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The Death of Miranda v. Arizona

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THE DEATH OF MIRANDA V. ARIZONA

I. Introduction

On June 1, 2010, the United States Supreme Court made a watershed decision, turning its decision in *Miranda v. Arizona* “upside down.” In the case of *Berghuis v. Thompson*, the court ruled 5 to 4 that a Michigan defendant who incriminated himself in a fatal shooting after nearly three hours of questioning gave up his right to silence, and the statement could be used against him.¹

II. The Necessary Accommodation

When confronted with challenges to the constitutionality of the Fourth, Fifth, and Sixth Amendments, the Supreme Court has sought to achieve “a necessary accommodation between the individual’s right to liberty and the State’s duty to control crime.”² On the one hand, the Court seeks to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.³ On the other hand, the Court seeks to give fair leeway for enforcing the law in the community’s protection.⁴

In the seminal case, *Terry v. Ohio*⁵ the Court wrestled with this delicate balance in determining, *inter alia*, the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.⁶ That is, whether it is always unreasonable for a policeman to temporarily detain an individual on the street and subject him to a threshold inquiry where probable cause to arrest has yet to be determined by the policeman.

In a brilliantly written opinion, Chief Justice Earl Warren clearly set forth the necessary accommodation between the State’s duty to control crime and the individual’s right to liberty.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an

¹ Robert Barnes, *High court rules suspect must invoke own silence right*, Boston Globe, June 2, 2010, A6.

² *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975)

³ *Brinegar v. United States*, 338 U.S. 160, 176 (1949)

⁴ *Id.* at 176.

⁵ *Terry v. Ohio*, 392 U.S. 1 (1968)

⁶ *Id.* at 4.

escalating set of flexible responses, graduated in relation to the amount of information they possess...[On the other hand], the heart of the Fourth Amendment...is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution.⁷

It is difficult, if not impossible, to achieve a balance between these competing interests because the fulfillment of one comes at the expense of the other. That is, the heightened protection of an individual's liberty comes at the expense of the State's desire to enforce the law, protect the community, and control crime. Conversely, too much leeway for enforcing the law comes at the expense of the individual's constitutional liberties, such as the right against unreasonable searches and seizures, the right against self-incrimination, and the right to counsel.

In the context of police interrogations, the struggle to achieve this necessary accommodation has been debated amongst protestors, criminal defense attorneys, legislators and the Supreme Court. That is, proponents of effective law enforcement stress the importance of police interrogations and confessions whereas proponents of individual liberties emphasize the abuse of interrogations and its potential infringements upon the right against self-incrimination and the right to counsel.

III. Pre-Miranda & The Effective Enforcement of Criminal Law

Before its decision in *Miranda v. Arizona*,⁸ the admissibility of an individual's statements made pursuant to a police interrogation depended on the Due Process Clause of the Fourteenth Amendment. That is, the Court subscribed to the procedures of Anglo-American criminal justice, which prohibited the admissibility of incriminating statements procured during an interrogation through the use of kindness, cajolery, entreaty deception, persistent cross-questioning, and physical brutality.⁹ In other words, the Due Process Clause forbids the admissibility of incriminating statements made as a result of

⁷ Id. at 9.

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966)

⁹ See, e.g., ABA Committee Report, *passim*; IV Wickersham, *passim*; Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Note, 43 Harv. L. Rev. 617 (1930); Hopkins, Our Lawless Police (1931), *passim*; Report of the President's Committee on Civil Rights, To Secure These Rights (1947), 25-27.

an overborne will. It follows, naturally, that incriminating statements, to be admissible, must be the product of the free, voluntary, and unconstrained choice by the maker.

*Culombe v. Connecticut*¹⁰ provides an illustration of how the Court approached police interrogations and incriminating statements made as a result thereof prior to *Miranda v. Arizona*. In *Culombe*, the Connecticut State Police suspected the defendant as being the perpetrator of at least two holdups. Immediately, the defendant was accosted by a team of officers and hauled down to State Police Headquarters for questioning. In the Headquarters' interrogation room, the defendant was questioned for ten days and the State Police had procured five oral confessions and three typed-written statements of the defendant, where he admitted to his involvement in the holdups and the killings associated with them. The defendant was convicted of first-degree murder and appealed on the grounds that the incriminating statements were made in violation of the Due Process Clause of the Fourteenth Amendment.

In the beginning of the Court's opinion, Justice Frankfurter sets forth the Court's task in achieving the necessary accommodation between the individual's right to liberty and the State's duty to control crime.

This recurring problem touching the administration of criminal justice by the States presents in an aggravated form in this case the anxious task of reconciling the responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements.¹¹

On the liberty-side of the spectrum, the legal order forbids making a suspect the unwilling collaborator in establishing his guilt.¹² In determining whether the Culombe's incriminating statements were admissible, the Court deferred to the ultimate test established in Anglo-American courts for two hundred years: the test of voluntariness.¹³ Is the confession the product of an essentially free and unconstrained choice by its

¹⁰ *Culombe v. Connecticut*, 367 U.S. 568 (1961)

¹¹ *Id.* at 568.

¹² The Fifth Amendment to the United States Constitution provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation."

¹³ *Id.* at 602.

maker?¹⁴ If it is, if he has willed to confess, it may be used against him.¹⁵ If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.¹⁶

Whether the defendant's statements were made voluntarily depended on several factors, which were espoused by the Court in an earlier decision, *Cicenia v. La Gay*.¹⁷ These factors include the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control, in company with all the surrounding circumstances.¹⁸

The Court found that Culombe's statements and confession were made involuntarily. Applying these factors, the Court found as persuasive the following circumstances leading up to the confession: (1) officers told Culombe that he was not under arrest,¹⁹ (2) during a three-hour car ride, Culombe was questioned about his possible participation in the crimes,²⁰ (3) Culombe was permitted to drink liquor,²¹ (4) Culombe was kept in the interrogation room for three hours,²² (5) at the end of another four-and-a-half-hour interview, Culombe was unshaved, his clothing a sorry sight, and he was tired,²³ (6) Culombe told the officer that he wanted to see a lawyer,²⁴ (7) the officer knew Culombe was illiterate and could not operate a phone,²⁵ (8) Culombe was questioned intermittently from Wednesday to Saturday,²⁶ (9) Culombe was never warned of his right to remain silent,²⁷ (10) Culombe was never cautioned about his constitutional

¹⁴ Id. at 602.

¹⁵ Id. at 602.

¹⁶ Id. at 602.

¹⁷ *Cicenia v. La Gay*, 357 U.S. 504, (1958)

¹⁸ Culombe at 602.

¹⁹ Id. at 607.

²⁰ Id. at 607.

²¹ Id. at 607.

²² Id. at 608.

²³ Id. at 617.

²⁴ Id. at 609.

²⁵ Id. at 609.

²⁶ Id. at 609.

²⁷ Id. at 610.

rights,²⁸ and (11) Officers charged and had Culombe arraigned on charges of breach of the peace, in order to procure his murder confession.²⁹

Despite its holding, Justice Frankfurter emphasizes the importance of police interrogations and confessions, echoing the proponents of effective law enforcement.

Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains – if police investigation is not to be balked before it has fairly begun – but to seek out possible guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.³⁰

Justice Frankfurter’s recognition of the importance of police interrogations and confessions synthesizes the position taken by Lord Justice Patrick Devlin³¹ in *Criminal Prosecution in England* and others championing the State’s interest in effective law enforcement:

“The least criticism of police methods of interrogation deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused’s own statement.”³²

The majority opinion of *Culombe* was a lengthy dissertation, almost an advisory opinion, which sought to clarify the difficult problems associated with a coerced confession.³³ However, the dissent found the case to be a simple one governed by the principle that “any accused—whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused, he is denied ‘the Assistance of Counsel for his defence’ guaranteed by the Sixth and Fourteenth Amendments.”³⁴ As the testimony of Officer Rome plainly indicates, Culombe affirmatively requested an attorney during his custodial interrogation. His

²⁸ Id. at 610.

²⁹ Id. at 611-612.

³⁰ Id. at 571.

³¹ Patrick Devlin was junior barrister for Attorney General William Jowitt before becoming Lord Justice of the Court of Appeals in 1960.

³² Devlin, *The Criminal Prosecution in England* (1958), 58.

³³ In his concurrence, Chief Justice Warren criticizes the majority opinion in this regard. Id. at 635-36.

³⁴ Id. at 637.

request, however, fell on deaf ears and Culombe had not spoken with or consulted with an attorney until six days after he had confessed to police. Therefore, the denial of the Culombe's request, the dissent states, was a violation of his constitutional rights.

The dissenting opinion foreshadowed another individual liberty coming at the expense of police interrogations, the Sixth Amendment, which reads: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." The dissenting opinion represented a growing minority of the Court, which sought to implement tougher measures to control police interrogations. Mainly, the growing minority (Chief Justice Warren, Justice Black, Justice Douglas, and Justice Brennan) interpreted the "*In all criminal prosecutions*" language of the Sixth Amendment as guaranteeing the right to counsel *during* custodial interrogations. That is, the growing minority defined custodial interrogations as a critical stage in criminal prosecutions, which triggered the suspect's right to counsel.

The growing minority had their first opportunity to enforce its view that individual's had a right to counsel during police interrogations in the case of *Crooker v. California*.³⁵ In *Crooker*, the defendant, John Russell Crooker, was a college graduate who worked as a houseboy in the home of the victim as he attended his first year of law school. His position as houseboy led to an illicit relationship with the woman of his employ. The week of her death, the woman informed the defendant that their relationship had been discovered, and she attempted several times to terminate the relationship. Shortly thereafter, the defendant discovered that the woman had found another boyfriend.

At 1:30 in the afternoon, the defendant was arrested in his apartment and taken to the Los Angeles Police Station where he was photographed and asked to take a lie detector test, which he refused to submit to. The defendant requested an attorney but was not offered to use the telephone, however. The defendant was interrogated for the first time from 8:30 – 9:30 p.m. Four officers conducted the questioning, and the questions centered on the defendant's refusal to submit to a lie detector test. During the interrogation, the defendant requested, for the second time, the opportunity to get a

³⁵ *Crooker v. California*, 357 U.S. 433 (1958)

lawyer, naming a specific attorney whom he thought might represent him, but was told that ‘after (the) investigation was concluded he could call an attorney.’³⁶

At 9:30 p.m. the defendant was transferred to the West Los Angeles Police Station, where five officers interrogated him until midnight. The third and last questioning period was conducted by the same five men from approximately 1-2 a.m., which culminated in the defendant’s confession for murder in a signed and detailed statement. At 5 a.m. the defendant was put in jail and permitted to sleep.

The defendant was convicted of first-degree murder and appealed his conviction on the grounds that his confession violated the Due Process Clause of the Fourteenth Amendment because his confession had been coerced from him by state authorities. In the alternative, the Defendant asserted that, even if the confession were voluntary, it was inadmissible because it had been procured over his repeated requests for counsel, which had been denied.

The issue presented to the Supreme Court was one of first impression. That is, whether a denial of a suspect’s request to contact counsel constitutes coercion for purposes of the Due Process Clause. “This Court has not previously had occasion to determine the character of a confession obtained after such a denial.”³⁷

In the present case, Crooker’s background, i.e., age, intelligence, and education, stood in stark contrast with that of Culombe, *supra*, who was a 33-year old illiterate mental defective of the moron class who was more apt and suggestible to intimidation. That is, Crooker’s age, intelligence, and education negated or ruled out the possibility of coercion.

While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the results of such a test would not be admissible at trial absent a stipulation by the parties. Supplementing that background is the police statement to petitioner well before his confession that he did not have to answer questions. Moreover, the manner of his refusals to answer indicates full awareness of the right to be silent. On this record we are unable to say that petitioner's confession was anything other than voluntary.³⁸

³⁶ Id. at 436.

³⁷ Id. at 438.

³⁸ Id. at 438.

Nor does the fact that the confession was procured “after” the defendant requested and was denied his right counsel render the incriminating statement inadmissible under the Due Process Clause. Relevant to the Court’s analysis, in this regard, were the sum total of circumstances during the time the petitioner was without counsel, which were his age, intelligence, and education. “...The sum total of the circumstances here during the time petitioner was without counsel is a voluntary confession by a college-educated man with law school training who knew of his right to keep silent.”³⁹

The majority stressed the dangers associated with such a requirement proposed by the defendant “that a state denial of a request to contact counsel be an infringement of the constitutional right to counsel.” In particular, a requirement mandating the inadmissibility of incriminating statements procured “after” the request and denial of a suspect’s right to counsel would contravene the effective enforcement of criminal law. In seeking to balance the necessary accommodation, mentioned *supra*, the majority falls on the side of giving fair leeway for enforcing the law in the community's protection.

On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning-fair as well as unfair-until the accused was afforded opportunity to call his attorney.⁴⁰

The dissenting justices⁴¹ found, in essence, that the majority’s leeway to law enforcement came at the expense of the individual’s right to liberty. That is, Crooker’s demand for and denial of an attorney prior to the time of his confession was a denial of that due process of law guaranteed to the citizen by the Fourteenth Amendment. The dissent challenges the majority’s constant reliance on the defendant’s age, intelligence, and education as the calculus in determining whether any possible prejudice occurred while the defendant was without counsel.

‘The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising

³⁹ Id. at 440.

⁴⁰ Id. at 441.

⁴¹ Justice Douglas, Chief Justice Warren, Justice Black, and Justice Brennan.

from its denial.’⁴²... “Even the intelligent and educated layman has small and sometimes no skill in the science of law. He requires the guiding hand of counsel at every step in the proceedings against him.”⁴³

More importantly, the dissent vehemently argues that the right to counsel extends from trial, to pretrial proceedings, and reaches all the way to custodial interrogations; custodial interrogations being a critical stage in criminal prosecutions where the need for counsel is great.

The need is as great then as at any time. The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself. [Citation omitted] It may also be necessary as a restraint on the coercive power of the police. The pattern of the third degree runs through our cases: a lone suspect unrepresented by counsel against whom the full coercive force of a secret inquisition is brought to bear. [Citation omitted] The third degree flourishes only in secrecy. One who feels the need of a lawyer and asks for one is asking for some protection which the law can give him against a coerced confession. No matter what care is taken innocent people are convicted of crimes they did not commit. [Citation omitted] We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices. The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion. The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this the most critical period of his ordeal. For what takes place in the secret confines of the police station may be more critical than what takes place at the trial.⁴⁴

IV. Setting the Stage for *Miranda v. Escobedo v. Illinois*

Soon after the Court’s decision in *Crooker* (1958), the tide began to turn for the growing minority with a new appointment to the bench; altering the conservative complexion of the Supreme Court.⁴⁵ In *Escobedo v. Illinois*⁴⁶, the once minority’s stance

⁴² Id at 442, citing *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680.

⁴³ Id. at 446, citing *Powell State of Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158.

⁴⁴ Id. at 443-444.

⁴⁵ In 1958, President Eisenhower nominated Justice Potter Stewart to the bench, replacing Justice Harold Burton. Justice Stewart was known for his contributions to criminal justice reform, particularly in the realm of the Fourth Amendment. In *Katz v. United States*, Justice Stewart extended the protection of the Fourth Amendment and wrote that “the Fourth Amendment protects people, not places.”

⁴⁶ 378 U.S. 478 (1964)

and preference toward the Sixth Amendment right to counsel during police interrogations came to fruition.

In *Escobedo*, Daniel Escobedo's brother-in-law was fatally shot. Initially, the defendant (Daniel Escobedo) was arrested without a warrant early the next morning, and interrogated by police, only to be released pursuant to a state court writ of habeas corpus. Ten days later, Benedict DiGerlando, another suspect in the shooting, was taken into police custody and interrogated. During the interrogation, DiGerlando told the police that Escobedo fired the fatal shots.⁴⁷

That same night, Escobedo was arrested and taken into police custody. En route to the police station, the police "had handcuffed the defendant behind his back," and "one of the arresting officers told the defendant that DiGerlando had named him as the one who shot" the deceased. The defendant testified that the "detective said they had us pretty well, up pretty tight, and we might as well admit to this crime," and that he replied, "I am sorry but I would like to have the advice from my lawyer."⁴⁸

Shortly after the defendant reached the police station, his attorney arrived. When the attorney arrived, he asked Sergeant Pidgeon for permission to see his client. Sergeant Pidgeon told the attorney that he could not see his client because he had been from Lockup to the Homicide Bureau. Thereafter, the attorney went upstairs to the Homicide Bureau, identified himself as Escobedo's attorney to the Homicide Detectives, and asked permission to see his client. The Homicide Detectives said that the attorney could not see Escobedo and advised him to see Chief Flynn. The attorney spoke with Chief Flynn, identified himself as Escobedo's attorney, and asked permission to see his client. Chief Flynn told the attorney that he could see his client because the detectives were not finished questioning him. The attorney waited around the police station for two hours, and renewed his request to see his client to every police officer he could find, only to be refused over and over again. Despite his numerous attempts, the attorney was unable to meet with his client during the police interrogation.

During the interrogation, the defendant repeatedly requested to see his attorney; only to be told that his attorney "didn't want to see him." After making several

⁴⁷ Id. at 479.

⁴⁸ Id. at 479.

statements, which implicated the defendant in a murder plot, an Assistant State's Attorney was summonsed to take Escobedo's statement. The State's attorney, nor any other law enforcement official for that matter, advised the defendant of his constitutional rights. The State's Attorney posed carefully tailored questions to the defendant with the purpose of assuring their admissibility into evidence.

The defendant, Daniel Escobedo, was convicted of murder and appealed on the grounds that his Sixth Amendment right to counsel had been violated where the defendant's requests for counsel were repeatedly denied during the police interrogation.

Writing for the majority, Justice Goldberg observed that the questioning or interrogation of the defendant was not the product of an informal investigation into an "unsolved crime." Rather, the locus of the investigation centered on the defendant with the sole purpose to "get him" to confess his guilt despite his constitutional right not to do so.⁴⁹ Therefore, as soon as the police investigation focuses on a particular suspect (known as the accusatory stage), criminal prosecution has commenced and the suspect is entitled to the right of counsel at that very moment.

The government ardently stressed the dangers of extending the right to counsel prior to indictment. That is, the government emphasized its interest in the effective enforcement of criminal law and the importance of police interrogations in furtherance of that interest. "It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and "any lawyer worth his salt will tell the suspect in uncertain terms to make no statement to police under any circumstances."⁵⁰

The government's interest in obtaining confessions through custodial interrogations was not sufficient enough to outweigh the prejudice associated with an individual's deprivation of counsel during a critical pretrial proceeding, such as a custodial interrogation. In other words, a suspect's liberty interest of "fundamental fairness essential to the very concept of justice" trumped the governmental interest in effective enforcement of the criminal law.

⁴⁹ Id. at 485.

⁵⁰ Id. at 488.

The dissenting justices in *Escobedo* immediately questioned the crippling impact that the majority's decision would have for peace and order. That is, allowing lawyers to accompany their client's in the interrogation room would negate its very purpose and effectively kill the use of confessions. In the words of Justice White,

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult.⁵¹

V. Miranda v. Arizona

Two years after the Court's decision in *Escobedo*, the Court was confronted with another case involving a custodial police interrogation in *Miranda v. Arizona*.⁵² The Court granted certiorari in order to address a question, which goes to the root of our concept of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.⁵³

In March of 1963, a kidnapping and sexual assault occurred in Phoenix, Arizona. On March 13 Ernesto Miranda, 23, was arrested in his home, taken to the police station, identified by the victim, and taken into an interrogation room. Miranda was not told of his rights to counsel prior to questioning. Two hours later, investigators emerged from the room with a written confession signed by Miranda. It included a typed disclaimer, also signed by Miranda, stating that he had "full knowledge of my legal rights, understanding any statement I make may be used against me," and that he had knowingly waived those rights.

Two weeks later at a preliminary hearing, Miranda again was denied counsel. At his trial he did have a lawyer, whose objections to the use of Miranda's signed confession as evidence were overruled. Miranda was convicted of kidnapping and rape, and received a 20-year sentence.

Representing the defendant on appeal were John Flynn and John Frank. In their opening brief, defendant's counsel argued that Ernesto Miranda's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel had been violated by the

⁵¹ Id. at 499.

⁵² 384 U.S. 436 (1966)

⁵³ Id. at 439.

Phoenix Police Department. In support of their argument, petitioner made meticulous use of the Court's decisions in *Culombe*, *Crooker*, and *Escobedo*.

We deal with the basic principle, the principle expressed by Justice Douglas in his concurring opinion in *Culombe v. Connecticut*, [citation omitted] that "any accused-whether rich or poor-has the right to consult a lawyer before talking with the police."

We have here the clearest possible example of Justice Douglas' observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial."

Hence counsel was required for interrogation at least where requested in *Escobedo v. Illinois* [citation omitted].

More importantly, the petitioner stressed the dangers of affording undue deference and leeway to law enforcement during police interrogations. That is, granting complete and utter discretion to law enforcement in the confines of an interrogation room would obliterate our jealously guarded notions of ordered liberty. In effect, our system of criminal justice would be reduced to and, in essence, be an endorsement of the practices of ancient societies having no such concept of ordered liberty:

"The accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country-the free as well as the despotic, the modern as well as the ancient." We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.⁵⁴

In its decision, the Court recognized that custodial interrogations, by their very nature, generate "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."⁵⁵ In other words, custodial interrogations are inherently coercive. That is, the suspect is in a police-dominated atmosphere, cut off from the outside world, and worse, the suspect has little or no understanding of the nature and consequences of the custodial interrogation. Given these inherently compulsory circumstances, it is clear that the balance of power remains

⁵⁴ Petitioner's Opening Brief at 47.

⁵⁵ 385 U.S. at 467

in the sole hands of the interrogator or law enforcement. The detriment of this disparate balance of power has been evidenced from “extensive factual studies undertaken in the early 1930s, including the famous Wickersham Report to Congress by a Presidential Commission” where police violence and the “third degree” were permitted to flourish. The Court acknowledged cases involving “physical brutality, beating, hanging, [and] whipping[s]” in order to extort confessions. The instances of police brutality are not some faded, obscure figment of our past but were an unfortunate reality of the 1960s. For example, in *People v. Portelli*,⁵⁶ police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. Such coercion is not limited to physical compulsion. Police manuals advocate and teach the use of deception and other forms of psychological pressure to attain the desired objective: a confession. As the court points out, if there is a “desired objective,” it should be a statement that is the true product of free choice.

These so-called practices of “incommunicado interrogations” stand in stark contradiction with one of our Nation’s most cherished principles of ordered liberty: That the individual may not be compelled to incriminate himself. As the Court observed, the “privilege against self-incrimination – the essential mainstay of our adversary system – is founded on a complex of values....All of these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens. To maintain a ‘fair state-individual balance,’ to require the government ‘to shoulder the entire load,’ to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”

Inextricably linked with the defendant’s Fifth Amendment right against self-incrimination is the defendant’s Sixth Amendment right to counsel and the inherent coercion associated with custodial interrogations comes at the expense of both individual liberties. “The circumstances surrounding in-custody interrogation can operate very

⁵⁶ 205 N.E.2d 857 (1965)

quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege..." "The presence of counsel...would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."

Therefore, in order to combat the inherent compulsion associated with custodial interrogations, to achieve a "fair state-individual balance," and to safeguard the defendant's individual liberties, the Court imposed on the police an obligation to follow certain procedures in their dealings with the accused. Such procedural safeguards include:

"Prior to questioning, the person must be warned that he has a right to remain silent. And that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

The Miranda decision established a clear, bright-line rule for law enforcement officials to follow and for courts to apply. For example, in *Commonwealth v. Zook*, the defendant confessed to two murders was convicted and sentenced to death. On appeal, the defendant claimed that his confession had been illegally obtained when police had denied him counsel over his request for an attorney, which had been made during the interrogation. During the trial, the prosecutor examined Lieutenant Landis, the interrogating officer, and elicited the following response:

Q. During the interview, did Mr. Zook ever request an attorney?

A. Approximately – I don't know, about two-thirds of the way into the interview, something like that, right around the time we got through talking about whether he knew Conard or Wiker, he asked if he could use the phone to call his mother to see if he could get him an attorney. At that point, I said you are saying you want us to stop questioning you until you have an attorney present? And he said no, go

ahead and finish with what you are doing. That was the only time he came close to asking for an attorney, if that's what that was.

The Supreme Court of Pennsylvania found that the defendant's confession had been illegally obtained pursuant to *Miranda v. Arizona*.

We think that the trial court was in error in failing to suppress all statements made by the appellant after he made the request to use the phone to have his mother get an attorney...It is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

VI. The Resistance to *Miranda*

As Justice Frankfurter's opinion in *Culombe* illustrates, *Miranda* had its critics even before it was decided. In stressing the importance of police interrogations and confessions, Justice Frankfurter summarized the position of those who championed effective enforcement of the criminal law over individual liberties:

Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains – if police interrogation is not made to be balked before it fairly begun – but to seek out possible guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

Fred Inbau was a professor of law for over sixty years and the author of the leading manual on police interrogations.⁵⁷ He was considered one of the best interrogators of his time and developed several approaches to interrogation, such as “presenting a mass of damaging facts to persuade criminals that they had no choice but to confess,” “[using] subtle psychology in dealing with crimes of passion,” and “urg[ing] the police to use deceit, deception and outright lies to trick suspects into confessing.”⁵⁸

Professor Inbau supported Justice Frankfurter's position, and proffered three reasons why:

1. Police cannot solve many crimes unless guilty people confess or suspects give police information that can convict someone else who's guilty.

⁵⁷ “Criminal Interrogation and Confession”

2. Criminals do not confess unless the police either catch them in the act or interrogate them in private.
3. Police have to use “less refined methods” when they interrogate suspects than are “appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens.

Professor Inbau devoted himself and his career to the never-ending battle against crime and criminals. When the *Miranda* decision was issued, Professor Inbau became its leading critic, and spearheaded the organization, Americans for Effective Law Enforcement, “to fight what he regarded as a trend toward placing individual liberties ahead of society's rights in criminal cases.”⁵⁹

In an interview with John Hart, Professor Inbau expressed his criticism of the *Miranda* decision:

The tragedy of it is that there are many, many guilty people who have been turned lose because after receiving the warnings they did not talk to the police, and absent some statement of an incriminating nature, the prosecution did not have adequate evidence to prove guilty without reasonable doubt.⁶⁰

The sentiments of Justice Frankfurter and Professor Inbau were echoed and emphasized in *Miranda*'s dissenting opinion.

The rule announced today...is a deliberate attempt to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials. Criminal trials, no matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming...But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

⁵⁸ Robert Thomas, Jr. “Fred Inabu, 89, Criminologist Who Perfected Interrogation.” NYTimes, May 28, 1998.

⁵⁹ Id.

⁶⁰ John Hart, Anchor and Carl Stern, Reporting: “The Death of Ernesto Miranda” NBS News Transcript, available at: <http://webcache.googleusercontent.com/search?q=cache:B7AxxJLv6b8J:www.icue.com/portal/site/iCue/fla%3Fcuecard%3D5210+Fred+Inbau+and+Miranda&cd=5&hl=en&ct=clnk&gl=us>.

Criticism for the *Miranda* decision reached Capital Hill where Congress sought to overrule the decision when it enacted 18 U.S.C. § 3501⁶¹, which eliminates the requirement that officers warn suspects of their Fifth and Sixth Amendment rights before interrogating them. 18 U.S.C. § 3501 was part of a series of legislation passed with the purpose of “getting tough on criminals.”

In *Dickerson v. United States*, the government relied on 18 U.S.C. § 3501 to defeat the defendant’s motion to suppress statements on the ground that he had not

⁶¹ 18 U.S.C. § 3501: Admissibility of Confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term “confession” means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

received Miranda warnings “before he was interrogated.” Acknowledging that “Miranda has become embedded in routine practice to the point where the warnings have become part of our national culture,” Chief Justice Rehnquist found 18 U.S.C. § 3501 to be unconstitutional:

Miranda's warning-based approach to determining admissibility of statement made by accused during custodial interrogation was constitutionally based, and could not be in effect overruled by legislative act, by which Congress sought to reintroduce old totality-of-circumstances approach and to mandate that, as long as accused's statements were voluntary under all circumstances of case, they would be admissible.

VII. Setting the Stage for Berghuis: *Montejo v. Louisiana*

In *Montejo v. Louisiana*,⁶² Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. The police investigation focused on Jerry Moore, a disgruntled former employee of Ferrari's dry cleaning business. Police sought to question Montejo, who was a known associate of Moore.

Detectives brought the defendant to the sheriff's office where he was read his Miranda rights. The defendant waived his Miranda rights and during the course of the interrogation “repeatedly changed his account of the crime.”⁶³ Pursuant to Louisiana law, a preliminary hearing was required within 72 hours of arrest for the purpose of appointing counsel. Accordingly, the defendant was brought before a judge for a “72-hour hearing” as prescribed by Louisiana law. During the hearing, the court appointed the Office of Indigent Defender to represent the defendant.

Later that same day, before the defendant had the opportunity to meet with appointed counsel, detectives re-interrogated him. For a second time, the defendant waived his Miranda rights. The second interrogation produced two results. First, Montejo agreed to go with police to hunt for the murder weapon (which had been thrown in a lake). Second, during this expedition Montejo wrote an incriminating letter in which he apologized to the wife of the murdered man. “Only upon their return did Montejo finally

⁶² 129 S.Ct. 2079 (2009)

⁶³ *Id.* at 2082.

meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.”⁶⁴

At trial, the letter of apology was admitted over defense objection and, consequently, the jury convicted Montejo of first-degree murder, and he was sentenced to death. On appeal, the defendant claimed that the court abused its discretion in admitting the letter into evidence pursuant to *Michigan v. Jackson*⁶⁵, which forbids police from initiating an interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding. Relying on *Jackson*, the defendant asserts that the court’s appointment of counsel was tantamount to a “request” for counsel, which barred the police from interrogating him post-arraignment in the absence of counsel.

Writing for the majority, Justice Scalia found that the defendant failed to invoke his right to counsel at the arraignment. Therefore, the police were permitted to speak with the defendant post-arraignment.

No reason exists to assume that a defendant like Montejo, who has done nothing at all to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.⁶⁶

As a factor in its calculus, the Court emphasized that the defendant’s reading of *Jackson* would thwart police interrogations and strike an imbalance in the accommodation between civil liberties and public safety:

In practice, Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant. As the dissent in *Jackson* pointed out, with no expressed disagreement from the majority, the opinion “most assuredly [did] not hold that the Edwards per se rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant.” (citation omitted) That would have constituted a “shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society.”⁶⁷

⁶⁴ Id. at 2082.

⁶⁵ 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)

⁶⁶ Id. at 2086-2087.

⁶⁷ Id. at 2087.

On the other hand, critics of the *Montejo* decision find that an imbalance has been struck to the detriment of an individual's constitutional liberties:

The practical effects of the Court's overturning Jackson in the *Montejo* case will be to allow law enforcement to work the bureaucratic and administrative systems to keep uninformed suspects away from their attorneys for as long as possible, even beyond their arraignments.⁶⁸

VIII. *Berghuis v. Thompkins*⁶⁹

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. The defendant, Thompkins, was a suspect in the shooting and fled Michigan. A year later, the defendant was arrested in Ohio. Two police officers from Southfield traveled to Ohio and interrogated Thompkins, as he awaited transfer to Michigan.

At the beginning of the interrogation, Detective Helgert presented Thompkins with a standardized form, which enumerated his rights pursuant to *Miranda v. Arizona*. Detective Helgert requested that the defendant read the fifth warning aloud. The Defendant complied with the request. The detective's request was to ensure that Thompkins could read and understand English. After complying with the detective's request, Detective Helgert read the remaining four Miranda warnings aloud. After administering all of the Miranda rights, Detective Helgert asked Thompkins to sign the form to demonstrate that he understood his rights. "Thompkins declined to sign the form."⁷⁰

Even though the defendant had not effectively waived his Miranda rights, officers proceeded to interrogate the defendant. The interrogation lasted three hours. Throughout the interrogation, the defendant was "largely" silent with the limited exception of such verbal responses as "yeah," "no," or "I don't know." "Thompkins also said that he 'didn't want a peppermint' that was offered to him by the police and that the chair he was 'sitting in was hard.'"⁷¹

⁶⁸ "Montejo v. Louisiana, A Case you Probably Haven't Heard of." Available at <http://webcache.googleusercontent.com/search?q=cache:S8dRfbNcLHEJ:seminal.firedoglake.com/diary/5579+montejo+and+miranda&cd=2&hl=en&ct=clnk&gl=us>

⁶⁹ 130 S.Ct. 2250

⁷⁰ Id. at 2256.

⁷¹ Id. at 2257.

About 2 hours and 45 minutes into the interrogation, the following exchange occurred, which is the heart of the case.

“Helgert asked Thompkins, ‘Do you believe in God?’ Thompkins made eye contact with Helgert and said ‘Yes,’ as his eyes ‘well[ed] up with tears.’ Helgert asked, ‘Do you pray to God?’ Thompkins said ‘Yes.’ Helgert asked ‘Do you pray to God to forgive you for shooting that boy down?’ Thompkins answered ‘Yes’ and looked away.’”

The interrogation ended 15 minutes later and Thompkins refused to make a written confession. Subsequently, the defendant was charged and convicted of first-degree murder. On appeal, the defendant argued that “he had invoked his Fifth Amendment to remain silent, requiring the police to end the interrogation at one, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary.”⁷²

A. Right to Remain Silent

Firstly, the defendant claims that he “invoked his privilege” to remain silent by not saying anything for a sufficient period of time, so the interrogation should have “ceased” before he made his inculpatory statements.”⁷³ The Court, relying on *Davis v. United States*, found that the defendant failed to invoke his Miranda rights. “In the context of invoking the Miranda right to counsel, the Court in *Davis* (citation omitted) held that a suspect must do so ‘unambiguously.’ If an accused makes a statement concerning the right to counsel ‘that is ambiguous or equivocal’ or makes no statement, the police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.”⁷⁴

Put simply, the defendant did not say that he wanted to remain silent or that he did not want to talk with the police. Had the defendant merely stated, “I want to remain silent” or “I want an attorney,” the invocation of his Miranda rights would have been unambiguous and Detective Helgert would have to cease questioning. The defendant, however, failed to say either.

Lastly, the Court recognizes the burden to society in allowing suspect’s to invoke their Miranda rights ambiguously. “Suppression of a voluntary confession in these

⁷² Id. at 2257.

⁷³ Id. at 2259.

⁷⁴ Id. at 2259-2260.

circumstances would place a significant burden on society's interest in prosecuting criminal activity.”⁷⁵

B. Waiver of Right to Remain Silent

The prosecution has the heavy burden of establishing that the defendant made a valid waiver of his Miranda rights. That is, the prosecution must establish that the defendant “in fact knowingly and voluntarily waived his Miranda rights” when making the statement.⁷⁶

The Court acknowledges that the prosecution need not show that the waiver of Miranda rights was express. Rather, an “implied waiver” of the right to remain silent is sufficient to admit a suspect's statement into evidence.⁷⁷ That is, 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.”⁷⁸ Moreover, the prosecution must make the additional showing that the accused understood these rights.⁷⁹

In the present case, the Court found that there was sufficient evidence that the defendant understood his Miranda rights. “Thompkins received a written copy of the Miranda warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings.”⁸⁰

In addition to having found that the defendant understood his Miranda rights, the Court found that the defendant engaged in a “course of conduct indicating waiver” when he answered Detective Helgert's question, “Do you pray to God to forgive you for shooting that boy down?” “This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation. If Thompkins wanted to invoke his right to remain silent he could have (1) said nothing in response to Detective Helgert's questions, or (2) unambiguously invoked his Miranda rights and ended the interrogation.

⁷⁵ Id. at 2260.

⁷⁶ North Carolina v. Butler, 441 U.S. 369, 421 (1979)

⁷⁷ Id. at 2261.

⁷⁸ Id. at 2261.

⁷⁹ Id. at 2261.

⁸⁰ Id. at 2262.

Lastly, the Court found that the defendant made an “implied waiver” because there was no evidence of coercion. That is, there was no evidence of an incapacitated and sedated suspect, sleep and food deprivation, or threats.

C. No Requirement of Waiver at the Outset

Lastly, the defendant argues, even if his answers to Detective Helgert could constitute a waiver of his rights to remain silent, the police were not allowed to question him until they obtained a waiver first.⁸¹ The Court found that as long as the government administered Miranda rights to the defendant at the outset of the interrogation, their obligation has been satisfied. After being apprised of his Miranda rights, the defendant can determine, for himself, during the interrogation, whether he wants to cooperate or remain silent.

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment of the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps toward relief or solace for the victims; and the beginning of the suspect’s own return to the law and the social order it seeks to protect.⁸²

IX. Criticism of *Berghuis v. Thompkins*

A. Right to Remain Silent

The majority found that the defendant failed to invoke his right to remain silent because he failed to unambiguously state “I want to remain silent” when being interrogated by Detective Helgert. As the Court recognized in *Doyle v. Ohio*,⁸³ “silence in the wake of these warnings may be nothing more than the arrestee’s exercise of these Miranda rights.” Nevertheless, the majority found that Thompkins waived his right to remain silent, even after sitting tacit and uncommunicative through nearly three hours of police interrogation, when he uttered a few one-word responses. The majority found that

⁸¹ Id. at 2263.

⁸² Id. at 2264.

⁸³ 426 U.S. 610 (1976)

Thompkins should have affirmatively invoked his right to remain silent in a clear verbal statement to Detective Hergert. Such a requirement, according to the dissent, is counterintuitive:

The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of “waiver” must, counterintuitively, speak – and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation.⁸⁴

The majority found that the government was not required to obtain a valid waiver from Thompkins before interrogating him because: “As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or cooperate.” Yet, Thompkins remained silent even though Detective Helgert conveyed to him that “this was his opportunity to explain his side of the story because everybody else, including his co-defendants, had given their version.”⁸⁵

Based on the context of the interrogation, it was clear that Thompkins’ nonresponsiveness reflected his decision to remain silent. However, the majority purposefully minimizes the record evidence, which highlights Thompkins silence and unresponsiveness throughout the interrogation:

As for the interrogation itself, Helgert candidly characterized it as “very, very one-sided” and “nearly a monologue.” Thompkins was “peculiar,” “sullen,” and “generally quiet.” Helgert and his partner “did most of the talking,” as Thompkins was “not verbally communicative” and “largely” remained silent. To the extent Thompkins gave a response, his answers consisted of “a word or two. A ‘yeah,’ or a ‘no,’ or ‘I don’t know.’ ... And sometimes...he simply sat down...with his head in his hands looking down. Sometimes...he would look up and make eye contact would be the only response.”⁸⁶

Despite such record evidence, the majority upheld the Michigan court’s conclusion that Thompkins had not invoked his right to remain silent because “he

⁸⁴ Berghuis at 2266.

⁸⁵ Id. at 2267.

⁸⁶ Id. at 2267.

continued to talk with the officer, albeit sporadically, and that he voluntarily waived that right.”⁸⁷

B. Waiver of Right to Remain Silent

Citing *Davis supra*, the majority found that the defendant made an implied waiver. “The defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.” However, the majority ignores the clear evidence or course of conduct indicating Thompkins’ intent or refusal not to waive his rights. That is, Thompkins refused to sign an acknowledgement that he understood his Miranda rights. Compare, *United States v. Plugh*,⁸⁸ (suspect’s refusal to sign waiver-of-rights form “constituted an unequivocally negative answer to the question...whether he was willing to waive his rights.”)

As *Miranda* states, a court “must presume that the defendant did not waive his rights.”⁸⁹ Therefore, the prosecution has the “heavy burden” or “great burden” of proving that the defendant validly waived his Miranda rights. Based on the record evidence, it is clear that the prosecution failed to meet their “heavy burden” of proving waiver. The Miranda decision described facts likely to satisfy the prosecution’s burden of establishing the admissibility of statements obtained after a lengthy interrogation. According to the language of the Miranda decision, it is clear that the prosecution failed to meet its heavy burden:

“[The Court] must presume that a defendant did not waive his rights, 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.”⁹⁰

On the other hand, the majority purposefully disregards the presumption against waiver and, in its place, implements another presumption, which stands in stark contradiction to the Court’s longstanding view that “a valid waiver will not be presumed...simply from the fact that a confession was in fact eventually obtained.” In particular, the majority states:

⁸⁷ Id. at 2267.

⁸⁸ 576 F.3d 135, 142 (C.A.2 2009)

⁸⁹ Miranda at 475-476.

“[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise had made a deliberate choice to relinquish the protection those rights afford.”⁹¹

C. No Requirement of Waiver at the Outset

The majority found that as long as the government administered Miranda rights to the defendant at the outset of the interrogation, their obligation has been satisfied. “[O]ne of principal advantages” of *Miranda* is the ease and clarity of its application.⁹² As such, law enforcement officers have tailored their training and interrogation techniques to be in line with the mandates of Miranda. In Professor Inbau’s bible to police interrogations, *Criminal Interrogation and Confession*, police officers are trained and instructed to obtain a waiver of rights *prior to* proceeding at all with an interrogation.⁹³ Other contemporary police training manuals and resources provide the same instruction, (“Once a waiver is given, the police may proceed with the interrogation⁹⁴”); (“Only upon waiver of the Miranda rights by the suspect can interrogation occur⁹⁵”). However, the approach endorsed by the majority will have the inevitable consequence of muddying *Miranda*’s otherwise relatively clear waters.

Criticism for the Court’s decision in *Berghuis v. Thompson* is best summarized by Justice Sotomayor, who authored its dissent.

Today’s decision turns Miranda upside down. Criminal suspects must now unambiguously invoke their right to remain silent – which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in Miranda or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded. Today’s broad rules are all the more unfortunate because they are unnecessary to the disposition of the case before us.⁹⁶

⁹⁰ Miranda at 475-476.

⁹¹ Supra at 2262.

⁹² Moran v. Burbine, 475 U.S. 412 (1986)

⁹³ F. Inbau, J. Reid, J. Buckley, & B. Jayne, Criminal Interrogation and Confessions 491 (4th ed. 2004)

⁹⁴ D. Zulawski & D. Wicklander, Practical Aspects of Interview and Interrogation 55 (2d ed. 2002).

⁹⁵ Brief for National Association of Criminal Defense Lawyers et al.

⁹⁶ Id. at 2278.

X. Conclusion

As the Supreme Court has recognized, custodial interrogations implicate two competing concerns. On the one hand, “the need for police questioning as a tool for effective enforcement of criminal laws” cannot be doubted.⁹⁷ Admissions of guilt are more than merely “desirable⁹⁸,” they are essential to society’s compelling interest in finding, convicting and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is “inherently coercive” and that, as a consequence, there exist a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion.

Miranda sought to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation. However, the Supreme Court’s decision in *Berghuis* disrupts the purpose and meaning of Miranda. That is, the decision takes the “power to exert control over the course of the interrogation” from the defendant and places it back into the hands of the interrogator.

In *Berghuis*, the Supreme Court peels back some of the protection of Miranda by ruling that police need not to curtail their interrogation of a criminal detainee unless that detainee asks for a lawyer. Merely remaining silent is not enough to demonstrate that one seeks to exercise the right to remain silent. So police officers may now interrogate detainees for hours on end--no limit is suggested by the court--and so long as the detainee does not use the magic words that expressly indicate a refusal to answer questions or the desire for an attorney, any words uttered--no matter how few--may be used against him. The erosion of Miranda in *Berghuis v. Thompkins* reflects our legal system's sharp tilt in favor of the prosecution.⁹⁹

"This will make it more difficult for suspects and people in police custody to get the benefit of their Miranda rights," You can't just be silent, or say, 'I don't think I want to talk about this anymore.' You have to specifically say, 'I want to remain silent.' Very few people actually talk that way."¹⁰⁰

⁹⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)

⁹⁸ *United States v. Washington*, 431 U.S. 181, 186 (1977)

⁹⁹ Sherrilyn A. Ifill, *The erosion of Miranda in Berghuis v. Thompkins reflects our legal system's sharp tilt in favor of the prosecution*. THE ROOT, June 2, 2010.

¹⁰⁰ Quote from University of Pittsburgh law professor David Harris. Taken from Jill King Greenwood, *Ruling shifts Miranda burden to suspect*. Pittsburgh Tribune Press, June 3, 2010.

"It's a little bit less restraint that the officers have to show.”¹⁰¹

On the other hand, those like Supreme Court nominee Elena Kagan feel that the Supreme Court’s decision strikes an appropriate balance. "An unambiguous-invocation requirement for the right to remain silent and terminate questioning strikes the appropriate balance between protecting the suspect's rights and permitting valuable police investigation.”¹⁰²

Where of you stand?

¹⁰¹ Quote from Richard Friedman, University of Michigan Law Professor. Taken from Jessee J. Holland, Supreme Court expands limits on Miranda, Associated Press, June 1, 2010.

¹⁰² Quote from Supreme Court nominee Elena Kagan. Taken from Taken from Jessee J. Holland, Supreme Court expands limits on Miranda, Associated Press, June 1, 2010.