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Berghuis v. Thompkins: Retreat from Miranda

Jacquline Grossi

BERGHUIS V. THOMPKINS: RETREAT FROM *MIRANDA*

*Jacquline Grossi**

I. INTRODUCTION

Almost every American is familiar with the *Miranda* rights.[1] What most Americans do not realize, however, is that the *Miranda* decision has been under constant attack since it was handed down in 1966.[2] In the 2009–2010 term, the Supreme Court has continued to make rulings that narrow the scope of the *Miranda* decision,[3] including the ruling in *Berghuis v. Thompkins* (*Thompkins*), which now requires criminal suspects to "unambiguously invoke" their right to remain silent by actually speaking to do so.[4] This five-four decision marked "a substantial retreat from the protection against compelled self-incrimination that *Miranda* . . . has long provided during custodial interrogation."[5] Under this precedent, a criminal defendant is now required to speak to invoke his right to remain silent right after he is told that he has the right to remain silent.[6] In her dissenting opinion, Justice Sotomayor states that, "[t]oday's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain-silent, which counterintuitively, requires them to speak."[7] This decision has removed procedural safeguards that were put in place to protect the individual's right against self-incrimination which is guaranteed by the Fifth Amendment of the United States

* Jacquline Grossi, Barry University, Dwayne O. Andreas School of Law, J.D. Candidate 2013.

1. Liane J. Jackson, *Turning Miranda 'Upside Down'? The high court keeps pecking away at the famous 1966 decision*, A.B.A. J., Sept. 2010 at 20; Miranda v. Arizona, 384 U.S. 436 (1966).

2. Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting); *see* New York v. Quarles, 467 U.S. 649, 657–58 (1984) (holding that *Miranda* warnings need not be given prior to questioning in instances where there is an imminent threat to public safety (public safety exception)); Oregon v. Elstad, 470 U.S. 298, 307 (1985) (holding that statements acquired in violation of *Miranda* are barred from the prosecution's direct case, but may be used for impeachment purposes on cross-examination); 18 U.S.C.A. § 3501 (West 1968) (declared unconstitutional by Dickerson v. United States, 530 U.S. 428 (2000) (providing that the admissibility of a confession is to be determined by the "voluntariness" of the statement, and fails to mention any requirement for warning of rights)); *see also Dickerson*, 530 U.S. at 435–36 (stating that Congress intended to overrule *Miranda* by enacting the statute); *see also* Adam Cohen, *Has the Supreme Court Decimated Miranda?*, TIME, June 3, 2010, *available at* http://www.time.com/time/nation/article/0,8599,1993580-2,00.html (last visited Feb. 11, 2012).

3. SUPREME COURT OF THE UNITED STATES, 2009 TERM OPINIONS OF THE COURT, *available at* http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=09 (last visited Feb. 21, 2012); Jackson, *supra* note 1, at 20; *see also* Florida v. Powell, 130 S. Ct. 1195, 1204 (2010) (holding that *Miranda* warnings given to a suspect were adequate as long as the warnings 'reasonably convey' to the suspect his rights as set forth in *Miranda*); Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010) (holding that after a suspect has invoked his *Miranda* right to counsel, he can be re-interrogated by the police fourteen days after being released from investigative custody).

4. 130 S. Ct. 2250, 2259–60 (2010).

5. *Id.* at 2266 (Sotomayor, J., dissenting).

6. *Thompkins*, 130 S. Ct. at 2262.

7. *Id.* at 2278.

Constitution.[8] In addition, this decision has lessened the "high standards of proof for the waiver" of constitutional rights that the prosecution has the burden of proving,[9] and it "flatly contradict[s] [the] longstanding views that 'a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained.'"[10] Thus, this decision affects how a criminal suspect must invoke or waive his right against self-incrimination.

The *Thompkins* decision disrupts the delicate balance between effective law enforcement and the protection of civil liberties that was established in *Miranda*. Parts II and III will describe the underlying reasoning of the right against self-incrimination and how the right is applied to in-custody police interrogations. Part IV will explore how *Thompkins* contradicts the intentions of the privilege. Lastly, Part V will offer and explore an option that provides a reasonable balance between the protection of civil liberties and effective law enforcement procedures for in-custody interrogations of criminal suspects.

II. ORIGINS OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

A. Departure from an Inquisitorial System of Law Enforcement

Two opposing views of law enforcement existed in England as far back as the twelfth and thirteenth centuries: the accusatorial and the inquisitorial.[11] The accusatorial system is akin to the modern day adversarial system where opposing parties gather evidence and present arguments to a fact-finder.[12] The fact-finder knows nothing about the case until it is presented and the criminal defendant is not required to testify, placing a "premium on the individual rights of the accused."[13] In the inquisitorial system, on the other hand, the opposing parties play a more passive role while the judge is responsible for obtaining the necessary evidence to resolve the case, which includes questioning the witnesses and the defendant.[14] The

8. U.S. CONST. amend. V ("[N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."); *Miranda*, 384 U.S. at 478–79 (holding that "when an individual is taken into custody or otherwise deprived of his freedom . . . the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . .").

9. *Miranda*, 384 U.S. at 475 ("a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."); *see* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (holding that there is a presumption by the court against a waiver of constitutional rights. A waiver is an "intentional relinquishment or abandonment of a known right or privilege," and the State must prove the right was waived intelligently); *see also* Brewer v. Williams, 430 U.S. 387, 404 (1977) (holding that it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege").

10. *Thompkins*, 130 S. Ct. at 2271 (Sotomayor, J., dissenting) (quoting *Miranda*, 384 U.S. at 475); Cohen, *supra* note 2.

11. Cornell University Law School, [hereinafter Cornell I] http://www.law.cornell.edu/anncon/html/amdt5afrag6_user.html#amdt5a_hd24 (last visited Feb. 28, 2012); West's Encyclopedia of American Law from Answers.com, http://www.answers.com/topic/inquisitorial-system (last visited Feb. 11, 2012).

12. West's Encyclopedia, *supra* note 11.

13. *Id.*

14. *Id.*

judge "actively steers the search for evidence," and the "rights of the accused [are] secondary for the search for truth."[15]

The inquisitorial system developed in the ecclesiastical courts in which the witnesses, including the suspect, were compelled to "take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned."[16] The individual taking the oath "was not advised as to the nature of the charges against him, or whether he was accused of [a] crime, and was also not informed of the nature of the questions to be asked."[17] The oath was being used in the Court of the Star Chamber, and the power was being expanded to allow the court to use torture to compel the taking of the oath.[18]

The source of the self-incrimination clause is embodied in the Latin phrase *nemo tenetur seipsum accusare*, which translates as "no man is bound to accuse himself."[19] The concept came about as "a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons . . . and [for] the erection of additional barriers for the protection of the people against the exercise of arbitrary power."[20] In *Brown*, the Court states:

> While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the system so odious as to give rise to a demand for its total abolition.[21]

After the Revolutionary War against England during the late eighteenth century, the privilege against self-incrimination was "recommended by several state ratifying conventions for the inclusion in a federal bill of rights" and was a concept which the states sought to establish in their own individual state constitutions.[22] The colonists feared that such an unjust system as embodied in the inquisitorial model led to overbearing governmental intrusion and threatened the civil liberties the colonists had fought to obtain. They saw the right against self-incrimination as such a fundamental law that it "became clothed in this country with the impregnability of a constitutional enactment." [23]

15. *Id.*
16. Cornell I, *supra* note 11.
17. *Id.*
18. West's Encyclopedia, *supra* note 11.
19. Cornell I, *supra* note 11.
20. Brown v. Walker, 161 U.S. 591, 596 (1896).
21. *Id.* at 596–97.
22. Cornell I, *supra* note 11.
23. *Brown*, 161 U.S. at 597.

B. Policies behind the Privilege

The purpose of the privilege is not to "protec[t] the innocent from conviction, but rather to preserve the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder[s] the entire load.'"[24] As the Supreme Court stated in *Murphy v. Waterfront Commission of New York Harbor*:

> [The privilege against self-incrimination] reflects many of our fundamental values and most notable aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him . . . our respect . . . of the right of each individual 'to a private enclave where he may lead a private life,' . . . and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'[25]

The privilege is there to "regulate a particular government-governed relations . . . to help prevent inhumane treatment of persons from whom information is desired."[26] The privilege prevents the government from using compulsion "to elicit self-incriminating statements" and prevents the usage of those statements elicited by compulsion in a criminal trial.[27]

In sum, "the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion."[28]

C. Applying the Privilege to Confessions

The courts were forced to address the balancing of governmental police powers utilized in investigating crimes and the civil liberties that were put in jeopardy by the procedures used during criminal investigations. Two constitutional bases emerged that governed the admissibility of a suspect's confession: the Due Process

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So deeply did the iniquities of the ancient system impress themselves upon the minds of the American Colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

24. Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (1966).
25. 378 U.S. 52, 55 (1964).
26. *Id.* at 56 n.5.
27. *Id.* at 57 n.6.
28. Cornell I, *supra* note 11.

Clause of the Fourteenth Amendment[29] and the Self-Incrimination Clause of the Fifth Amendment.[30]

1. Due Process Analysis

It was not until the late eighteenth century that coerced confessions were excluded from criminal trials, with the rationale being that induced confessions were unreliable.[31] Early cases involving confessions were settled by adopting the common-law rule that a confession made absent of "inducements, promises, and threats" was voluntary and thus admissible.[32] This voluntariness test used due process standards in determining the admissibility of confessions.[33] The inquiry is that of whether a defendant was coerced and his free will overtaken "by the circumstances surrounding the giving of a confession."[34] "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[35]

A "voluntariness rubric" was established which infused "a number of different values."[36] Those values included "an . . . emphasis on reliability . . . a concern over the legality and fairness of the police practices in an 'accusatorial' system of law enforcement and . . . close attention to the individual's state of mind and capacity for effective choice."[37] This resulted in "a continuing re-evaluation on the facts of each case of how much pressure on the suspect was permissible."[38]

The following were among criteria that were taken into account: "[T]hreats or imminent danger, physical deprivations such as lack of sleep or food, repeated or extended interrogation, limits on access to counsel or friends, length and illegality of detention under state law and individual weakness or incapacities." [39] There was "no single default or fixed combination of defaults [that] guaranteed exclusion.[40] If the surrounding circumstances indicated that the "confession was coerced or compelled," it could not be used against the defendant.[41] In determining whether or not a confession has been coerced, there is a weighing of the pressure of the surrounding circumstances "against the power of resistance of the person confessing."[42] Nothing would be "more revolting to the sense of justice" than to

29. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").
30. *Dickerson*, 530 U.S. at 433.
31. Cornell University Law School, [hereinafter Cornell II] http://www.law.cornell.edu/anncon/html/amdt5afrag8_user.html#amdt5a_hd31 (last visited Feb. 21, 2012).
32. *Miranda*, 384 U.S. at 506 (Harlan, J., dissenting).
33. Cornell II, *supra* note 31.
34. *Dickerson*, 530 U.S. at 434.
35. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).
36. *Miranda*, 384 U.S. at 507 (Harlan, J., dissenting).
37. *Id.* (Harlan, J., dissenting) (citations omitted).
38. *Id.* (Harlan, J., dissenting).
39. *Id.* at 508 (Harlan, J., dissenting) (citations omitted).
40. *Id.* (Harlan, J., dissenting).
41. Malinski v. New York, 324 U.S. 401, 404 (1945).
42. *Dickerson*, 530 U.S. at 434 (citing Stein v. New York, 346 U.S. 156, 185 (1953)).

use confessions that had been procured by coercion or brutality as a basis for conviction, which is clearly a denial of due process.[43]

It has been recognized by the courts "that [the] questioning of witnesses and suspects 'is undoubtedly an essential tool in effective law enforcement.'"[44] The use of a due process standard has provided a "workable and effective means of dealing with confessions."[45] The standard has "developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions" and "[i]t is 'judicial' in its treatment of one case at a time."[46]

2. Self-Incrimination Analysis

The first appearance of the Fifth Amendment applying to confessions came in an 1897 ruling where the Court held:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'[47]

This ruling marked "a sharp . . . break with the doctrine of previous cases in which the Court had applied the common-law test of voluntariness to determine the admissibility of confessions."[48] Until this ruling, the privilege against self-incrimination was applied to "compelled" witness testimony during "any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding . . . ."[49] Thus, the rule implies that the privilege was applicable only in legal proceedings and did not extend to those confessions not regulated by law.[50]

43. Brown v. Mississippi, 297 U.S. 278, 286 (1936); *see also* Ashcraft v. State, 322 U.S. 143, 153–54 (1944).

44. *Miranda*, 384 U.S. at 509 (Harlan, J., dissenting).

45. *Id.* at 506 (Harlan, J., dissenting).

46. *Id.* at 508 (Harlan, J., dissenting).

47. Bram v. United States, 168 U.S. 532, 542–43 (1897) (stating further the admissibility of an accused person's confession should follow those principles set forth in text books). The Court quotes 3 RUSSELL ON CRIMES 478 (6th ed.):

> But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence . . . . A confession can never be received into evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

48. Cornell II, *supra* note 31.

49. *Id.*

50. Cornell I, *supra* note 11; *see also Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

The privilege protects against "compulsory" incrimination. While initially, it only applied to "legally enforceable obligations," it has been interpreted to also include situations where "there is no legal compulsion to speak," such as in police interrogations.[51] The provision "must be accorded a liberal construction in favor of the right it was intended to secure."[52] The right it was intended to secure was one of humanity, civil liberty and a principle of a civilized government; that an accused person be free from compulsion to testify against himself.[53]

As society changes, and policies and procedures evolve, the interpretation of the Constitution expands and contracts to ensure that the civil liberties guaranteed are not lost.[54] "[T]he doctrine that one accused of [a] crime could not be compelled to testify against himself . . . was . . . considered as resting on the law of nature, and was imbedded in [the common law] system as one of its great and distinguishing attributes.[55] It should stand to reason that if the principle of the privilege is considered to rest "under the law of nature," then an accused should not be compelled to testify against himself in *any* circumstance in which compulsion is present."[56]

Under the Fifth Amendment, the inquiry focuses on whether the confession was "free and voluntary" and was made without any threats, violence, or obtained by promises, or by the use of improper influences.[57] There must be sufficient proof to establish "the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent."[58] "[T]he true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."[59]

The privilege is triggered by "compulsion"[60] and is available to those persons in settings "in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[61] The importance of police

51. Cornell I, *supra* note 11.
52. Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also Miranda*, 384 U.S. at 460–61.
53. *Bram*, 168 U.S. at 534–44.
54. Cornell I, *supra* note 11.
55. *Bram*, 168 U.S. at 545.
56. *Id.* at 547–48 (emphasis added):

> Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession as voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create.

57. Malloy v. Hogan, 378 U.S. 1, 7 (1964).
58. *Bram*, 168 U.S. at 549.
59. *Id.* at 548 (citing Wilson v. United States, 16 S. Ct. 895, 899 (1896)).
60. United States v. Monia, 317 U.S. 424, 427 (1943).
61. *Miranda*, 384 U.S. at 467.

interrogations is not lost on the courts and confessions "remain a proper element in law enforcement" as long as the statements are obtained "freely and voluntarily without any compelling influences."[62]

The Fifth Amendment analysis of the admissibility of confessions did not supplant that of the Due Process analysis, but "changed the focus . . . of the inquiry in determining the admissibility of suspects' incriminating statements."[63] Applying this privilege to confessions places more restrictions on the admissions of confessions than does the Fourteenth Amendment's voluntariness test.[64] Protecting the individual's right against self-incrimination reinforces the fact that an adversarial system of criminal proceedings is followed, and not that of an inquisitorial system.[65]

It was not until the privilege against self-incrimination was made applicable to the States through the Fourteenth Amendment's Due Process Clause that the courts would apply the privilege to confessions,[66] and would then set forth "new rules for admitting . . . confessions and other admissions made to police during custodial interrogation."[67]

III. GUARANTEEING THE RIGHT AGAINST SELF-INCRIMINATION DURING IN-CUSTODY POLICE INTERROGATIONS

As discussed above, there are at least two ways of determining the admissibility of confessions in criminal trials: the Fourteenth Amendment Due Process analysis and the Fifth Amendment Self-Incrimination analysis. Although for years, the majority of courts had been applying the Due Process Clause to the admission of confessions,[68] a nudge in the direction of applying the Fifth Amendment occurred in the ruling of *Escobedo v. Illinois*.[69]

Escobedo addressed both an accused's right to counsel guaranteed by the Sixth Amendment and his right against self-incrimination.[70] The Court stated that "[t]here is necessarily a direct relationship between" the time that the police are attempting to obtain a confession and the accused's absolute need for the presence of an attorney.[71] The Court went on to say that, "[o]ur Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."[72] The Court held the

62. *Id.* at 478.
63. *Dickerson*, 530 U.S. at 433–34.
64. *Miranda*, 384 U.S. at 511 (Harlan, J., dissenting).
65. *Id.* at 477.
66. *Malloy*, 378 U.S. at 6; *see also Dickerson*, 530 U.S. at 434.
67. Cornell II, *supra* note 31; *see also Miranda*, 384 U.S. at 439 ("We deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.").
68. *Miranda*, 384 U.S. at 506–07 (Harlan, J., dissenting).
69. 378 U.S. 478, 490–91 (1964).
70. U.S. CONST. amend. VI ("[A]nd to have the Assistance of Counsel for his defence"); *Escobedo*, 378 U.S. 478.
71. *Escobedo*, 378 U.S. at 488.
72. *Id.*

defendant's confession inadmissible for numerous reasons, one being that the police, during an in-custody interrogation, did not "[e]ffectively [warn] [the defendant] of his absolute constitutional right to remain silent."[73]

In the landmark case of *Miranda v. Arizona* in 1966, it became evident that the proper analysis for the admission of a confession into a criminal trial was under the Fifth Amendment.[74] Based on the origins of the Self-Incrimination Clause, it is easy to see why the privilege is applicable in the situation of an in-custody interrogation.[75]

A. Establishing Procedural Safeguards

The five-four decision in *Miranda* resonated through both the legal and law enforcement communities because of its implications and its creation of the "concrete constitutional guidelines" that must now be followed during in-custody police interrogations.[76]

In *Miranda*, the Court realized the psychological effects of modern day in-custody interrogations and the interrogation environment was seen as "[exacting] a heavy toll on individual liberty and trades on the weakness of individuals."[77] Such environment "[brings] with it the increased concern about confessions obtained by coercion."[78] *Miranda* states that there was no question that the self-incrimination privilege extended outside of criminal proceedings and is applicable in a custodial interrogation setting.[79] The Court found that "custodial police interrogation, by its very nature, isolates and pressures the individual"[80] and due to these inherent dangers, it blurs the line "[b]etween voluntary and involuntary statements, and thus heightens the risk that [the] individual will not be" afforded his right against self-incrimination.[81]

After establishing that the Fifth Amendment Privilege applied, the decision went on to say that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently

73. *Id.* at 490–91.

74. *Miranda*, 384 U.S. at 436.

75. *Brown*, 297 U.S. at 287 (quoting Fisher v. State, 110 So. 361, 365 (1926)) (internal citations omitted).

> Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

76. *The Supreme Court: New Rules for Police Rooms*, TIME, June 24, 1966, *available at* http://www.time.com/time/magazine/article/0,9171,835800-1,00.html (last visited Mar.11, 2012).

77. *Miranda*, 384 U.S. at 455.

78. *Dickerson*, 530 U.S. at 434–35 (citing *Miranda*, 384 U.S. 436).

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

80. *Dickerson*, 530 U.S. at 435 (citing *Miranda*, 384 U.S. at 455).

81. *Id.* at 435; *see also Miranda*, 384 U.S. 449–58 (stating that some of the inherent dangers present during an in-custody interrogation include detainment, isolation, lengthy interrogation, and unfamiliar atmosphere).

compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[82] Due to the natural pressures and inherent coercion that exists during in-custody interrogations, the individual must be advised of his right against self-incrimination and have every opportunity to exercise that right.[83]

Miranda requires that in order for a confession obtained during a custodial interrogation, to be admissible at a subsequent trial, it must be shown that the procedural safeguards used were "effective to secure the privilege against self-incrimination."[84] To demonstrate that procedural safeguards were employed, the following warnings—which have become known as *Miranda* rights/warnings[85]—must be given prior to any questioning: (1) The subject must be informed, under "clear and unequivocal terms," that he has the right to remain silent; (2) Anything he does say will be used as evidence against him in court; (3) He has the right to consult with an attorney, and to have the attorney present during questioning; (4) If he cannot afford an attorney, one will be appointed to represent him.[86] These warnings are an "absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[87]

1. Waiver vs. Invocation of the Privilege

Advising the individual of his rights assures that there is an "intelligent exercise of the privilege."[88] Flowing from this are two very important concepts: waiving the privilege and invoking the privilege.[89] In order for an accused's statement to be admissible, it must have been shown that he was warned of his rights, *and* that a valid waiver of those rights exists.[90]

a. Waiving of Privileges

The individual may waive his rights after the warnings "provided the waiver is made voluntarily, knowingly and intelligently."[91] "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived" both his right to counsel and his right against self-incrimination.[92] There have always been "high standards of proof for the waiver of constitutional rights."[93]

82. *Miranda*, 384 U.S. at 467.
83. *Id.*
84. *Id.* at 444.
85. *Dickerson*, 530 U.S. at 435; FindLaw, The Weakening of Miranda, http://knowledgebase.findlaw.com/kb/2010/Jul/111462.html (last visited Mar. 11, 2012).
86. *Miranda*, 384 U.S. at 444, 467–73. .
87. *Id.* at 468.
88. *Id.* at 469.
89. *Id.* at 444–45, 479.
90. *Id.* at 476 (emphasis added).
91. *Id.* at 444.
92. *Id.* at 475.
93. *Miranda*, 384 U.S. at 475 (citing *Johnson*, 304 U.S. at 458).

There is a "reasonable presumption" against the waiver of fundamental rights.[94] The *Miranda* Court reaffirmed that this high standard applies to in-custody interrogations.[95]

"[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[96] There must be some evidence that the accused "intelligently and understandingly" waived his rights.[97] The question of waiver turns on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[98]

For example, a valid waiver could be demonstrated by the accused expressing that he is willing to make a statement and that he does not want an attorney present, followed by the accused giving a statement.[99] On the contrary, if there is a lengthy interrogation and/or the individual was detained before the statement is made, there is strong "evidence that the accused did not validly waive his rights."[100]

b. Invocation of Privileges

After the *Miranda* warnings are given, if the individual either implies or expressly "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent," the interrogation must end.[101] This is considered an invocation of his right to remain silent, and any subsequent questioning is considered the product of compulsion and will not be admissible at a subsequent proceeding.[102] The person in custody must have the right to end the questioning at any time.[103] Because the individual answers some questions or chooses to volunteer information, it does not prevent him from later invoking his right.[104] If the individual states he wants an attorney present, the interrogation must end.[105] If the questioning continues after the request for the presence of an attorney, the government has the burden of proving that a valid waiver exists.[106] It is clear that it must be demonstrated that the accused was made aware of his rights; that he may exercise these rights; and any request to do so must be "scrupulously honored."[107]

94. *Johnson*, 304 U.S. at 464 (citations omitted).
95. *Miranda*, 384 U.S. at 475.
96. *Id.*
97. *Id.* (citing Carnley v. Cochran, 369 U.S. 506, 516 (1962)).
98. *Johnson*, 304 U.S. at 464; *see also* North Carolina v. Butler, 441 U.S. 369, 374–75 (1979).
99. *Miranda*, 384 U.S. at 475–76.
100. *Id.*
101. *Id.* at 473–74.
102. *Id.* at 474.
103. *Id.*
104. *Id.* at 445.
105. *Id.* at 474.
106. *Miranda*, 384 U.S. at 475.
107. *Id.* at 478–79.

B. Interpreting and Tailoring of the Safeguards

Many members of the Court and of law enforcement were not pleased with the *Miranda* decision.[108] While the fact that the warnings must be given was clear, the interpretation of the accused's actions in waiving or invoking those rights was not.[109]

In *North Carolina v. Butler*, the Court dealt with whether or not *Miranda* requires an *explicit* waiver of rights.[110] The Court held that an express oral statement or a written statement of the subject waiving his rights is "strong proof of the validity of that waiver," but it is not necessary to establish the waiver.[111] *Butler* addresses an implied waiver of rights by stating that while "mere silence is not enough," silence "coupled with an understanding of [the accused's] rights and a course of conduct indicating waiver," could support a valid waiver.[112] The presumption of the courts is that the subject did not waive his rights, but in some circumstances, a waiver can be "clearly inferred from the actions and the words of the person interrogated."[113] Simply stated, a waiver can be implied from the surrounding circumstances.[114] The courts refused to require that a waiver be explicit.[115]

The burden of proving waiver is addressed in *Colorado v. Connelly*, where the court held that, while the State shoulders the "heavy burden of proving waiver," the appropriate burden the State must overcome when dealing with motions to suppress confessions obtained in violation of *Miranda* is that of a preponderance of the evidence.[116]

In addressing the issue of invoking the right to counsel, the Court ruled in *Davis v. United States* that a suspect "must unambiguously request counsel."[117] In interpreting *Miranda*, *Davis* held that the requirement for the invocation of the right to counsel, at a minimum, required the use of a statement "that can reasonably be construed" as requesting the presence of an attorney.[118] If the suspect makes an "ambiguous or equivocal" statement to law enforcement that simply makes reference to an attorney, it is not up to law enforcement to interpret the meaning, and questioning may continue.[119] This requirement is an objective inquiry that

108. *Id.* at 541 (White, J., dissenting) ("The rule announced today will measurably weaken the ability of the criminal law to perform [its] tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials."); *see also id.* at 516 (Harlan, J., dissenting) (stating the rule impairs the ability of law enforcement to use a tool that has been available to them and has produced proper results.); *see also The Supreme Court: New Rules for Police Rooms*, TIME, June 24, 1966, *available at* http://www.time.com/time/magazine/article/0,9171,835800-3,00.html (last visited Feb. 28, 2012).

109. *See infra* notes 112–27 and accompanying text.

110. 441 U.S. at 370.

111. *Id.* at 373.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 375.

116. 479 U.S. 157, 168 (1986).

117. 512 U.S. 452, 459 (1994).

118. *Id.* (citing McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

119. *Id.* (citing Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

"provide[s] guidance to officers conducting the interrogation."[120] The request for counsel must be articulated in such a way that a "reasonable officer in light of the circumstances would have understood" that the subject was asserting his right.[121] "If the statement fails to meet the requisite level of clarity," the officer is not required to stop questioning the individual.[122] This rule prevents the police officer from guessing what the suspect means with the consequence being that "of suppression if they guess wrong."[123] There is no rule requiring law enforcement to ask clarifying questions after an ambiguous or equivocal statement is made or to cease questioning after such a request is made, and questioning may continue "until and unless the suspect clearly requests an attorney."[124]

There is clearly a distinction in the analysis between whether a defendant invokes his rights versus waives his rights. The issue of implicit and explicit waivers was addressed, but nowhere in these previous cases does it spell out how one must invoke his right. The *Davis* decision comes the closest when it holds that the invocation of the right for the presence of an attorney must be unambiguous.[125] This holding does not pertain to the right against self-incrimination. It has been established that the court must not presume a waiver;[126] it is, therefore, not fair and reasonable to conclude that if a subject does not invoke his rights, he has waived them.

IV. THE EFFECTS OF THE *THOMPKINS* DECISION ON THE ESTABLISHED PROCEDURAL SAFEGUARDS REQUIRED TO PROTECT AGAINST SELF-INCRIMINATION

Slowly, it seems, the procedural safeguards that were established to preserve the right against self-incrimination are becoming more and more narrow. This, in turn, is disturbing the delicate balance that exists between the protection of individual civil liberties and the invasion of those rights by the government. This disturbance of balance is obvious from the ruling in *Thompkins*. A brief discussion of the facts of the *Thompkins* case is necessary to understand how the Court's ruling takes a step closer to infringing on the personal liberty of the right against self-incrimination.

A. Background of *Thompkins*

Van Chester Thompkins, a suspect in a murder investigation, was apprehended and subsequently interrogated by two police officers.[127] "At the beginning of the

120. *Id.* at 458–59.
121. *Id.* at 459.
122. *Id.* at 462 (holding that "Maybe I should talk to a lawyer" was not a sufficient invocation of the right to counsel; therefore, agents were not required to stop the questioning).
123. *Id.* at 461.
124. *Davis*, 512 U.S. at 461–62.
125. *Id.* at 459.
126. *Johnson*, 304 U.S. at 464.
127. *Thompkins*, 130 S. Ct. at 2256.

interrogation," the officers provided a form to Thompkins advising him of his *Miranda* rights.[128] Thompkins was asked to sign the form acknowledging that he understood his rights, which he refused to sign, however, it was not clear whether there was a verbal response by Thompkins that he understood his rights.[129]The interrogation lasted approximately three hours.[130] There was no point during the interrogation that Thompkins stated that he did not want to talk to the police or that he wished to remain silent, nor did he make a request for an attorney.[131] Thompkins was "[l]argely silent during the interrogation," but did give limited responses, such as "yeah," or "no," and occasionally nodded his head.[132]

Approximately two hours and forty-five minutes into the interview, the officer asked Thompkins if he believed in God, to which Thompkins made eye contact with the officer and replied "Yes."[133] Thompkins' eyes became full of tears, and when the officer asked him if he prayed to God to "forgive him for shooting that boy down," Thompkins replied, "Yes."[134] No written confession was made, and the interrogation ended approximately fifteen minutes later.[135] Thompkins was charged with multiple offenses, including first-degree murder.[136] He moved to suppress the confession claiming that he had invoked his "right to remain silent," that he had not waived this right and the statements made were not voluntary; the trial court denied the motion, and Thompkins was found guilty on all counts charged.[137]

It is clear by the procedural posture of this case that neither the lower courts nor the Justices are in complete agreement.[138] There is no question that the *Miranda* warnings given in this case were adequate.[139] The issue arises out of the defendant's behavior after the sufficient warnings are given.[140] The Supreme Court of the United States granted certiorari, and in a five-four decision found, in pertinent part, that: (1) defendant's silence during the interrogation was not sufficient to invoke his right to remain silent under *Miranda*; (2) defendant waived his right to remain silent under *Miranda* by responding to the police's questioning which is a "'course of conduct indicating waiver' of the right to remain silent;" and (3) police are not required to obtain a waiver of defendant's right to remain silent under *Miranda* before commencing interrogation since *Miranda's* requirements are

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Thompkins*, 130 S. Ct. at 2256.
133. *Id.* at 2257.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Thompkins*, 130 S. Ct. at 2257–58.
138. *Id.* at 2258–59 (stating that both the Michigan Court of Appeals and the United States District Court for the Eastern District of Michigan affirmed the trial court's decision claiming that Thompkins had waived, and not invoked, his right to remain silent; the United States Court of Appeals for the Sixth Circuit reversed on the *Miranda* issue holding that it was unreasonable for the court to find an inferred waiver of rights based on the circumstances).
139. *Id.* at 2259.
140. *Id.*

met if a "suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions."[141]

Based on the previous findings, the Court established the new rule that a suspect must "unambiguously" invoke the right to remain silent.[142] To effectuate the exercise of this right, the Court says, all one has to do is simply *make a statement* that one wishes to remain silent, or that one does not wish to talk to the police.[143] The Court also concludes that an individual, who has not invoked his *Miranda* rights, waives those rights by making voluntary statements to the police after he has been advised of his rights and understands them.[144] The "heavy burden" of the state to show waiver has been removed, and the Court reaffirmed that obtaining an express waiver from the suspect is not required prior to an interrogation.[145] "[A]fter giving a *Miranda* warning, police may interrogate a suspect whom has neither invoked nor waived his or her *Miranda* rights."[146]

B. The Majority's Reasoning

As discussed previously, it must be determined either that a suspect has invoked his right or waived his right in order for the admission of the statement. The majority's reasoning is as follows:

1. Invocation of Right to Remain Silent

In addressing a suspect's invocation of his right to remain silent, the Court stated that it "has not yet been stated whether an invocation of [this right] can be ambiguous or equivocal " and goes on to say there is no reason "to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel . . ."[147] The principle behind requiring an accused to unambiguously invoke the right to remain silent is simple: it provides police with an "objective inquiry . . . on how to proceed in the face of ambiguity," which was already addressed in *Davis*.[148] "Treating an ambiguous or equivocal act, omission or statement as an invocation of . . . rights 'might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation.'"[149] The Court continues to say that *Miranda*'s goal of removing the inherent coercion present in an interrogation is accomplished as long as the suspect has a "full comprehension" of his rights.[150]

141. *Id.* at 2259–60, 2262–63.
142. *Thompkins*, 130 S. Ct. at 2260.
143. *Id.* (emphasis added).
144. *Id.* at 2264.
145. *Id.* at 2261–64.
146. *Id.* at 2264.
147. *Thompkins*, 130 S. Ct. at 2260.
148. *Id.*
149. *Id.* at 2260 (citing Moran v. Burbine, 475 U.S. 412, 425 (1986)).
150. *Id.* at 2260.

2. Waiving the Right to Remain Silent

In determining whether or not a subject has waived his right, the Court looks to the *Butler* decision where it was "made clear that a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'"[151] An implied waiver can be established if *Miranda* warnings are given, understood by the subject, and then the subject makes voluntary statements.[152]

There is no established "formalistic waiver procedure" that must be followed by the subject in order to waive his rights.[153] "As 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 afford."[154] In order for the waiver to be valid, it must only be shown that, by the preponderance of the evidence, the individual understood the rights that he is now choosing to relinquish.[155] A waiver can either be express or implied and "may be contradicted by an invocation at any time."[156] Taking into consideration the whole course of questioning, there must be evidence to support that an implied or express waiver was obtained.[157] It is unnecessary for the police to obtain a waiver prior to questioning a subject.[158] With this ruling, "suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so."[159] The Court states that the main protection of *Miranda* has been realized when the accused has been "advised of and understands" both his right to remain silent and his right to an attorney.[160]

C. The Implications: Losing Sight of What Was Intended to be Protected

The decision by the Court "mark[s] a substantial retreat from the protection against compelled self-incrimination."[161] Not only does this ruling change the way a criminal suspect must invoke his right to remain silent, it also lessens the burden on the State to prove that the right was waived.

1. Implications on Invoking the Right to Remain Silent

Until the ruling in *Thompkins*, the Court had yet to decide whether the bright-line rule in *Davis* requiring a clear statement for the presence of counsel applied to

151. *Id.* at 2261 (quoting *Butler*, 441 U.S. at 373).
152. *Thompkins*, 130 S. Ct. at 2262.
153. *Id.*
154. *Id.*
155. *Id.* at 2261–62 (stating that the standard for proving waiver need only meet the "intentional relinquishment of a known right" established in *Zerbst*).
156. *Id.* at 2263.
157. *Id.* at 2264.
158. *Id.* at 2263 (citing *Butler*, 441 U.S. at 379).
159. *Thompkins*, 130 S. Ct. at 2278 (Sotomayor, J., dissenting).
160. *Id.* at 2261.
161. *Id.* at 2266 (Sotomayor, J., dissenting).

invoking the right against self-incrimination.[162] The simple extension of the *Davis* rule to the right to remain silent, even with the good intention of providing a guideline in the face of ambiguity, contradicts the intentions of the Fifth Amendment.

The Fifth Amendment came into existence to prevent Government compulsion of individuals to testify about a matter in front of a tribunal.[163] Government compulsion was seen as an unjust practice that infringed so deeply on the civil liberties of individuals that it became a fundamental law in the United States.[164] To "compel" is defined as "to cause or bring about by force, threats, or overwhelming pressure."[165] The extension of the application of the right against self-incrimination from criminal proceedings to modern day police in-custody interrogations is only natural. The interpretation today is broader than in the past in order to protect the underlying guarantees in the face of newly developed policy and procedure.[166] Therefore, the clause is not to be interpreted literally, but as it was written, to protect the civil liberty against self-incrimination, not to protect witnesses from making detrimental statements to the police or to "unduly impede, hinder, or obstruct the administration of criminal justice."[167]

Miranda correctly drew the parallel between the compulsion that existed by taking the oath that the Court of the Star Chamber mandated and that which exists during in-custody interrogations. Part of the compulsion exists simply by placing an ordinary citizen in a situation with law enforcement, in that the majority of the general public perceives law enforcement personnel as being in an authoritative position.[168] When that is taken one step further, and the encounter between law enforcement and the individual is moved to an interview room in a police station, the "psychological stress" that *Miranda* refers to begins: placing an individual in an unfamiliar environment and subjecting him to an interrogation with no end in sight.[169]

Miranda provided procedural safeguards to ensure citizens were aware of their constitutional rights and had an opportunity to exercise those rights in the face of compelling government action. In light of the recognition that in-custody interrogations have the potential to create a coercive environment, the warnings serve as a balance between protecting civil liberties and the government interest of public safety.

Mandating that an individual must speak in order to invoke his right to remain silent goes against the natural reaction that one would have after being advised of his right to remain silent. "If a person has been advised explicitly that she need not

162. *Id.* at 2274 (Sotomayor, J., dissenting).
163. *Brown*, 161 U.S. at 596.
164. *Id.* at 597.
165. BLACK'S LAW DICTIONARY 121 (Bryan A. Garner ed., 3d Pocket ed. 2006).
166. Cornell I, *supra* note 11.
167. *Brown*, 161 U.S. at 596.
168. *Bram*, 168 U.S. at 551 ("There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority . . . .").
169. *Miranda*, 384 U.S. at 448–56.

speak and that her words may be used against her, it is no longer natural to expect her to speak."[170] Not only does this ruling state that the individual must speak to invoke his right to remain silent, it allows law enforcement to continue to question the subject until he clearly invokes his right.[171] This allows law enforcement to continue an interrogation for an indeterminate amount of time unless and until an incriminating statement is made. As a procedural safeguard, it was determined that, based on the totality of the circumstances, if the individual "indicated in any manner prior to or during questioning, that he wishes to remain silent," then that request must be "scrupulously honored."[172]

Silence will generally be ambiguous.[173] However, actions or reticence, such as "when a suspect sits silent throughout [a] prolonged interrogation, long past the point of when he could be deciding whether to respond—cannot reasonably be understood other than as an invocation of the right to remain silent."[174] Contemporary law enforcement practices have instructed "police not to engage in prolonged interrogation after a suspect has failed to respond to initial questioning."[175] This new ruling is in direct conflict with this philosophy and encourages police to act to the contrary. Just how long is long enough to continue to interrogate an individual who is clearly unresponsive, especially since that individual has the right to invoke the privilege at any time during the interrogation? Applying a bright-line rule to the invocation of the right to an attorney as was done in *Davis*, can be distinguished from placing that same rule on the right to remain silent. In requesting an attorney, it is inevitable that one must speak to make that request, so insisting on an unequivocal response creates no contradiction.[176] But, there is no implication that one must speak to request the invocation of the right to remain silent.[177]

There are other ways for law enforcement to proceed in the face of ambiguity in determining whether an individual has invoked his right to remain silent without creating a bright-line rule. Although it is not required for law enforcement to do so, it would be "good police practice for the interviewing officer"[178] to ask for clarification when an ambiguous statement is made, or the suspect "engages in conduct that creates uncertainty about his intent to invoke his right."[179]

In light of the intentions of the Fifth Amendment right against self-incrimination and the fact that this Nation has an accusatory criminal justice system, it must be remembered that if there is any doubt as to whether or not influence was exerted or the confession was voluntary, "it must be determined in

170. GEORGE FISHER, EVIDENCE 433 (2d ed. 2008).
171. *Thompkins*, 130 S. Ct. at 2278 (Sotomayor, J., dissenting).
172. *Miranda*, 384 U.S. at 478–79.
173. FISHER, *supra* note 170, at 434 ("A defendant's silence always will be 'insolubly ambiguous.' It always will be impossible to know whether a defendant's silence in the face of an accusation was an admission of guilt or an assertion of a broadly understood right to remain silent.").
174. *Thompkins*, 130 S. Ct. at 2275–76 (Sotomayor, J., dissenting).
175. *Id.* at 2276 (Sotomayor, J., dissenting).
176. *Id.* (Sotomayor, J., dissenting)
177. *Id.* (Sotomayor, J., dissenting)
178. *Davis*, 512 U.S. at 461.
179. *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).

favor of the accused."[180] This is paramount in maintaining the balance between the protection of civil liberties and effective functions of law enforcement.

2. Implications on Waiving the Right to Remain Silent

Miranda clearly established that "a valid waiver will not be presumed from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[181] A "reasonable presumption" against a waiver was established, and the burden was placed on the government to prove that a valid waiver was obtained.[182] This concept was lost on the Court with the ruling in *Thompkins*.

Thompkins essentially holds that it will be *presumed* that an individual has waived his right even if he has not given a clear intent to do so.[183] It has long been held that "mere silence is not enough" to indicate an invocation or a valid waiver.[184] It is not whether the intent to waive was implied or express, but that the right was waived "knowingly and intelligently."[185] It is possible for a valid waiver to be obtained by the defendant's silence "coupled with an understanding of his rights *and* a course of conduct indicating waiver."[186] The safeguard against a presumption of waiver was completely removed by the *Thompkins* decision.

Thompkins also removed the safeguard of placing a "heavy burden" on the government to prove a valid waiver.[187] The rulings in *Miranda* and *Butler* have established that:

> [A] court "must presume that a defendant did not waive his right[s]"; the prosecution bears a "heavy burden" in attempting to demonstrate waiver; the fact of a "lengthy interrogation" prior to obtaining statements is "strong evidence" against a finding of valid waiver; "mere silence" in response to questioning is "not enough"; and waiver may not be presumed "simply from the fact that a confession was in fact eventually obtained."[188]

It has been repeatedly stated that inculpatory statements that are made during a lengthy interrogation are themselves insufficient to establish a waiver.[189] The question of waiver has turned on the "facts and circumstances surrounding" the case.[190] Until now, the government had to prove either an express statement or

180. *Bram*, 168 U.S. at 565.
181. *Miranda*, 384 U.S. at 475.
182. *Johnson*, 304 U.S. at 464.
183. *Thompkins*, 130 S. Ct. at 2278 (Sotomayor, J., dissenting) (emphasis added).
184. *Butler*, 441 U.S. at 373.
185. *Id.*
186. *Id.* (emphasis added).
187. *Thompkins*, 130 S. Ct. at 2261.
188. *Id.* at 2270 (Sotomayor, J., dissenting) (citing to *Miranda*, 384 U.S. at 475–76 and *Butler*, 441 U.S. at 372–73).
189. *Thompkins*, 130 U.S. at 2270 (Sotomayor, J., dissenting).
190. *Johnson*, 304 U.S. at 464; *Butler*, 441 U.S. at 374–75.

conduct by the subject that is "sufficiently clear" to support a finding that a valid waiver was obtained.[191]

This ruling emphasizes only one aspect of the *Miranda* safeguards and disregards the other. *Miranda* emphasized that it must be shown that a suspect was advised of his rights *and* that a valid waiver exists.[192] The majority suggests that as long as the individual is advised of his rights, and understands those rights, the procedural safeguards are met. By presuming a valid waiver without either an express waiver or a waiver based on the totality of the circumstances, the balance of government action is skewed in favor of the government and against that of the protection of civil liberties.

3. An Alternative to *Thompkins*

The Court did not have to make a bright-line rule requiring a criminal suspect to unequivocally invoke his right to remain silent; nor did the court have to condone law enforcement to presume a waiver in the face of ambiguity. Law enforcement should not succumb to infringing the civil liberties of an individual for fear that advising the individual of his rights will hamper a confession. As stated in *Escobedo*:

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[193]

A more equal balance between effective law enforcement and protection of civil liberties can be struck by ending *Miranda* warnings with two simple questions as exhibited by the following *Miranda* warning card:

1. You have the right to remain silent.
2. Anything you say can be used against you in court.
3. You have the right to an attorney present now or at any time during questioning.
4. If you cannot afford an attorney, one will be appointed for you without cost.
5. If you talk to me, you have the right to stop answering questions or speak to an attorney at any time.

191. *Miranda*, 384 U.S. at 475; *Thompkins*, 130 S. Ct. at 2272 (Sotomayor, J., dissenting).
192. *Miranda*, 384 U.S. at 476.
193. *Escobedo*, 378 U.S. at 490.

6. *Do you understand each of these rights?*
7. *Will you talk to me?*[194]

V. CONCLUSION

It is clear that the Fifth Amendment privilege against self-incrimination was borne into the Constitution to protect the individual from any unjust interrogation tactics that may be employed by the government to obtain a confession or incriminating statement.

Advising an individual of his guaranteed rights, by no means, is meant to hinder police investigation and prevent law enforcement from effectively doing its job of protecting society. It is to ensure that any statement obtained is given "freely and voluntarily."[195]

As history has taught us, a system of criminal law enforcement that depends solely on confessions is "less reliable and more subject to abuses than a system that depends on extrinsic evidence independently secured through skillful investigation."[196]

The *Miranda* warnings are in place to strike a balance between effective law enforcement and the protection of civil liberties and will "not constitute an undue interference with a *proper* system of law enforcement."[197] The *Thompkins* decision has disrupted this balance by requiring that an individual speak to invoke his right to remain silent. The individual in custody must now know specifically how to invoke his right by "[using] magic words" that contradict his being silent.[198] If the individual does remain silent, he has not invoked his right, and it is presumed that he has waived it if he subsequently makes a statement other than, "I do not want to talk to you."

194. *Miranda* warnings used by the Seminole County Sheriff's Office, Seminole County, Sanford, Florida (emphasis added); *see also Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).
195. *Miranda*, 384 U.S. at 478.
196. *Escobedo*, 378 U.S. at 488–89.
197. *Miranda*, 384 U.S. at 481 (emphasis added).
198. *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).