards* Court was concerned that "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if

125. *Davis*, 512 U.S. at 455.
126. *Thompkins*, 130 S. Ct. at 2256.
127. *Id.*
128. *Id.* at 2257.

he has been advised of his right,"[129] the *Thompkins* majority should have respected the right to silence as much. Without having to verbally say that he needed counsel, Thompkins's inaction and remarks would have met the clarity concerns brought up by the *Davis* Court. The Court's conclusion begs the related question: What if Thompkins said, "no" instead of "yes" to Helgert's questions? Would the Court have been as convinced that Thompkins waived his right to silence? Similarly, how will courts interpret a statement such as, "I think I might need to remain silent?"

The infirmities of the majority opinion did not escape the attention of Justice Sotomayor, who was critical of the majority's decision not to exercise judicial restraint. In her strongest dissent to date, she believed the Court could have rendered a decision based strictly on Thompkins's request for habeas relief alone, without creating new constitutional law.[130] Justice Sotomayor asserted that the Court recognized as much when it remarked that "[t]he Court has not yet stated whether an invocation of the right to remain silent can be an ambiguous or equivocal."[131] Justice Sotomayor proceeded to criticize the Court's logical leap forward in its belief that there is no reason not to treat the right to counsel and the right to remain silent the same for *Miranda* purposes. Justice Sotomayor accused the majority of discarding judicial restraint,

> Today's decision turns *Miranda* upside down, criminal suspects must now ambiguously invoke their right to remain silent—which counter intuitively requires them to speak. . . . suspects will be legally presumed to have waived their rights even if they have no clear expression of their intent to do so.[132]

Justice Sotomayor analyzed the facts of the case and determined that: (1) Thompkins never expressly waived his right to remain silent, which was supported by his refusal to sign the *Miranda* acknowledgment; and (2) Thompkins's "actions and words" before he made inculpatory statements did not constitute a

129. Edwards v. Arizona, 451 U.S. 477, 484 (1981).

130. *Thompkins*, 130 S. Ct. at 2267. Professor Robert Weisberg also claims that the Court went beyond the scope of Thompkins's habeas corpus petition and made constitutional law unnecessarily. Robert Weisberg, *High Court Reinforces Doctrine Against Lower Court*, SAN FRANCISCO DAILY J., June 11, 2010, at 6. He asserts that the question before the Court should not have been whether the Sixth Circuit was correct in its ruling, but rather, it should have only determined whether the state court decision was either clearly contrary to, or an unreasonable application of federal law. *Id.*

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

132. *Id.* at 2278.

"course of conduct indicating waiver."[133] She believed that the prosecution did not carry its heavy burden in establishing that Thompkins either expressly or implicitly waived his right to remain silent.[134] As such, she argued that the Court's finding that Thompkins waived his right to silence, and that invocation of that right had to be a clear statement, was counterintuitive.[135] Accordingly, Justice Sotomayor forcefully disagreed with the Court's application of *Davis*, a case involving a right to counsel, not the right to silence, to extend its rationale to hold that police may continue questioning a suspect until he unambiguously invokes his right to remain silent.[136]

Further, Justice Sotomayor argued that *Davis* said nothing about the right to silence and noted that *Miranda* itself distinguished the right to counsel from the right to silence. She argued that *Davis*'s clear-statement rule is a poor fit for the right to silence and that the Court's concern that the police will face "difficult" decisions about an accused's unclear intent" and suffer the consequences of "guess[ing] wrong" is misplaced.[137] She contended that,

> [T]oday's novel clear statement rule for invocation invites police to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights.[138]

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133. *Id.* at 2270.
134. *Id.* at 2272.
135. *Id.* at 2266.
136. *Id.* at 2275.
137. *Id.* at 2276.
138. *Id.* at 2273. Here lies the thrust of Justice Sotomayor's criticisms. She argued that the more appropriate case to apply to Thompkins would have been *Michigan v. Mosely*, 423 U.S. 96 (1975), because that case offers a more flexible form of prophylaxis and applying the reasoning of *Mosely* would allow the police to re-approach a suspect who has invoked his right to remain silent after a break in questioning. *Id.* at 2275. Additionally, Sotomayor argued that *Mosley* also respected a suspect's right to cut off questioning. *Id.* She asserted that,

> The rule would acknowledge that some statements or conduct are so equivocal that police may scrupulously honor a suspect's rights without terminating questioning—for instance, if a suspect's actions are reasonably understood to indicate a willingness to listen before deciding whether to respond. But other statements or actions . . . when a suspect sits silent throughout prolonged interrogation . . . cannot be reasonably be understood other than as an invocation of the right to remain silent.

Id. at 2275-76.

Although Justice Sotomayor enthusiastically embraces *Mosely* as precedent that she believes is more appropriate to apply than *Davis*, *Mosley* is not exactly the best case to apply to the facts of *Thompkins* either. Actually, *Mosley* does not strike a good balance between the competing interests of law enforcement and suspects. Unlike Thompkins, the respondent in *Mosley* first

The *Thompkins* majority also erred in its analysis of the waiver issue.[139] Justice Kennedy cited to *Butler* for the proposition that a waiver of *Miranda* may be interpreted from "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver."[140] He also noted that "[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afforded."[141] Here, had the Court properly analyzed *Butler*, it would have realized that the two cases are different in terms of each prong of *Butler*'s implied waiver standard—both the evidence that the defendant understood his *Miranda* rights and that he engaged in a "course of conduct indicating waiver."

Further, *Butler* and *Thompkins* were also factually different.

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declined to answer questions posed by one detective about a robbery, but later, when questioned by a second detective about an unrelated murder, he made incriminating statements. *Mosley*, 423 U.S. at 98. The *Mosley* Court exaggerated what it considered to be a vague passage of the *Miranda* opinion, which states in relevant part, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 100 (citing *Miranda*, 384 U.S. at 473-74). The *Mosley* Court reasoned that the passage could be interpreted in extreme ways to benefit the accused and law enforcement. *Id.* at 101-02. An assertion can be made that the passage could reasonably be interpreted to mean that: (1) a person who invokes his "right to silence" can never be asked further questions about any subject; (2) any statements made after the invocation will be considered "the product of compulsion," even if volunteered; or (3) an interrogation may resume after a break in questioning. *Id.* at 102. The *Mosley* Court said that these different interpretations could allow "repeated rounds of questionings" that would undermine the will of the person being questioned, or "a blanket prohibition against the taking of voluntary statements" that would thwart legitimate police investigations. *Id.*

Perhaps to the chagrin of Justice Sotomayor, the *Thompkins* majority summarily dismissed any application of the *Mosley* methodology in three sentences stating,

> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "right to cuff off questioning." Here he did neither, so he did not invoke his right to remain silent.

Thompkins, 130 S. Ct. at 2260 (citing *Mosley*, 423 U.S. at 103 (quoting *Miranda*, 384 U.S. at 474)).

139. *See* Friedland, *supra* note 113, at 24 (stating that "[t]he Court in *Thompkins* ignored the implications of context for the invocation and implied waiver of constitutional rights, particularly the specific factors involving the duration of the interrogation and the new normal of asynchronous, immediate and impulsive, unfiltered communication.").

140. *Thompkins*, 130 S. Ct. at 2261 (citing *Butler*, 441 U.S. at 373).

141. *Id.* at 2262 (citing *Butler*, 441 U.S. at 372-76).

Butler was not a case about the waiver of the right to silence, but rather the waiver of the right to counsel. William Butler was convicted in North Carolina of kidnapping, armed robbery, and felonious assault stemming from a robbery of a gas station.[142] Butler was read his *Miranda* rights. When he was asked if he understood his rights, he replied that he did, but he refused to sign a waiver of those rights.[143] Butler, unlike Thomkpins, spoke. He told his interrogator, "I will talk to you, but I am not signing any form."[144] Afterwards, he admitted to the agents that he and his companion had robbed the gas station, but that it was his accomplice who shot the attendant.[145] The *Miranda* warnings were closely followed by Butler's statements, which were deemed by the *Butler* Court as a waiver.[146] But in *Thompkins*, a waiver cannot be clearly inferred from the actions and words of Thompkins. He did not sign the wavier. Still, compelling questions were continually asked for almost three hours, and the interrogator refused to infer Thompkins's failing to answer the questions as an invocation of his right to silence. He was uncommunicative. This was the type of situation that the *Miranda* Court was concerned with when it explained its reasons for the prophylactic rules it created:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he wouldn't otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored.[147]

With this in mind, I argue that the *Thompkins* Court erroneously cited to *Butler* when it viewed Tompkins's answer to Detective Helgert's question about whether Thompkins prayed to God for forgiveness for shooting the victim as a "course of conduct indicating wavier" of the right to remain silent.[148] However, by the same logic, the police could have ended Thompkins's interrogation after a few hours of observing him sitting in silence, which is a course of conduct expressing his desire and intent to be silent. "[T]he only evidence of Thompkins's participation consisted of his declining a permit, complaining about his chair, and occasionally

142. *Butler*, 441 U.S. at 370.
143. *Id.* at 371.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Miranda*, 384 U.S. at 467.
148. *Thompkins*, 130 S. Ct. at 2263.

nodding his head or responding 'I don't know' to unidentified questions, and these actions do not amount to even 'sporadic' conversation with the officers."[149] If the invocation of the right to silence will be equated with the assertion to counsel, under *Edwards*, Thompkins did not knowingly and intelligently waive his right to silence. But even assuming that there was some ambiguity, consistent with *Miranda*, the ambiguity should be interpreted against the interrogators.[150] As Chief Justice Earl Warren wrote in *Miranda*,

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.[151]

Justice William Brennan echoes those sentiments in his dissent in *Butler*,

> The rule announced by the Court today allows a finding of waiver based upon "[inference] from the actions and words of the person interrogated." The Court . . . thus shrouds in half-light the question of waiver, allowing courts to construct inference form ambiguous words and gestures . . . the very premise of *Miranda* requires that ambiguity be interpreted against the interrogation . . . only the most explicitly waivers of rights can be considered knowingly and freely given.[152]

Justice Sotomayor was just as critical. Regarding what the majority considered to be a "waiver," Justice Sotomayor noted that *Davis*'s statement of its holding was expressly contingent on an initial waiver. Justice Sotomayor asserted, "[t]hat Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as 'strong evidence' against waiver."[153] Justice Sotomayor wrote,

> It is undisputed here that *Thompkins* never expressly waived his right to remain silent. His refusal to sign even an acknowledgment that he understood his *Miranda* rights evinces, if anything, an intent not to waive those rights.

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149. Thompkins v. Berghuis, 547 F.3d 572, 586 (6th Cir. 2008).

150. *Davis*, 512 U.S. at 473.

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

152. *Butler*, 441 U.S. at 378-79 (Brennan, J., dissenting). Justice Brennan arrived to the Court with concerns about protecting the constitutional rights of poor and uneducated criminal defendants. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 242 (2010).

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

. . . .

> I believe a precautionary requirement that police 'seriously' hono[r] a suspect's right to cut off questioning is a more faithful application of our precedents than the Court's awkward and needless extension of *Davis*.[154]

In finding that statements obtained from *Mosley* elicited from the second officer's questioning about the murder did not violate *Miranda*, the *Thompkins* Court's reasoning and result allows the police to keep questioning a suspect about any and all unrelated crimes indefinitely. Lastly, because Thompkins's silence in response to the majority of the questions were not admitted at trial,[155] it remains unknown whether *Thompkins* allows the use of a defendant's post-*Miranda* silence as substantive proof of guilt in the state's case-in-chief, which is currently a violation of the Due Process Clause.[156]

With all of this in mind, it is not an exaggeration to say that under the shadow of the rulings in *Davis*, *Shatzer*, *Powell*, and *Thompkins*, along with efforts by the U.S. Department of Justice to carve out a public safety exception,[157] it appears that the future of what remains of *Miranda* is now up for grabs.

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154. *Id.*

155. *Id.* at 2257.

156. *See* Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (holding that using post-*Miranda* silence as evidence of petitioner's sanity violated his due process rights); Doyle v. Ohio, 426 U.S. 610, 611 (1976) (holding that it would be fundamentally unfair and a deprivation of due process to allow the defendants' silence to be used to impeach him at trial). The use of post-*Miranda* is explored in great detail by Marcy Strauss. Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101 (2001).

157. *See* Charles Weisselberg, *Obama's Justice Department Sticks a Fork in* Miranda-*Why?*, HUFFINGTONPOST.COM (Feb. 25, 2010), http://www.huffington post.com/charles-weisselberg/obamas-justice-department_b_476973 (stating that the government's position is hostile to *Miranda*); *Read Him His Rights*, 202 AMERICA 5, 5 (2010), *available at* 2010 WLNR 12367100 (discussing the idea of amending the *Miranda* rules to allow the police to obtain security sensitive information from terror suspects); Stuart Taylor, *A Course Correction on Terrorism*, NAT'L J., Feb. 5, 2010, *available at* 2010 WLNR 2703130 (disagreeing with the notion that suspects can be subjected to prolonged interrogation without *Miranda* warnings only if they are detained by the military); Michael Kirkland, *U.S. Supreme Court: Should Terror Suspects be Mirandized*, UPI.COM (May 16, 2010, 4:38 AM), http:www.upi.com/Top_News/ 2010/05/16/US-supreme-court-should-terror-suspects-be-Mirandized/UPI-8628 1273999080/ (discussing the debate regarding whether terror suspects should be Mirandized before an interrogation).

III. FUTURE IMPLICATIONS OF *DAVIS* AND *THOMPKINS* IN THE FEDERAL CIRCUIT COURTS AND STATE COURTS

> [W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer.—Justice O'Connor, *Davis v. U.S.*[158]

> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "right to cut off questioning."—Justice Kennedy, *Berghuis v. Thompkins.*[159]

A. The Importance of the Pre-/Post-Waiver Distinction: Timing Is Everything

As an initial matter, in her dissent, Justice Sotomayor makes an astute observation of the pre-/post-waiver distinction in *Davis* that was ignored by the majority.[160] In particular, Justice Sotomayor considered the split among federal and state courts in their interpretation of *Davis*'s applicability in pre/post-waiver situations.

> [T]he suspect's equivocal reference to a lawyer in *Davis* occurred only *after* he had given express oral and written waivers of his rights. . . . The Court ignores this aspect of *Davis*, as well as the decisions of numerous federal and state courts declining to apply a clear-statement rule when a suspect may not previously given an express waiver of rights.[161]

Justice Sotomayor's argument that *Thompkins*, like *Davis*, only applies in post-waiver invocations should be given deeper consideration. Accordingly, where there is no waiver, there is no need to clearly assert the right to silence. After *Davis*, lower courts adhered to the Court's clarity requirement for requests of counsel. The only manner in which the courts differed was in the determination of whether or not the rule applied in pre-waiver situations. With this in mind, it may be a reasonable prediction that courts will do the same with *Thompkins*. Some courts will find that *Thompkins*'s clear invocation of the right to silence applies before and after waiver, while others will reason that it only applies in post-waiver situations. In cases involving a suspect who does not expressly assert their right to silence or their desire to remain silent, a defense attorney may argue that under *Thompkins*, the defendant was not required to clearly invoke his

158. *Davis*, 512 U.S. at 462 (emphasis added).
159. *Thompkins*, 130 S. Ct. at 2260.
160. *Id.* at 2275. For further discussion of this distinction, see Strauss, *supra* note 109.
161. *Thompkins*, 130 S. Ct. at 2275.

right to remain silent in a pre-waiver situation.

Edwards held that it is inconsistent with *Miranda* and its progeny for authorities, at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel.[162] The *Edwards* rule seems to serve the prophylactic purpose of preventing officers from badgering a suspect into waiving his previously asserted *Miranda* rights. Its applicability requires courts to determine whether the accused actually invoked his right to counsel, and by extension, his right to silence. This is an objective inquiry requiring some statement that can reasonably be construed as being an expression of a desire to remain silent or to obtain an attorney's assistance. As such, I argue that the *Edwards* doctrine, rather than the *Thompkins* rationale, applies in cases where the offender is silent prior to any *Miranda* waiver. The *Edwards* doctrine remains viable and still serves an important function in our criminal procedure jurisprudence.

As an illustration of the applicability of *Edwards*, consider the following. The situation in this case is almost analogous to the facts of *Thompkins*, but differing in that the facts indicate with reasonable clarity that the suspect did not waive his right to silence. In this context, without a waiver the suspect's silence is a sufficiently explicit exercise of his right to silence, and the protections of *Edwards* are triggered whenever there is an affirmative invocation by the suspect. If the suspect wants to waive his right after he invokes it, *Edwards* holds that he cannot do so, unless he initiates the conversation.

Because *Davis* is a post-waiver case, I would also suggest that *Thompkins* be a post-waiver case. The possibility that lower courts will interpret *Thompkins* to only apply when a suspect has given an express waiver of rights is increased if, judging by the amount of prior decisions by the federal and state courts in the post-*Davis* era, they have declined the clear statement rule in pre-waiver situations involving requests for counsel.[163] But as demonstrated by federal and state courts during the past seventeen years, because the Court was not specific enough in its *Davis* and *Thompkins* opinions, the uneven application of *Davis* will probably continue. As such, it is reasonably foreseeable that *Thompkins* will

162. *Edwards*, 451 U.S. at 485.

163. *E.g.*, United States v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008); State v. Turner, 305 S.W. 3d 508 (Tenn. 2010); State v. Blackburn, 766 N.W.2d 177 (S.D. 2009); State v. Tuttle, 650 N.W. 2d 20 (S.D. 2002); State v. Leyva, 951 P.2d 738 (Utah 1997); Wilder v. Florida, 40 So.3d 804 (Fla. Dist. Ct. App. 2010); State v. Collins, 937 So.2d 86, 92 (Ala. Crim. App. 2005); Freeman v. State, 857 A.2d 557 (Md. Ct. Spec. App. 2004); United States v. Salazar-Orellana, No. 1:09-CR-475-WSD-CCH-3, slip op. (N.D. Ga. 2010), *available at* 2010 WL 3293343; United States v. Fry, No. CR-09-44-N-JLQ, slip op. (D. Idaho 2009), *available at* 2009 WL 1687958.

also cause a split in the circuits and amongst the state courts. On this issue, a survey of the post-*Davis* jurisprudence is helpful.

B. Lessons from Davis

As shown in many court rulings about the reach of *Davis*, the general application of *Davis* and *Thompkins* without definite guidelines could potentially lead to more aggressive police interrogation tactics. *Davis* allows a great deal of leeway for police interrogators because it says nothing about the manner in which interrogators are permitted to respond to an ambiguous request for an attorney. As a result, interrogators may feel they have wide latitude in employing tactics to deflect suspects from invoking their right to an attorney.[164] Since *Davis*, there have been a number of lower courts that have applied *Davis*, creating conflict.

In fact, there are several instructive cases in which an ambiguous request for counsel was made before *Miranda* warnings. In *United States v. Rodriguez*,[165] the United States Court of Appeals for the Ninth Circuit held that *Nelson v. McCarthy*,[166] a case decided before *Davis* that required police officers to clarify any ambiguous requests for counsel made during an interrogation, was not abrogated by *Davis*. The Ninth Circuit wrote, "a duty rests with the interrogating officer to clarify any ambiguity before beginning general interrogation."[167] The Ninth Circuit found that the interrogator should have clarified Rodriguez's ambiguous statement, and it reversed the district court's decision to admit Rodriguez's subsequent incriminating statements.[168] Following *Rodriguez*, the U.S. District Court for the District of Idaho held in *United States v. Fry*[169] that an ambiguous request concerning the right to counsel requires the interviewing officer to stop any questioning and clarify the statement to determine whether it was a request for counsel. In *State v. Blackburn*,[170] the South Dakota Supreme Court similarly held that

164. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1585 (2008) (discussing a preference for express waivers over implied waivers); Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. SOC. SCI. 193, 200 (2008) (stating that "[i]n theory, the process of interrogation is designed to overcome the anticipated resistance of individual suspects who have been judged liars and presumed guilty. To achieve these goals, police employ a number of tactics that involve using a combination of negative and positive incentives.").

165. 518 F.3d 1072, 1079-80 (9th Cir. 2008).

166. 637 F.2d 1291 (9th Cir. 1981).

167. *Rodriguez*, 518 F.3d at 1080.

168. *Id.* at 1080-81.

169. No. CR-09-44-N-JLQ, slip op. at 17-18 (D. Idaho 2009), *available at* 2009 WL 1687958.

170. 766 N.W.2d 177, 184 (S.D. 2009).

in a pre-waiver situation where the accused has not yet expressly waived his *Miranda* rights, the officers must clarify the waiver before proceeding with the interview.

The Sixth Circuit Court of Appeals applied *Davis* to a pre-waiver situation in *Abela v. Martin*,[171] and distinguished the facts of *Abela* from those of *Davis* and found Abela's request for his attorney to be unequivocal in nature, stating that "[a]fter Abela requested counsel, the police were required to cease questioning him until he had a lawyer present."[172] The South Dakota Supreme

171. 380 F.3d 915, 926 (6th Cir. 2004).

172. *Id.* at 927. The Colorado Supreme Court has rendered three published opinions addressing the issue of ambiguous requests for counsel. The most recent came down at the beginning of this year. In *People v. Broder*, 222 P.3d 323, 325 (Colo. 1999), the en banc court reviewed an interlocutory appeal and reversed the trial court's finding that Broder made an ambiguous request for counsel during a police interrogation. Broder, a police officer, was charged with attempted sexual assault and unlawful sexual conduct of an eighteen-year-old girl while he was on duty. *Id.* What makes *Broder* stand apart from the previous cases was the fact that *Broder* involved a pre-waiver situation: Broder made an ambiguous request for counsel *before* he waived his *Miranda* rights. *Id.* at 326.

As discussed below, the two Colorado Supreme Court cases that preceded *Broder*, *State v. Adkins*, 113 P.3d 788 (Colo. 2005) and *State v. Arroya*, 988 P.2d 1124 (1999), presented situations where the defendants made ambiguous requests for counsel after they waived their *Miranda* rights. In the wake of *Davis*, the Colorado Supreme Court in *Arroya* affirmed the trial court's finding that the police failed to scrupulously honor the defendant's clear articulation of her right to remain silent during a custodial interrogation. *Arroya*, 988 P.2d at 1127. The state sought an interlocutory appeal challenging the trial court's suppression of a custodial statement made by Arroyo who was interviewed concerning the drowning of her three-year-old son. *Id.* After Arroya was provided her rights under *Miranda*, she signed the advisal form. *Id.* Arroya was then interviewed three times at the police station. *Id.* After the first almost hour long interview, a second interview was conducted two hours later, during which Arroya made several incriminating statements. *Id.* At some point, the detective asked her if she wanted a break; Arroya responded, "I don't wanna talk no more." *Id.* The detective testified that he believed Arroya wanted a break, not that she wanted the interrogation to cease. *Id.* Questioning resumed after a brief break, and Arroyo made incriminating statements. *Id.*

Next, in *Adkins*, the State Supreme Court held that the defendant unambiguously requested counsel and that the interrogation should have ceased. *Adkins*, 113 P.3d at 791. Atkins was charged with one count of sexual assault on a child by one in a position of trust and one count of sexual assault on a child. *Id.* Adkins was in an interrogation room when he was read his *Miranda* rights. As the advisal was being given by the detective, Adkins asked, "How come I don't have a lawyer right now[?]" *Id.* He repeats this request upon completion of the advisement. *Id.*

A few years later, the Colorado Court of Appeals also interjected on the issue of ambiguous request for counsel in *State v. Grenier*, 200 P.3d 1062 (2008). Grenier was found guilty of first degree murder and abuse of a corpse. *Id.* at 1071. After waiving his *Miranda* rights, and during the interrogation,

Court in *State v. Tuttle*[173] held that *Davis* does not apply to pre-waiver situations, and where the accused has not yet validly waived his *Miranda* rights, the officers must clarify the waiver before proceeding.[174] The viewpoint that the *Davis* rationale should not be extended to pre-waiver situations gained traction at the intermediate court of appeals level. Similarly, the Maryland Court of Appeals declined to extend *Davis* in the pre-waiver context in *Freeman v. State*.[175] These courts are seemingly saying that allowing the police to conduct pre-waiver interrogation is contrary to the guarantees of *Miranda*.

Other courts have applied the *Davis* doctrine regardless of its timing.[176] The Massachusetts Court of Appeals acknowledged that the *Davis* rationale is limited to post-waiver ambiguity, not an ambiguous request for counsel in the context of the initial advisement of rights.[177] The court found no difference, however, between applying the *Davis* rule to any waiver situation, either before *Miranda* warnings or after, stating that "[c]ourts have held that unless a suspect 'clearly and unambiguously' invokes his right to remain silent, either before or after a waiver of that right, the police are not required to cease questioning."[178] In *In re Christopher K*,[179] the Illinois Supreme Court applied *Davis*'s objective test to a pre-waiver setting and addressed whether the suspect's articulation of his request for counsel was sufficiently clear for a reasonable officer in the circumstances to have understood the statement as such a request.[180] The court concluded that respondent's statement was not sufficiently clear to

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Grenier says, "The truth is I don't want to say the truth without a lawyer or something . . ." and further remarked, "I don't want to say the truth cause it's not a court of law and I don't have an attorney." *Id.* The court of appeals concluded that the "defendant was merely hesitant about telling the truth during questioning," and that his statements were not unambiguous requests for counsel. *Id.*

Most recently, in *Broder*, the Supreme Court determined that Border was a trained police officer who was deliberately hesitant in providing a clear response. *Broder*, 222 P.3d at 325. After being Mirandized, but before waiving his rights, Broder asked the interviewing detective whether he had "coverage" for him and stated afterwards, "I don't have a problem talking to you." *Id.* The detective made two separate attempts to clarify Broder's question about "coverage for counsel." *Id.* In response, Broder twice said "I'll talk to you." *Id.*

173. 650 N.W.2d 20 (S.D. 2002).

174. *Id.* at 74.

175. 857 A.2d 557, 572 (Md. Ct. Spec. App. 2004).

176. Abela v. Martin, 380 F.3d 915 (6th Cir. 2004); In the Matter of H.V., 252 S.W. 3d 319 (Tex. 2008); *In re* Christopher K, 841 N.E. 2d 945 (Ill. 2005); Commonwealth v. Sicari, 752 N.E.2d 684 (Mass. 2001)

177. Commonwealth v. Sicari, 752 N.E.2d 684, 697 n.13 (Mass. 2001).

178. *Id.*

179. 841 N.E.2d 945 (Ill. 2005).

180. *Id.* at 965.

invoke his right to counsel.[181]

It appears that not only are these courts reading *Davis* as saying that it applies in pre-waiver situations, but also that any request for counsel, either before or after waiver, must be made clear by the suspect. The burden of clarification rests squarely on the shoulders of the suspect.[182] The late Professor Welsh White commented on this point stating,

> [P]ost-*Davis* cases have provided remarkably little restraint on such tactics . . . . most courts seem to have interpreted *Davis*'s holding to mean that tactics designed to deflect suspects from requesting counsel will be subject to little or no scrutiny. In some case[s] . . . courts do not even discuss the possibility that the tactics vitiated the suspect's waiver of the right to an attorney, but simply conclude that the suspect did not invoke his right to an attorney.[183]

C. Davis *and* Thompkins*: A Duet*

The effects of *Davis* and *Thompkins* combined are already becoming visible in state and federal courts across the country. On the one hand, it has worked against the interests of defendants. This happened when the federal district court in Maine ruled on a motion to suppress statements in a firearms possession case where the defendant, after he was mirandized, immediately said in a soft voice, "I guess this is where I have to stop and ask for a lawyer, I guess."[184] But the officer interrogating him claimed that he did not hear the part of the statement requesting counsel when he spoke over the defendant.[185] The court concluded that the defendant did not unambiguously invoke his right to counsel or request to cease questioning.[186] *Davis* and *Thompkins* give law enforcement opportunities to make arguments such as the one offered during oral argument by the government.

> She argued that a defendant bears some responsibility for making sure that his or her request is heard, that the defendant in this case did nothing when Webster talked over him, that it would have been apparent that his statement was inaudible, and that the audible portion of this request was ambiguous . . . even had his entire statement been audible, his demeanor, attitude, and word choice . . . did not convey an unambiguous desire to cease questioning or

181. *Id.*
182. Kaiser & Lufkin, *supra* note 21, at 760.
183. Welsh White, *Deflecting a Suspect From Requesting An Attorney*, 68 U. PITT. L. REV. 29, 41 (2006).
184. United States v. Clark, No. 10-82-P-S, 2010 WL 3719617, at *2 (D.Me 2010).
185. *Id.* at 2.
186. *Id.* at 8.

invoke his right to counsel.[187]

The Court of Appeals in Ohio similarly held in *State v. Raber* [188] that in a pre-waiver situation, the appellant who said nothing after her *Miranda* rights were read to her, but looked at the detective and said, "can I have an attorney?" did not unambiguously request counsel.[189] Conversely, there are other courts that have recently applied the *Davis/Thompkins* analysis when they considered suppression motions and concluded that there existed *Miranda* violations when the courts determined defendants did unambiguously request counsel.[190]

The Ninth Circuit also acknowledged in *Hurd v. Terhune*[191] that a suspect's responses to the police were an unambiguous invocation of his right to silence. While the decision did not directly analyze the substance of *Thompkins*'s clear invocation rule, it did distinguish Supreme Court authority that allows post-*Miranda* inconsistent statements to be used against defendants as evidence of guilt.[192] There, after being taken into custody and given his *Miranda* rights, the accused expressed his willingness to speak with an attorney.[193] Later, when asked repeatedly to submit to a polygraph examination and reenact a shooting incident, the

187. *Id.*

188. State v. Raber, 938 N.E.2d 1060 (Ohio Ct. App. 2010).

189. *Id.* at 1068. The court of appeals concluded:

> defendant did not unambiguously request an attorney. Defendant's question . . . can be interpreted in two different ways: either defendant was asking whether his rights, as he had just read them, included the right to a public defender or he was asking for access to a public defender. [The officer's] response—that defendant would be entitled to a public defender if he could not afford to hire an attorney—indicated that he believed defendant wanted a clarification of his rights, not that he sought to invoke his right to counsel. Given the ambiguous inherent in defendant's question, we find that reasonable police would come to the same conclusion . . . .

This was the opposite conclusion drawn by Judge Baird in his concurrence.

> I would conclude that Raber clearly and unambiguously invoked her right to counsel when she stated "Can I have an attorney?" . . . the police were required to stop all questioning. It is troubling that upon asserting her right to counsel, the police neglected to follow their own protocol, which required the police to inform Raber how and when a lawyer would be provided.

Id. at 1077 (Baird, J., dissenting).

190. *See generally* United States v. Diermyer, No. 3:10-cr-071-HRH-JDR, slip op. (D. Alaska 2010) (concluding that the motion to suppress should be granted due to a violation of the defendant's *Miranda* rights), *available at* 2010 WL 4683550; United States v. Hughett, No. 2:10-CR-41-FtM-36DNF, slip op. (M.D. Fla. 2010) (discussing *Miranda* in light of *Davis* and *Thompkins*), *available at* 2010 WL 3958681.

191. 619 F.3d 1080, 1088 (9th Cir. 2010).

192. *Id.* at 1084.

193. *Id.*

suspect repeatedly refused.[194] The Ninth Circuit rejected the state's argument that the responses were ambiguous and concluded that the accused's responses were "objectively unambiguous," and he was invoking his right to remain silent with his right to remain silent.[195]

D. Toward a Modest Proposal

To protect against police coercion, there have been commentators who advocate that police interrogations be taped,[196] videotaped,[197] or that the *Miranda* rules themselves be amended.[198] State constitutions may also be amended to afford individuals more constitutional safeguards than the federal constitution allows.[199] I suggest that until such major changes occur, and in the interim at least, courts can employ an analytical framework that relies on the pre-/post-waiver distinction—a practice that some courts are currently utilizing with ambiguous requests for counsel. Indeed, lower courts after *Thompkins* can follow the *Thompkins* ruling, but limit its applicability to post-waiver situations only. Just as some courts have declined to apply *Davis* in pre-waiver situations, courts can do the same with regard to the right to silence. This represents a modest solution that roughly balances the interests of law enforcement and the accused, which is within the spirit of *Miranda*.

In practice, only after a suspect waives their *Miranda* rights would a suspect be required to clearly invoke their right to silence. Under this scheme, the onus will be placed on him because he voluntarily chose to subject himself to questioning. However, in an interrogation where a suspect does not waive their right and says nothing, he should not be required to expressly state that he is invoking his right to silence, and the police should interpret this as his desire to remain silent. This compromise would also be aligned

194. *Id.*

195. *Id.* at 1089.

196. *See* Slobogin, *supra* note 31, at 309 (arguing that police interrogations should be taped).

197. *See* Stephen B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 571 (2007) (arguing that compulsory video recording of interrogations is the least controversial remedy for abuses in the interrogation room).

198. *See* Akhil Reed Amar, *Ok All Together Now: "You Have the Right to . . .",* L.A. TIMES, Dec. 12, 1999, at M1 (providing suggestions for a change to the *Miranda* warning in the wake of *Dickerson*).

199. *See e.g.*, N.C. CONST. art. I, § 23; KY. CONST. § 11; N.Y. CONST. art. I, § 6; CAL. CONST. art. I, § 15, cl. 6; FLA. CONST. art. I, § 9; COLO. CONST. art. II, § 18; ILL. CONST. art. I, § 10; OKLA. CONST. art. II, § 21; MINN. CONST. art. I, § 7; MICH. CONST. art. I, § 17 (listing criminal rights statutes that could include more safeguards).

with the reality that circuit courts and state courts will employ different analytical approaches on these issues as to the applicability of *Davis* and *Thompkins*.

IV. CONCLUSION

At this time, given the recency of *Thompkins*, it is entirely premature to make any definite predictions as to what direction(s) the courts will take. But if the manner in which the post-*Davis*, ambiguous request for counsel jurisprudence has evolved is any indication, as years pass and more cases apply *Thompkins*, courts across the nation will be compelled to choose to apply or not apply the *Thompkins* right to silence rule in pre-waiver contexts. If the suspect waives or does not waive his right—the accused will have to speak up in order to exercise his right to silence. Under such a regime, the accused could be questioned for fifty uninterrupted hours without the interrogator concluding that he did not want to talk, even if they refused to sign a written waiver. As has happened with post-*Davis* rulings, varying applications of *Thompkins* in the future will create inconsistencies, and even confusion, in the judicial system. Whether an accused will be afforded proper and adequate due process will depend on what court he is appearing in.

As much as *Davis* tipped the scales in favor of law enforcement, the broader ruling of *Thompkins* further presses down on those same scales against defendants.[200] In the post-

200. *Davis* and *Thompkins* could encourage more false confessions. False confessions may result from the accused's false perception that a confession is their only option, or they may succumb to pressure or threats. The many instances where DNA has exonerated convicted persons demonstrates the prevalence of false confessions. According to statistics presented by The Innocence Project, false confessions have been commonplace even before *Thompkins*. "Innocent defendants made incriminating statements, delivered outright confessions, or pled guilty" in about twenty-five percent of the DNA exoneration cases. *False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Apr. 19, 2011). The Innocence Project suggests that "a variety of factors can contribute to false confessions," including duress, coercion, intoxication, and mental impairment. *Id.*; *see also* Kassin, *supra* note 164, at 216 (noting that "[t]he problem of False confessions is complex and multifaceted, and it indicates that there may be holds in the various 'safety nets' built into the criminal justice system."); Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 130 (2006) (providing information on police interrogation methods). Some observers have recommended that recordings of interrogations focus on both the interrogator and the suspect. *Id.*

> Recordings benefit suspects, law enforcement, prosecutors, juries, trial and reviewing court judges, and the search for the truth in our justice system. The time has come for standard police practice throughout the United States to include the use of devices to record the entire interrogation of suspects in custody in all major felony investigations.

Thompkins world the right to remain silent can no longer be invoked in "any manner." Under *Thompkins*, police officers emboldened with their broader powers, can imply waivers where there were none after countless hours and days of questioning in the hopes of wearing down the accused to obtain a confession.[201] To

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Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, *in* NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS 28 (2004), *available at* http://www.law.northwestern.edu/wrongfulconvictions/causes/custodyalnterrogations.htm.

The "Norfolk Four Case" decision was an especially egregious miscarriage of justice. More than a decade after a Virginia woman was found raped and stabbed to death in her home, four of five men convicted of the crime are still trying to clear their names. Ian Urbina, *Virginia Governor Sets Free 3 Sailors Convicted in Rape and Murder*, N.Y. TIMES, Aug. 6, 2009, at A9, http://www.nytimes.com/2009/08/us/07norfolk.html?scp=6&sq=&st=nyt. The case had questionable confessions that did not match the details of the crime scene and an expanding number of suspects although authorities initially pointed to a lone assailant. *Id.* The police initially honed in on Danial Williams because he once had a crush on the victim. *Id.* DNA tests were completed, and the profile did not match Williams. *Id.* The police then got confessions from three of Williams's friends. *Id.* They all gave facts consistent with Williams's confession and the crime scene. *Id.* Later, in a letter, the real perpetrator admitted that he committed the crime. *Id.* Supporters, including former prosecutors and twenty-six former FBI agents, called for clemency from the Governor's Office. *Id.* Three of the four received conditional pardons from the governor. *Id.*; *See* Louis Hansen, *Death Row Inmates Seek New Evidence After Detective's Conviction*, VIRGINIA PILOT & LEDGER-STAR, Dec. 14, 2010, at 8, (providing information on the pardons of the Norfolk Four and the prosecution of a detective in the original case), *available at* 2010 WLNR 24697763. The detective who got the confessions from the four was recently convicted in federal court on several counts of extortion and making false statements to the FBI. *Id.* Joseph Dick, Jr., and Danial Williams were also granted partial pardons. *Id.* The fourth defendant comprising "the Norfolk 4," Eric Wilson, had been convicted only of rape and had already been released from prison when Governor Kaine acted. Urbina, *supra*. In granting a partial pardon, the governor left the men's convictions intact, but reduced their life prison sentences to time served, allowing them to be freed from incarceration. *Id.*

201. *See also* ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11 162-63 (2008) (stating that "today police are allowed to employ trickery, lies, threats of certain kinds, promises and other forms of deception and psychological manipulation in order to get suspects to waive their right to counsel and to admit their crimes."). *Thompkins* could also have a disproportionate effect on members of certain cultural groups who often phrase requests in an equivocal manner. For example, imagine an interrogation of an Asian immigrant who does not understand English. Even through an interpreter, it is plausible to think that a suspect will not realize that he has to expressly state that he is exercising his right to counsel. In such a situation, would the interpreter repeat the warnings until the suspect understood? Would the officer be compelled to explain to the suspect that he must speak up? Or would the officer take the opportunity to continue questioning for hours because there had been no invocations and he would be operating within *Miranda* and *Thompkins*?

be sure, the practice of the police to continue questioning until they receive incriminating statements reflects the reality of police station interrogations.[202] Police officers are trained in integration techniques and are often issued outlines and detailed manuals about varied ways to illicit incriminating statements.[203] Even when officers work within the boundaries created by *Miranda*, *Davis*, and now *Thompkins*, they can still employ whatever

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What about individuals who naturally do not speak clearly or declaratively? *See* Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1057 (2007) (considering language barriers in conveying *Miranda* rights). Would consideration be paid to a suspect's emotional or psychological state? *Thompkins* may also make it easier for police to obtain incriminating statements from juveniles who are unaware that they have to speak up in order to exercise their right to counsel. *See* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 944 (2010) (discussing juveniles and their susceptibility to false confessions); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 42-45 (2006) (discussing juveniles and their ability to understand *Miranda*); Rebecca S. Green, Miranda *Baffling for Teens; Creating Warning for Kids Can Aggravate Confusion*, JOURNAL-GAZETTE, Oct. 18, 2010, at 1A, *available at* 2010 WLNR 20866282 (discussing confusion created by *Miranda* warnings when given to juveniles). Similarly, individuals who have intellectual disabilities, mental illness, or particular personality traits that may make them susceptible to making false confessions also have a disadvantage. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 496 (2002) (stating that "[a]mong the most troubling of *Miranda*'s failures is its inability to ensure the constitutional validity of confessions obtained from mentally retarded suspects . . . imposing *Miranda* on this population exposes the opinion's most fundamental deficiencies"); For further discussion of coerced confessions and *Miranda*, see Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010) and Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300 (2010). Accordingly, after *Davis* and now *Thompkins*, the ideal of safeguarding the constitutional rights of criminal suspects against pernicious interrogation practices has become more or less an afterthought.

202. Professor Pam Karlan asks, "What about the case where somebody is questioned for 12 hours, or 14 hours, while they resolutely say nothing, and eventually they just get worn down." Renee Montagne, *Suspects Must Invoke* Miranda *Right to Stay Silent*, NAT'L PUBLIC RADIO, June 2, 2010, *available at* 2010 WLNR 11294952.

203. The Los Angeles Police Department, Investigative Analysis Section's training manuals recommend that,

> in asserting psychological domination after the Miranda, waiver, the interrogation should leave the interrogation room for 30 to 45 minutes to allow the suspect to worry and ponder his fate. When officers re-enter the interrogation room, they would bring props such as notebooks with the suspects name on them—intimating that a great deal of evidence has been collected.

John T. Philipsborn, *Interrogation Tactics in the Post-*Dickerson *Era*, CHAMPION, Feb. 25, 2001, at 75.

trickery or psychological coercion that the *Miranda* Court considered.[204]

As the erosion of *Miranda* seemingly continues with each subsequent Supreme Court term, the limitations placed on ambiguous requests for counsel under *Davis* and right to silence under *Thompkins* seem destined to remain in place, or perhaps even further narrowed. Attorneys will also continue to litigate over these issues, as the lower courts continue to disagree over when a suspect must be clear in requesting counsel and in exercising their right to silence.[205]

204. *See* Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 30 (1999) (arguing that a confession is an important goal of police interrogation and noting that there are psychological and social factors influencing innocent suspects to offer self-incriminating false statements).

205. *See* Kaiser & Lufkin, *supra* note 21, at 762 (showing the need for clarity in requesting counsel and the right to silence).