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# THE UNJUST APPLICATION OF *MIRANDA*: *BERGHUIS v. THOMPKINS* AND ITS INEQUITABLE EFFECTS ON MINORITY POPULATIONS

MICHAEL O'NEIL\*

**Abstract:** In *Berghuis v. Thompkins*, the U.S. Supreme Court held that in order to invoke the right to remain silent during a custodial interrogation, a criminal suspect must do so clearly and unambiguously. The Court also held that the *Thompkins* suspect's conduct during his interrogation—remaining mostly silent for almost three hours before offering three one-word responses—was sufficient to indicate waiver of his right to remain silent. This Comment argues that these holdings serve to curtail the rights established in *Miranda v. Arizona*, in line with the recent direction of the Court's jurisprudence with respect to custodial interrogations. This Comment further argues that, although *Thompkins's* dual holdings will abridge the constitutional rights of all criminal suspects, they will even more substantially curtail the rights of minority populations in the United States.

## INTRODUCTION

In *Miranda v. Arizona*, the Supreme Court held that in the context of custodial interrogations criminal suspects enjoy both a right to remain silent and a right to have legal counsel present during their interviews.<sup>1</sup> The Court expressed concern over the “inherently compelling pressures” suspects face in custodial interrogations and worried that such pressures may lead to incriminating statements in violation of the Fifth Amendment right against compelled self-incrimination.<sup>2</sup> Scholars argue, however, that the social and legal backdrop against which *Miranda* was decided proves that the Court was more narrowly focused on

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>2</sup> *See id.* at 456, 467 (noting that “without proper safeguards, the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak,” and further noting that the Court was “primarily [concerned] with this interrogation atmosphere and the evils it can bring”); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 112 (1998).

protecting the rights of poor and minority populations.<sup>3</sup> On June 1, 2010, the Supreme Court decided *Berghuis v. Thompkins*, which followed a pattern established by several preceding cases and departed substantially from this central premise of *Miranda*.<sup>4</sup> In doing so, the Court has encouraged a course of police conduct harmful to the rights of all criminal suspects, but particularly the rights of marginalized, traditionally powerless segments of society.<sup>5</sup>

This Comment discusses the Supreme Court's holding in *Thompkins* in terms of its place in the Court's custodial interrogation jurisprudence and demonstrates that the case is the latest in a line of cases to depart from the fundamental principles of *Miranda*. Part I describes the background of the *Thompkins* decision, starting with *Miranda* and moving through the relevant Supreme Court cases modifying the doctrine. It also examines the facts and holdings of *Thompkins* and explains where the case fits within the *Miranda* line of cases. Part II argues that both the invocation holding and the waiver holding in *Thompkins* are in direct conflict with the law and policy embodied in *Miranda* and will lead to the retrenchment of the rights of interrogated persons. Finally, Part III argues that the application of *Thompkins's* holdings will have more significant and detrimental effects on traditionally powerless segments of U.S. society.

## I. THE *MIRANDA* DOCTRINE

In one of its best-known decisions, the Supreme Court held in *Miranda* that statements made by suspects during custodial interrogations

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<sup>3</sup> See George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 221 (2002) ("*Miranda* was simply about police taking advantage of suspects who were poor, ignorant, frightened, and thus no match for police interrogators."); Weisselberg, *supra* note 2, at 120.

<sup>4</sup> See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2271–72 (2010) (Sotomayor, J., dissenting); *Davis v. United States*, 512 U.S. 452, 459 (1994); *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *Edwards v. Arizona*, 451 U.S. 477, 484–85, 487 (1981); *North Carolina v. Butler*, 441 U.S. 369, 373–74 (1979); *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). In *Thompkins*, the Court referred to *Miranda's* "core ruling" simply as excluding unwarned statements from evidence. See *Thompkins*, 130 S. Ct. at 2261 (majority opinion) (quoting *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000)). Yet, previous cases upon which the majority relied recalled *Miranda's* "central 'virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation'" but understood "the need for effective law enforcement." *Davis*, 512 U.S. at 461; *Burbine*, 475 U.S. at 426 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

<sup>5</sup> See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1592 (2008). See generally Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (arguing that requiring a clear and unambiguous statement to invoke the right to counsel disadvantages women and minority populations).

would be inadmissible unless authorities informed the suspects of their rights.<sup>6</sup> *Miranda* required officers to warn suspects of the right to remain silent and the right to an attorney during questioning.<sup>7</sup> Although *Miranda* is considered the landmark decision, it is just one in a line of cases in which the Supreme Court has attempted to strike a balance between the state's law enforcement interests and the constitutional rights of suspects.<sup>8</sup> In some ways, though, *Miranda* represents the high-water mark of the Court's concern for individual rights; since *Miranda*, the Court has shifted more in favor of the state's interests.<sup>9</sup>

#### A. Before *Miranda*: Supreme Court Precedent and Social Realities

Prior to *Miranda*, the Court recognized in *Escobedo v. Illinois* that, after a suspect invokes his or her right to counsel, is denied, and the police do not warn the suspect of the right to remain silent, no statement made during a custodial interrogation can be used against that suspect.<sup>10</sup> The *Miranda* Court supplemented *Escobedo*'s protections when it held that the prosecutor carries a "heavy burden" and must demonstrate that a suspect waived his or her rights before any statements become admissible.<sup>11</sup>

In *Miranda*, the Court expressed its uneasiness with the "inherently compelling" psychological pressures of police interrogations.<sup>12</sup> These pressures had long been a concern for the Court, however, and so the timing of the decision in *Miranda* is particularly relevant.<sup>13</sup> At

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<sup>6</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); Weisselberg, *supra* note 2, at 110 ("*Miranda v. Arizona* may be the United States Supreme Court's best-known decision.>").

<sup>7</sup> *Miranda*, 384 U.S. at 444.

<sup>8</sup> See *Davis v. United States*, 512 U.S. 452, 459 (1994); *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *Edwards v. Arizona*, 451 U.S. 477, 484–85, 487 (1981); *North Carolina v. Butler*, 441 U.S. 369, 373–74 (1979); *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *Miranda*, 384 U.S. at 444; *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964).

<sup>9</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (observing that the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement"); *Davis*, 512 U.S. at 461 (declaring that the Court "must consider the other side of the *Miranda* equation: the need for effective law enforcement"); *Burbine*, 475 U.S. at 427 (denying the exclusion of confessions in part because of the "substantial cost to society's legitimate and substantial interest in securing admissions of guilt" that would result).

<sup>10</sup> *Escobedo*, 378 U.S. at 490–91.

<sup>11</sup> *Miranda*, 384 U.S. at 475.

<sup>12</sup> See *id.* at 455–57, 467; Weisselberg, *supra* note 2, at 112 (describing *Miranda*'s original purpose as "protecting the privilege against self-incrimination and its underlying values by influencing police behavior during custodial interrogations").

<sup>13</sup> See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) ("We think a situation such as that here . . . is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom . . ."); *Lisenba v. California*, 314 U.S. 219, 240 (1941) ("Of-

the time *Miranda* was decided, shifting attitudes in the United States resulted in increased recognition of the struggles of minority populations.<sup>14</sup> *Miranda*'s protections were intended to benefit poor and minority populations because these were the populations least likely to know and assert their rights.<sup>15</sup> Since that time, the understanding of the protections originally intended in *Miranda* and the underlying rationale for those protections have been distorted.<sup>16</sup> The Court has become overly concerned with the state's interest in effective law enforcement, and the resulting distortion of the *Miranda* doctrine is eroding the rights it was originally intended to protect.<sup>17</sup>

### B. After *Miranda*: Development of the Invocation Holding

After *Miranda*, in *Edwards v. Arizona*, the Court dealt with a suspect who had invoked his right to an attorney and then went on to make incriminating statements.<sup>18</sup> The Court held that the suspect's incriminating statements were not admissible because once a suspect invokes the right to an attorney, the police may not continue the interrogation without obtaining an express waiver.<sup>19</sup> This affirmation of the concerns of *Miranda*, however, came at a destructive cost because *Edwards* laid the foundation for the Court's holding in *Davis v. United States*.<sup>20</sup>

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ficers of the law must realize that if they indulge in [practices such as subjecting suspects to questioning for long periods] they may, in the end, defeat rather than further the ends of justice."); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) ("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."); see also Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 25, 25-26 (Richard A. Leo & George C. Thomas III eds., 1998) (noting that, by the 1940s, the Supreme Court began seriously developing its jurisprudence with respect to custodial interrogations).

<sup>14</sup> See Thomas & Leo, *supra* note 3, at 217 (declaring that racism in police practices became more of a concern in 1950s and 1960s and noting the "1960s also brought a heightened concern about fairness and distributive justice").

<sup>15</sup> See *id.* ("[T]he cases from the 1950s often had poor black suspects facing white police in a Southern police station."); Weisselberg, *supra* note 2, at 120 (noting that the Court's opinion in *Miranda* "[took] care to indicate the particular impact of these pressures upon minorities and the poor").

<sup>16</sup> See Weisselberg, *supra* note 2, at 132 (arguing that a "new vision of *Miranda*" has emerged).

<sup>17</sup> See *Burbine*, 475 U.S. at 426 (describing *Miranda*'s directive as giving police and prosecutors instructions for custodial interrogations); Weisselberg, *supra* note 2, at 132.

<sup>18</sup> See *Edwards*, 451 U.S. at 479.

<sup>19</sup> See *id.* at 484-85, 487.

<sup>20</sup> See *Davis*, 512 U.S. at 458; *Edwards*, 451 U.S. at 484-85; Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 814 (2009) ("While the *Davis* Court overestimated the cost to law

In *Davis*, the Court held that in order to invoke the right to an attorney, a suspect must do so “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”<sup>21</sup> The resulting doctrine concerning the invocation of the right to counsel is clear: a suspect must clearly and unambiguously assert the right to counsel; once he or she asserts the right, police may not resume questioning unless they obtain an express waiver.<sup>22</sup>

A different rule, however, developed with respect to the right to remain silent.<sup>23</sup> In *Michigan v. Mosley*, the Court decided that once a suspect invokes his or her right to remain silent, authorities can continue the interrogation if the right is “scrupulously honored.”<sup>24</sup> In *Mosley*, the suspect had invoked his right to remain silent, and the interrogation ceased for more than two hours.<sup>25</sup> Subsequently, different officers re-read the suspect his *Miranda* rights and proceeded to question him about a separate crime at a different location.<sup>26</sup> The Court found his right to remain silent was therefore “scrupulously honored.”<sup>27</sup> The Court did not, however, address the implications of an ambiguous invocation of the right to remain silent in the way *Davis* did with respect to an ambiguous invocation of the right to counsel.<sup>28</sup> The Court would not do so until *Thompkins*.<sup>29</sup>

### C. After *Miranda*: Development of the Waiver Holding

In *North Carolina v. Butler*, the Court addressed the heavy burden that *Miranda* imposed upon the prosecution to demonstrate that a suspect knowingly waived his or her rights prior to offering an incriminating statement.<sup>30</sup> The suspect in *Butler* refused to sign a form indicating

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enforcement if ambiguous invocations were treated as invocations (or required to be clarified), they underestimated (or ignored) the significant costs to the objectives of *Miranda*—ensuring a free and voluntary choice to submit to police interrogation.”).

<sup>21</sup> *Davis*, 512 U.S. at 459.

<sup>22</sup> *See id.*; *Edwards*, 451 U.S. at 484–85.

<sup>23</sup> *See* Strauss, *supra* note 20, at 816.

<sup>24</sup> *Mosley*, 423 U.S. at 104.

<sup>25</sup> *Id.* at 97, 104.

<sup>26</sup> *Id.* at 97–98.

<sup>27</sup> *See id.* at 104–06.

<sup>28</sup> *See* Strauss, *supra* note 20, at 784.

<sup>29</sup> *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010); Strauss, *supra* note 20, at 784. Professor Strauss’s research indicates that *Davis*’s clear and unambiguous invocation requirement had been applied to the right to remain silent in a majority of lower courts prior to *Thompkins*. *See* Strauss, *supra* note 20, at 784.

<sup>30</sup> *See Thompkins*, 130 S. Ct. at 2264; *Butler*, 441 U.S. at 373–74.

waiver of his rights, but he stated that he wanted to talk to the officers and subsequently made incriminating statements.<sup>31</sup> He was silent as to his right to counsel.<sup>32</sup> He challenged the admission of his statements because he had not waived his right to an attorney.<sup>33</sup> The Court held that an express waiver is not necessary and waiver may “clearly [be] inferred from the actions and words of the person interrogated.”<sup>34</sup> This holding was meant to apply to both the right to remain silent and the right to counsel; courts applying the *Butler* holding have found waivers of both rights based upon a statement of the accused during interrogation.<sup>35</sup> Not until *Thompkins*, however, did the Supreme Court apply *Butler* in such a way.<sup>36</sup>

#### D. Filling the Gaps: The *Thompkins* Decision

In *Thompkins*, the defendant, Van Chester Thompkins, was suspected of involvement in a fatal shooting.<sup>37</sup> The following year, Thompkins was found and arrested.<sup>38</sup> During a subsequent interrogation, one of the two interrogating detectives presented Thompkins with a form based on the *Miranda* rule, part of which Thompkins read aloud.<sup>39</sup> Detectives then read him the remaining rights guaranteed by *Miranda*.<sup>40</sup> When the detectives asked Thompkins to sign a form demonstrating he understood his rights, however, he declined.<sup>41</sup>

The interrogation lasted three hours, and at no point did Thompkins say he did not want to answer questions or that he wanted a lawyer present.<sup>42</sup> He was mostly silent during the first two hours and forty-five minutes of the interview, although he did answer questions unrelated

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<sup>31</sup> *Butler*, 441 U.S. at 371.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 373.

<sup>35</sup> *See id.* (“An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver.”); Weisselberg, *supra* note 5, at 1582 (“My own research shows that every federal court of appeals has upheld the admission of a statement based upon an implied *Miranda* waiver.”).

<sup>36</sup> *See Thompkins*, 130 S. Ct. at 2256–57, 2261, 2264; *id.* at 2272 (Sotomayor, J., dissenting); *infra* note 88 and accompanying text.

<sup>37</sup> *Thompkins*, 130 S. Ct. at 2256 (majority opinion).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Thompkins*, 130 S. Ct. at 2256.

to the shooting.<sup>43</sup> After the initial period of silence, Thompkins made the statements at issue in his appeal; the Court recounted the events as follows:

About 2 hours and 45 minutes into the interrogation, [Detective] Helgert asked Thompkins, “Do you believe in God?” Thompkins . . . 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.<sup>44</sup>

At trial, the judge denied Thompkins’s motion to suppress the incriminating statements.<sup>45</sup> Thompkins was convicted of first-degree murder and sentenced to life in prison.<sup>46</sup> Thompkins subsequently appealed the trial judge’s refusal to suppress his pretrial statements under *Miranda*.<sup>47</sup> When the Michigan Court of Appeals affirmed the trial court’s ruling, Thompkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, claiming his incarceration was unlawful because the trial court erred in admitting the statements used to convict him.<sup>48</sup> The Sixth Circuit Court of Appeals found in favor of Thompkins, holding the evidence indicated he did not wish to waive his rights.<sup>49</sup> The Supreme Court reversed, holding that (1) in order to invoke the right to remain silent during a custodial interrogation, a suspect must unambiguously make a statement asserting that right, and (2) a suspect who is read his or her rights, understands them, is not coerced, and makes a statement has waived his or her *Miranda* rights.<sup>50</sup>

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<sup>43</sup> *Id.* at 2256–57. The record indicates that, aside from the incriminating statements, the responses Thompkins gave were statements that he “didn’t want a peppermint” and the chair that he was sitting in was hard. *Id.*

<sup>44</sup> *Id.* at 2257 (citations omitted).

<sup>45</sup> *Id.* at 2258.

<sup>46</sup> *Id.* at 2257–58.

<sup>47</sup> *Thompkins*, 130 S. Ct. at 2258.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2258–59; *Thompkins v. Berghuis*, 547 F.3d 572, 588 (6th Cir. 2008), *rev’d*, 130 S. Ct. 2250 (2010).

<sup>50</sup> *See Thompkins*, 130 S. Ct. at 2260, 2264.

## II. IMPLICATIONS OF *THOMPKINS* FOR POOR AND MINORITY POPULATIONS

*Thompkins* is the latest in a line of cases scaling back *Miranda*'s protections.<sup>51</sup> In its dual holdings—the invocation holding and the waiver holding—the Court supplemented the principles announced in previous cases and “filled holes” in the jurisprudence of custodial interrogations.<sup>52</sup> Combined with these previous cases, *Thompkins* will have the practical effect of increasing the state's power at the expense of criminal suspects, especially poor and minority suspects.<sup>53</sup>

### A. *The Invocation Holding: Applying the Clear Statement Rule to the Right to Remain Silent*

The *Thompkins* Court held that, in order to invoke the right to remain silent, a suspect must do so clearly and unambiguously.<sup>54</sup> In effect, *Thompkins* applied the clear statement rule from *Davis*, which implicated only to the right to an attorney, to the right to remain silent.<sup>55</sup> Unfortunately, this holding will lead to significant problems and further abridge the rights of interrogated persons.<sup>56</sup>

First, in requiring clear, unambiguous statements to assert one's rights, the Court implicitly assumed that suspects who make ambiguous assertions are unsure that they want to invoke these rights.<sup>57</sup> In fact, as studies show, it is likely that the pressures of the custodial interrogation setting cause suspects to adopt a less direct mode of speaking.<sup>58</sup> Therefore, interrogators may interpret an invocation as ambiguous when, in

<sup>51</sup> See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260, 2264 (2010); *Davis v. United States*, 512 U.S. 452, 459 (1994); *North Carolina v. Butler*, 441 U.S. 369, 373–74 (1979).

<sup>52</sup> See *Thompkins*, 130 S. Ct. at 2260, 2264; Strauss, *supra* note 20, at 784; Weisselberg, *supra* note 5, at 1582, 1590.

<sup>53</sup> See Ainsworth, *supra* note 5, at 261; Strauss, *supra* note 20, at 811–14.

<sup>54</sup> *Thompkins*, 130 S. Ct. at 2260.

<sup>55</sup> See *id.*; *Davis*, 512 U.S. at 459; Strauss, *supra* note 20, at 784.

<sup>56</sup> See Strauss, *supra* note 20, at 802–03, 816.

<sup>57</sup> See *id.* at 804. Professor Strauss outlines the following three possible interpretations of an ambiguous invocation: (1) the suspect is actually uncertain; (2) he or she is not uncertain but cannot articulate clearly given the circumstances; or (3) the person is afraid of the consequences that follow from asserting the right. See *id.*

<sup>58</sup> See Ainsworth, *supra* note 5, at 263–64 (arguing that the “asymmetries of power” inherent in an interrogation increase the likelihood that the suspect will use ambiguous language); see also Weisselberg, *supra* note 5, at 1589 (“To avoid offending those in power and for other reasons, suspects may articulate their positions in tentative ways; but tentative assertions of rights will not be recognized as invocations under an ‘unambiguous or unequivocal’ standard.”).

reality, the suspect is attempting to assert his or her rights clearly.<sup>59</sup> To compound this problem, when suspects feel as if their initial invocation has been ignored, they tend to believe any further assertion would be futile and thus are less likely to assert their rights again.<sup>60</sup> These are precisely the type of subtle psychological pressures inherent in interrogations the *Miranda* Court sought to obviate.<sup>61</sup> Thus, *Thompkins* and *Davis* directly subvert the central goal of *Miranda*—the protection of the suspect’s Fifth Amendment right against self-incrimination.<sup>62</sup>

Second, although the *Thompkins* majority stated there is “no principled reason” to establish separate rules with regard to invocation of the two different *Miranda* rights, courts regularly act to the contrary without significant problems.<sup>63</sup> Moreover, the Court established two different rules with respect to what must occur after a suspect invokes a *Miranda* right—one for the right to remain silent and another for the right to an attorney.<sup>64</sup> Under *Mosley*, when a suspect invokes the right to remain silent, interrogators are free to recommence the interrogation provided the suspect’s rights are “scrupulously honored.”<sup>65</sup> Conversely, when a

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<sup>59</sup> See Strauss, *supra* note 20, at 804.

<sup>60</sup> See *id.* at 775.

<sup>61</sup> See *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (observing that “the modern practice of in-custody interrogation is psychologically rather than physically oriented”); Strauss, *supra* note 20, at 822.

<sup>62</sup> See *Miranda*, 384 U.S. at 457–58; Weisselberg, *supra* note 5, at 1588, 1592.

<sup>63</sup> See *Thompkins*, 130 S. Ct. at 2260; Strauss, *supra* note 20, at 816 (noting that “in virtually every other aspect of the rules, the courts go out of their way to develop distinct standards”). There are a number of reasons why, as Professor Strauss argues, courts should not apply the *Davis* clear statement rule to the right to remain silent. See Strauss, *supra* note 20, at 816–17. The invocation of the two different rights implicates different procedures for law enforcement officers to follow. See *id.* at 816; *infra* notes 64–69 and accompanying text. Additionally, as Professor Strauss notes, “the right to remain silent is the transcendent right protected by *Miranda*” and therefore should be treated differently than the right to counsel. See Strauss, *supra* note 20, at 817. See generally Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal*, 29 SETON HALL L. REV. 558 (1998) (examining the difference between the right to remain silent and the right to counsel and arguing that *Davis* should not be applied to the former).

<sup>64</sup> See *Miranda*, 384 U.S. at 473–74. *Miranda* made no distinctions between the right to remain silent and the right to an attorney with respect to the rules for police conduct after the invocation of the rights. See *id.* The Court stated, “If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* at 474. The Court also declared, “If the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease.” *Id.* But see *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (modifying *Miranda* with respect to police conduct after a suspect’s invocation of the right to an attorney); *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975) (modifying *Miranda* with respect to police conduct after a suspect’s invocation of the right to remain silent).

<sup>65</sup> See *Mosley*, 423 U.S. at 103–04. In *Mosley*, the Court identified six factors that bear on whether the right to remain silent is “scrupulously honored.” See *id.* at 104–05. In deciding

suspect invokes his right to counsel, *Edwards* establishes that the interrogation must cease until an attorney is present unless the suspect initiates the conversation.<sup>66</sup> Therefore, application of the *Davis* clear statement rule to the right to remain silent has a different effect than its application to the right to counsel.<sup>67</sup> If ambiguous invocation of the right to remain silent were sufficient to trigger *Miranda's* protections, the interrogator would only have to pause and "scrupulously honor" a suspect's rights before commencing questioning.<sup>68</sup> If ambiguous invocation of the right to counsel were sufficient to trigger *Miranda's* protections, the interrogator would be forced to cease the interrogation altogether.<sup>69</sup>

An additional problem exists when attempting to reconcile the invocation holding with the explicit language of *Miranda*.<sup>70</sup> In *Miranda*, the Court specifically held, "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."<sup>71</sup> Given *Miranda's* concern over the coercive atmosphere of interrogations and its stated desire to protect suspects' rights rigorously, the most logical interpretive application

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that the suspect's rights were, indeed, "scrupulously honored" in *Mosley*, the Court found the following: (1) the interrogation ceased immediately when the suspect stated he did not want to discuss the robberies; (2) an interval of "more than two hours" passed; (3) the suspect was re-read his *Miranda* rights at the beginning of the second interview; (4) the subsequent questioning pertained to a different matter; (5) the suspect was questioned by different officers; and (6) the questioning took place at a different location. *Id.* Professor Strauss has observed, however, that "most courts only require three" of these factors to find that a suspect's rights were "scrupulously honored." Strauss, *supra* note 20, at 811-12. Her research shows the significant factors are "that the original interrogation immediately cease, that there be a significant passage of time, and that the suspect be afforded a fresh set of *Miranda* warnings." *Id.* at 812.

<sup>66</sup> See *Edwards*, 451 U.S. at 484-85. Justice O'Connor, writing for the majority in *Davis*, reasoned that as long as the invocation of the right to an attorney was ambiguous, *Edwards* did not require the interrogation to cease. *Davis*, 512 U.S. at 459. This rule from *Edwards*, which applies only to the right to an attorney, seemed to be the basis for the *Davis* Court's holding that invocation of the right to counsel must be unambiguous, because otherwise an ambiguous invocation "would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." See *id.* at 460. The same reasoning does not, however, apply to the right to remain silent because invocation of that right does not require that the interrogation cease until a lawyer arrives. See *Mosley*, 423 U.S. at 103-04; Strauss, *supra* note 20, at 816. The *Thompson* majority should have considered the distinction between the two rights, in terms of the practical effects of invocation on police interrogations, in deciding whether the *Davis* clear statement rule is a necessary or prudent requirement for invoking the right to remain silent. See Strauss, *supra* note 20, at 816.

<sup>67</sup> See Strauss, *supra* note 20, at 816.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 817-18.

<sup>71</sup> *Miranda*, 384 U.S. at 473-74.

of this language should be to resolve ambiguities in favor of the suspect.<sup>72</sup> Thus, the *Thompkins* holding is a clear example of the Court moving away from the primary concerns of *Miranda* and focusing more on the law-enforcement interest of creating bright-line rules.<sup>73</sup>

B. *The Waiver Holding: Decreasing the Burden on the Prosecution to Show Waiver*

The *Thompkins* Court held that a suspect who makes an uncoerced statement to officers, after receiving and understanding his or her rights, has impliedly waived his or her *Miranda* rights.<sup>74</sup> This holding is a reversion to a pre-*Miranda* understanding of suspects' rights and prosecutorial burdens.<sup>75</sup> Read in conjunction, *Miranda* and *Butler* establish that the prosecution bears a "heavy burden" to prove waiver and courts must presume a defendant did not waive his or her rights.<sup>76</sup> Yet, the Court found that the prosecution met the burden in *Thompkins*.<sup>77</sup> With such a clear departure from the *Miranda* doctrine on waiver, the Court has eroded a suspect's right to remain silent to such a degree that it is now effectively nonexistent.<sup>78</sup> In this way, the *Thompkins* implied-waiver doctrine undermines *Miranda's* core purpose of protecting the right against self-incrimination and providing meaningful redress for infringement of that right.<sup>79</sup>

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<sup>72</sup> See Strauss, *supra* note 20, at 817–18; Thomas & Leo, *supra* note 3, at 221; Weisselberg, *supra* note 2, at 120.

<sup>73</sup> Compare *Thompkins*, 130 S. Ct. at 2268–69 ("Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity."), with *Miranda*, 384 U.S. at 456 ("[W]e concern ourselves primarily with this interrogation atmosphere and the evils it can bring.").

<sup>74</sup> *Thompkins*, 130 S. Ct. at 2264.

<sup>75</sup> See Weisselberg, *supra* note 5, at 1578, 1583, 1590.

<sup>76</sup> See *Butler*, 441 U.S. at 373; *Miranda*, 384 U.S. at 475.

<sup>77</sup> See *Thompkins*, 130 S. Ct. at 2264.

<sup>78</sup> See Strauss, *supra* note 20, at 803; Weisselberg, *supra* note 5, at 1578, 1591 (arguing that, because of the shift from placing the burden on prosecutors to prove waiver to placing the burden on suspects to invoke their rights clearly, it cannot reasonably be maintained "that these procedures counter the 'inherently compelling pressures' of custodial interrogation").

<sup>79</sup> See *Thompkins*, 130 S. Ct. at 2267–68 (Sotomayor, J., dissenting) (citing Supreme Court precedent embracing the proposition that *Miranda's* safeguards must be enforced to guarantee the Constitution's Fifth Amendment right against compelled self-incrimination); *Miranda*, 384 U.S. at 439; see also Weisselberg, *supra* note 5, at 1583, 1590 (arguing that the implied-waiver doctrine has "altered the contours" of the *Miranda* doctrine and observing that those who still cling to the belief that *Miranda* protects suspects' rights must be able to "show that suspects are generally able to communicate to officers").

The ruling in *Thompkins* contradicts *Miranda's* understanding of when waiver will be found.<sup>80</sup> *Miranda* dealt explicitly with the issue of a suspect's waiver of rights and declared that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."<sup>81</sup> *Butler* clarified *Miranda* and established that a suspect could waive the right to remain silent through "a course of conduct indicating waiver."<sup>82</sup> Implicit in this clarification, however, was the notion that a "course of conduct" was a series of affirmative acts unmistakably indicating that the suspect intended to waive his or her right to remain silent.<sup>83</sup> Thus, *Butler* maintained allegiance to *Miranda's* statement that a suspect's eventual confession after a long period of silence would not constitute waiver.<sup>84</sup>

Yet in *Thompkins*, the Court found waiver in exactly these circumstances.<sup>85</sup> The Court reasoned that, under *Butler*, *Thompkins's* waiver of his right to remain silent could be inferred from his actions and words.<sup>86</sup> Given the dual admonitions of *Miranda* and *Butler* about waiver—that the prosecutor's burden in proving waiver is heavy and an eventual confession is not sufficient to establish waiver—*Thompkins* seems to be an incorrect application of the Supreme Court's own

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<sup>80</sup> See *Miranda*, 384 U.S. at 475; see also *Thompkins*, 130 S. Ct. at 2268–70, 2272 (Sotomayor, J., dissenting).

<sup>81</sup> *Miranda*, 384 U.S. at 475.

<sup>82</sup> See *Butler*, 441 U.S. at 373.

<sup>83</sup> See *id.* Specifically, the Court noted in *Butler* that even though silence in the face of the warnings was not enough to indicate waiver, "silence, coupled with an understanding of his rights and a course of conduct indicating waiver" may, in some circumstances, "support a conclusion that a defendant has waived his rights." See *id.* The Court added that "courts must presume that a defendant did not waive his rights," and the prosecution bears a heavy burden to prove the circumstances in which waiver "can be clearly inferred from the actions and words of the person interrogated." *Id.* Waiver of any constitutional right must be determined on the particular facts of each case, including the background and conduct of the suspect. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The particular facts of *Butler* included a clear statement that the suspect wanted to talk to his interrogators, followed by a full conversation in which he made inculpatory statements. See 441 U.S. at 371. In contrast, *Thompkins* never made such a clear statement or engaged in other affirmative acts clearly indicating waiver. See *Thompkins*, 130 S. Ct. at 2271 (Sotomayor, J., dissenting).

<sup>84</sup> See *Thompkins*, 130 S. Ct. at 2269 (Sotomayor, J., dissenting); *Butler* 441 U.S. at 373.

<sup>85</sup> See *Thompkins*, 130 S. Ct. at 2256–57, 2264 (majority opinion); *id.* at 2268–70, 2272 (Sotomayor, J., dissenting) ("Rarely do this Court's precedents provide clearly established law so closely on point with the facts of a particular case."); *Miranda*, 384 U.S. at 475.

<sup>86</sup> *Thompkins*, 130 S. Ct. at 2261 (majority opinion).

precedent.<sup>87</sup> Rather than expressly contradicting *Miranda* on this point, however, in *Thompkins* the Court quietly but thoroughly undermined the force of *Miranda*'s directives with respect to evaluating waiver, thereby weakening its Fifth Amendment protections.<sup>88</sup>

The *Thompkins* holding also applies a different definition of coercion than *Miranda* contemplated.<sup>89</sup> Thompkins was not physically coerced or threatened into talking; but the psychological pressures inherent in custodial interrogations, with which *Miranda* was concerned and to which Thompkins was subjected, are in many ways more compelling than physical coercion.<sup>90</sup> The *Miranda* Court described a scenario strikingly similar to that present in *Thompkins* when it was discussing the notion of subtle coercion, writing,

[T]he fact of lengthy interrogation . . . is strong evidence that the accused did not validly 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

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<sup>87</sup> See *id.*; *Butler*, 441 U.S. at 373; *Miranda*, 384 U.S. at 475; see also George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1099 (2001) (“*Miranda* could be read to require considerably more to prove waiver than has turned out to be the standard.”). As Justice Sotomayor noted in her dissent, “Thompkins’s ‘actions and words’ preceding the inculpatory statements simply do not evidence a ‘course of conduct indicating waiver’ sufficient to carry the prosecution’s burden. *Thompkins*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting) (quoting *Butler*, 441 U.S. at 373).”

<sup>88</sup> See *Thompkins*, 130 S. Ct. at 2261 (majority opinion); *id.* at 2267–68, 2272 (Sotomayor, J., dissenting). In reality, the federal courts have been misapplying *Butler* for years, and the *Thompkins* waiver holding may not have significant practical effect. See Weisselberg, *supra* note 5, at 1582 (“My own research shows that every federal court of appeals has upheld the admission of a statement based upon an implied *Miranda* waiver.”); see also Thomas, *supra* note 87, at 1082 (noting that once courts establish that warnings were read to a suspect in a language he or she understands, “courts find waiver in almost every case”). It is nevertheless significant that the Supreme Court has now put its imprimatur on this erroneous reading of *Butler*. See Thomas, *supra* note 87, at 1082; Weisselberg, *supra* note 5, at 1582.

<sup>89</sup> Compare *Thompkins*, 130 S. Ct. at 2263 (majority opinion) (concluding that as long as Thompkins was not threatened or fearful, his statement was not coerced), with *Miranda*, 384 U.S. at 455 (focusing on the capacity for custodial interrogation to coerce suspects into making self-incriminating statements not through violence or the threat of violence but through more subtle means).

<sup>90</sup> See *Thompkins*, 130 S. Ct. at 2263 (“Thompkins does not claim that police threatened or injured him during the interrogation . . .”); *Miranda*, 384 U.S. at 455 (“Even without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”); see also Strauss, *supra* note 20, at 776 (noting that the *Miranda* Court was concerned with sophisticated police interrogation tactics leading to coerced statements, not overt brutality).

inconsistent with any notion of a voluntary relinquishment of the privilege.<sup>91</sup>

Under a proper reading of *Miranda*, then, the fact that the interrogation lasted as long as it did and through Thompkins's silence would counsel against finding waiver due to the existence of coercive time pressure.<sup>92</sup> Intensifying the coercive dynamics of Thompkins's interrogation was the investigator's appeal to his religious beliefs after a lengthy interrogation.<sup>93</sup> As the Court noted in *Miranda*, "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."<sup>94</sup> Although the majority in *Thompkins* held that appealing to Mr. Thompkins's religious beliefs was not trickery, it undoubtedly increased the pressure to talk.<sup>95</sup>

Finally, the *Thompkins* Court's conception of what is required for a suspect to "understand" his or her *Miranda* rights is arguably more limited than the *Miranda* Court's conception.<sup>96</sup> Thompkins presented evidence indicating that he only superficially understood his rights.<sup>97</sup> The

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<sup>91</sup> *Miranda*, 384 U.S. at 476. This dicta from *Miranda* seems to contradict the *Thompkins* majority's contention that "there is no authority for the proposition that an interrogation of this length is inherently coercive." See *Thompkins*, 130 S. Ct. at 2263; *Miranda*, 384 U.S. at 476. The Court nevertheless attempted to support its assertion and distinguish *Thompkins* by noting that cases in which confessions were excluded due to the length of the interrogation sessions generally dealt with interrogations longer than three hours and contained an additional factor of coercion. See *Thompkins*, 130 S. Ct. at 2256, 2263; cf. *Colorado v. Connelly*, 479 U.S. 157, 163-64, 163 n.1 (1986) (declaring that, when examining police conduct during custodial interrogations to determine if a suspect's rights have been violated, the Court looks for "a substantial element of coercive police conduct" and collecting authorities for the proposition that the length of interrogation is not dispositive).

<sup>92</sup> See *Miranda*, 384 U.S. at 476. The length of the interrogation is one of many coercive factors the Court explored and attempted to counteract in *Miranda*. See *id.* at 449-55.

<sup>93</sup> See *Thompkins*, 130 S. Ct. at 2257.

<sup>94</sup> *Miranda*, 384 U.S. at 476.

<sup>95</sup> See *Thompkins*, 130 S. Ct. at 2263; Ainsworth, *supra* note 5, at 288. Professor Ainsworth specifically cites "appeals to the suspect's religious values" as a tactic that is designed to weaken the will of the suspect and control the interrogation. *Id.* Although the majority in *Thompkins* stated that appeals to religious beliefs do not render a suspect's statements involuntary, such appeals can increase the pressure on the suspect and thus fall within the scope of activity *Miranda* sought to eliminate. See *Thompkins*, 130 S. Ct. at 2263; *Miranda*, 384 U.S. at 448-51; Ainsworth, *supra* note 5, at 288.

<sup>96</sup> See *Thompkins*, 130 S. Ct. at 2262; *Miranda*, 384 U.S. at 468-69.

<sup>97</sup> See *Thompkins*, 130 S. Ct. at 2256, 2262. The evidence conflicted as to whether Thompkins orally indicated that he understood his rights, but the Court found "more than enough evidence" to conclude he understood. See *id.* The Court noted that the police provided *Miranda* warnings in writing and asked Thompkins to read one of them to ensure he could read and understand English. *Id.* at 2256. The fact that he could read and under-

level of understanding required by *Miranda*, however, exceeds such cursory knowledge.<sup>98</sup> Although suspects may understand the language in which the warnings are given, the uneducated populations *Miranda* sought to protect likely do not possess a full understanding of the nature of their rights and the legal implications of waiving them.<sup>99</sup> Whether Thompkins actually understood his *Miranda* rights is perhaps debatable; what is not debatable is the negative impact the Court's ruling will have on the poor and uneducated suspects *Miranda* intended to protect.<sup>100</sup>

Regardless of whether the Court was faithful to its precedent in *Thompkins*, the law after *Thompkins* is clear: whenever an accused suspect is not overtly coerced, understands his or her rights, is given *Miranda* warnings, and remains almost completely silent but later confesses after continued (and subtly coercive) questioning, he or she has engaged in "a course of conduct indicating waiver" under *Butler*.<sup>101</sup> This ruling will infringe on the Fifth Amendment rights of criminal suspects established in *Miranda*.<sup>102</sup> The holding reduces the government's burden to show waiver; it also encourages police to continue their interro-

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stand English was, for the majority, sufficient to establish Thompkins's understanding. *See id.* at 2262.

<sup>98</sup> *See Miranda*, 384 U.S. at 475. *Miranda* requires that a defendant "knowingly and intelligently" waive his right. *Id.* To satisfy this standard, the suspect must be aware of "both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

<sup>99</sup> *See Thomas & Leo*, *supra* note 3, at 247–48; Weisselberg, *supra* note 5, at 1577. Police inform suspects that what they say can be used against them in court but police do not apprise suspects of the consequences of silence. *See Strauss*, *supra* note 20, at 823. As a result, suspects could reasonably fear that by remaining silent or asking for a lawyer they are incriminating themselves. *See id.* To alleviate this problem, Professor Strauss argues the prescribed warnings should include assurances that the invocation of rights will not incriminate the suspects. *Id.* Under current conditions, evidence that the suspect speaks the language in which the warnings are given simply is not enough to establish a suspect's "understanding," contrary to the Court's position in *Thompkins*. *See Thomas*, *supra* note 87, at 1082.

<sup>100</sup> *See Thompkins*, 130 S. Ct. at 2256–57, 2264; *id.* at 2272 (Sotomayor, J., dissenting); Weisselberg, *supra* note 5, at 1577. The fact that warnings are read is not sufficient to ensure that a waiver is made knowingly and intelligently because understanding the warnings takes a higher education level than many suspects possess. Weisselberg, *supra* note 5, at 1577; *see also* Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 37 (1999) ("The validity of a suspect's waiver is, by far, the most controversial issue in the matter of *Miranda* rights and cultural or ethnic background.").

<sup>101</sup> *See Thompkins*, 130 S. Ct. at 2263, 2264 (majority opinion); *Miranda*, 384 U.S. at 455; Ainsworth, *supra* note 5, at 288. *But see Thompkins*, 130 S. Ct. at 2270 (Sotomayor, J., dissenting) ("*Miranda* and *Butler* expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.").

<sup>102</sup> *See Thompkins*, 130 S. Ct. at 2272 (Sotomayor, J., dissenting).

gations until suspects either confess or come up with the magic words to invoke the right to counsel clearly.<sup>103</sup> There is no other way a suspect can effectively bring a custodial interview to an end.<sup>104</sup> This may lead to an increase in false confessions.<sup>105</sup> It will certainly increase law-enforcement authorities' ability to subvert the rights of criminal suspects with impunity.<sup>106</sup>

### III. UNJUST CONSEQUENCES: THE PRACTICAL RESULT OF *THOMPKINS*

*Thompkins* will negatively impact all criminal suspects, but its dual holdings will have more damaging effects on the poor and minority populations who have been relatively powerless throughout U.S. history.<sup>107</sup> First, by requiring that a suspect clearly invoke the right to remain silent, the Court institutes a doctrine that provides "systematically inferior protection to the least powerful in society."<sup>108</sup> Second, by lowering the prosecution's burden to show waiver, *Thompkins* will lead to a further retrenchment of the rights of minority suspects.<sup>109</sup>

Jurists and scholars alike recognize the differential impact of a clear invocation rule with respect to asserting a right effectively during a custodial interrogation.<sup>110</sup> Such a rule favors those with more direct

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<sup>103</sup> See *id.*; Weisselberg, *supra* note 5, at 1583–84. Professor Weisselberg demonstrates the manner in which police training manuals and actual academy courses instruct officers based on Supreme Court rulings. Weisselberg, *supra* note 5, at 1583. He found that police understand that express waivers are preferred, but "implied waivers—and resulting statements—are preferred to no waiver at all." *Id.* at 1585. Because the Court has now issued another decision that "tolerate[s] tactics that diminish *Miranda's* effectiveness," it is safe to conclude that officers will be trained to use those tactics. See *id.* at 1583, 1592.

<sup>104</sup> See Strauss, *supra* note 20, at 811–14.

<sup>105</sup> See GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 195–96 (2003). Whether false confessions are a major problem is open for debate. Compare Weisselberg, *supra* note 2, at 113 (noting that the Court's cases leading up to the *Miranda* decision indicated a concern with the reliability of coerced statements), with Thomas & Leo, *supra* note 3, at 220 (noting that false confessions were not a major concern in *Miranda*). That false confessions do occur is not similarly open for debate. See John Schwartz, *Confessing to Crime, but Innocent*, N.Y. TIMES, Sept. 14, 2010, at A14.

<sup>106</sup> See *Thompkins*, 130 S. Ct. at 2272 (Sotomayor, J., dissenting); Weisselberg, *supra* note 5, at 1591–92.

<sup>107</sup> See Ainsworth, *supra* note 5, at 261.

<sup>108</sup> See *id.*

<sup>109</sup> See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010); Einesman, *supra* note 100, at 37, 49, 47; Thomas, *supra* note 87, at 1082.

<sup>110</sup> See *Davis v. United States*, 512 U.S. 452, 469–70 (1994) (Souter, J., concurring); Ainsworth, *supra* note 5, at 306–08; Strauss, *supra* note 20, at 1056; Weisselberg, *supra* note 5, at 1589.

and assertive speech patterns.<sup>111</sup> As a corollary, the clear invocation rule negatively impacts indigent, uneducated populations more than other segments of society.<sup>112</sup> This doctrine is much more harmful to marginalized and powerless groups because they are more likely to use indirect language and be less assertive, particularly in the context of a police interrogation.<sup>113</sup>

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<sup>111</sup> See *Thompkins*, 130 S. Ct. at 2260; Ainsworth, *supra* note 5, at 320. At the time of Professor Ainsworth's article, *Davis* had not been decided yet, so there were three ways that courts treated invocation questions. See *Davis*, 512 U.S. at 452 (majority opinion); Ainsworth, *supra* note 5, at 301–02. The method the article argued was least sensitive to the issue of differences in speech patterns, “the threshold-of-clarity standard,” was the standard adopted in *Davis*. See *Davis*, 512 U.S. at 461–62; Ainsworth, *supra* note 5, at 306–07, 320 (“In limiting their consideration to the literal sense of the suspects' words, courts applying the threshold-of-clarity standard penalize those whose indirect speech acts rely upon normal conversational implicature for their meaning.”). The second standard, called “the clarification standard,” is a sort of middle ground, requiring officers to ask questions and clarify the intent of suspects after ambiguous statements. See Ainsworth, *supra* note 5, at 308. The majority of the courts had applied this standard and, although this is the standard the officers in *Davis* followed, the majority held that it was unnecessary. See 512 U.S. at 461–62; Ainsworth, *supra* note 5, at 308. Professor Ainsworth, conversely, advocated for an approach called the per se standard, “the polar opposite of the threshold-of-clarity standard.” Ainsworth, *supra* note 5, at 307, 320. Under this standard, ambiguous requests for counsel are given full legal weight and result in ending the interrogation. *Id.* at 306–07.

<sup>112</sup> See *Davis*, 512 U.S. at 469–70 (Souter, J., concurring); Ainsworth, *supra* note 5, at 261. Justice Souter first articulated this argument in his concurrence in *Davis*, in which he remarked,

[C]riminal suspects who may (in *Miranda's* words) be “thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures,” would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, many are “woefully ignorant,” and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.

512 U.S. at 469–70 (Souter, J., concurring) (internal citations omitted). Indeed, even the majority in *Davis* indicated its awareness of this problem but declared that “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.” See *id.* at 460 (majority opinion). Professor Ainsworth argues that the use of certain language is less effective both with respect to communicating a desire to assert one's rights to the interrogator, and proving to the court that one was attempting to assert one's right. See Ainsworth, *supra* note 5, at 261, 291–92.

<sup>113</sup> See Ainsworth, *supra* note 5, at 320. Although Professor Ainsworth's study dubs the language relevant to the analysis “the female register,” and its use is correlated with the female mode of communication, studies also show the same analysis applies to other communities as well. See *id.* at 285, 317; see also WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 70 (1982) (concluding that the register “is more appropriately termed powerless language”); Thurmon Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. BLACK STUD. 233, 234–35

The unjust results of the clear invocation rule are exacerbated because the “rights of suspects in police custody are at risk not only because of how they speak, but also because of how the police hear and interpret their words.”<sup>114</sup> A listener interprets speech not by attempting to glean what the speaker means, but by asking what the listener would have meant by the statement.<sup>115</sup> This social reality becomes especially problematic in the context of a custodial interrogation, where a significant power differential characterizes the relationship between the interrogator and the suspect.<sup>116</sup> Interrogators are likely to treat unintended degrees of equivocation as total ambiguity.<sup>117</sup> Under *Thompkins*, such unintended degrees of equivocation allow an interrogator to continue the questioning even after the suspect attempted to invoke the right to remain silent.<sup>118</sup> Thus, *Thompkins*’s application in the police interrogation room can and will lead to interrogators violating suspects’ rights.<sup>119</sup>

The language register difference is just one problem that arises from the *Thompkins* holdings that disproportionately affects minorities.<sup>120</sup> In decreasing the government’s burden to show waiver, *Thompkins* indirectly exacerbates a problem caused by courts’ failure to give weight to the cultural differences of suspects.<sup>121</sup> Although courts purport to take cultural factors into consideration, as long as the warnings are “given in a language that the suspect understands, courts find

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(1983) (observing similar indirect speech patterns are common within the spoken language of African American communities).

<sup>114</sup> See Ainsworth, *supra* note 5, at 288.

<sup>115</sup> *Id.* at 289.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 290.

<sup>118</sup> See *Thompkins*, 130 S. Ct. at 2264; Ainsworth, *supra* note 5, at 288–90.

<sup>119</sup> See Ainsworth, *supra* note 5, at 288–90; Weisselberg, *supra* note 5, at 1583–84, 1592. Again, this problem is exacerbated because after a suspect’s attempted invocation is ignored, the resulting frustration or confusion often leads the suspect to cease any further attempt. See Strauss, *supra* note 20, at 775. A suspect may then feel that the only way to end the interrogation is to tell the interrogators what they want to hear. See GUDJONSSON, *supra* note 105, at 195–96. Of course, the interrogator’s goal is only to obtain such confessions, without regard to the suspect’s motivation for confessing. See Weisselberg, *supra* note 5, at 1583–84, 1592.

<sup>120</sup> See *Thompkins*, 130 S. Ct. at 2264; Weisselberg, *supra* note 5, at 1590 (arguing that implied waiver holdings combine with invocation holdings to abridge the Fifth Amendment privileges of suspects further); see also Einesman, *supra* note 100, at 47 (concluding that “the suspect’s cultural heritage and language abilities affect every facet of *Miranda*”).

<sup>121</sup> See *Thompkins*, 130 S. Ct. at 2271–72 (Sotomayor, J., dissenting); Einesman, *supra* note 100, at 45, 47 (arguing it is “not particularly onerous for the Government to prove a valid waiver,” and that cultural differences must be considered in applying *Miranda*).

waiver in almost every case.”<sup>122</sup> The problem with *Thompkins’s* expansion of the implied waiver doctrine is that cultural differences affect the true voluntariness of waivers.<sup>123</sup> For example, some cultures mandate compliance with authorities and furthermore, suspects in a cultural minority may lack experience with the U.S. legal system.<sup>124</sup> It is “critically important” to consider the “roles culture and language play in the interpretation of confession law,” especially when considering how to establish waiver.<sup>125</sup> Although courts claim to take these factors into consideration, they do not seem to affect rulings on waiver.<sup>126</sup> *Thompkins*, by decreasing the government’s burden, exacerbates the problem that culture is not sufficiently considered in determining waiver.<sup>127</sup>

#### CONCLUSION

In *Thompkins*, the Supreme Court departed further from *Miranda’s* concerns with the rights of indigent or uneducated minorities and the coercive effect of police interrogations. The *Miranda* Court decided that the “values embodied within the Fifth Amendment outrank the prosecution’s desire to obtain an admission of guilt from a suspect in custody.”<sup>128</sup> As time has passed, however, the Court has placed more emphasis on law enforcement needs and the state interest in bright-line rules. *Miranda’s* force as precedent has been limited and, unless the Court or Congress reverses the trend away from protecting suspects’ rights in custodial interrogations, *Thompkins* will continue to apply unequally and unjustly, harming the very segments of society *Miranda* sought to protect.

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<sup>122</sup> See Thomas, *supra* note 87, at 1082; see also Einesman, *supra* note 100, at 40–46 (surveying different factors courts have purported to consider in determining waiver, such as language, culture, and familiarity with the court system).

<sup>123</sup> See Einesman, *supra* note 100, at 37, 39 (noting there are “major cultural factors in determining the validity of a *Miranda* waiver”).

<sup>124</sup> See *id.* at 39. (“If a person does not understand his rights due to language or cultural difficulties, or if his culture mandates that he comply with government authorities, then a *Miranda* waiver may be suspect.”).

<sup>125</sup> See *id.* at 37, 47.

<sup>126</sup> See Thomas, *supra* note 87, at 1082.

<sup>127</sup> See *Thompkins*, 130 S. Ct. at 2272 (Sotomayor, J., dissenting); Einesman, *supra* note 100, at 47.

<sup>128</sup> Weisselberg, *supra* note 2, at 122–23.